

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE MUHAMMAD ZAFAR YASIN
MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO. 36/I OF 2008

1. Nadeem Ahmed son of Mehmood Hussain,
r/o Dakhli Skote, P.S.Kallar Syedan,
Rawalpindi
2. Javed Iqbal son of Abdul Aziz,
r/o Dhoke Dheri Dakhli Dobarian

.... Appellants
Versus

The State Respondent

Counsel for appellants Mr. Basharatullah Khan and
Sardar Khurram Latif Khan Khosa,
Advocates

Counsel for complainant ... Mr. Muhammad Ilyas Siddiqui,
Advocate

Counsel for the State Raja Shahid Mehmood Abbasi,
Deputy Prosecutor General

FIR No. Date & Police Station 287, 06.10.2005
Kallar Syedan, Rawalpindi

Date of judgment of trial court 1.04.2008

Date of Institution 15.04.2008

Date of hearing 12.02.2009

Date of decision 17.02.2009

JUDGMENT

SYED AFZAL HAIDER, Judge Nadeem Ahmad and

Javed Iqbal appellants have, through Criminal Appeal No. 36/I of 2008 challenged the judgment dated 01.04.2008 delivered by learned Additional Sessions Judge, Rawalpindi whereby both of them have been convicted under section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to life imprisonment each and to pay a fine of Rs. 50,000/-each. In default of non payment of fine to further undergo one year rigorous imprisonment each. Both of them have further been convicted under section 10(3) of the said Ordinance and sentenced to twenty five years rigorous imprisonment each and pay additionally a fine amounting to Rs. 50,000/- each and in default of payment of fine both will suffer another span of six months rigorous imprisonment. Both the appellants have been afforded the benefit of section 382-B of the Code of Criminal Procedure. Both the sentences are ordered to run concurrently.

2. FIR. No. 287, Ex.PA/2 was registered at Police Station, Kallar Sayedan District Rawalpindi on 06.10.2005 at 5.10.p.m. on the written application Ex.PA/1,

submitted by Ali Asghar complainant/P.W.2 to Mukhtar Ahmad, S.I. P.W.12 regarding an occurrence alleged to have taken place in the village Dobarian Kalan during the night between 30 September and 1st October, 2005.

3. The facts disclosed in the application Ex.PA/1 by the complainant are that during the night between 30-09/01.10.2005, his niece Mst.Narjis Mehmood came to his house and after having meal, she alongwith his daughter Mst. Hira Zainab retired in a separate room. Near about 2.00.a.m. his sister namely Seran Begum widow of Muhammad Gulzar woke him up after having observed that door of the room where both the girls were sleeping was open and Mst. Narjis and Hira were missing. Thereafter the complainant alongwith Ulfat Hussain and Azmat Abbas (given up P.Ws) commenced search of the missing girls. In this process they reached the Land Rover Adda situated in the village Dobarian where they saw both the girls in the company of accused Nadeem and Javed sitting in an Alto Car whose registration number could not be deciphered. However the complainant observed that the girls were occupying rear seat while Raja Nadeem accused was occupying the

driver's seat and Muhammad Javed was sitting next to him. On seeing the complainant party, the accused sped away the vehicle toward Kalar Syedan. It was further alleged that both the accused had abducted the girls for committing zina. Subsequently the complainant Ali Asghar demanded the return of abductees from the accused but they did not oblige. Thereafter the complaint was got registered on 06.10.2005.

4. The case was partly investigated by Shehzad Shamim, S.I. P.W.11. He arrested Nadeem Ahmed accused after cancellation of his pre-arrest bail on 17.11.2005 and got him medically examined for verification of his potency. Mukhtar Ahmad, S.I. P.W.12 also investigated the case. He received the written complaint and formally registered FIR and then visited the place of occurrence on 06.10.2005, inspected the same, recorded statements of witnesses under section 161 of the Code of Criminal Procedure. On 07.10.2005 he was going in search of the abductees when Ali Asghar, complainant and Ulfat Hussain produced both the girls before him at Petrol Pump Looni. He recorded statements of the abductees under section 161 of the Code of Criminal Procedure and sent them for medical

examination on the same day. The medical of Narjis Mehboob was deferred on account of menstruation. The Investigating Officer produced both the victims before Magistrate for recording their statements under section 164 of the Code. Nargis Mehboob was medically examined by the lady Doctor on 10.10.2005. Lady constable Shabana Uzma is reported to have given the sealed parcel and MLR to PW.12 which was taken into possession vide memo Ex.PM. The Investigating Officer stated that he also recorded the statement of Shabana Uzma. Thereafter the witness completed other codal formalities. Investigation was concluded on 29.10.2005 and incomplete "challan" was submitted on the same day against Javed accused alone as Nadeem accused had not been arrested by then. "Challan" against Nadeem accused was sent on 25.11.2005. His bail has been cancelled on 17.11.2005.

5. During the pendency of "Challan", the investigation of the case was entrusted to S.S.P/RIB Rawalpindi a consequence of the order of Additional Inspector General Police Investigation Branch, Lahore under the new law Police Order 2002. The S.S.P. after investigation found that

Nadeem Ahmed accused was in fact in Murree staying in Red Himalayan Hotel. Thereafter a fresh "Challan" was presented in the court requiring Javed Iqbal accused to face trial and Nadeem Ahmed accused was found innocent.

6. The trial court thereafter on 03.10.2006 framed formal charges against both the accused under sections 11 and 10 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. Both the accused did not plead guilty and claimed trial.

7. The prosecution in order to prove its case at the trial produced as many as 13 witnesses. The gist of the deposition of P.Ws is as under:-

- i. P.W.1 Gulzar Ali, Constable No.887 deposed that on 8.10.2005 the Moharrar of the Malkhana handed over to him one sealed parcel containing swabs for onwards transmission to the Office of the Chemical Examiner which was delivered intact.
- ii. Ali Asghar complainant appeared as P.W.2. He supported the facts as recorded in his application Ex.PA/1.
- iii. Mst. Hira Zainab victim appeared at the trial as P.W.3 and stated that both the accused abducted both the girls on pistol point and carried them in a car to an unknown place. Both the accused committed zina-bil-jabar with both of them. She further narrated that accused Javed committed zina with her twice.

- iv. Dr. Shahzad Hussain appeared as P.W.4 and stated that on 19.10.2005 he medically examined Javed Iqbal and found him fit to perform sexual intercourse.
- v. P.W.5 Mst. Nargis Mehboob corroborated the statement of PW.3 Mst. Hira Zainab. She further stated that accused Nadeem committed zina-bil-jabr with her twice.
- vi. Muhammad Ashraf, Constable No.1681 appeared as P.W.6 and stated that on 7.10.2005 he received an envelope for keeping in malkhana and on 10.10.2005 the I.O. handed over to him a sealed parcel in this case and on 11.10.2005 he sent both the articles to the Office of the Chemical Examiner through Nematullah constable PW.13.
- vii. Dr. Tahir Rizvi P.W.7, deposed having medically examined Nadeem Ahmad accused for his potency and found him fit to perform sexual act.
- viii. Dr. Tayyaba Muddasar, WMO PW.8, medically examined Mst. Hira Zainab and Mst. Narjis Mehboob on 07.10.2005 and on 10.10.2005 respectively and found "History of penetration is positive" with both the victims.
- ix. Muhammad Wajid Hussain Mughal, Judicial Magistrate appeared as P.W.9 to state that both the victims were produced before him and he recorded their statement under section 164 of the Code of Criminal Procedure as per request of the police through application Ex.PE.
- x. P.W.11 Shahzad Shamim, S.I. investigated the case. The detail of his deposition and investigation has already been mentioned.
- xi. Mukhtar Ahmad, SI P.W.12 stated that the complainant had submitted application Ex.PA/1 before him and he drafted the formal FIR Ex. PA/2. He partly investigated the case, recorded statements of both the

victims under section 161 of the Code of Criminal Procedure and submitted challan against accused Javed.

8. The trial court after close of the prosecution evidence examined both the accused on 03.03.2008 under section 342 of the Code of Criminal Procedure wherein accused Nadeem stated as under:-

“There is no independent corroborative evidence on the file in support of tutored and tainted evidence of alleged abductees. Best evident has been given up by the prosecution. Contrary to that more than hundreds of people of the locality appeared in support of my innocence during investigation.

That before the alleged occurrence and Fir I contested the election of Nazim of Union Council Dobaran held on 25.08.2005 and defeated the candidate of complainant party Javed Akhtar Bhatti Advocate and his Naib Nazim Siddiqui Khan. The said Siddique Khan belongs to the village of complainant who was staunch supporter of Siddique Khan. The complainant driver of the said Siddique Khan through out his campaign and during the election campaign the complainant also hit my vehicle and hot words were also exchanged between me and complainant. My co-accused was my supporter in the village/area of the complainant.

The alleged abductees left their houses due to pressure of their parents as they wanted to marry them against their wishes. This flew spread in the village that the alleged abductees have left their homes. Due to the running of the girls from the house, the complainant suffered great shock and humiliation in the public and at this juncture the political rivals of mine intervened and nursed their political grudge against me by falsely involved me and my co-accused in a false case. After thinking out a false story they got registered instant false case. The said Siddique Khan was perusing the case which is proved on record.

After winning the election of Nazim I was busy in the election of reserved seats for District Assembly. On 30.09.2005 I went to Murree and Stayed in the Red Hamalivan Hotel Murree in the night between 30-9/1.10.2005. This fact was verified during investigation and the Manager of the Hotel issued certificate about my stay in the Hotel and also joined the investigation and made statement to IO. The SSP/RC, CW also examined the register and the said Manager and placed on record the certified copy of the Hotel Register.

Complainant and the political rivals being in league with each other involved me and my co-accused falsely in the instant false case. Best evidence either withheld or given up by the complainant, which clearly

establishes the fact that they were not going to support the false case of the complainant.

Even medical evidence did not support the false prosecution story. It is worth mentioning here that the hymen of both the ladies were found intact by the medical officer although both the ladies alleged that sexual intercourse remained with them for hours and hours.

That the investigation conducted by Mukhtar Ahmed SI was dishonest and malafide as per law. He was not competent to investigate the case registered under offence of Zina Ordinance. Malafide of the IO Mukhtar Ahmed SI is evident from the fact that I moved an application for transfer of investigation and I was also on bail before arrest and he was served with the robkar of the court. Despite that he being in connivance with the complainant submitted incomplete challan in the court against my co-accused which clearly establishes the malafide of the police that he was fully in connivance with the complainant. Thereafter, the investigation was transferred by the IG and was investigated by SSP Range Crime CW1 and found me innocent and I was present at Red Hamalaiyan Hotel at the time of alleged occurrence and this fact was proved on record.”

9. Accused Javed stated almost what Nadeem Ahmed had stated.

Both of them claimed innocence. The accused neither produced any evidence in their defence nor opted to make statement on oath under section 340(2) of the Code of Criminal Procedure. The learned trial court after examining the evidence and arguments of the parties returned the verdict of guilt against both the accused under sections 10(3) and 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and convicted and sentenced them as noted above. Hence the present appeal.

10. We have gone through the file and perused the evidence brought on record. We have also scanned the impugned judgment as well as the statements of accused and the court witness. We have also heard the arguments of learned counsel for the appellants, the complainant and the State. After careful consideration of the case and assessment of the evidence on record we feel that it is not safe to maintain the convictions and sentences awarded to both the accused by learned trial court under sections 10(3) and 11 of Ordinance VII of 1979 for the following reasons:-

i. The assertion of the prosecution, as disclosed in the deposition of both the abductees, is that at about 11.30 p.m. when both the girls came

out of their house they found Nadeem Ahmed and Javed accused, armed with pistols present outside. The accused aimed their pistols towards them and put their hands on their mouths and made them sit in the car forcibly. Thereafter both the accused are alleged to have taken them to an unknown place where they committed rape. Why were two accused, duly armed, present at the spot along with a car precisely at the time when two young girls had come out to answer the call of nature particularly when the wash room was also available in the house? Had the girls not informed them before hand that they would oblige them?

ii. The complainant PW.2 stated both in the crime report as well as his examination-in-Chief that his widow sister Mst. Meeran woke him up at 2.00 (a.m) during the night to inform him that the two girls were missing from the house. Strange enough this witness has not been produced by the prosecution.

iii. The complainant further stated that he along with Ulfat Hussain and Azmat Abbas went out in search of the girls. Incidentally the prosecution has not produced even a single person from among these two nominated witnesses.

iv. The complainant further states that during search of the girls they reached the Land Rover Adda and saw an Alto white coloured car in which both the girls were seen sitting in the rear seat while both the accused were in the front seat and they fled away towards Kalar Syedan after having seen them. This aspect of the story is doubtful because during night it is not possible to recognize passengers sitting in a car and secondly it is interesting to note that the abductees were seen sitting quiet in the rear seat while the abductors were sitting comfortably in the front seats and

thirdly no one from among the two named witnesses has come forward to corroborate the scene along-with-accused theory. From these facts it appears that the prosecution built up a case of a consensual youthful affair.

v. Neither the place of actual abduction has been identified nor the place where rape was committed immediately after the abduction at about 11.30 p.m. and before they were seen at the Adda around 2.00 a.m. was pointed out by the abductees.

vi. The abductees further claimed that they were abandoned at the road-side by the accused in Lahore on 01.10.2005 where one Shaukat met them who took them to his house and kept them till 06.10.2005 when the two maternal uncles namely Tariq and Mahboob came there and escorted them back home where they reached on 07.10.2005 morning. Here again Shaukat, the gentleman who quartered them in his house for six days as well as the two real maternal uncles who retrieved the abductees from Lahore and brought them back, were not produced by the prosecution to prove this part of the story. It is strange that the beginning and the end of the story of abduction, rape and recovery was alleged to have been witnessed by six persons but none of them appears at the trial to support the prosecution story. This glaring omission certainly gives rise to doubts which do not favour the prosecution.

vii. The information about the presence of girls in Lahore was received by the complainant on 06.10.2005 when the said Muhammad Tariq and Mahboob Hussain (not produced) went from village Doberen Kalan, District Rawalpindi, to Lahore and bought them back on 07.10.2005 morning when the complainant met the girls at 9.30 a.m. It is also in evidence of the abductee PW.3 that the "address and telephone of our

house' was given to Shaukat on 05.10.2005. Two things are significant: firstly the complainant does not disclose in the FIR recorded on 06.10.2005 at 5.10 p.m. that the abductees had been traced and his close relations have proceeded to Lahore to retrieve them and secondly the complainant in response to a pointed question about the existence of telephone facilities at his residence replied 'I have no telephonic connection at my house.' If this part of story is accepted then the entire edifice of the recovery of abductees is shattered because the very source of information is not forthcoming.

viii. Our impression about the investigation is **not** good. The second Investigating Officer PW.11, Shahzad Shamim SI admits that at the time of his arrest the accused disclosed that he was in Murree in Red Himalian Hotel and he had produced a certificate to that effect. The Manager of the Hotel also appeared before the Investigating Officer who verified the contents of the certificate but this Police Officer did neither visited Murree nor produced the certificate in the Court even though he had received it and was part of police file. The certificate could not be exhibited during the trial.

ix. This Investigating Officer neither visited Lahore nor inspected the place of occurrence. This omission is dereliction of duty.

x. The other Investigating Officer Mukhtar Ahmed S.I, PW.12, stated firstly that the statements of the abductees Ex.DD and Ex.DE, recorded the Judicial Magistrate under section 164 of the Code of Criminal Procedure are in his handwriting and secondly that Mst. Shabana Noreen the lady constable appeared before S.S.P. Iftikhar Ahmed on 08.06.2006 and stated that on the two recovery memos Ex.PM and Ex.PN (parcels

allegedly containing contaminated swabs of the abductees) and the PILR “*were fictitious*” (Emphasis added).

xi. The evidence of PW.9 Muhammad Wajid Hussain Mughal, Judicial Magistrate is not worthy of credence to say the least.

xii. There is un-explained delay of seven days. Delay simplicitor may not be the sole factor for raising doubts but if it is accompanied by suppression of facts, non production of best evidence, deliberation and meaningful improvements then the element of delay does reflect upon the authenticity of the prosecution story.

xiii. A careful reading of the file indicates that the actual story is different from the one disclosed by the prosecution. The court must be taken into confidence and correct story should not be suppressed. The courts are called upon to decide issues on the basis of evidence placed on record and if the evidence of a party does not inspire confidence or it appears that suppression has been resorted to by a party or improvements have been made by witnesses to lend strength to their case then the courts exercise caution in accepting such evidence on its face value.

xiv. We will not touch the medical evidence which disclosed that the hymens of the abductees were not ruptured because it is a proven medical fact that non-rupture of an intact hymen does not preclude rape/sexual intercourse.

xv. The deposition of PW.8 the Lady Doctor does neither disclose identity of the police officer who received three contaminated swabs required from her for being sent for chemical analysis nor did the lady constable Shabana Uzma who, according to Investigating Officer PW.12 Mukhtar Ahmed delivered to him the said swabs/parcel allegedly received

the same from the lady doctor, has appeared at the trial to corroborate the Investigation Officer. To the contrary the Investigating Officer admitted that the said lady constable leveled accusation against him for forging her signatures. This link between the handing over of swabs/parcel by the lady doctor to the Investigating Officer is missing conspicuously with the result that the analysis of Chemical Examiner loses significance.

xvi. It is significant to note that neither the father of Hina Zainab. PW.3 nor the father of Narjis Mehmood PW.5 went to collect the abductees though the complainant PW.2 father of PW.3 got telephonic information from one Shaukat Mehmood (not produced) that the abductees were in his custody.

xvii. We find that neither section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 nor 10(3) of the said Ordinance has been proved in the given facts and circumstances of the case with the result that conviction and sentence under both sections cannot be maintained.

11. We are not considering the effect of the statement of C.W.1 S.S.P. Mukhtar Hussain Terror as the points raised above have certainly created a dent in the prosecution story. As a result thereof the accused have earned benefit of reasonable doubt.

12. In this view of the matter we accept Criminal Appeal No. 36/I of 2008 of appellants Nadeem Ahmed and Javed Iqbal wherein they have

challenged the judgment dated 01.04.2008 passed by learned Additional Sessions Judge, Rawalpindi and set aside the conviction and sentences recorded under sections 11 and 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and the appellants are directed to be released forthwith unless they are required in any other case.

S. Haider

JUSTICE SYED AFZAL HAIDER

M. Z. Yasir

JUSTICE MUHAMMAD ZAFAR YASIN

Islamabad the 17 February, 2009
UMAR DRAZ/

S. Haider

Fit for Reporting