

IN THE FEDERAL SHARIAT COURT  
( Appellate Jurisdiction )

PRESENT:

MR. JUSTICE ABDUL WAHEED SIDDIQUI

Criminal Appeal No.46/P of 1998.

Sabir Hussain s/o Muhammad Hussain r/o Right Bank Colony Tarbela Dam, Teh. & Distt: Swabi	.....	Appellant
	Versus	
The State	.....	Respondent
Counsel for the appellant	.....	Mr. Aziz-ur-Rehman Khan Advocate
Counsel for the State	.....	Khawaja Azhar Rasheed Asst: Advocate General NWFP, Peshawar
FIR No. Date and Police Station	.....	106 dated 13-3-1996 P.S Swabi
Date of judgment of the trial Court	.....	21-9-1998
Date of Institution	.....	18-11-1998
Date of hearing	.....	13-4-1999
Date of Decision	.....	13-4-1999

JUDGMENT:

ABDUL WAHEED SIDDIQUI, J:- Appellant has assailed a judgment delivered by the Court of Additional Sessions Judge, Swabi on 21-9-1998 whereby he has been convicted under Article 10(3) Offence of Zina- (Enforcement of Hudood) Ordinance 1979, hereafter to be referred to as the said Ordinance, and sentenced to suffer R.I for 7 years and whipping numbering 30 stripes. Benefit of Section 382-B Cr.P.C is also extended.

2. Story of the prosecution, in brief, is that one Mst.Fauzia Bibi (PW-2), complainant, appeared at P.S Topi district Swabi and lodged an FIR on 13-3-1996 at 16 hours wherein she alleged that during the days of occurrence she was a student of class 7th in G.H.S. Wapda Terbela Dam. The summer vacations were going on and she was ailing. She was waiting for official vehicle near Right Bank Colony's Mosque for Sobra hospital for treatment. In the meanwhile mother of the appellant came there and disclosed that on that day namely 10-7-1995 there was a strike of buses and that she also wanted to go to the hospital. Then she offered the complainant to go with her to her house and after some time both of them shall go to the hospital. The complainant

went alongwith the mother of the appellant, Mst.Zar Bibi by name, to the house and after some time the appellant came there and straight away entered into the room whereas Mst.Zar Bibi shut the door from out side and chained it. Then the appellant committed Zina-bil-jabr with her twice. The complainant remained making hue and cry but the culprit did not show mercy and that culprit remained with her in the room upto Pashin wela and remained making love with her whereas his mother was present out side the room. Later on the appellant culprit arranged a Datsun in which he took the complainant alongwith his mother Mst.Zar Bibi, Siddique Muhammad, Javed and Nawaz and took all of them to stamp vendor where appellant armed with a pistol and Sadiq Muhammad armed with a knife criminally intimidated the complainant and obtained her signature on a paper and thereafter all the accused took the complainant in a datsun to her house and alighted her on the thoroughfare near her own house and told her to bring her personal articles and come back to their house but out of fear she did not inform her parents about the incident and remained silent but now she made the disclosure of the incident to her mother who intimated her father and brothers

Later on she was brought to the police station where FIR Ex.PA was recorded by Amirullah Khan (PW-6) S.I.

After registration of the case, necessary investigation was carried by Amirullah Khan (PW-6). The case was challaned and 9 persons were charged among whom was appellant himself. The charge was under Articles 16 & 10<sup>and 10</sup> (3) /of the said Ordinance and also under sections 506/149 P.P.C to which none of the accused pleaded guilty.

3. To prove its case, prosecution examined 7 witnesses. Dr.Naseem Akhtar, W.M.O (PW-1) has proved that she medically examined the complainant on 11-3-1996 and found her of about 12 years of age. She has further deposed as under:-

"Since the incident has occurred about 6-months back so on external examination there is no fresh signs of intercourse. It cannot be ascertained whether the hymen was ruptured or not. So she was referred to Gynaecologist of DHQ Swabi for Specialist Opinion her age was about 12/13 years."

During cross she has admitted as under:-

"In our country generally it is the observations that a girl becomes pubert in the age of 11 to 13 years."

Mst.Fauzia (PW-2), the complainant, has deposed in conformity with her complaint which is incorporated in the FIR.

Mst.Mehboob Sultana (PW-3) has proved the complainant to be

her daughter. She has further proved that two days prior to the report the complainant told her about the offence committed by the appellant with her at the instance of his mother Mst.Zar Bibi. The complainant also told her that the appellant had obtained her signature upon a stamp paper regarding Nikah forcibly. On coming to know about this fact she and her husband and her son Muhammad Javid consulted and thereafter the matter was reported. She has further deposed that the appellant had committed zina-bil-jabr with her daughter with the help of his mother and arranged a fictitious Nikahnama which is the result of force and torture. Saddiq Khan (PW-4), SHO has deposed that on 15-4-1996 he arrested the appellant and on 18-8-1996, he submitted challan against the appellant and other accused which correctly bears his signature. After the arrest of/accused Hassan Ali and Muhammad Nawaz, on 31-7-1997, he submitted supplementary challan against them. Dr.Ghulam Nabi (PW-5), M/O has proved that on 18-4-1996 he examined the appellant and found him to be of about 21 years of age and also found him to be medically fit<sup>to</sup>/perform sexual intercourse. He has proved his medical report Ex.PW-5/1. Amirullah Khan (PW-6), S.I and I.O, has proved that during the days of occurrence he was posted

as ASI at P.S Topi. On 13-3-1996 at about 4 P.M. the complainant reported the matter to him and he recorded the report in the shape of FIR which is Ex.PA and it was read over and explained to the complainant who signed the same and correctly bears her signature. ~~After recording the FIR~~ After recording the FIR/<sup>he</sup> proceeded to the spot and prepared the site plan Ex.PB/1. Then he conducted the house search of the appellant who was not available. He recorded the statements of the PWs and on 13-3-1996 he produced the complaint before the doctor where she was medically examined. On 24-3-1996 he got the complainant examined through Gynaecologist and obtained the report which is Ex.PW-6/2. He also obtained the age certificate of the complainant which is Ex.PW-6/3. Later on ~~different~~ days he remained arresting the accused persons and got the appellant medically examined vide his application Ex.PW-6/6. He interrogated him before the Court for recording his confessional statement, but he refused. He also placed on the record Nikahnama Ex.PW-6/9. He also obtained warrants under section 204 Cr.P.C as against the absconding accused Muhammad Nawaz and Hassan Ali and also proclamation notices under section 87 Cr.P.C. ~~After~~ After completing the investigation he handed over the case to the I.O. Lady doctor Fahmeeda (PW-7), Gynaecologist has proved

that on 24-3-1996 she examined the complainant aged about 12 years and she found the following:

"This girl examined externally and it was found that her hymen was torn posteriorly (old healed torn hymen)."

Her report is Ex.PW-7/1.

In his statement under section 342 Cr.P.C the appellant has denied all the specific questions. To a question as to why he has been charged he has replied as under:-

"I am innocent and falsely charged. In fact Mst.Fauzia being free and major girl, had contracted valid marriage with me but the marriage being without permission of her parents were objected to and the present case was fabricated against after a delay of 8 months. The nikahnama Ex.PW-6/9 in original is available on the file and in the family court the cases regarding restitution of conjugal rights is also pending. I will produce the attested copies of the same at the time of arguments."

The appellant has declined to be examined on oath and has not produced any witness in his defence.

4. I have heard the counsel for appellant and State.

At the outset, it stands proved beyond reasonable doubt that the appellant has admitted that the victim complainant

Mst.Fauzia has contracted a marriage with him without the permission of her parents. He has not denied the consummation

of marriage in view of the fact that he has admitted having

~~filed a suit for the restitution of the conjugal rights~~

meaning thereby that the conjugal relationships were already established and he was pursuing restitution of the said conjugal relationship as of a right.

According to Nikahnama PW-6/9 the age of the complainant Mst.Fauzia is shown to be approximately 18 years on the date of the performance of Nikah i.e 10-7-1995. This oral declaration of age in Nikahnama is falsified by two lady doctors who examined the victim on two different dates. Dr.Naseem Akhtar (PW-1) who examined the victim on 11-3-1996 has declared her age to be of about 12 years. Gynaecologist doctor Fahmeeda, who examined the victim on 24-3-1996 has declared her age to be of about 12 years. All this evidence proves that the victim complainant had not yet attained the age of 16 years on the date of the performance of nikah and was not a sui juris to perform a valid nikah without the ~~permission~~ permission of Wali. Consequently it stands proved that no valid nikah persisted at the time of cohabitation with the complainant girl. The counsel for appellant has conceded with this position but has contended that the evidence on record proves that the pubert girl of 11+ years of age was in love with the appellant at the time of nikah and this creates mitigating circumstances. The photograph of the



complainant with the appellant Ex.DA and her willing posture seen with the love letters written by the appellant Ex.DA/1 to Ex.DA/9 do indicate the truthfulness of the content on of the counsel for appellant. Therefore I am inclined to believe that there exist mitigating circumstances.

On the other hand a letter No.273 dated 1-4-1999 has been received from the Superintendent, judicial lock-up, Swabi in which it has been informed that the appellant has almost completed his sentence and only 30 to 40 days remain for release depending upon further reductions and remissions as per the rules of jail and notifications of the government. In view of this circumstance and conceding position of the counsel for State, while maintaining the conviction, the sentence is reduced to the extent already undergone. Sentence of stripes is set aside as it is no more required. With this modification, the impugned judgment is upheld and the appeal is dismissed. The appellant shall be released forthwith if not wanted in any other case.

Fit for Reporting

( Abdul Waheed Siddiqui )  
Judge

Islamabad, the  
13th April, 1999.  
Zain/\*