

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE SYED AFZAL HAIDER
MR.JUSTICE SHAHZADO SHAIKH

CRIMINAL APPEAL NO.5/L OF 2009

1. Mansab Dar
 2. Zafar (both sons of Syed)
 3. Syed
 4. Sher
 5. Ayub (sons of Sohna).
 6. Muhammad Afzal
 7. Haq Nawaz alias Hakim (both sons of Sher)
- All accused Awan by Caste resident of Mauza Panj Garain,
Tehsil & District Jhang.

.... Appellants

Versus

The State Respondent

For the appellants ... Mr.Mehram Ali Bali,
Advocate

For the State ... Miss. Shabnam Rasheed Abbasi

Private complaint No. ... 5/2006, 05.04.2006

Date of judgment of
trial Court ... 20.12.2008

Date of Institution ... 20.01.2009

Date of hearing ... 31.03.2010

Date of decision ... 02.04.2010

JUDGMENT

JUSTICE SYED AFZAL HAIDER, J.- This appeal has been moved by appellants Mansab Dar, Zafar, Syed, Ayub, Afzal and Haq Nawaz alias Hakim to impugn the judgment dated 20.12.2008 delivered by learned Additional Sessions Judge, Jhang whereby they were convicted under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and sentenced to 5 years R.I. with fine of Rs.5000/- each, in default whereof to further undergo one month simple imprisonment each. Accused Mansab Dar was also convicted under section 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and sentenced to 10 years rigorous imprisonment. However, all the convicts/appellants were granted benefit of section 382-B of the Code of Criminal Procedure.

2. Brief facts of the prosecution case are that complainant Mst. Kausar Bibi PW.7 initiated a crime report by way of private complaint on 05.04.2006 in the Court of Additional Sessions Judge, Jhang alleging that on 08.11.2005 at about 8/9:00 p.m. she had gone in the nearby field to answer the call of nature. Accused Mansab Dar, Syed, Zafar, Afzal, Hakim and Ayub came there on a tractor and boarded her on the tractor after putting

a piece of cloth on her mouth. At that moment Zafar and Umar, who were passing nearby, identified the accused with the help of tractor light. The accused then took her hurriedly towards Ratta Adda at the Lalian Road where Ghulam Abbas was present. Accused Mansab Dar thereafter took her to some unknown place on a motor cycle where she was kept in a room for two nights. Accused Mansab Dar reportedly subjected her to *Zina-bil-Jabr*. The complaint proceeds further to disclose that as the complainant had not returned home so her father along with Shera, on the information given by Zafar etc, approached the accused and demanded restoration of the complainant. The accused consequently brought the complainant to the house of her *phupha* Sher Muhammad on 10.11.2005. Mansab Dar accused is also alleged to have admitted his guilt in the presence of Sher Muhammad and many others. The complainant alleged further that Ismail son of Saie and Shera son of Sohna had lent support to the accused in the commission of this offence. Accused Afzal, Syed and Mansab Dar were allegedly armed with guns at the time of occurrence. The complainant also stated that on her written application a case was registered whereafter her medical examination was also undertaken wherein the lady doctor confirmed the allegation of

Zina-bil-Jabr. The complainant also alleged that the police, under the influence of the accused, declared them innocent and hence she moved a private complaint against nine accused including the appellants.

3. Charge was framed by the learned trial Court on 28.08.2006 against eight accused under section 11 while a charge under section 109 of the Pakistan Penal Code was framed against Ismail and Sher accused. However Mansab Dar accused was charged under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, VII of 1979 and 109 of the Pakistan Penal Code. The accused did not plead guilty and claimed trial.

4. The prosecution in order to prove its case produced 12 witnesses at the trial. The gist of the statements of the witnesses is as follows:-

i) PW-1: Muhammad Iqbal MHC had handed over two sealed parcels of envelope and a phial to constable Ghulam Farid for onward submission to the office of Chemical Examiner, Lahore.

ii). PW-2: Safia Sultana Lady constable had taken Mst. Kausar Bibi to DHQ Hospital, Jhang on 12.11.2005 for medical examination. She received from the medical officer the medico legal report, a phial and a sealed envelope alongwith a blood stained Shalwar which was handed over

to Ashiq Hussain S.I. who recorded her statement under section 161 of the Code of Criminal Procedure and took the Shalwar into possession vide memo Ex.PA which was attested by her.

iii) PW-3: Dr. Nasreen Ghauri medically examined Mst. Kausar Bibi and observed as under:-

- “1. There were multiple scratches in an area 6 cm x 4 cm on lower side of chin (mental region).
2. An abrasion 3 cm x 3 cm on medical and inner side of right lower limb.
3. Hymen showed healed tears.
4. Vaginal orifice admits two fingers easily.
5. Three vaginal swabs taken, sealed and sent to Chemical Examiner for detection of semen and serological examination.

OPINION.

In my opinion she was subjected to sexual inter-course. Nature of Injuries was given under section 337-L(2)PPC. Probable duration of injury was not given. Certified copy of the original which is also before me. Ex.PB and is true copy of the original which is also before me. Ex.PB was prepared and signed by me. I examined the victim on the application given by the police which is Ex.PB/1. I also endorsed the same. After examination, I handed over certified copy of MLC, Sealed phial & sealed envelope to Lady Constable.”

iv) PW-4: Dr. Muhammad Shafi Saleem conducted potency test of accused Mansab Dar and found him fit to perform sexual intercourse.

v). PW-5: Constable Ghulam Farid deposited two sealed parcels and the envelope intact in the office of Chemical Examiner, Lahore on 16.11.2005.

vi) PW-6: Hazoor is father of the victim/complainant Mst. Kausar Bibi and Mst. Kausar Bibi PW.7 is complainant/victim herself. Both of them supported the contents of private complaint.

vii). PW-8: Umar Hayat is an eye witness of alleged abduction. He supported the contents of the crime report.

viii). PW-9: Sher is the witness who along with PW.6 Hazoor, the father of abductee, allegedly received information from Umar Hayat PW.8 about the abduction of Mst. Kausar. He is also a witness of motive and search of abductee. He also supported the factum of return of abductee.

ix). PW-10: Ahmed Ali deposed about the conspiracy to abduct Mst. Kausar Bibi. According to him Ismail and Sher came to the river bank to board a boat and there prompted Haqnawaz, Mansab Dar and Syed to abduct sister of Zafar son of Hazoor in order to equalize the score.

x). CW-I: Mushtaq Ahmed S.I appeared at the trial to state that being on duty he recorded FIR.

xi). CW-2: Ashiq Hussain Inspector appeared at the trial to state that he investigated the case FIR No.260 dated 12.11.2005 registered under sections 10/11 of Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and 109 of the Pakistan Penal Code, visited the place of occurrence; prepared rough site plan Ex.CW2/B, recorded statement of the PWs under section 161 of the Code of Criminal Procedure; got medically examined the abductee Mst. Kausar Bibi and took into possession Shalwar of the victim. On 21.11.2005, he arrested accused Mansabdar, Afzal, Haq Nawaz and Syed. On 24.11.2005, accused Mansab Dar got recovered .12 bore gun. He also prepared rough site plan of the place of recovery Ex.CW.2/C. He arrested accused Ayub on 24.11.2005. He also got accused Mansab Dar medically examined and recorded statements of the witnesses under section 161 of the Code of Criminal Procedure.

5. After closure of prosecution evidence, all the above mentioned accused were examined under section 342 of the Code of Criminal Procedure. In reply to the question "why this case against you and why the

PWs have deposed against you?, the principal accused Mansab Dar stated as

follows:-

“The PWs are related interse and they have deposed against me due to enmity. Ismail co-accused had purchased one Acre of land from Veriah tribe and Ismail etc. were cultivating the said land. The complainant party had forcibly taken possession of the said land. I was supporting my co-accused Ismail etc; and a quarrel had taken place prior to the registration of this FIR, in which I abused Hazoor Muhammad father of Mst. Kausar Bibi, who got lodged this false FIR against me and my co-accused because of the land in dispute and above said grudge of quarrel.”

In reply to the question “why this case against you and why the PWs have

deposed against you?, the accused Ismail, Ghulam Abbas, Haq Nawaz alias

Hakim, Muhammad Afzal, Sher, Ayub, Syed and Zafar endorsed the

statement of their co-accused Mansab Dar. None of the accused appeared as

his own witness under section 340(2) of the Code of Criminal Procedure. No

evidence was produced in defence.

6. We have examined the record of the case. Evidence of the

witnesses for prosecution as well as the statement of the accused has been

perused. Relevant portions of the judgment have been scanned. Learned

counsel for the contending parties have also been heard.

7. Learned counsel for the appellants at the outset stated that it

was a case where the conviction should have been recorded under section

10(2) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and not 10(3) *ibid.* He further contends that the conviction recorded under section 11 of Ordinance VII of 1979 is not called for in the facts and circumstances of the case. The learned counsel also urged reduction in sentence.

8. Learned Deputy Prosecutor General for the State is of the view that the facts of the case do not support conviction under section 10(3). Learned counsel is also of the view that conviction should have been recorded under section 10(2) *ibid.* It is also submitted that ingredients of section 11 of the Order have not been proved by the prosecution.

9. We have given anxious thought to the points urged by learned counsel for the appellants which have been duly supported by the learned Deputy Prosecutor General. The evidence placed on record does not establish the element of Zina-bil-jabr. However, consensual relationship between the complainant and Mansab Dar accused cannot be ruled out. On the other hand this relationship is admitted by learned counsel for the appellant. Medical evidence does not support prosecution version of Zina bil Jabr. The element of delay in reporting the matter is also not explained by the prosecution as the incident had taken place allegedly on 08.11.2005

whereas the FIR was recorded on 12.11.2005 and Mst. Kausar was reported to have been returned on 10.11.2005. During this period no complaint was lodged by the father of Mst. Kausar Bibi. It is an intriguing fact that the families of three brothers Said, Ayub and Afzal have been involved in this case. It is also significant to note that P.W.6 Hazoor Bakhsh, father of Mst. Kausar Bibi, admitted in cross-examination that on the night of occurrence no attempt was made by them to find out the whereabouts of Mst. Kausar Bibi. It was only on the next day of her disappearance that the father made efforts in that direction. The witness also admitted that the accused had suspicion that his son had illicit relations with the sister of accused. This suspicion had developed since one or two years before the occurrence. PW.9 Shera, the Phupha of Mst. Kausar, stated that Umar and Zafar informed them about the incident in the evening but efforts to locate the missing girl was made only next morning. The house of accused is at a distance of one and a half acre from the place of occurrence. The names of accused were allegedly brought to their notice but strangely enough her family members did not deem it expedient to trace the missing youth. The search allegedly commenced next day. The abductee was admittedly not recovered from the

accused. No raid was conducted by police in this respect. Shera PW.9 got his statement under section 161 of the Code of Criminal Procedure recorded a month after the alleged incident. It is an admitted position that the alleged place of abduction is only 8/10 karams from her house and she is reported to have raised cries but nobody was attracted from adjoining houses.

10. It is in the evidence of P.W.10 that the conspiracy theory had been found incorrect by the Investigating Officer. Ashiq Hussain, Inspector appeared as C.W.2 and stated that he recommended discharge report of accused Muhammad Ayub Zafar, Abbas, Sher and Ismail as they were not found involved in the occurrence. In cross-examination C.W.2 stated that during investigation the place of commission of zina was not shown to him. As far as recovery of gun from the house of Mansab Dar appellant is concerned the Investigating Officer admitted that the house was jointly owned by family members. He also admitted not having sent the alleged crime weapon .12 bore gun to the Forensic Science Laboratory to determine whether it was in working condition. He had also stated that at the time of recovery of .12 bore gun no one was present in the house. There was no boundary wall of the house from where the gun was recovered. The entire

prosecution case is therefore not free from doubts. Zina-bil-Jabr is certainly not established.

11. PW.8: Umar Hayat is a chance witness. He lives in a different village across the river. He was successfully confronted by defence on a number of points with his previous statement. His deposition smacks of improvement. According to him the search for Mst. Kausar started immediately after he laid information of abduction but the father of abductee asserted that they pursued the girl only next morning. Apparently the prosecution has introduced this element to improve its case.

12. We have also not been able to discover any evidence to connect the appellants with the offence contemplated by section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. Finding of guilt cannot be placed on high probabilities. The onus certainly rests upon the prosecution to prove the guilt of accused beyond reasonable doubt. The accused cannot be convicted merely because he has not stated the whole truth. In order to bring the action of the accused within the mischief of section 11 of Ordinance VII of 1979 it is essential in such like cases to establish that force was employed with the intention of subjecting the adult abductee to illicit intercourse. But

if the court finds that the allegedly abducted party was a consenting partner and nothing was done against her will then the case is not hit by section 11 ibid. The requisite ingredients of the offence have neither been proved by prosecution nor discussed in the impugned judgment. Reference Amanullah vs. The State 1993 SCMR 1806; State vs. Khuda Bux 2004 SCMR 425 (at pages 429-430). As far back as 1938 Mr. Justice Blacker of Lahore High court in the case of Mohammad Sadiq versus Emperor, reported as AIR 1938 Lahore 474, had held that in case of offences under section 366, the evidence of girl alleged to have been abducted must be taken with great amount of caution. It was also held that natural presumption in cases of abduction is that the girl is abducted with intention of having sexual intercourse with her forcibly or with her consent after seduction or after marrying her. If any other intention is alleged to exist, burden is on accused to prove it. The appellants resultantly are entitled to benefit of doubt. Six accused have suffered incarceration for almost two years each without solid proof of abduction.

13. In this case notices were issued to appellants Mansab Dar, Zafar, Syed, Ayub, Afzal and Haq Nawaz on 22.02.2010 to show cause why

the sentence awarded under section 11 of Ordinance VII of 1979 be not enhanced because section 11 *ibid* contemplates life imprisonment only as the requisite punishment. Since we have come to the conclusion that ingredients of section 11 *ibid* are not established in this case, so we have decided to withdraw notices for enhancement of sentence against all the appellants. All of them are therefore acquitted under section 11 of Ordinance VII of 1979.


We have already found that the prosecution has failed to prove allegations of Zina bil Jabr. Consequently in view of the statement of learned counsel for appellant Mansab Dar that the case is covered by 10(2) *ibid*, his conviction is altered to one under section 10(2) of Ordinance VII of 1979. Resultantly his sentence is reduced to the period already undergone with a fine of Rs. 5000/- and in default whereof he will suffer 10 days simple imprisonment. Benefit of section 382-B of the Code of Criminal Procedure is extended to him.

14. The appeal is partly accepted and disposed of in the above terms.

15. Before parting with this Judgment we consider it expedient in the interest of justice to take judicial notice of the fact that five accused,

other than Mansab Dar, were involved in criminal proceedings under section 11 of Ordinance, 1979 without justification. They had to face the harrowing period of investigation, the travail of the trial and then suffer additional pain on account of appeal in the Federal Shariat Court. Each one of them has already been in jail for almost two years. It is an unfortunate trend to involve innocent persons alongwith the real culprit. We have found that it was not a case of abduction. Mst. Kausar Bibi ought to have been charged along with Mansab Dar as a consenting party. Mst. Kausar Bibi alone was not responsible for initiating the complaint. She was apparently supported by her father and other witnesses. In this view of the matter we direct the learned trial court to issue notices to the complainant P.W.7, her father Hazoor P.W.6, Umar Hayat, P.W.8 and Sher P.W.9. An enquiry should be held with the object of fixing liability. Learned trial court will send a comprehensive report in this Court through its Registrar by the end of May, 2010. The learned trial court will, apart from considering the possibility of imposing fine upon the complainant and witnesses by way of compensation to be paid to all those who were charged and convicted under section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, try to ascertain whether a

case of perjury could be registered against the defaulters. It should be a speaking order passed after recording statements of the complainant and other witnesses. The learned trial court may, if it considers necessary, summon the acquitted accused in order to find out whether FIR. No. 260/2005 Police Station Qadir Pur District Jhang and the subsequent complaint lodged by Mst. Kausar Bibi was motivated or otherwise. It is the duty of the court to watch the interest of all the parties before it so that process of the court is not abused.



JUSTICE SYED AFZAL HAIDER



JUSTICE SHAHZADO SHAIKH

Announced in open Court
at Islamabad on 02.04.2010.

UMAR DRAZI

Fit for reporting



JUSTICE SYED AFZAL HAIDER