

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO.5/L/2008

Muhammad Arif son of Noor Khan, caste Rajput, R/o Gali No.3, Saeed Abad, Tehsil & District Faisalabad (presently confined in Central Jail, Faisalabad.

....., Appellant

Versus

The State.

..... Respondent

Counsel for the appellant	...	Rana Muhammad Saleem Akhtar, Advocate
For the State	...	Mr. Arif Karim, D.P.G.
F.I.R No. Date and Police Station, district	406/99, dated 2.05.2006, Ghulam Muhammad Abad, Faisalabad.
Date of Judgment of trial Court	...	04.12.2007
Date of Institution	...	01.02.2008
Last date of hearing	05.01.2009
Date of decision	05.01.2009

JUDGMENT:

Justice Syed Afzal Haider, Judge: Muhammad Arif

appellant, through this appeal assails judgment dated 04.12.2007 delivered by the learned Additional Sessions Judge, Faisalabad in Hudood Case No.4-7A of 2006, Hudood Trial No.15 of 2007 whereby he has been convicted under Section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and sentenced to rigorous imprisonment for a term of ten years with benefit of section 382-B of the Code of Criminal Procedure.

2. The prosecution case in brief is that complainant Muhammad Sohail PW.7, got recorded crime report as F.I.R No.406/06 dated 21.05.2006 under Section 18 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 at Police Station Ghulam Muhammad Abad, District Faisalabad wherein he alleged that on 02.05.2006 his younger sister Mst. Saira Jabeen aged 11 years, student of 5th class was also alone at the

house and was doing school work at about 2/3.00 p.m, Muhammad Arif accused, who was visiting on terms with the complainant, entered the house and after removing the clothes of Mst. Saira Jabeen attempted to commit Zina with her. The complainant and Muhammad Pervez reached at the spot on hearing the hue and cries of Mst. Saira Jabeen. The accused was armed with 30-bore pistol. He threatened them of dire consequences and fled away. The accused party pressed the complainant for a settlement but the complainant did not agree and lodged the crime report the next day.

4. The investigation ensued as a consequence of the registration of Crime Report. Jahangir Khan, Sub Inspector, PW.8, investigated the case. He recorded the statement of Mst. Saira Javeen victim wherein she stated that the accused committed Zina-bil-jabr with her but due to shame she did not disclose this fact to his brother. The Investigating Officer after getting the victim medically examined added Section 10 of the

Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 in the Crime Report and arrested the accused on 22.05.2006. The S.H.O submitted report under Section 173 of the Code of Criminal Procedure on 10.06.2006 in the Court requiring the accused to face trial. The trial Court framed charge on 25.01.2007 against the accused under Section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. He pleaded not guilty and claimed trial.

5. The prosecution produced eight witnesses to prove its case. The gist of the depositions of the prosecution witnesses is as follows:-

- (i) PW.1 Doctor Nusrat medically examined Mst. Saira on 23.05.2006. She, after considering the report of Chemical Examiner, observed that the victim was subjected to intercourse. According to the report of Chemical Examiner, the swabs were stained with semen.

(ii) PW.2 Nazir Ahmed Head Constable deposed that on 27.05.2006 the Moharrar handed over to him a sealed parcel which he deposited intact in the office of Chemical Examiner Punjab, Lahore. E.1

(iii) PW.3 Pervez Khalid ASI, deposed that on 23.05.2006 he was posted as Moharrar at Police Station Ghulam Muhammad Abad. The Investigating Officer handed over to him a sealed parcel which he kept in Malkahan for safe custody and on 27.05.2006 he handed over the said parcel to Nazir Ahmad Constable for onward transmission to the officer of Chemical Examiner, Lahore.

(iv) PW.4 Doctor Muhammad Ashraf deposed that he conducted medical examination of Arif accused and found him potent.

(v) Muhammad Ashraf ASI PW.5 deposed that on 21.05.2006 at 5.30 p.m, he was on patrol duty alongwith police Constables at Dogar Chowk when Muhammad Sohail complainant presented complaint Ex.PB whereafter he recorded Karvai Ex.PC on it and sent the same for registration as formal F.I.R through Khushi Muhammad Constable.

(vi) Sara Bibi victim appeared as PW.6. She deposed the same story as narrated in the Crime Report with the addition that "due to fear and shame I could not disclose the whole fact to my brothers and secretly washed the shalwar, which was blood stained. However, I narrated the whole incident to my maternal aunt and elder sister. I produced my torn shirt P-1 with broken bangles P-2, which was

broken at the time of my resistance to the accused.”

(iii) PW.7 Muhammad Sohail complainant reiterated the story as disclosed in the Crime report.

(iv) Jahangir Khan S.I. PW.8 investigated the case. He inspected the place of occurrence, prepared its site plan Ex.PE and recorded the statements of PWs under Section 161 of Code of Criminal Procedure.

He recorded supplementary statement of complainant Muhammad Sohail and also took into possession pieces of broken bangles P-2 through recovery memo Ex.PC, shirt P-1 of the victim through recovery memo Ex.PD. He arrested the accused on 22.05.2006. He got the victim and the accused examined medically. He also completed the other formalities of the investigation.

6. The prosecution gave up Muhammad Parvez PW as unnecessary on 07.07.2007 and closed its case on 22.09.2007.

Thereafter the statement of the accused was recorded under Section 342 of the Code of Criminal Procedure on 29.08.2007

who denied the charges and stated that:-

“I am innocent. All the PWs are related inter-se. The actual story is that sister of the victim had borrowed some money from me, which I was demanding time and again but she refused and threatened that she would teach a lesson to him for demanding the money. Resultantly, the complainant party managed to register a false case by mixing up with Lady Doctor and got a false case against me.”

7. The learned trial Court after assessing the evidence in the light of the arguments and objections raised by learned Counsel for the parties, convicted the accused by holding:-

“Thus summing up the above discussion it is held that the prosecution by examining natural and confidence inspiring witnesses including the victim of the case getting support from medical evidence, recoveries and

fair investigation conducted by independent people has fully established its case against the accused and there is found no serious or material contradiction or discrepancy in the statements of above said witnesses and if there have come on record some minor discrepancies or contradictions relating to details of occurrence, the same are insignificant and ignorable. In defence the accused has not produced any worthwhile reliable evidence.”

The learned trial Court, it appears by taking a lenient view, awarded ten years sentence to the accused because the accused had no previous criminal record and was of “young age”.

8. I have gone through the file and perused the evidence of witnesses as well as the statement of the accused. The learned Counsel for the appellant has raised the following points:-

- (a) That infact it is a case which is covered by the mischief of Section 18 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and the F.I.R was also registered under Section 18 of the Ordinance.

(b) That according to the medico-legal report of PW.1

Nusrat Gynacologist the probable duration of injury at the private parts was two days but the incident took place three days before the victim was medically examined.

(c) That since there is no allegation that force was employed by the appellant against the victim, therefore, the question of Zina-bil-jabr does not arise.

(d) The learned Counsel contended that in view of the vaginal examination, PW.1 stated that "there was small tear in posterior vaginal wall, it was fresh". The learned Counsel states that after three days the injury does not remain fresh.

(e) That none of the witnesses saw the occurrence and, therefore, they are not eye witnesses.

(f) That though the witness has not been confronted with the statement recorded under Section 161 of the Code of Criminal Procedure and as such it was not a legal document but still its contents should be read.

9. Learned Counsel for the State on the other hand supported the impugned judgment and urged that the accused was nominated in the crime report, there was no considerable delay, the evidence of the victim was supported by medical opinion, the occurrence took place during day time and hence there was no question of mistaken identity and the accused had refused to provide semen for group matching and lastly that conviction could be maintained even on the solitary statement of the victim.

10. I have gone through the record and perused the evidence available on record. The learned trial Court after consideration

of the arguments of the parties and assessment of the evidence made observations which have been reproduced above.

11. I will now revert to the points raised by learned Counsel for the appellant. In so far as the objection as to how could a wound remain fresh even on third day, the answer is available in the cross-examination of the lady doctor herself who had stated that if the injury in the vagina is observed on the first day of the occurrence the wound is "very fresh" but on the third day it is described as fresh as is clear from Modi's Medical jurisdiction.

12. As regards the next objection that "all the PWs are not eye witnesses" it is clear from the statement of the victim herself and even her brother Muhammad Sohail PW 7 that the witnesses had arrived immediately *after the offence of Zina had been completed.*

13. As regards the objection that it was a case of attempt and not of Zina-bil-jabr, I specifically asked the learned Counsel

whether he would advance this argument and claim reduction in sentence but he stated that he would argue the case on merits.

14. In relation to the argument that no force was employed upon the victim by the appellant the learned Counsel on being asked whether he pleads that it was a case of consent, his reply was in the negative.

15. The next point raised by learned counsel for the appellant pertains to blood grouping. It is stated that the blood group of the appellant is AB + whereas the blood group found on the swabs is of O group. I have examined this aspect carefully because this objection on the face of it goes to the root of the case and find that it was for the first time on 07.03.2007, when Lady Doctor was being cross-examined as PW.1, that the question of grouping arose before the learned trial Court. Then after a period of twenty two weeks i.e. on 29.08.2007 the appellant, while deposing under Section 342 of the Code of

Criminal Procedure in response to question No.3 stated as under:-

“Q.3 It is in the prosecution evidence that Saira Bibi, the victim was medically examined by the Women Medical Officer, who took the vaginal swabs and sent the same to the Office of Chemical Examiner Punjab, Lahore and Serologist for determination of semen and grouping of blood. The said office has sent the reports, which are in positive. According to MLR issued by the WMO the intercourse has been committed with the victim. What do you say about it?”

“Ans. It is incorrect. I cannot say anything about the alleged medical examination. However, the semen detected from the swabs was stained with secretions of ‘O’ Group, whereas my group was found A,B+, which I tender as Ex.DB and DB/1, which was conducted on my application duly approved by the learned Illaqa Magistrate upon which I was produced before the concerned doctor from Jail and the same was tendered in the

court by the Medical Officer. I have been roped in this case falsely.”

16. In response to the Court question whether any application was moved by the appellant during the trial i.e. the period between 07.03.2007 and 29.08.2007, the learned Counsel for the appellant stated that no such application was moved before learned Additional Sessions Judge, Faisalabad between these two dates. However learned Counsel for the appellant referred to Ex.DB and Ex.DB/1 an application made to the Judicial Magistrate by accused for ascertaining his blood group. I have carefully seen this application with the assistance of learned Counsel for the parties. The unknown scribe of this application jotted down that the application was being submitted through a Counsel. The scribe, however, conveniently elected to omit the date when it was drafted or submitted. Even the mention of the name of the lawyer authorised to move the application has not been attempted. The stamp, however, on the application Ex.DB, is dated 03.07.2006. This

application of the accused seeks permission for analysis of his blood group from a particular private hospital i.e Allied Hospital, Faisalabad. The following order was apparently passed by learned Judicial Magistrate on this application on 03.07.2006:-

“Superintendent District Jail Faisalabad is directed to do the needful according to law.”

17. Another endorsement dated 03.07.2006, made apparently by the Superintendent Jail as a consequence of the Magisterial order, on right bottom of the same application reads as follows:-

“DS/Assist/MO”

Thereafter, the course of movement of that application is not traceable. The application does neither contain any certificate even from that particular private hospital nor is supported by any prescribed Form or a stamp certifying the blood group of the accused. The chain of events is broken after the endorsement was made by jail authorities.

18. The application on the other hand is neither signed/thumb marked by the accused nor does it bear the signature of the Counsel who is supposed to have moved it before the learned Magistrate. The scribe of the application remains unidentified.

Even the short order of the learned Magistrate gives no indication as to the person who presented the application before him. Therefore, it is presumed that the application Ex.DB was moved on 03.07.2006. Additionally, it is also worth noting that:

- (i) The words "Through Counsel" were scored on 17.07.2006; i.e 14 days after the Magisterial order and endorsement by jail authorities.
- (ii) Incomplete Challan was submitted on 10.06.2006 with a note that the report of Chemical Examiner has not been received as yet. Therefore, incomplete Challan was submitted on 10.06.2006;
- (iii) There is a Note on the last page of the Challan that report No.990/S dated 08.06.2006 and Chemical

Report No.216 dated 08.07.2006 have been received;

(iv) Report No.216 dated 08.07.2006 was issued by the

Serologist of the Government of Punjab, Lahore

wherein it is stated that the material of the above swabs was stained with secretion of 'O' group.

This report of the Serologist pertains to one

vaginal swab relating to Mst.Sairan, sent to the

Serologist vide MLC No.106-03 dated 23.05.2006

which fact finds mention in Ex.P-J and Ex.P-K.

(v) There was no allegation that the secretion of blood

found on the vaginal swabs pertained to the

appellant. The swabs containing blood secretion

were certainly the result of fresh tear in the

posterior vaginal wall of the victim. The 'O' group

of the blood, therefore, related to the victim and

the contention of the learned counsel for the

appellant that the blood group of the latter is AB + is not only misconceived but calculated to confuse the issue.

(vi) It is quite intriguing that on 03.07.2006, when the statement of Lady Doctor had not been recorded, the appellant thought it expedient to get his blood group analysed but never applied for the matching of semen.

(vii) There is no certification by jail authorities that blood grouping of appellant had to be undertaken from private sources due to non-availability of means to analyse the blood group of the appellant in Government Hospital. Apart from that there is no indication whatsoever on record that the blood grouping of the appellant was undertaken even by a medical person from any private but a known

laboratory. There is neither any signature nor any stamp below the insertion O group nor is any date mentioned below this uncanny entry "Blood AB +".

19. In this view of the matter, it is crystal clear that the objection raised on behalf of the appellant as regards the difference of blood group is baseless to say the least. It is strange that the jail authorities did not act in the manner which can be termed as transparent. It is hoped that in future such lapse of duty will not be repeated. The accused is certainly entitled to the benefit of reasonable doubt but not from shoddy transactions.

20. As regards the objection that the Crime Report was registered under a particular section, the learned counsel on Court question agreed that the trial Court on receipt of the report was competent to frame charge under another section.

21. As a result of what has been stated above, I agree with the points raised by learned counsel for the State that the appellant was nominated in the F.I.R, it was not a case of mistaken identity as the occurrence took place during day time, the accusation of the victim were duly corroborated by medical evidence and that the appellant had refuse to provide his semen for group matching.

22. Learned Counsel at the end has vehemently stressed that some concession in the sentence may be given because the appellant is a first offender and was quite young at the time when the alleged offence took place.

23. In view of what has been stated above, I would maintain the conviction of Muhammad Arif appellant under Section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and having regard to the facts and circumstances of the case including the age and

absence of any criminal record of the appellant, I reduce his sentence of rigorous imprisonment to 5 years' but the benefit of section 382-B Code of Criminal Procedure will, under the circumstances, not be extended to him.

24. With the above modification in the sentence, the appeal is dismissed.

Smaida

Justice Syed Afzal Haider

Announced at Lahore on 5th January, 2009.

Amjad /*

Fit for reporting.

Smaida

Justice Syed Afzal Haider