

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER ✓

CRIMINAL APPEAL NO. 52/L OF 2009

Muhammad Tariq son of Chirag Din, Caste Rehmani, resident
of Naimatabad, Balal Masjid, Faisalabad.

... Appellant

Versus

The State ... Respondent

Counsel for appellant ... Syed Shabahat Hussain Tirmazi and
Ch. Muhammad Nazir, Advocates

Counsel for complainant ... Mr. Muhammad Arif Awan,
Advocate

Counsel for the State ... Ch. Abdul Razzaq,
Deputy Prosecutor General

FIR No. Date & ... 78/2005, 27.01.2005
Police Station Saddar, Faisalabad.

Date of Judgment of ... 09.04.2009
trial court

Dates of Institution ... 08.05.2009

Date of hearing ... 06.10.2009

Date of decision ... 17.11.2009

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JUDGMENT:

JUSTICE SYED AFZAL HAIDER, J:- This appeal is directed against judgment dated 09.04.2009 delivered by learned Additional Sessions Judge, Faisalabad, whereby appellant Muhammad Tariq was convicted under section 12 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to five years rigorous imprisonment with fine of Rs.50,000/- or in default thereof to further undergo three months' simple imprisonment. He was also convicted under section 377 of the Pakistan Penal Code and sentenced to 5 years rigorous imprisonment with fine of Rs.50,000/-, and in default of payment of fine, to further undergo 3 months' simple imprisonment. Both the sentences were ordered to run concurrently with benefit of Section 382-B of the Code of Criminal Procedure.

2. Facts leading upto this criminal trial are that Muhammad Amin PW.4, the complainant of the case, lodged a written complaint with police on 27.01.2005 to the effect that on

20.01.2005 at about 8.30 p.m. accused Tariq enticed away his minor son Ali Haider, aged 10/11 years, and forcibly committed unnatural offence in a room of his Haveli. The hue and cry raised by the victim attracted Muhammad Saleem son of Mehr Din and Muhammad Saleem son of Manzoor Hussain to the spot. The accused made good his escape leaving the bleeding victim at the place of incident. The witnesses brought the minor victim back to his house. The relatives of the accused put pressure on the complainant for compromise but the latter did not agree.

3. The complaint lodged by Muhammad Amin was then registered as First Information Report No.78/2005 dated 27.01.2005 with Police Station Saddar, District Faisalabad, under sections 377 of Pakistan Penal Code and 12 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. This report is placed on record as Ex.PD/1.

4. Investigation ensued as a consequence of registration of the said crime report. Shafqat Hussain, Sub Inspector PW-8, initiated the investigation. He inspected the place of occurrence, prepared site

plan Ex.PE, recorded statements of witnesses under section 161 of the Code of Criminal Procedure, prepared application Ex.PB for medical examination of Ali Haider victim. The latter was sent to Civil Hospital Faisalabad for his medical examination through Constable Maqbool Ahmad 4348-C.2. The latter produced one sealed parcel alongwith a copy of medico-legal report Ex.PC before the Investigating officer who in turn handed over the same to Moharrar Khizar Hayat PW.5 for safe custody for subsequent transmission to the office of Chemical Examiner, Lahore. He arrested Muhammad Tariq accused on 31.01.2005. Application Ex.PF for the medical examination of accused was prepared who was then sent for medical examination to Civil Hospital through Ghulam Mustafa Constable No.1935/C. The latter produced his medico-legal report Ex.PA before the Investigating Officer. Thereafter accused Muhammad Tariq was sent to judicial custody on the same day. The Investigating Officer had also recorded statements of Moharrar Khizar Hayat and Noubahar Constable under section 161 of the Code of Criminal Procedure. During investigation, he

5/1

found accused Muhammad Tariq guilty whereafter the Station House Officer submitted a report under section 173 of the Code of Criminal Procedure on 01.02.2005 in the Court requiring the accused to face trial.

5. Learned trial Court framed charge against the accused on 22.03.2006 under sections 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 as well as section 377 of the Pakistan Penal Code. The accused did not plead guilty and claimed trial.

6. The prosecution, in order to prove its case, produced nine witnesses at the trial. The gist of evidence of the witnesses for the prosecution is as follows:

(i) PW.1: Dr.Siraj-ud-Din after medical examination of accused Muhammad Tariq found him sexually potent.

This finding was not challenged by the accused.

(ii) PW-2: Dr.Qaisar Abbas medically examined the victim

Ali Haider in knee elbow position. He found an infected

bone area 1 cm x $\frac{3}{4}$ cm at 9.0 clock position at inside

anus. The trouser worn by the victim at the time of incident was produced before the Medical Officer by his father. The same was sent to Chemical Examiner, Punjab Lahore for detection of semen and blood from the stains present on trousers. This witness opined that possibility of sodomy could not be excluded. Probable duration of injury of anus was more than three days. He further stated that the report of Chemical Examiner (Ex.P.G) was received on 16.02.2005 according to which, the article i.e. the sample portion of trousers was found stained with semen and blood. He had made an entry accordingly in the office copy of medico-legal report Ex.PC/1. The positive report of Chemical Examiner was not challenged by accused during cross-examination.

- (iii) PW-3: Noubahar Constable No.1083/C was handed over one sealed phial and three envelopes by Khyzar Hayat Muharrar PW-5, for delivery in the office of

Chemical Examiner, Lahore which was deposited in the said office intact.

- (iv) PW-4: Muhammad Amin complainant of the case endorsed the contents of his crime report Ex.PD.
- (v) PW-5: Head Constable Khyzar Hayat was handed over one sealed phial and three sealed envelopes which were kept in Malkhana in safe custody. On 01.02.2005 he handed over the said parcel to Noubahar Constable 1083/C PW-3 for onward transmission to the office of Chemical Examiner, Lahore.
- (vi) PW-6: Muhammad Saleem son of Mehr Din stated that in the month of January, 2005, he alongwith Muhammad Saleem son of Manzoor was passing in front of Haveli of accused Muhammad Tariq when he heard hue and cry of the victim Ali Haider. On their entry into the Haveli, Muhammad Tariq accused managed to make good his escape. They found the victim weeping and a portion of trousers was stained

with blood. They took the victim to his home after which Muhammad Amin father of the victim got registered the instant case against Muhammad Tariq accused.

(vii) PW-7: Ali Haider is victim of the case. He not only supported the occurrence but also explained the unavoidable delay caused in his medical examination.

He stated that after the occurrence his father took him to DHQ Hospital, Faisalabad and the doctor instead of undertaking his examination advised him to approach the Police. Accordingly they went to police post Rashidabad where they met Shafqat Shah Sub Inspector PW-8 who asked them to come back on next morning but on the next day they did not find him due to Eid holidays. Thereafter the Police recorded his statement on 27.01.2005 and took him to DHQ Hospital, Faisalabad where he was medically examined. He also corroborated the version of PW.6 Muhammad Saleem.

(viii) PW-8 Shafqat Hussain Sub Inspector had investigated

the case. His role has already been discussed in para 3 of this judgment.

(ix) PW-9: Head Constable Muhammad Yousaf No.4052 in

his capacity as Moharrar of the Police Station Saddar,

Faisalabad had recorded formal F.I.R. Ex.PD/1 without

any addition or omission on the receipt of complaint

Ex.PD.

7. Learned DDA gave up Muhammad Saleem son of Manzoor Ahmad on 23.09.2006 as having been won over by the accused. On 26.01.2009, Rana Muhammad Muzammil Khan, ADPP, tendered a report of Chemical Examiner Ex.PG and closed the prosecution evidence. Thereafter, statement of the accused Muhammad Tariq was recorded under Section 342 of the Code of Criminal Procedure on 03.02.2009. The accused denied the allegations levelled against him. In reply to the question "Why this case against you and why the PWs deposed against you", the accused stated:-

“There is previous criminal/civil litigation with my father and Malik Munir Ahmad at whose instance the complainant had got registered instant false and fabricated case against me. PWs are close related with each other and they have deposed falsely.”

The accused offered to produce defence evidence but did not appear as his own witness under section 340(2) of the Code of Criminal Procedure to disprove the allegations. On 24.02.2009, the accused tendered a copy of application, Ex.DA, filed by his mother Mst.Sabiran Nasreen before Chairman, Safety Commission, Faisalabad. Thereafter defence evidence was closed.

8. The learned trial Court, after completing the codal formalities returned a verdict of guilt. Conviction and sentence ensued as stated in the opening paragraph of this Judgment. Hence, this appeal.

9. The reasons that prevailed upon the learned trial court to record conviction of the appellant may be summed up as under:-

- i. Delay in lodging the First Information Report had been fully explained in the evidence of the complainant as well as the victim;

- ii. According to the evidence of victim the accused was enticed into the Abadi which occasioned conviction under section 12 of Ordinance VII of 1979;
 - iii. According to medical evidence the possibility of sodomy could not be ruled out;
 - iv. The evidence of victim alone was sufficient to prove that Muhammad Tariq committed sodomy with minor victim;
 - v. The allegation of sodomy was supported by P.W.6 Muhammad Saleem;
 - vi. The defence asserted that civil/criminal litigation was pending between the parties which fact was not established on record; and
 - vii. The interse relationship of witnesses did not make the evidence interested.
10. Learned counsel for appellant raised the following points:-
- i. That Malik Munir had civil and criminal litigation with father of accused;
 - ii. That there was an element of delay of seven days in laying information with police; and
 - iii. That Muhammad Saleem, P.W.6 is closely related with the victim.

11. I have gone through the record. Evidence produced by prosecution as well as the statement of accused has been read. Relevant portions of the impugned judgment have been considered. The points urged by learned counsel for the appellant have been assessed in the light of facts and circumstances of the case. The contention of the learned counsel for the complainant is that the accused has already been dealt rather leniently. He supports the conviction.

12. The objection as regards delay in lodging the report is not valid because plausible and satisfactory explanation was given by prosecution. The witnesses had stated that the victim was taken to the Hospital but the doctor referred the complainant to police. Due to the festival of Eid-ul-Azha, falling two days after the occurrence, the hospital and police staff was not available to render assistance to the complainant. It is even otherwise common knowledge prompt relief or even timely attention to complainants in matters relating to registration of cases is usually denied by officials in the police station. This trend is amply proved from the fact that in quite a few

cases the complainants have to seek judicial intervention just to lay information of a cognizable case in a police post or a police station.

In this view of the matter the judicial trend is that delay perse is not considered consequential in Hudood matters if there is a reasonable explanation. Moreover the explanation about delay given by the prosecution witnesses was not specifically challenged at the trial on

behalf of the accused. Reliance is place on the case of Saleem Khan

and others Versus State and others reported as PLJ 2001 Federal

Shariat Court 46, decided by a Division Bench of this Court wherein

it was held that where delay had been satisfactorily explained and the

medical evidence was not at variance with the evidence of

prosecution and victim had also supported prosecution case as

regards allegation of sodomy and nothing could be elicited from the

witness by defence through cross-examination, then in such cases the

sole testimony of the victim could be relied upon to maintain

conviction if the evidence was confidence inspiring. The learned

author judge, relying upon certain precedents, also held that in the

absence of evidence of enmity between parties, element of delay in lodging the first information report was not significant.

13. It might as well be pointed out that the victim PW.7 and the witness Muhammad Saleem, PW.6, uncle of victim made no effort to effect any improvement. Both of them corroborated each other. The victim stated that the witnesses were attracted to the spot on account of his hue and cry. The witness in turn did not state that the accused was seen committing sodomy. The witness affirmed that he was attracted to the spot on account of the noise raised by victim. The witness saw the accused in the room. The latter managed to run away. The evidence of both of them is consistent, correct and confidence inspiring.

14. The objection about close relationship of the witness with the victim would have been valid had it been shown that the witness appearing on behalf of the prosecution at the trial had a personal grudge against the accused or he was motivated by extraneous considerations to falsely involve the accused in a filthy charge. The witness Muhammad Saleem, as shown above did neither

indulge in exaggeration nor opted to tell a lie. In fact the statements of victim and PW.6 are straightforward and precise. The defence failed to establish malafides on the part of one or more witnesses.

15. The contention of learned counsel for the appellant that the accused was falsely implicated on account of civil and criminal litigation pending between the parties would have certainly carried weight if the accused had deemed it fit to place on record some certified copies of pending civil and criminal litigation between complainant group and the accused party. Litigation is neither hidden nor is its proof not possible to get. In the absence of concrete evidence, the mere assertion of pending litigation does not lend support to the defence.

16. I have considered the evidence on record in the light of the arguments advanced at the Bar. I have also examined the charges framed by learned trial court. My observations are as follows:-

- i. The first charge framed by learned trial court against Muhammad Tariq appellant on 22.03.2006 saddled the accused with the liability of kidnapping Ali Hyder victim in order to subject him to unnatural lust. But

there is no evidence that the minor was removed from the custody of his guardian nor is it on record that the accused was controlling movement of the victim after kidnapping him. Reliance is placed on the case of Muhammad Tufail versus State reported as PLD 1984 Federal Shariat Court 23 wherein it was held that *taking of victim from path to a nearby Wahn* would not constitute kidnapping. It is therefore clear that the act of taking of victim to an adjoining Haveli from a walk way for sodomy would not be covered by the mischief of the offence of kidnapping. In this case the evidence is that the victim was passing in front of the Haveli of accused when the latter asked him to help him lift some load for being transported into the Haveli where the offence was committed. In this view of the matter the charge of kidnapping has not been proved by the prosecution. Consequently conviction and sentence recorded by learned trial court under section 12 of Ordinance VII of 1979 cannot be maintained which is hereby set aside. Appellant is, therefore, acquitted of the charge of kidnapping.

- ii. The second charge against the appellant related to unnatural offence committed by him upon the minor victim. The oral and direct evidence of the victim has not only been supported by the eye witness account of Muhammad Saleem P.W.6 but the evidence given by

Medical Expert Doctor Qaisar Abbas P.W.2 did not rule out possibility of sodomy. The doctor described the anus injury. The medical and oral corroboration of the allegation of sodomy was not challenged in the cross-examination. The testimony of the minor victim and PW.6 even otherwise is confidence inspiring.

iii. The collateral damage and big loss suffered by the minor victim is his loss of ~~education~~ because circumstances forced him to leave his school while he was in class 5 as his class-mates would tease him on account of the unfortunate incident. The victim as a poor person could not migrate to any other place to pursue educational career. The victim had to seek manual and unskilled employment in some garage at this tender age. His future is doomed.

iv. The Chemical Examiner had found that the spots found on the trousers of victim were contaminated with human semen and blood. This report corroborated the observation of doctor that he had seen "spots on trouser." The trousers, worn by the victim at the time of commission of offence, was handed over to the doctor who sent the same for test under sealed cover. This part of evidence also corroborates the allegation of sodomy. The ownership of the trousers or its being contaminated was not questioned by defence.

v. The impugned judgment is well reasoned and all the material witnesses have been discussed therein. The various points urged by the contending parties were duly considered before arriving at the conclusion that the offence of unnatural offence stood proved against the appellant. Learned counsel has not been able to point out any instance of unreasonable deduction or faulty conclusion arrived at by the learned trial court. There is no objection either that any piece of material evidence was omitted from consideration.

vi. The age of victim, 10 years at the time when he was subjected to unnatural lust by a fully grown up youth aged 23 years (on his own showing as recorded in his statement under section 342 of the Code of Criminal Procedure) is a factor to be kept in mind while deciding the question of award of sentence and learned trial court has certainly exercised its discretion judiciously. The punishment is by no standard excessive.

17. In view of what has been stated above Criminal Appeal No. 52/L of 2009 of appellant Muhammad Tariq succeeds partly. Conviction and sentence under section 12 of Ordinance VII of 1979 recorded against the appellant is set aside. However, I have not been persuaded to disturb the findings on the second charge recorded by learned trial court in the impugned judgment dated 09.04.2009

delivered in Hudood case No.25-7A of 2007, Hudood Trial No.2 of 2009. Consequently conviction and sentence recorded under section 377 of Pakistan Penal Code alone is maintained. The appellant has already been awarded benefit of section 382-B of the Code of Criminal Procedure which will remain intact.

Syaidar

JUSTICE SYED AFZAL HAIDER

Announced in Open Court
at Islamabad on 17-11-2009
*Mujeeb-ur-Rehman/**

Fit for reporting

Syaidar

JUSTICE SYED AFZAL HAIDER