

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE MUHAMMAD KHIYAR
MR.JUSTICE CH.EJAZ YOUSAF.

CRIMINAL APPEAL NO.85/I OF 1999.

1. Said Bahadur Shah son of Muhammad-
Shah r/o Par Hoti Distt:Mardan.
2. Mir Zaman Khan son of Haji Khatim Jan
resident of Jehangirabad Sari Bahlol
District Mardan.

... Appellants.

Versus

The State ... Respondent

For the appellants ... Mian Muhammad Murad-
Kakakhel, Advocate.

For the State ... Mr.Fazal-ur-Rehman Rana,
Advocate

No.& date of F.I.R ... No.222,dt.15.2.1997
Police Station P.S Shahbaz Garhi

Date of judgment ... 19.5.1999
of trial court

Date of Institution ... 8.6.1999

Date of hearing ... 19.10.1999

Date of decision ... 22.10.1999.

JUDGMENT

CH.EJAZ YOUSAF, J.- This appeal is directed against the judgment dated 19.5.1999 passed by Additional Sessions Judge-II Mardan whereby the appellant Said Bahadur-Shah has been convicted under section 14 of the Offence of Zina(Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the "Ordinance") and sentenced to life imprisonment, ten stripes and to pay a fine of Rs.10,000/- or in default thereof to further undergo R.I for six months. Appellant Mir Zaman has been convicted under section 10 of the "Ordinance" and sentenced to undergo R.I for twenty five years, whipping numbering thirty stripes. Benefit of section 382-B Cr.P.C has been extended to both the appellants. However, the co-accused namely Kachkool has been acquitted of the charge.

2. The relevant facts, briefly stated, are that on 5.6.1997 report was lodged at Police Station Shahbaz Garhi by one Sardool Khan son of Akhtar Biland wherein, it was alleged that on 15.2.1997, in the morning, he in order to inquire about the health of his daughter namely Mst.Mumlikat, had gone to village Cheema Rustam alongwith his wife, while his daughter namely Mst.Touheeda aged about 14/15 years, was left in the house. In the evening, when they came back to their house they found that their daughter was missing

She was searched but her whereabouts were not possible to be ascertained. Later on, they came to know that she was enticed away by the appellant Said Bahadur Shah. for the purpose of committing zina, with her. On the stated allegations, F.I.R bearing No.222 was registered under sections 5/10/11 and 14 of the "Ordinance" and investigation was carried out in pursuance thereof. In the course of investigation abductee Mst.Touheeda was allegedly recovered from the house of acquitted accused Kachkool situated in village Gar Mumara District Swabi. Appellant Said Bahadur Shah was also arrested from the said house. The abductee, after her recovery, was produced before a Magistrate for the purpose of recording her 164 Cr.P.C statement. In her above statement she not only charged appellant Mir Zaman Khan for commission of zina with her but laid blame for bringing other persons and compelling her, to have sexual intercourse with them, against receipt of money. After completion of the investigation the accused persons were challaned to the court for trial.

3. Charge was accordingly framed to which the accused persons pleaded not guilty and claimed trial.

4. At the trial the prosecution in order to prove the charge and substantiate the allegations levelled against the accused persons produced ten witnesses, in all.

P.W.1 Dastawaiz F.C is a formal witness of the issuance of the warrant of arrest as well as the proclamation notice issued against acquitted accused Kachkool.

P.W.2 Dilawar Shah F.C is a marginal witness of recovery memo vide which two phials, said to contain swabs, were taken into possession. P.W.3 Dr.Muhammad Tariq had on 12.6.1997 examined appellant Mir Zaman qua the potency test. P.W.4 Israruddin Khan S.I had submitted complete as well as supplementary challan in the court.

P.W.5 Dr.Tariq Anwar had on 10.6.1997 examined the victim Mst.Touheeda qua the pregnancy test. He produced report Ex.PW.5/1 to that effect. She was also examined for the determination of her age vide Ex.PW/5/2.

P.W.6 Sardool Khan is the complainant. He at the trial reiterated the version contained in the F.I.R.

P.W.7 Lady Dr.Sajida had on 9.6.1997 examined the victim, she produced the medicolegal report as Ex.PW.7/1.

P.W.8 Liaqat Ali ASI is a marginal witness of recovery memo Ex.PW.8/1 vide which the abductee was recovered from the house of acquitted accused Kachkool.

P.W.9 Muhammad Ghufuran Khan ASI is the investigating officer, P.W.10 Mst.Tauheeda is the victim. She, at the trial, deposed that she was betrothed by her parents to one Nizar Ali, over which, she was not happy. It was decided that she would be married on 16.2.1997 therefore, she on 15.2.1997 abandoned her house and boarded a bus. At bus Adda Mardan, she met appellant Said Bahadur Shah who took her to Rawalpindi to the house of appellant Mir Zaman Khan. At night Mir Zaman committed zina with her thrice and thereafter compelled her for prostitution. She also charged the appellant Mir Zaman for supplying his own wife for prostitution. She further deposed that the factum of her being compelled for prostitution, was disclosed by her to appellant Said Bahadur Shah, who used to visit house of the appellant Mir Zaman regularly but no heed was paid by him. After about 4/5 months, she in order to attend marriage ceremony was taken by Mst.Surriya wife of appellant Mir Zaman as well as appellant Said Bahadur to Mardan wherefrom she was ultimately recovered from the house of acquitted accused Kachkool.

5. On the conclusion of the prosecution evidence the accused persons were examined under section 342 Cr.P.C.

In their statements they denied the charge and pleaded innocence. Initially they showed their willingness to give their statements on oath and also to produce evidence in their defence but later on, they declined to do so.

6. After hearing arguments of the learned counsel for the parties the learned trial court convicted the appellants and sentenced them to the punishment as mentioned in the opening para hereof whereas, co-accused namely Kachkool was acquitted of the charge.

7. We have heard Mian Muhammad Murad Kakakhel, Advocate, learned counsel for the appellants, Rana Fazal-ur-Rehman, Advocate, for the State and have also perused the entire record with their help.

8. Mian Muhammad Murad Kakakhel, Advocate, learned counsel for the appellants has inter alia contended that; F.I.R in the instant case was lodged after a delay of about 3½ months and plea taken by the complainant regarding the delay was false, that; medical examination of the prosecutrix too, was conducted after a considerable delay, that; the impugned judgment is based on mis-reading and non-reading of evidence and that; in recording conviction against the appellants, testimony of interested prosecution witnesses has been relied upon. It is further his grievance that in the absence of a specific charge under section 14 of the "Ordinance" against appellant Mir Zaman Khan conviction recorded against co-appellant Said Bahadur Shah under section 14 was patently illegal. In order to supplement his above contention he has submitted that as per

evidence available on record, appellant Said Bahadur Shah had neither abducted the victim, nor had he, subjected her to zina-bil-jabr nor proof to the effect was available that he had ever employed or compelled her for prostitution or had purchased, hired or obtained possession of Mst. Touheeda with the intention that she, at any time, be employed or used for the purpose of prostitution, therefore, unless charge under section 14 of the "Ordinance" was substantiated against the principal offender i.e appellant Mir Zaman Khan he i.e Said Bahadur Shah could not have been punished, because in the facts and circumstances of the case, appellant Said Bahadur Shah could have at the most been termed as an abettor.

10. Rana Fazal-ur-Rehman, Advocate, learned counsel for the State, while controverting the above contentions raised by the learned counsel for the appellants submitted that; guilt of the appellants was materially and substantially brought home, at the trial, by the prosecution through independent and reliable evidence; that the delay in lodging the F.I.R was satisfactorily explained; though the delay in the medical examination of the victim was not inordinate yet, that too, was duly accounted for thus conviction and sentences recorded against the appellants

were legal and warranted. He added that so far as conviction recorded against appellant Said Bahadur Shah under section 14 of the "Ordinance" is concerned, it too, appears to be justified because it has come on record that appellant Said Bahadur Shah had not only taken the victim to the house of appellant Mir Zaman Khan but had exposed her to zina-bil-jabr as well as prostitution and turned a deaf ear when informed by the abductee regarding the nefarious and evil deeds of appellant Mir Zaman Khan thus he appeared to be in league with him and had facilitated him in committing the offences. He submitted that in the facts and circumstances of the case, appellant Mir Zaman Khan in addition to section 10(3) of the "Ordinance" was though required to be charged under section 14 of the "Ordinance" as well, yet keeping in view the provision of section 237 Cr.,P.C he may be convicted thereunder as well. He, however, stated that he would have no objection if the case is remanded to the trial court for its decision afresh in accordance with law.

11. In order to ascertain as to whether there is substance in the contentions raised by the learned counsel for the appellants, we have ourselves minutely gone through the record of the case. In the instant case

the accused persons were charged as under:-

"Charge

That I Syed Afsar Shah Addl. Sessions Judge-I Mardan do hereby charge you as:-

- 1) Mir Zaman son of Khatam Jan r/o Jehangir Abad Takhat Bhai,
- 2) Said Bahadur Shah son of Muhammadi Shah r/o Par Hoti Mardan,
- 3) Kachkol son of Said Rasool r/o Gar Munara Morghuz District; Swabi, as follows:-

That you accused Said Bahadur Shah on 15.2.1997 at about 11.00/12.00 hours at New Bus Stand Mardan abducted Mst. Touheeda for the purpose of prostitution and illicit intercourse and thereby committed an offence punishable U/S 11 & 14 of Offences of Zina, (Enforcement of Hudood) Ord:1979 and within my cognizance.

That you accd Mir Zaman after the abduction of Mst. Touheeda by your co-accd Said Bahadur to your house situated at Rawalpindi, subjected her to zina-bil-jabr and thereby committed an offence punishable U/S 5 & 10 Offences of Zina (Enforcement of Hudood) Ordinance, 1979 and within my cognizance.

That you accd Kachkol on 9.6.97 at un-known time, in your house, situated at Gar Munara Swabi, abetted your co-accd Said Bahadur Shah to commit zina with Mst. Touheeda, and you thereby committed an offence punishable U/S 19(2) Offences of Zina, (Enforcement of Hudood) Ordinance, 1979 and within my cognizance.

And I hereby direct that you be tried by me on the said charges.

Sd/-

S. Afsar Shah"
ASJ-I Mardan

R.O. & A.C
Dt. 24.2.98.

A perusal of the above would reveal that appellant Said Bahadur Shah was charged under sections 11 and 14 of the "Ordinance" whereas accused/appellant Mir Zaman Khan was

charged under sections 5 and 10 of the "Ordinance" however, they were convicted under sections 14 and 10 respectively. They were acquitted of the remaining charges, for lack of evidence. Admittedly appellant Mir Zaman Khan was neither charged nor tried under section 14 of the "Ordinance". Here, it would be profitable to reproduce section 14 of the "Ordinance" which reads as follows:-

"Sec.14. Whoever buys, hires or otherwise obtains possession of any person with intent that such person shall at any time be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any time be employed or used for any such purpose, shall be punished with imprisonment for life and with whipping not exceeding thirty stripes and shall also be liable to fine.

Explanation.- Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution

12. A perusal of above section especially the explanation tagged to the main provision makes it clear that any person who buys, hires or otherwise obtains possession of any person with the intention that such person shall at any time, be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose is an "offender" within the meaning of section 14 of the "Ordinance". It further

implies that if possession of a female is obtained by any prostitute or any person keeping or managing a brothel then until the contrary is proved, it would be presumed that he or she, whatsoever the case may be, has obtained possession of such female with the intention that she shall be used for the purpose of prostitution.

In the instant case allegation against appellant Mir Zaman Khan is that he had not only subjected Mst. Touheeda to

zina-bil-jabr but had also compelled her to have sexual intercourse with others, in receipt of money. Thus

prima facie a case under section 14 of the "Ordinance" was also made out against him. We are unable to understand

as to why the trial court has omitted to charge him

thereunder as well. If on the basis of evidence collected

and produced by the prosecution alongwith the challan

he was unable to do so yet, after recording the statement

of the victim, he was certainly in a position to amend

the charge. Though learned counsel for the State has requested

that in view of section 237 Cr.P.C appellant Mir Zaman Khan

may now be convicted under section 14 of the "Ordinance"

as well yet, we are unable to subscribe to the idea because

section 237 Cr.P.C is an exception to the general rule

that "no person can be convicted for an offence for which

he is not charged", therefore, it must be construed

strictly and can be applied in those cases only in which either the offences committed are cognate or it is doubtful as to what offence is made out of the Act or Acts allegedly committed by the accused. In a number of cases, this view has been expressed by the superior courts, that section 237 Cr.P.C is controlled by section 236 Cr.P.C and, therefore, application thereof is limited to those cases only, which fall within the provision of section 236 Cr.P.C. Thus where, at the time of framing the charge, it is ascertainable from the perusal of evidence produced by the prosecution alongwith the challan, as to what offence is prima facie made out or has subsequently something come on record, section 237 Cr.P.C would have no application. Needless to point out that in such an eventuality the accused must be charged for the particular offence.

13. We see force in this contention of the learned counsel for the appellants that unless charge is substantiated against the principal offender, an abettor cannot be punished, though there are and may be, certain exceptions to the rule. For instance an abettor on his own confession or plea of guilty to the charge may be convicted of the offence of abetment although the principal

is acquitted for insufficient evidence or where it is found by the appellate court that the substantive offence was committed by an unknown person, in consequence of the abetment. This proposition has been thoroughly discussed in the cases of Shama alias Jinnat Ali Vs. The State reported as PLD 1966 Dacca-269, Fateh Muhammad Vs. The State reported as PLD 1961 Lah.212, Grandhe Sarabhayya and others AIR 1943 Mad.408 Umadasi Dasi Vs. The King Emperor 28 CWN 1046 as well as AIR 1924 Cal-1031 and Lal Khan Vs. Karim Khan and others 71 P.R-1866. As discussed above it is quite possible that an abettor is charged and tried alongwith the principal offender and is convicted despite acquittal of the principal but it is not conceivable that an abettor is punished without a formal charge and trial of the principal offender. It would be pertinent to mention here that in all the above referred cases principal offenders were charged and tried alongwith the abettors whereas, nothing of the sort has happened in the instant case. At this stage, we are not inclined to indulge in the controversy "as to what was the status of appellant Said Bahadur Shah whether he was an abettor, an accessory or an accomplice, lest it may prejudice the case of either of the parties. Needless to point out that while dealing with a case the court has to take cognizance of the "offences" and not the "offenders" therefore,

if it was apparant on record that in addition to section 10(3) of the "Ordinance" the appellant Mir Zaman Khan had committed other offences as well than he should have been charged and tried accordingly.

14. In the instant case, to our mind, appellant Mir Zaman-Khan having been charged for the offence of zina only, cannot be and could not have been convicted for the offence of buying or hiring the victim for the purpose of prostitution without a formal charge because, firstly the offences i.e section 10(3) as well as section 14 of the "Ordinance" are distinct offences and fall within two different penal provisions and secondly, both the sections would require different facts to be given prominence.

Since needful was not done by the trial court, therefore, there is no escape from remand of the case. Consequently the impugned judgment dated 19.5.1999 passed by the learned Additional Sessions Judge-II Mardan is set aside and the case is remanded to the trial court for trial and decision afresh, in accordance with law.

(MUHAMMAD KHIYAR)
JUDGE

(CH. EJAZ YOUSAF)
JUDGE

Announced on 22.10.1999.
at Islamabad.
M.Akram/

APPROVED FOR REPORTING

JUDGE