

IN THE FEDERAL SHARIAT COURT

( Appellate Jurisdiction )

PRESENT

MR. JUSTICE AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE  
MR. JUSTICE SYED AFZAL HAIDER  
MR. JUSTICE SHAHZADO SHAIKH

CRIMINAL APPEAL NO. 90/I OF 2009 L/W.

CRIMINAL APPEAL NO.81/I OF 2009 L/W.

CRIMINAL REVISION NO.8/I OF 2009

1. Intikhab Hassan Alam son of Dr. Lal Hassan  
R/o Dahiwal, Tehsil Sohawa, District Jhelum
2. Muzafar Hussain son of Mazhar Hussain  
R/o Dahiwal, Tehsil Sohawa, District Jhelum

... Appellants

Versus

The State ... Respondent

Counsel for appellants ... Malik Nasrullah Awan  
Advocate

Counsel for petitioner/  
Complainant ... Malik Shahzad Ahmad Khan,  
Advocate

Counsel for respondents ... Raja Shiraz Ahmed Janjua and  
Raja Farrukh Arif Bhatti,  
Advocates

Counsel for the State ... Ch. Muhammad Sarwar Sidhu,  
Additional Prosecutor General

FIR No. Date &  
Police Station ... 133, 7.6.2006  
Sohawa, Jhelum

Date of judgment of  
trial court ... 23-5-2009

Dates of Institutions ... 22.6.2009, 24.6.2009 and  
15.7.2009 respectively

Date of hearing ... 22.11.2010

Date of decision ... 26.11.2010

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JUDGMENT

SYED AFZAL HAIDER, J.- Intikhab Alam and Muzaffar

Hussain appellants have filed Criminal Appeal No. 90/I of 2009 against the judgment dated 23.05.2009 delivered by learned Additional Sessions Judge, Jhelum whereby they were convicted under section 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to 07 years rigorous imprisonment each. They were also convicted under section 16 of the said Ordinance and sentenced to 07 years rigorous imprisonment each and to pay a fine of Rs. 100,000/- each and in default whereof to further undergo six months simple imprisonment each. Both the sentence were directed to run concurrently. Benefit of section 382-B of the Code of Criminal Procedure was granted to both the appellants.

2. Arshad Mehmood, complainant has moved Criminal Appeal No. 81/I of 2009 against the acquittal of respondents Abdul Qadeer, Muhammad Akram, Muhammad Masood, Sajjada Parveen, Naseem Akhtar and Nusrat Shaheen who were tried alongwith appellants Intikhab Alam

and Muzaffar Hussain. The complainant has also moved Criminal Revision No. 8/I of 2009 for enhancement of sentences of both appellants. All the three matters have arisen out of the same judgment and consequently they are being disposed of through this single Judgment.

3. The incident, as narrated in the complaint Ex.PE, is that during the night between the 4<sup>th</sup> and 5<sup>th</sup> June 2006, at about 2.00-3.00 a.m, Mst. Samina Kousar the daughter-in-law of Muhammad Arshad complainant, P.W.7, was found missing from the house. The family undertook her search. During the probe Sajida Parveen disclosed that Mst. Samina Kousar had been abducted by accused Muzaffar Hussain. Since the issue related to family honour so the complainant initially made attempts for the recovery of Mst. Samina Kausar through family elders. Muzaffar Hussain and Abdul Qadeer promised to return the abductee but ultimately did not oblige. Abaid-ur-Rehman and Muhammad Ajmal reportedly informed the complainant that they had seen Mst. Samina Kousar going with accused Muzaffar Hussain towards Adda Jahaik on the fateful day. The complainant asserted that Muzaffar Hussain had abducted Mst. Samina

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Kousar with the help of Mst. Sajjada Parveen, Abdul Qadeer and his friend Intikhab Alam. Resultantly FIR. No.133 Ex. PE/1, dated 07.06.2006 was registered at Police Station Sohawa, on the basis of crime information laid before the local police by complainant Arshad Mehmood.

4. Investigation ensued as a consequence of registration of the said crime report. Investigation was conducted by Irfan Jilani, Sub Inspector P.W.10. who, after recording formal FIR. Ex.PE/1, visited place of occurrence and prepared site plan Ex. PJ. He recorded statements of three witnesses under section 161 of the Code of Criminal Procedure. On information received through Special Court Rawalpindi on 10.06.2006 he came to know that Mst. Samina Kausar was in Rawalpindi. Accordingly he obtained copy of proceedings and statement of the victim recorded by the Court. The brother of victim took her custody on 10.06.2006 whereafter the Investigating Officer arrested accused Abdul Qadeer and Intikhab Alam on 15.6.2006 and got both of them medically examined. On 16.06.2006 he recorded statement of victim Mst. Samina Kousar U/S. 161 of the Code of Criminal Procedure and on the same day produced her before the Illaqa

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Magistrate where her statement was recorded under section 164 of the Code of Criminal Procedure. On the same day he handed over the victim to lady Constable Safeera PW-4, for her medical examination. After her medical examination the lady Constable entrusted a sealed parcel given by the Lady Doctor which was taken into possession by the Investigating Officer vide memo Ex. PD. On 21.06.2006 accused Muzaffar Hussain was arrested whereafter he was medically examined on 22.06.2006 to ascertain his potency. On 28.06.2006 Mst. Sajjada Parveen accused joined investigation while she was on pre-arrest bail. On 11.07.2006 section 10 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 was added to the initial offence under section 16 ibid, as directed by DSP and then the file was handed over to SHO who prepared and submitted report under section 173 of the Code of Criminal Procedure in the court requiring the accused to face trial.

5. The learned trial court proceeded to frame charge against accused Abdul Qadeer, Intikhab Alam, Muzaffar Hussain and Muhammad Akram under sections 16 and 10(3) of Offences of Zina (Enforcement of

Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

6. The prosecution in order to prove its case produced 10 witnesses at the trial. The gist of deposition of witnesses is as under:-

- i. Muhammad Zubair, Head Constable appeared as P.W.1 and stated that on 16.06.2006 the Investigating Officer handed over to him one sealed parcel for safe custody which was kept in the Malkhana. On 22.06.2006 he handed over the same to Nadeem Qaisar, Constable No.284 intact for onward transmission to the Office of Chemical Examiner Rawalpindi.
- ii. Nadeem Qaisar, Constable No. 284 appeared as P.W.2 and deposed that on 22.06.2006 he delivered the sealed parcel intact in the office of Chemical Examiner, Rawalpindi on the same day.
- iii. Dr.Zahid Ali, Medical Officer, THQ Hospital Sohawa had medically examined Abdul Qadeer, Intikhab Alam on 15.6.2006 and Muzaffar Hussain accused on 22.06.2006. He found them fit to perform sexual act. He appeared as P.W.3 and stated about the medical examination of the three accused.
- iv. Safeera Begum Lady Constable appeared as P.W.4 and stated that on 16.06.2006 she got Mst. Samina Kousar medically examined. Thereafter she handed over one sealed parcel to the

Investigating Officer and the I.O. also recorded her statement under section 161 of the Code of Criminal Procedure.

- v. Muhammad Ajmal P.W.5 stated that he had seen accused Muzaffar Hussain, Abdul Qadeer, Intikhab Alam and Muhammad Akram in a white vehicle going towards Adda Jaik on 05.06.2006 at Fajar time
- vi. Mst. Samina Kousar, victim, appeared as P.W.6 and narrated, the incident of her abduction and detention at Rawalpindi where accused committed rape with her.
- vii. Arshad Mehmood, complainant appeared at the trial as P.W.7. He endorsed the contents of his application Ex.PE.
- viii. Mudassar Hussain Sindhu, Judicial Magistrate Ist Class appeared as P.W.8 and stated that on 16.06.2006 the police produced Mst. Samina Kousar before him and he recorded her statement Ex.PG under section 164 of the Code of Criminal Procedure.
- ix. The Lady Dr. Mehjabeen Asjad, who had medically examined Mst. Samina Kousar, was on long leave and had shifted to USA. Faisal Shahzad, Junior Clerk DHQ Hospital Jhelum therefore appeared as P.W.9 to state that he remained with Dr. Meh Jabeen Asjad for about four years and verifies the MLR issued by her and he also identifies her signatures on the same.

- x. Irfan Jilani, Sub Inspector appeared as P.W.10 and deposed about the investigation conducted by him in the case. The detail of his investigation has already been mentioned in an earlier paragraph of this Judgment.
7. After close of the prosecution evidence the learned trial court recorded statements of accused under section 342 of the Code of Criminal Procedure wherein accused took the same plea and denied the allegation of abduction of Mst. Samina Kousar. They also stated that they have been falsely involved on account of a concocted story and they were innocent.
8. The learned trial court after concluding codal formalities of the trial returned a verdict of guilt. Muzaffar Hussain and Intikhab Alam appellants were convicted and sentenced as mentioned in the opening paragraph of this Judgment while the other accused tried alongwith the appellants were acquitted through the same judgment. Hence this appeal on behalf of the two appellants against the impugned judgment.
9. The reasons that prevailed upon the learned trial court in recording conviction of the appellants may be summarized as follows in order to appreciate the contentions raised before us:



i. That the alleged statement of victim (Ex.DA, DB, DC) recorded by Judicial Magistrate has not been proved as the latter did not appear at the trial to verify the contents of the statement made by victim;

ii. That the statement made by victim before the Judicial Magistrate was the result of undue influence;

iii. That the statement of the victim, PW.6, Ex.PG recorded by learned Judicial Magistrate under section 164 of the Code of Criminal Procedure was proved as the learned Magistrate appeared as PW.8 to prove the contents of her statement.

iv. That the victim Mst. Samina Kausar in her statement at the trial had implicated the accused. The learned trial court believed the statement of the prosecutrix to the extent of the appellants. (Paragraph 14 of the impugned judgment).

10. We have heard the arguments of contending parties. Evidence brought on record on behalf of prosecution and defence as well as the statements of accused have been perused. Relevant portions of the impugned judgment have been scanned.

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11. Learned counsel for the appellants raised the following points.

for consideration of this Court:

- i. That in the statement recorded before the Judicial Magistrate (Ex.DA, DB, and DC) the victim did not implicate the appellants;
- ii. That there is inordinate delay in reporting the incident to local police;
- iii. That the entire story has been fabricated on the basis of previous enmity;
- iv. That the last seen evidence has not been proved at the trial;
- v. That the report of Chemical Examiner is of no value as the victim is a married woman;
- vi. That the co-accused were acquitted on the basis of same evidence;
- vii. That the charge under section 16 of Ordinance VII of 1979 is not proved; and
- viii. That the accused have already suffered imprisonment for quite some time. Convict Muzaffar Hussain has already been released while the

probable date of release of convict Intikhab Alam is February 2014. It was therefore urged that the sentence already undergone by convict Intikhab Alam may be deemed sufficient in the circumstances of this case.

12. Learned counsel representing Arshad Mahmood complainant, in support of his contention for a) enhancement of sentence of respondents Muzaffar Hussain and Intikhab Hussain Alam in Criminal Revision No.8/I of 2009 and b) for setting aside the impugned verdict dated 23.05.2009 whereby respondents 1 through 6 in Criminal Appeal No.81/I of 2009, were acquitted by the learned trial court, raised the following points:-

i. That the allegation of abduction and gang rape was proved by the prosecution. Death penalty is the normal sentence when gang rape is proved;

ii. That the accused should have been convicted and sentenced under section 11 of Ordinance, VII of 1979.

iii. That the learned trial court has ignored the statement made by the victim under section 164 of the Code of Criminal Procedure;

iv. That the case against the acquitted accused was also proved;

v. That the acquittal was based upon surmises and that the learned trial court took note of inter-se relationship of accused. It was asserted that the mere fact that the accused are related to each other does not mean that the offence was not committed; and lastly

vi. That one of the reason for acquitting the respondents was the fact that the police had found them innocent. It was submitted that this is no ground to record acquittal because the opinion of a police officer has no value in view of the positive assertion of a prosecution witness.

13. Learned Additional Prosecutor General supported the judgment and maintained that Abdul Qadeer should be convicted because he was also nominated by victim. On a Court question the learned Additional Prosecutor General conceded that from the facts and circumstances appearing on the record the case of abduction is not made out as the element of consent can be discerned on the file.

14. Our observations, after considering the various aspects of this case are as follows:-

i. That the Medical Legal Report placed on record as Ex.PH relating to Mst. Samina Kausar, PW.6. was prepared allegedly on 16.06.2006 by Lady Doctor Mahjabeen Asjad. The Doctor did not appear at the trial. No medical expert appeared in her place to answer technical questions which the accused is entitled to put to an expert in cross-examination. The accused were therefore adversely affected in their defence. PW.9 Faisal Shahzad, a junior Clerk District Headquarter Jhelum appeared to prove signatures of the lady doctor. This witness very candidly stated that he never performed duty with the said lady doctor and that on 16.06.2006 he was not serving with the said lady doctor. In this view of the matter not only the MLR No.2006/16.06.2006 is of no value but the subsequent positive report of the Chemical Examiner Ex.PK as a result of the disputed medical report loses significance. PW.6 is a married. At one point she conceded that her husband was with her in Pakistan shortly before the occurrence. The learned counsel for the complainant stated that the vagina retains semen for 21 days. There was no grouping test

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of the semen swabs and it cannot be said with certainty that the semen contaminated swab was relatable to any one accused or her husband;

ii. An application was moved by Mst. Samina Kausar P.W.6, before Special Judicial Magistrate Rawalpindi on 09.06.2006 which indicated that she was being maltreated by her husband and her in-laws and has consequently reached Rawalpindi for safety of her life. She prayed that she be sent to Dar-ul-Aman. The Judicial Magistrate directed the SHO to enquire into the matter. It was also ordered that the parents of the applicant be informed. The Court order dated 10.06.2006 shows that Sohawa police officer appeared in the court with record and stated that a case is pending in the police station wherein she is a witness. Abdul Kafeel, brother of Mst. Samina Kausar had also appeared. The latter opted to accompany her brother and she was allowed by the court to go with her brother. Thereafter on 26.06.2006 she swore an affidavit that she had nominated Mst. Naseem Akhtar and Mst. Nusrat as accused by *mistake and would not object if both of them are acquitted/released*. Another element of greater significance is worth mentioning; She neither alleged that she was raped nor did she state

before the Special Judicial Magistrate that she was abducted. She claimed that she had left her house on her own. No one was nominated as accused by her till at least 16.06.2006 i.e. six clear days after she left Dar-ul-Aman when, as stated by her in her cross-examination dated 20.09.2008 that she went to police station to get recorded her statement about the occurrence.

iii. There was therefore ample time for consultation on the part of prosecution party and it was eleven days after her disappearance and nine days after registration of crime report that she persuaded herself to make a statement under section 161 of the Code of Criminal Procedure. The ring of truth is consequently missing because the entire episode smacks of consent. She was not under threat during this considerable period. It appears that she was persuaded ultimately by her father in law, who is also her uncle, to support the initial unseen version lodged by him as complainant PW 7.

iv. The only corroborating evidence of abduction is apparently provided by Muhammad Ajmal, PW.5 the maternal uncle of Mst. Samina Kausar. The witness is *Wajtakar*. His statement makes an interesting reading. He claims that he is regular visitor of the mosque but states that

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there are 4 *Rakats* in Fajr Jamaat and seven *Rakats* in Maghrib prayers. He reportedly saw the accused along with abductee in the closed carry daba at 4.00 a.m. According to him it was moon light but according to Mst. Samina Kausar she was abducted at 1.00 a.m. and there was no moon light.

15. The element of force employed by the accused is not proved. The allegation of abduction and rape is of course has been altered in the examination in chief but the attending circumstances, referred to above cast serious doubts. It is not possible to ascertain the person who accompanied PW.6 during the night. There was a knock at the door at about 1.00 a.m. There was no male member in the house. Mst. Samina Kausar responded to the call and disappeared. The possibility that Mst. Samina Kausar was a consulting party cannot be ruled out.

16. In the case of Nayyar Abbas and another vs. State 2006 SD 326, Full Bench of this Court held:-

“The appellants have been convicted under section 10(4) of the Ordinance and have been awarded extreme penalty of death. To prove an offence entailing extreme penalty of death, every possible care and caution has to be adopted. If the accumulative effect of the facts and



circumstances leads to two probabilities then one in favour of the accused has to be adopted. The aforesaid circumstances lead to a probability that Mst. Asifa would have accompanied the accused/ appellants and thereafter subjected herself to the commission of sexual intercourse. If this probability is available on the record, then the benefit should be extended to the accused.”

17. In view of the fact that Mst. Samina Kausar made a false statement as regards two accused it is not safe to rely on what she has stated under the circumstances of this case. Reliance is placed on the report

Habibullah and others versus The State, PLD 1969 Supreme Court 127:-

“The witness has to be taken on his own words. If he has made a false concession in favour of the accused persons and has compromised his integrity, his veracity is evidently damaged. If he is capable of making a false statement for one party he is equally capable of making it for the sake of the other party. But the inherent improbabilities in his story are more important.”

18. The prosecution has not proved the convening of the Family Jirga to persuade the accused party to restore the abductee. It was alleged in the crime report but no evidence was produced either before police or at the trial in this regard. Had the family elders approached the accused party then any elder could take the trial court into confidence and establish complicity

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of any one or more persons charged in this case. The statement of such an elder could have been treated extra judicial confession if Mazhar Hussain or Abdul Qadeer accused had in fact promised restoration of the abductee. It is significant that if Mazhar Hussain and Abdul Qadeer were available in the village to answer the questions of the complainant then how could both of them be present at the same time in Azad Kashmir or else where in the company of the alleged abductee. The entire episode is shrouded in mystery and the prosecution has not disclosed the real facts. Prosecution must come to the court with clean hands. The courts will not come to the aid of a story teller. A genuinely aggrieved persons has a claim on justice.

19. In this view of the matter it is not safe to maintain the convictions and sentences recorded by learned trial court in Hudood case No.12 of 2006. The judgment dated 23.05.2009 is consequently set aside. The appellants are acquitted as they have earned benefit of doubt. Convict Muzaffar Hussain has already been released. Appellant Intikhab Alam is directed to be released forthwith unless required in any other case. Criminal Appeal No.90/I of 2009 is accepted.

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Criminal Appeal No. 81/I of 2010.

20. In view of what has been stated above Criminal Appeal No. 81/I of 2009 fails because the main accused have been given benefit of doubt. Consequently verdict of guilt cannot be returned against respondents Abdul Qadeer, Muhammad Akram, Muhammad Masood, Mst. Sajjada Parveen, Mst. Naseem Akhtar and Mst. Nusrat Shaheen. Moreover the mere fact that a verdict of guilt may also be possible on the facts and circumstances of a given case has not been accepted judicially as a reason to convert acquittal verdict into a conviction order. The impugned judgment contains ~~valid~~ reasons for recording acquittal of six respondents. It is no doubt true that the opinion of Investigating Officer, about the innocence or guilt of an accused, is not binding on the trial court but the court has not misdirected itself while appreciating evidence qua the acquitted accused. The presumption of innocence of six accused was fortified by the acquittal order and it must be shown that the verdict was capricious and contrary to the established facts. Elements of offences have

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to be proved beyond reasonable doubt. There are lurking doubts at every  
stage of this case.

21. Since Criminal Appeal No.90/I of 2009 has been accepted so  
the Criminal Revision No. 8/I of 2009 fails as being without substance.

  
  
JUSTICE SYED AFZAL HAIDER

  
  
JUSTICE AGHA RAFIQ AHMED KHAN  
Chief Justice

  
  
JUSTICE SHAHZADO SHEIKH

Announced in open Court  
on 26.11.2010 at Islamabad  
*Mujeeb ur Rehman/\**

*Fit for reporting*

  
JUSTICE SYED AFZAL HAIDER