# IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

**MR. JUSTISCE SYED AFZAL HAIDER**

**CRIMINAL APPEAL NO. 92/I OF 2008**

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| Zafar Iqbal son of Muhammad Iqbal, r/o Dhok Tilla Dakhli Bhitiot Tehsil Jand District Attock | ... | Appellant |
| | Versus | |
| The State | ... | Respondent |
| Counsel for appellant | ... | Mr.Sadaqat Ali Khan, Advocate |
| Counsel for State | ... | Raja Shahid Mehmood Abbasi, Deputy Prosecutor General |
| FIR No. Date & Police Station | ... | 130, Dated 20.08.2006 Basal Attock |
| Date of judgment of trial court | ... | 11.09.2008 |
| Dates of Institution | ... | 07.10.2008 |
| Date of hearing of Appeal | ... | 03.04.2009 |
| Date of decision by Federal Shariat Court | ... | 03.04.2009 |

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**JUDGMENT**

**SYED AFZAL HAIDER, Judge.-** Appellant Zafar Iqbal has through this appeal challenged the judgment dated 11.09.2008 delivered by learned Additional Sessions Judge, Attock, Camp at Jand, whereby the appellant has been convicted under section 12 of Offence of Zina (Enforcement of Hudood) Ordinance,1979 and sentenced to ten years rigorous imprisonment with a fine of Rs.20,000/- and in default of non payment of fine to further undergo one year rigorous imprisonment. He has further been convicted under section 377 of Pakistan Penal Code and sentenced to ten years rigorous imprisonment with a fine of Rs.20,000/- and in case of default in payment of fine to further suffer six months rigorous imprisonment. Both the sentences were directed to run concurrently. Benefit of section 382-B of the Code of Criminal Procedure was extended to the appellant.

2.The machinery of law was set into motion by Muhammad Ibrahim P.W.4 when he moved a written crime report on 20.08.2006 before the Station House Officer of Police Station Basal regarding the occurrence of a

cognizable offence of even date in the area of Tilla Dakhli Bhatiot. The crime report, according to the police officer was covered by the mischief of section 377 of Pakistan Penal Code read with section 12 of Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. Crime report was eventually registered as FIR No. 130 dated 20.08.2006 on the basis of the written complaint exhibited at the trial as Ex.PB/1 and Ex.PB respectively.

3. Brief facts of the case as disclosed in the crime report are that Muhammad Ibrahim, aged 16/17 years and a student of class 6 on 20.08.2006 when his school was closed on account of summer vacations, after leaving the cattle in Jungle for grazing, was returning home at about 8.30 a.m. On the way he accosted Zafar Iqbal accused armed with a 30 bore pistol at Dhok Jhagiwala graveyard. The accused invited him to have a tete-a-tete in the grove of Keekar. On his refusal the accused forcibly took him to the copse. The accused on pistol point removed his shalwar as well as his own and started satisfying his unnatural offence. On his hue and cry Babar Ali was attracted to the spot. The accused made good his escape with his pistol at the approach of the witness. The father of complainant Haji

Ghulam Shabbir had gone to Attock to attend a wedding. He was informed of the incident by the complainant telephonically who returned home at 12.00 noon, whereafter he took the victim to Police Station for reporting the matter and consequent action. FIR 130/06 was thereafter registered on 20.08.2006 at 6.45 p.m. on the written application of Muhammad Ibrahim, complainant Pw.4. Police investigation ensued as a consequence of the registration of crime report.

4. The investigation of this case was taken up by Riaz Hussain, S.I. P.W.7. He drafted application Ex. PE for medical examination of victim Muhammad Ibrahim and got him medically examined through Sher Gul Constable PW.6, on 20.08.2006 from Dr. Sher Muhammad, P.W.1. On 21.08.2006 the Investigating Officer inspected the spot, prepared rough site plan Ex.PF, recorded statements of witnesses under section 161 of the Code of Criminal Procedure. He arrested accused Zafar Iqbal on 13.09.2006 and got him medically examined on 14.08.2006 vide application Ex.PA/1 to ascertain his potency and on the same date physical remand of the accused was obtained whereafter he was sent to judicial lock up. At the conclusion of

investigation a report under section 173 of the Code of Criminal Procedure was submitted by local police in the court on 17.09.2006 requiring the accused to face trial.

5. The learned trial court on receipt of the report formally charged the accused on 21.11.2006 under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 as well as section 377 of Pakistan Penal Code. The accused did not plead guilty and claimed trial.

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

i. Dr. Sher Muhammad appeared at the trial as P.W.1. He had medically examined the victim Muhammad Ibrahim on 20.08.2006 and found parts of the clothes of victim were torn and there was staining on the shalwar. He also observed that the victim was psychologically depressed and there were two scratches on his left buttock and reddened area near anal region. Three anal swabs were taken from the anal and peri anal region

by the doctor for chemical analysis. He further deposed that according to the report of the Chemical Examiner only the anal swabs were stained with semen. This witness also examined the accused on 14.09.2009 and found him physically fit to perform sexual intercourse.

ii. Muhammad Akhtar, MHC appeared at the trial as PW.2 and deposed that on 20.08.2006 he received two sealed parcels for keeping the same in safe custody in the Malkhana which were later on handed over by him to Tariq Mehmood constable on 23.08.2006 for onward transmission to the office of the Chemical Examiner Rawalpindi.

iii. Tariq Mehmood, Constable No.113, appeared as P.W.3 to depose that on 23.08.2006 he received two sealed parcels from Muhammad Akhtar Moharrar Head Constable and handed over the same intact in the office of the Chemical Examiner Rawalpindi on the same day.

iv. Muhammad Ibrahim, complainant/victim appeared as P.W.4. He endorsed the contents of his complaint Ex.PB.

v. P.W.5 Babar Ali, a student of 8th class, appeared to give an eye witness account of the occurrence. He claimed having seen the accused committing unnatural offence with Ibrahim.

vi. Sher Gul, Constable No.68 appeared as P.W.6. to depose that he took the victim to Rural Health Centre Domail for medical examination. He had received two sealed envelopes and the shalwar of the victim from the doctor which were produced before the Investigating Officer who took into possession the articles including shalwar P1 vide recovery memo Ex.PD. The memo was attested by this witness.

vii. Lastly Riaz Hussain, SI appeared as P.W.7 and deposed about the various steps undertaken by him during the course of investigation of the crime report. Details of his deposition have already been mentioned in an earlier paragraph of this Judgment.

7. The learned trial court after close of the prosecution evidence recorded statement of accused Zafar Iqbal under section 342 of the Code of Criminal Procedure wherein he, in answer to question, "Why this case against you and why the P.Ws have deposed against you" stated as follows:-

> "Actually there was a dispute of land in between complainant party and the accused party. The detail of which is that, the land situated near the railway crossing/railway line, is under the possession of the complainant party in which accused party is co-sharer and the possession of the complainant party over said land to the extent of ownership of accused party is illegal. Inspite of sever demands complainant party is not willing to hand over the possession and a quarrel took place in between complainant party and accused party two days prior to registration of the instant case at the Dhoke. Accused party in the preceding local bodies election supported the Anjum Nisar and the rival candidate of Anjum Nisar was Shazi Khan, supported by Sardar Mumtaz Khan and the complainant. Sardar Mumtaz is a leader of ruling party of the District. Shazi Khan and Sardar Mumtaz had a grudge against the accused party due to said political reason. Complainant party, Shazi Khan and Sardar Mumtaz Khan with the consultation

concocted a false story against present accused due to said reasons and involved me in the present case. No occurrence took place. Sardar Mumtaz had also in league with the police. All the private PWs are inter-se related and are interested witnesses and inimical to me whereas Doctor and the official of the police deposed against me due to said Sardar Mumtaz, Shazi Khan and complainant."

8. The accused did not produce witnesses in his defence but submitted documentary evidence by way of copy of Jamabandi for the year 2002-2001 Ex.DA, Ex.DB, Ex.DC, copy of birth certificate of Ibraheem Ex.DD, copy of Patwar Ex.DE, copy of Khasra Girdawari for the year 2004 Ex.DF before the learned trial court on 21.07.2008. The accused did not avail the advantage of appearing as a witness to make statement on oath as contemplated by section 340(2) of the Code of Criminal Procedure.

9. The learned trial court after close of the prosecution evidence and completing legal formalities proceeded to assess the evidence on record. He also heard the arguments of the learned counsel of contending parties. After discussing the contentions of the parties in the light of evidence on

record he found that the prosecution had proved the case beyond any reasonable doubt. The accused was consequently convicted under section 12 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 as well as section 377 of Pakistan Penal Code and sentenced as mentioned in the opening paragraph of this Judgment. The appellant through this appeal seeks to challenge the conviction and sentence on both counts recorded in the impugned judgment dated 11.09.2008.

10. I have gone through the record of this case and perused the deposition of witnesses as well as the statement of accused. I have also seen the documents produced by the appellant at the trial. Relevant positions of the impugned judgment have also been scanned. Learned counsel appearing on behalf of the appellant as well as the State have argued the case before me.

11. A bare perusal of the crime report as well as the eye witness account produced by the prosecution at the trial shows that conviction and sentence recorded by learned trial court under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 against the appellant cannot

be maintained for the reason that the element of abduction has not been proved at all. Taking away the victim to a nearby hiding place for commission of sodomy does not attract the provisions of section 12. The distance, whether a few steps or a short one, does not really matter because the intention was neither to remove or take away the minor from lawful guardianship nor was it intended to confine the victim at any place but the intention as maintained by the prosecution in its story was only to commit carnal intercourse against the order of nature. Not an iota of evidence is available on record to establish the charge of abduction/kidnapping. Judicial opinion is settled on this point as is reflected in the following precedents.

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| Muhammad Tufail versus The State | NLR 1983 Criminal 445 |
| Muhammad Tufail versus The State | PLD 1984 FSC 23 |
| Shams Saeed Ahmed Khan Vs. Shafaullah | SCMR 1985 1822 |
| Zulfiqar versus State | PLD 1955 FSC 404 |
| Muhammad Akhtar versus Muhammad Shafique | SCMR 1986 533 |
| Abdul Wadood and another Versus The State | SCMR 1986 1947 |

In this view of the matter the conviction and sentence recorded under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 aginst the appellant is hereby set aside as being based on no evidence.

12. However the conviction recorded by the learned trial court under section 377 of the Pakistan Penal Code in the given facts and circumstances of the case needs reconsideration. The appellant has already suffered imprisonment for almost 2 ½ years which is a little more than the minimum sentence contemplated by section 377 of the Pakistan Penal Code but the learned trial court was pleased to award maximum dose prescribed under section 377 and a fine of Rs. 20,000/-. In the event of non payment of fine the appellant was to undergo an additional term of rigorous imprisonment for six months. Such a sentence is certainly on the higher side. Maximum penalties are awarded in exceptional cases where for example the victim is a child and the accused is a grown up man or where it is established that it was a gang crime.

13. On reconsideration of the evidence I am not persuaded to maintain the conviction recorded by learned trial court. My reasons are as follows:-

i. The initial crime report Ex.PB indicates that an attempt for sodomy was alleged.

ii. It was also alleged that the appellant committed the un-natural offence on pistol point but no pistol was recovered from the appellant.

iii. The alleged eye witness, P.W.5 at a distance of 200/250 yards outside the grove of 200 keekar plantation would not be in apposition to see the even in shaded area. During cross-examination this witness admitted as follows:-

> " From the place where I was available, the jungle containing "KICKER" trees was not visible. From the place where I heard the noise, nobody was visible and only thick "KICKER" trees were visible"

iv. The alleged victim Muhammad Ibrahim P.W.4 in the cross-examination stated as under:-

> "When the accused after apprehending me, was taking me to the place where he allegedly had committed sodomy with me. *I did not raise any*

*alarm.* When the accused was allegedly committing sodomy with me, I had been making noise due to pain. *The occurrence of my apprehension, by the accused was not seen by Babar P.W."*

( Emphasis added ).

In this view of the matter the evidence of the alleged solitary eye witness of the occurrence, who is a first cousin of the victim, becomes doubtful.

v. Admittedly the land belonging to the father of appellant is joint with the land of complainant party. The accused party is understandably pestering the complainant group for gaining physical possession of their share in the illegal possession of complainant party.

vi. A part of the report of the Chemical Examiner, Ex.PG, discloses that two perianal swabs No.939/940 on microscopic examination for semen Identification Tests were found " Sperm Negative" while one Anal Swab No.941 was found "Sperm Positive".

vii. I particularly asked the learned Deputy Prosecutor General appearing on behalf of the State, whether he would support the impugned judgment in view of the doubts appearing in this case and the half hearted reply was that he would endorse the request of learned counsel for the appellant for reduction of sentence to already undergone.

14. This case was originally heard partly on 02.04.2009 whereafter it was heard again on 03.04.2009. On re-appraisal of the evidence on record I thought that the appellant was entitled to benefit of doubt and consequently I adjourned the case for 04.04.2009 for further consideration even though 4th April is a Saturday.

15. On further consideration I have come to the conclusion that it is well nigh impossible by an unarmed person to overpower an unwilling rustic youth for the satisfaction of his un-natural lust particularly when there are no sign of force on the clothes or body of the subdued youth. Such a bald statement of the complainant lack the element of truth. Furthermore the lack of recovery of a pistol and the doubt whether it was a case of unsuccessful attempt as well as the suspicion that the alleged eye witness, a first cousin of the complainant, should have been available at the spot to appear in support of the prosecution case. The evidence of P.W.5, Babar, does not inspire confidence. His cross-examination is clear that he did not see the occurrence. He has been produced to lend support to a doubtful story. It is intrinsic worth of the evidence that a discerning judicial mind needs. I am cognizant of the

fact that even the solitary statement of the victim can sustain conviction but it is always safe to first of all consider the quality of the deposition and conduct of the victim. The allegation of abduction has not been found proved. I have not been able to resolve the doubt with the alleged eye witness account given by Babar P.W. More than one circumstances are not essential to the grant of benefit of doubt to any accused person. The principle that even a single circumstance which creates reasonable doubt about the guilt of an accused in the mind of a prudent person is sufficient to acquit the accused, has been established by superior judiciary. This principle is being followed which deciding criminal cases. This principle is as operative as the principle that conviction can be based upon solitary statement if it is not motivated. The prosecution has not been able to bring charge home to the appellant.

16. As a result of the discussion in the preceding paragraphs Criminal Appeal No. 92/I of 2008 is accepted. The impugned judgment dated 11.09.2008 delivered in Hudood Case No. 03 of 2008/ Hudood Trial No. 70 of 2008 arising out of FIR. No. 130 dated 20.08.2006 Police Station

Basal, District Attock, is hereby set aside. Appellant is directed to be released forthwith unless required in any other case.

**JUSTICE SYED AFZAL HAIDER**

Islamabad the 3rd April, 2009
*MUJEEB UR REHMAN/**

***Fit for reporting***