

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

**MR. JUSTICE DR. AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN**

CRIMINAL APPEAL NO.33/I OF 2013

Atlas Khan alias Attasi son of Dilawar Khan
R/o. Taj Takhti Khel, District Lakki Marwat

..... Appellant

Versus

1. The State
2. Mst. Ajmair Bibi D/o Misal Khan
R/o Taj Takhti Khel District Lakki Marwat

.... Respondents

Counsel for appellant M/s. Zia-ur-Rehman & Mati Ullah
Khan,
Advocates

Counsel for State Mr. Arshad Ahmed Khan,
Deputy Advocate General, KPK

FIR, Date and 159, 08.08.2000
Police Station Haveed, Bannu

Date of judgment of 03.12.2013
trial court

Date of Institution 20.12.2013
of appeal

Date of hearing 24.02.2014

Date of decision 24.02.2014

 Date of judgment 04.03.2014

JUDGMENT

DR. FIDA MUHAMMAD KHAN, J.- This appeal filed by

Atlas Khan alias Attasi assails the judgment dated 3.12.2013 delivered by the learned Additional Sessions Judge-I, Bannu, whereby the appellant has been convicted under section 376 PPC and sentenced to suffer twenty five years rigorous imprisonment with a fine of Rs.3,00,000/- or in default thereof to undergo three years simple imprisonment. The benefit of section 382-B, Cr. P.C has been extended to the appellant.

2. Briefly stated the facts of the case are that on 08.08.2000 complainant Mst. Ajmair Bibi registered the instant case at police Station Haveed, Bannu, vide FIR (Ex.PA) wherein she stated that on the day of occurrence at morning time she left for field to graze sheep. She was present in the fields near Shagai Takhti Khel when at *dopehar* time accused/appellant Atlas Khan alias Attasi and his father Dilawar Khan, absconding co-accused, who were their relatives, came over there. She alleged that the accused Dilawar Khan stopped at some distance while accused facing trial Atlas Khan came near her and asked her for the



friendship. According to her, she refused and told him that she will inform her parents. On this, the appellant/accused Atlas Khan dragged her towards a dry pool where he forcibly laid her down and removed her trouser. He also removed his own shalwar and started committing Zina-bil-jabar with her. Due to pain and fear she became unconscious. After lapse of sufficient time she regained her senses but she was unable to walk. In the meantime her step brother Gul Nasib Khan and Almar Jan who were searching her reached there and took her along to the house in injured condition. Her father who was not present at that time in the house was informed accordingly. Her father accompanied her to the police station where she lodged the report. The investigation ensued. However, the appellant/accused and his absconding co-accused Dilawar Khan evaded their arrest and absconded. After completion of the investigation challan was submitted in court under section 512 Cr.P.C.

3. After almost more than twelve years, however, the appellant/accused was arrested on 23.1.2013 and a supplementary challan



against him was submitted to the court. The appellant/accused was charge - sheeted on 9.3.2013 but he denied and claimed trial.

4. The prosecution in order to prove its case, produced as many as ten witnesses. The gist of their evidence is as under:-

- * PW.1 Akhtar Khan SHO arrested the appellant/ accused and thereafter on completion of the investigation submitted supplementary challan against him on 26.1.2013.
- * PW.2 Khan Bahadar DFC completed proceedings in pursuance of warrants and proclamation issued against the appellant/accused and the absconding co-accused Dilawar Khan.
- * PW.3 is Attaullah Khan FC. In his presence the SHO searched the house of the accused but recovered nothing incriminating.
- * PW.4 is Umar Khitab SHO. After cancellation of BBA of the appellant/accused, he arrested him. He produced him before the court for physical remand, however no custody was granted to him. Accordingly he was remanded to judicial lock up.



- * PW.5 is Mst. Ajmair Bibi. She is the complainant. Her statement is reproduced hereunder:-

“On the day of occurrence I had taken the cattles for grazing in the field of Shagayee, at dopaher vella, accused Atlas Khan alias Atlasi son of Dilawar Khan and Dilawar Khan son of Qadar Khan came there. Dilawar Khan stopped at some distance, whereas Atlas Khan accused came near to me and asked for friend ship, but I refused and also told him that I will complain the matter to my elder. On this Atlas Khan dragged me towards the Talab and committed cruelty with me. Again stated the accused had committed Zina with me. After that I became unconscious and was lying on the spot. When my brother Almar and Gul Nasib attracted there and taken away me from the spot but I do not know that when and where I was taken. My father was not present in the village and when he came to the village. We came to the Police Station for registration of the case, where I lodged the report (Ex.PW.5/1), admitting the same as correct. I thumb impressed my report as a token of its correctness. After report I was medically examined by the lady doctor. On discharge from the hospital, I was taken to the spot where I verified the site plan to the IC, already prepared by him. I charge the accused for the commission of offence.”

- * PW.6 Misal Khan is father of the complainant. He stated that on the day of occurrence he had gone to Mirali for labouring. When he came back to the house, he was informed about the occurrence, as stated above. He corroborated the statement of PW.5. According to him,

she remained in the hospital till her recovery. His statement was recorded by the Investigation Officer under section 161 Cr.P.C.

- * PW.7 is Mujib-ur-Rehman. He was posted as SHO Police Station Haveed, Bannu. He stated that on 8.8.2000, complainant Mst. Ajmair Bibi alongwith her father came to the police station and reported the matter to him. He registered the case and prepared injury sheet of complainant and sent her to hospital through Muhammad Ayub FC and Mir Sardar IHC. On the next day he alongwith police officials went to the spot and prepared the site plan on the pointation of the complainant as well as his father. He recovered and took into possession the blood stained earth from the spot and in this regard he prepared the recovery memo. He also searched the house of the accused but nothing incriminating was recovered from there. He also received blood stained shalwar of the victim sent by the Lady Doctor through Constable Mir Sardar Khan which he took into possession through recovery memo. According to him, as the accused were absconding, he applied for proceedings against the accused under section 204 and 87 Cr.P.C. He submitted complete challan under section 512 Cr.P.C against the accused.

* PW.8 is lady Doctor Robina Gul Tiaz. She made the following statement:-

“On 9.8.2000 at 12.30 (night) I medically examined Mst. Ajmair Bibi daughter of Misal Khan (aged about 8/10 years) found the following:

Breast not developed well.

External genetaria normal.

Whole clothes fully covered with blood and have been dried up. OE: Hymen absent. Laceration of her vagina wall tear. Packing done. No signs of violence seen because of blood.

It was a case of rape. The patient was admitted in the hospital. I handed over to the local police blood stained shalwar with MLR. I have seen Medicolegal report which is correctly prepared and signed by me. The same is Ex.PW-8/1. Observation recorded on back of IO's application, respond by me which is Ex.PW-8/2. The said victim was stitched and further managed by lady Dr. Parveen Shoib (now posted at D.I.Khan), vide her report Ex.PW-8/3.”

* PW9 Mir Sardar S.I escorted the victim Mst. Ajmair Bibi to the lady doctor and after her examination by the lady doctor he was handed over the MLR alongwith shalwar of the injured victim, which he handed over to the Investigation Office. His statement was also recorded by the I.O under section 161 Cr.P.C. The Investigation Officer vide recovery memo Ex.PW7/5 took into

possession and sealed into a parcel the shalwar (Ex.P.1) of the victim.

* PW.10 Almar Jan stated that Mst. Ajmair Bibi was taking cattle to the fields for grazing in routine. On the day of occurrence at *Digar vela* the cattle came to the house but Mst. Ajmair Bibi had not returned to the house. On this, he and his brother Gul Nasib went out for searching her in the field and found her in the dry water pond but she was unable to move. On this he and Gul Nasib brought her to the house. As the father of the victim was not available in his house and had gone to Miranshah for labouring. On this the father of Mst. Ajmair Bibi was called upon through telephone and he came to his house and thereafter he went to the Police station for registration of the case. They did not accompany him to the police station. On the next morning police came to the spot and they pointed out the place of occurrence to the police. Vide recovery memo Ex.PW7/4 the I.O recovered and took into possession the blood stained earth from the spot in his presence. He verified his signature on the said recovery memo as its marginal witness.

5. After conclusion of the prosecution evidence, the appellant/accused was examined under section 342 Cr.P.C, wherein he

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denied the allegation of the prosecution. While replying to questions No.7 he replied as under:-

“I am innocent. The complainant falsely deposed against me under the pressure of her father. Similarly PW Misal Khan is highly inimical and interested witness. The case was built in the sky after due deliberation and consultation. The delay in the report by itself speaks about the false charge and deliberation.

The appellant/accused however declined to record his statement on oath as provided under section 340(2) Cr. P.C. He also declined to produce any evidence in his defence.

6. We have heard learned counsel for the appellant as well as learned Deputy Advocate General, KPK and also perused the record with their assistance.

7. Learned counsel appearing on behalf of the appellant contended that:-

- * the order and judgment dated 03.12.2013 of learned trial court is totally against the law, facts and material available on record, hence, liable to be set aside;

- * the order and judgment dated 03.12.2013 of learned Additional Sessions Judge-I, Bannu is liable to be set aside on the ground that the case was registered under sections 6/10/10(2) Zina Ordinance, 1979 and similarly charge was also framed against the appellant under the same sections of law, but after completion of prosecution evidence the learned trial court has convicted the appellant under section 376 PPC and sentenced him thereunder. He contended that on one side the learned trial court has mentioned in its judgment that the prosecution has been successful in proving the guilt against the appellant beyond any shadow of doubt, but on the other hand it has been mentioned in the judgment that standard of proof of evidence provided under the Hudood laws is not available. He submitted that when proof was not available as provided under the Hudood laws, the learned trial court was duty bound to acquit the appellant rather to convict him;
- * the learned trial court has ignored this aspect of the case as the appellant and absconding co-accused are real father and son and it is natural phenomena and custom of the society that father and son can not commit zina together, specially Zina-bil-jabar. So, on this sole ground the impugned judgment was liable to be set aside;
- * the learned trial court has not properly appreciated the prosecution evidence as there is contradiction between the prosecution evidence which creates doubt and even a single

doubt is sufficient which should go in favour of accused/appellant;

- * the impugned order and judgment is based on presumptions, surmises and conjectures, hence, liable to be set aside;
- * the learned trial court has made abscondence as a base for conviction of the appellant, but it is also a settled principle of law that the abscondence per se is no ground for conviction or to prove guilt, hence, on this ground also the impugned judgment is liable to be set aside;
- * there is no independent eye witness of the occurrence;
- * while delivering the impugned judgment and order, the learned trial Court has not exercised its judicial mind and thus passed the impugned order in a hasty manner;
- * the prosecution has totally failed to prove its case against the appellant;
- * the medico-legal report does not support the prosecution version.
- * it is also pertinent to note that at the time of alleged occurrence the appellant was teenager when there could be no concept of Zina-bil-jabr as is evident from card of arrest;

8. Learned counsel appearing on behalf of the State, however, vehemently opposed the contentions raised by learned counsel for the


appellant and submitted that the judgment of the learned trial court is based on cogent pieces of evidence. So far as the contention regarding age of the accused is concerned, he submitted that, this question was not at all raised at the initial stage nor any proof regarding the same was tendered in evidence. The learned counsel further submitted that a girl of 8/9 years has been subjected to zina-bil-jabar, the medical and circumstantial evidence coupled with the version of the complainant fully proves the case of prosecution. He also submitted that no question has been put to any witness about the malafide borne by the complainant party and in the background of the tribal conventions no one would ever like to subject the honour of a minor girl by false implication.

9. We have thoroughly considered the contentions of learned counsel for parties and perused the record. It transpires that the occurrence took place on 08.08.2000. However, the appellant had since then absconded, the necessary proceedings as required under the law were initiated and completed. He was subsequently arrested on 23.01.2013 and duly charged and tried. At the trial 10 witnesses were examined, out of whom P.W.5

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Ajmair Bibi is the victim who directly charged the appellant/accused of commission of zina with her. Her statement has been reproduced hereinabove. She has been cross-examined at great length but nothing fruitful to the defence has been adduced from her statement. Though after the occurrence she became unconscious and regained senses in the hospital, she was fully conscious at the time of occurrence prior to that and has not only narrated the facts of the case but nominated the appellant/accused for commission of zina-bil-jabar with her. The appellant was quite known to her as he was her relative. This was a broad day occurrence and any misidentification was not possible. Her statement is fully corroborated by MLR submitted by P.W.8 Lady Dr. Robina Gul Tiaz who examined her on 09.08.2000 at 12.30.a.m. during night. It means that soon after the occurrence she had examined the victim and found that her clothes were fully blood stained. She observed that her hymen was absent and there was laceration on her vaginal wall tear. She handed over the blood stained shalwar and MLR to the local police. In cross-examination she clarified that it is not necessary in each and every intercourse that external genitalia

should be abnormal. In her MLR she candidly conceded that no sign of violence was seen because of blood in the vaginal area. She also clarified that the vaginal wall had been teared and blood was oozing from vagina and therefore treatment was given to her. She, however, did not take internal swabs from her vagina as the external affected area of the vagina was covered with blood. Besides these two significant witnesses, the statement of PW.10 Almar Jan who while searching found her near a dry pond, in pool of blood, and brought her to the house. This fully corroborates the statement of PW.5 Mst. Ajmair Bibi. Moreover testimony of P.W.7 Mujeeb-ur-Rehman, DSP, the then SHO is also very important. In his testimony he deposed that he took into possession blood stained earth from the place of occurrence. He packed and sealed that into a parcel in the presence of marginal witnesses. He also received blood stained shalwar of the said victim. He explained that no independent witness was ready to depose on account of fear of enmity. It is thus clear from the above that the appellant/accused has been directly charged in the FIR by the complainant for an occurrence that took place in a broad day light. No question of substitution has been put to any PW. As



stated above, the appellant was already known to the complainant party and so there was no misidentification also. The testimony of complainant has been fully corroborated by the medico-legal report reproduced hereinabove. Recovery of the blood stained earth and the blood stained shalwar further lend full support to the case of prosecution. It is pertinent to mention that even a solitary statement of a victim is sufficient, for conviction under Taazir, if it inspires confidence and finds necessary corroboration from an independent source. In this case besides the unexplained extremely long abscondance, the independent corroboration of testimony of P.W.5, prosecutrix is abundantly available on record and there is nothing to doubt the veracity of depositions made by PWs. The contradictions referred to by the learned counsel are very minor in nature and do not affect the main case in any way. After lapse of thirteen years such small contradictions were quite normal. So far as the reference to tribal customs made by the learned counsel is concerned, that is really considerable otherwise. No sane person would ever like to put a stigma on the career of his minor daughter or would

ever stake her future by making false allegations of such a heinous nature without any rhyme or reason.

10. We may however mention that the occurrence took place on 08.08.2000 and at that time section 376 PPC was not in existence. It had rather been repealed by the Offences of Zina (Enforcement of Hudood) Ordinance, 1979. However, after the promulgation of Women Protection Act in 2006, this section was revived and at the time of announcement of impugned judgment, this Section was very much in vogue and, as provided under Section 237 Cr.P.C., the trial court was empowered to convict and sentence the appellant thereunder even if he was not charged with it.


11. We may also mention that the appellant was arrested on 23.01.2013 and at that time his age was alleged to be 25 years. Giving slight benefit of doubt in respect of his age, though not substantiated by any cogent piece of evidence, his approximate age would be 11/12 years at the time of occurrence. In this view of the matter, we are inclined to take a lenient view. Therefore, we reduce the sentence of imprisonment to 10 years R.I. The sentence of fine of Rs. 3 Lacs or in default thereof 03 years S.I, is, however

maintained. The benefit of section 382-B, Cr.P.C. already extended to the appellant/accused shall remain intact.

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

13. These are the reasons for our short Order dated 24.02.2014.

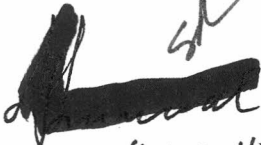

JUSTICE DR. FIDA MUHAMMAD KHAN


JUSTICE DR. AGHA RAFIQ AHMED KHAN
Chief Justice

Islamabad the 4th March, 2014

*Mujeeb ur Rehman/**

File for reporting


4.3.2014