

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE M.MAHBOOB AHMAD, CHIEF JUSTICE
MR.JUSTICE CH.EJAZ YOUSAF.

CRIMINAL APPEAL NO.5/I OF 1996.

Mahazulla son of Karim Dad
resident of Sily Shah Bohr,
District Musa Khail ... Appellant

Versus

The State ... Respondent

For the appellant ... Mr.Munir Elahi Qureshi
Advocate.

For the State ... Mr.Nasrullah Achakzai,
Advocate

Date of report
of occurrence ... 18.5.1995

Date of judgment
of trial court ... 19.12.1995

Date of Institution ... 8.1.1996

Date of hearing
and decision ... 28.4.1999

JUDGMENT

CH.EJAZ YOUSAF,J.- This appeal is directed against judgment dated 19.12.1995 passed by Sessions Judge Loralai, whereby the appellant has been convicted under section 14 of the Offence of Zina(Enforcement of Hudood) Ordinance,1979 (hereinafter referred to as the "Hudood Ordinance" and sentenced to life imprisonment, ten stripes and a fine of Rs.10,000/- or in default thereof to further undergo R.I for one year. Benefit of section 382-B Cr.P.C has,however, been extended to them.

2. The facts, in brief, are that on 18.5.1995, in consequence of a source report received by A.C Musa Khel Tehsildar Musa Khel was directed to recover Mst.Salma then aged about 7 years from the possession of one Shamsuddin Levies Sepoy, in whose house, she at the relevant time, was informed to have been confined. Resultantly Mst.Salma was allegedly recovered from the possession of the present appellant. Investigation was accordingly carried out and on completion thereof the appellant was challaned to the court for trial.

3. The appellant was charged under section 363 PPC, to which, he 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 appellant produced five witnesses, in all. P.W.1 Mehraj-Gul Levies Sepoy is a marginal witness of the recovery memo Ex.P/A vide which Mst.Salma was recovered from the possession of the appellant. He, at the trial, was declared hostile and was permitted to be cross-examined by the District Attorney. P.W.2 Umar Din is another marginal witness of the recovery memo Ex.P/A. He too, at the trial was declared hostile. Mst.Salma, the victim was examined as P.W.3,. She, at the trial, deposed that her mother had died and she was residing at Rahim Yar Khan with her uncle who, transferred her custody to the appellant in consideration of Rs.20,000/-. She further stated that she was brought from Rayim Yar Khan to Musa Khel and was kept by the appellant in his house. It would be pertinent to mention here that no cross was offered to her and her statement at the trial, remained un-challenged. P.W.4 Ahmad Nawaz Tehsildar, on the direction of A.C Musa Khel, had recovered Mst.Salma. He, deposed that he had recovered Mst.Salma from the possession of one Shamsuddin Levy Sepoy vide recovery memo Ex.P/B. He identified his signatures thereon. He further deposed that on 21.5.1995 he had submitted his

written report i.e Ex.P/C to the Deputy Commissioner Musa Khel which bears his signature. He admitted that in Ex.P/A though it was mentioned that Mst.Salma was recovered from the possession of present appellant yet, she was recovered from the house of Shamsuddin. In the course of his cross-examination, he admitted the suggestion as correct that he had neither arrested said Shamsuddin nor had registered a case against him. P.W.5 Faizullah at the relevant time was posted as A.C.Musa Khel. He deposed that on his direction Mst.Salma was recovered vide memo Ex.P/B.

5. On the completion of prosecution evidence the accused/appellant was examined under section 342 Cr.P.C. In his statement, though, he admitted that Mst.Salma was residing at Rahim Yar Khan with her uncle yet, denied that he had taken her hand from her uncle in consideration of Rs.20,000/-. He however, did not opt to appear as his own witness in terms of section 340(2) Cr.P.C. He also failed to produce any evidence in his defence though in his 342 Cr.P.C statement he showed his intention, to do so.

6. After hearing arguments of the learned counsel for the parties the learned trial court convicted the

accused/appellant and sentenced him to the punishment as mentioned in the opening para hereof.

7. We have heard Mr. Munir Elahi Qureshi, Advocate, learned counsel for the appellant, Mr. Nasrullah Achakzai, Advocate, learned counsel for the State and have also perused the entire record with their help.

8. Mr. Munir Elahi Qureshi, Advocate, the learned counsel for the appellant at the very outset submitted that for the time being, he does not assail conviction of the appellant on merits but would pray for remand of the case only, for the reasons inter alia, as under:-

- i) That the appellant was charged under section 363 PPC whereas he has been convicted under section 14 of the "Hudood Ordinance", therefore, he having been charged for a minor offence could not have been convicted for an offence carrying a major penalty.
- ii) That co-accused persons namely Shamsuddin from whose house the abductee as per P.Ws 1, 2 and 4 was recovered as well as uncle of Mst. Salma who had allegedly sold her to the appellant were not arrayed as accused, at the trial, thus the matter was not properly adjudicated upon.

In order to supplement his above contention, the learned counsel for the appellant after taking us through the record of the case, submitted that if the allegations regarding charge and selling of Mst. Salma for the purpose

of prostitution were true, then her uncle was equally liable for the offence and in all fairness he should have been impleaded as an accused. Likewise if she was actually recovered from the house of Shamsuddin then he too, being an accomplice, was liable for the offence. The learned counsel for the appellant vehemently urged that since aforementioned defects have invalidated the proceedings therefore, the case may be remanded to the trial court for decision afresh, in accordance with law.

9. Mr.Nasrullah Achakzai,Advocate,learned counsel appearing for the State candidly conceded that the appellant having been charged under section 363 PPC could not have been convicted under section 14 of the "Hudood Ordinance". He further submitted that Shamsuddin as well as uncle of Mst.Salma who had allegedly sold her to the appellant should have been arrayed as accused in the case and tried as such. He added that since needful was not done and trial was not conducted in a proper manner,therefore, the case may be remanded to the trial court for trial, afresh.

10. Notwithstanding the fact that the learned Advocate for the State has not controverted the contention raised by the learned counsel for the appellant, we have ourselves minutely gone through the record of the case.

Admittedly the appellant has not been charged under section 14 of the "Hudood Ordinance". At the trial, he was required to answer the charge under section 363 PPC only. A perusal of these provisions would show that while section 363 PPC carries a maximum sentence of seven years with fine, the sentence of imprisonment provided for the offence under section 14 of the "Hudood Ordinance" is, imprisonment for life with fine, which is not only greater in quantum but severe as well. It is well settled that an accused person charged for a minor offence, cannot be convicted for a major offence.

It may be mentioned here that 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 be applied in those cases only where, either the offences allegedly 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, 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. It therefore, follows that on a charge of one particular offence a person cannot be convicted for a distinct offence especially when it falls within a different penal statute.

In the instant case, to our mind, the appellant having been charged for the offence of kidnapping only, could not have been convicted for the offence of buying or hiring the victim for the purpose of prostitution or that she was likely to be employed or used for the purpose as aforesaid or for any other unlawful or immoral purpose because, firstly the offences for which the appellant was "charged" and "convicted" are distinct offences and fall within two different penal statutes and secondly, the penal clause in these two enactments would require different facts to be given prominence.

11. So for as the submissions made by the learned counsel for the appellant with regard to trial of Shamsuddi and the "uncle" of Mst.Salma are concerned, we are of the

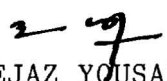
opinion that the record of the case does prima facie indicate their involvement and it was incumbent on the court below to be alive to this position and if on critical examination of the material on record it was found that they were accomplice in the matter then they should have also been called, charged and tried alongwith the present appellant because it was conspicuous on record that Mst.Salma was recovered from the house of Shamsuddin and it was her "uncle" who had transferred her custody to the appellant in consideration of Rs.20,000/-, therefore, the possibility that they were also involved in the offence, could not have been ruled out, unless there was a proper trial. Needless to point out that while dealing with a case, the court has to take cognizance of the "offences" and not the "offenders", and if the record indicates that there were some other offenders as well, than the court while acting under sections 190 or 265-D Cr.P.C or thereafter even, should have initiated proceedings against them.

12. As regards the conduct of P.W.4 Ahmad Nawaz the then Tehsildar Musa Khel(Mall) who as per observations of the trial court, made in the impugned judgment, had "tried to safe-guard interest of the accused from the very beginning", it may be observed here that though in the impugned judgment it was ordered that copies of the judgment be sent to

Senior Member Board of Revenue, Quetta as well as to the Commissioner Zhob Division at Loralai for initiation of disciplinary/departmental action against the said Tehsildar and they were also required to intimate to the court, action taken in pursuance thereof yet, record is silent about the action taken in this regard. It is not ascertainable as to whether any action in compliance with the direction of the Court was taken, and if taken, what was its nature? Suffice it to observe, that matter should have been taken to its logical end, since the case is being remanded the learned trial court shall also take care of this aspect of the matter and ensure that it reaches some ultimate desired result.

Since needful was not done by the trial court, therefore, there is no escape from remand of the case. Consequently the impugned judgment dated 19.12.1995 passed by the learned Sessions Judge Loralai is set aside and the case is remanded to the trial court, for trial and decision afresh, in accordance with law.


(M. MAHBOOB AHMAD)
CHIEF JUSTICE


(CH. EJAZ YOUSAF)
JUDGE

(APPROVED FOR REPORTING)


JUDGE