

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

Present.

JUSTICE AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE.

Criminal Appeal No.11/L of 2010.

1. Jehangir son of Sultan,
2. Manazir son of Gama,
Both residents of Rawana,
Tehsil Kotmomin,
District Sargodha Appellants.

Versus

The State Respondent.

Counsel for the Appellants	....	Syed Sajjad Sarwar Gillani, Advocate.
Counsel for State	....	Mr.Imran Sherazi, D.P.G, Punjab.
Case FIR No, date & Police Station.	.... ....	No.598, dated 27.9.2006, P.S.Kotmomin District Sargodha.
Date of judgment of trial Court	....	01.10.2009.
Date of institution.	....	30.01.2010.
Date of hearing.	....	07.10.2010.
Date of decision	....	<u>15-10-2010.</u>

JUDGMENT

Justice Agha Rafiq Ahmed Khan, Chief Justice.— Through this appeal, ~~the~~ appellants Jehangir and Munazir have challenged judgment dated 01.10.2009 delivered by learned Additional Sessions Judge, Bhalwal, whereby the appellants were convicted under section 377 of the Pakistan Penal Code and sentenced to 10 years R.I, each, with fine of Rs.5000/- each, in default whereof, to further undergo three months simple imprisonment, each. However, both the convicts/ appellants were granted benefit of section 382-B Cr.P.C.

2. Brief facts of the case arisen out of F.I.R No.598/2006 dated 27.09.2006 registered under sections 377 PPC and 12 Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 at Police Station Kotmomin, District Sargodha, as narrated by the victim/complainant Qaisar Abbas PW-3, are that on 26.09.2006 he was sitting at the hotel of one Nasar Pauly at evening time. Accused Jehangir and Manazir came there and asked him that they had to show him picture on the CD. He went with them to the Dera of Karmli Glondli. There they gave him tea after mixing some intoxication. Firstly accused Jahangir committed sodomy with him and thereafter accused Manazir committed sodomy

with him. The victim raised hue and cry which attracted PWs Muhammad Akram and Nasar Iqbal who witnessed the occurrence. On seeing them, the accused made good their escape. On the next day, the victim went to the Police Station and lodged this FIR Ex.PD.

3. The case was duly investigated; the accused was arrested and statements of the PWs were recorded under section 161 Cr.P.C. After investigation, challan was submitted in the Court against the accused to face the trial. The learned trial Court framed charge against the accused on 15.11.2008 under sections 12 Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and 377 of the Pakistan Penal Code.

The accused did not plead guilty and claimed trial.

4. The prosecution in order to prove its case produced 07 witnesses at the trial. The gist of the evidence of prosecution witnesses is

as follows:-

- i) PW-1: Doctor Ansar Ahmad conducted potency test of accused Munazir and Jahangir and found them fit to perform sexual intercourse. This witness also medically examined the victim aged 15 years on 27.09.2006 and observed as under:-

“ On external examination:

1. An abrasion size 2 cm x 1 cm on inner side of left knee.
2. An abrasion size 4 cm x 2 cm on the front of left leg.
3. An abrasion size 2 cm x 2 cm on front of right knee. Stool passed, closed and changed.

On internal examination

1. Redness around the anus.
2. Three laceration on the anus 12.00-O-clock and 6.00-O-clock.”

ii) PW-2: Constable Muhammad Asghar was handed over one sealed parcel for onward transmission to the office of Chemical Examiner, Rawalpindi which he deposited in the said office on 12.10.2006 intact.

iii) PW-3: Qaisar Abbas is victim/complainant of the case. He endorsed the contentions of the FIR.

iv) PW-4: Muhammad Akram stated that on the day of the occurrence at 8/9 p.m, he alongwith Nasar PW went to the hotel of one Nasar Pauly in search of the victim Qaisar Abbas. They inquired from the persons sitting at the hotel about the victim who disclosed that accused Jahangir and Manazir Ali took the victim.

Both the accused obtained C.D and went to the Dera of Riaz

Gondal. As soon as they reached the Dera of Riaz Gondal, they observed that accused Jahangir and Manazir were committing sodomy with the victim Qaisar Abbas. On seeing them, both the accused picked up their Shalwars and decamped. The victim was not in full senses at that time. On the following day they went to the Police Station for registration of the FIR and medical examination of the victim. He further stated that his statement was recorded by the Investigation Officer.

v) PW-5: Constable Shafqat Rasool stated that on 27.09.2006, the Investigation Officer handed over to him injury statement and a docket for medical examination of the victim from RHC Kot Momin. He went in RHC Kot Momin alongwith the victim where the victim was medically examined. The Medical Officer handed over to him a sealed envelope and MLC bearing No.209/06 of RHC Kot Momin which he produced before the Investigation Officer.

vi) PW-6: Muhammad Ajmal S.I recorded the FIR Ex.PD; visited the place of occurrence, recorded statements of the PWs under section 161 of the Code of Criminal Procedure; drafted

unscaled site plan of the place of occurrence Ex.PE; arrested both the accused Jahangir and Manazir; got the victim medically examined; got conducted the potency test of the accused; took into possession one sealed envelope vide recovery memo Ex.PF and completed challan against the accused.

vii) PW-7: Muhammad Riaz ASI was handed over one sealed envelope on 27.09.2006 which he placed in the Malkhana and on 11.10.2006 he delivered the said parcel to Constable Muhammad Asmat for onward transmission in the office of Chemical Examiner, Rawalpindi intact.



5. After closure of the prosecution evidence, the learned trial Court examined both the accused under section 342 of the Code of Criminal Procedure on 23.05.2009. They, inter-alia, pleaded their innocence. In reply to the question “why this case against you and why the PWs deposed against you?” both the accused Manazir and Jahangir stated as follows:-

“Due to grouping in village, we have been falsely roped in this case.”

6. The accused did not make their statements under section 340(2) of the Cr.P.C. However, Muhammad Riaz appeared as DW-1 and stated that no occurrence of unnatural offence as alleged in the FIR took place at the place of occurrence i.e, Dera Karmli Gondli.

7. The learned trial Court after examination of the evidence on record and hearing arguments of learned counsel for the accused and the State counsel, convicted and sentenced the accused as mentioned in paragraph No.1 of this judgment, hence this appeal before this Court.

8. I have gone through the evidence on record with the help of learned counsel for the parties and also heard them at length.

9. The plea of the learned counsel for the appellants is that there is delay in lodging the FIR which has not been explained; there are also material contradictions in the statements of the prosecution witnesses regarding the place of incident and further that there no matching of semen as the semen of the appellants were never obtained and sent for grouping. His further contention is that there is no independent witness in the case. He has relied on the case of Waqar-ul-Islam and another.. Vs..The State reported as 1997 P.Cr.L.J page 1107. The learned Deputy

Prosecutor General for the State, however, supported the impugned judgment.

10. There is force in the plea of appellants' counsel regarding delay in lodging the FIR. The offence is said to have take place on 26.9.2006 at evening time but the FIR was lodged on second day, i.e. 27.9.2006 at 12.30 noon. No explanation with respect to the delay has been given in the FIR or in the statement of the complainant. Natural course under these circumstances would have been to inform the police or the neighbours immediately after the incident, which has not been done in the present case.



11. There are also major contradictions in the statements of PW.3 complainant/victim Qaisar Abbas, his real uncle PW.4 Muhammad Akram and Investigating Officer S.I Muhammad Ajmal regarding the place of incident. According to the victim the sodomy was committed at a 'Thara' outside the room at little distance where Television was also installed. His uncle PW Muhammad Akram has deposed that the appellants were committing sodomy in poultry room. The Investigating Officer Sub-Inspector Muhammad Ajmal in cross-examination has stated that sodomy was committed in the courtyard of the Dhera. Since

there are different versions of the above three witnesses, therefore, it cannot be said with certainty as to at which place sodomy was committed. Moreover, it is an admitted position that in the two rooms of the Dhera families of both the appellants were residing. It does not appeal to mind that the appellants would commit sodomy adjacent to the rooms where several members of their families reside and were present.

12. The victim as well as the witnesses have not disclosed the incident to any person of the village or neighbourhood. Prime witness of the case Nasar Pouly, owner of the hotel from where the victim is said to have accompanied the appellants toward Dhera and from whom they took the Television and C.D Player, has neither been examined by the Investigating Officer nor shown as witness in the challan. The T.V, C.D Player and the film have not been recovered by the police. On the contrary this prime witness Nasar Pouly filed his affidavit in favour of appellant Jahangir in Crl.Misc.No.4053-B/2007 in Lahore High Court and the Lahore High Court vide order dated 23.8.2007 granted bail to the appellant Jahangir and observed as under:-

“The petitioner has submitted an affidavit of the owner of the hotel which was identified as the place wherefrom the victim alleged his abduction by the two accused. In his affidavit Nasar Iqbal son of Muhammad

Hayat resident of Rawana, Tehsil Bhalwal District Sargodha has deposed that on 26.9.2006, the alleged date of occurrence neither victim Qaisar Abbas nor the accused Manazar and Jahangir visited his hotel.

Accordingly the petitioner is directed to be released on bail subject to furnishing bail bonds in the sum of Rs.25,000/- with one surety in the like amount to the satisfaction of the trial court”

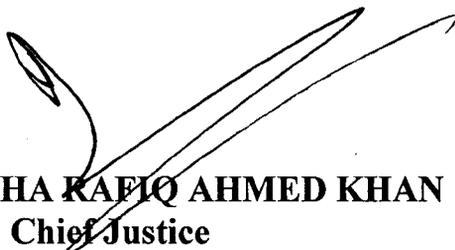
13. Under the above circumstances, it was the duty of the Investigating Officer to have obtained the semen of the appellants through Medical Officer and sent the same to laboratory for grouping matching. Unfortunately it has not been done and definitely benefit of this fact would go in favour of the appellants.

14. Defence witness namely Muhammad Riaz who is the owner of the Dhera and who used to live in one of the room, has deposed as under:-

“I know the accused present in the court. These are Manazir and Jahangir. The Derra which is mentioned in the FIR situated within the village of Bharwana. It is owned by my father. My father has passed away but said Derra is still known by the name of my father. There are three Pakka rooms in that Derra. One room is occupied by wife of Jahangir accused and his children and the next room accused Manazir’s brother who are 4/5 in number are living there. The third room I lived there. I also keep 26 cattles on the said Derra. I swear that on the said Derra on 26.09.2006, no such occurrence as narrated in

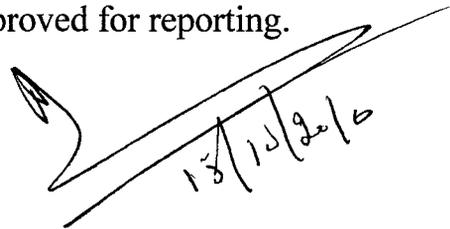
the FIR has occurred. As no occurrence took place there, therefore, I did not come in the knowledge about the occurrence”

15. Looking to the above discussed evidence and the circumstances, I am of the considered opinion that the prosecution has not been able to prove the charges against the appellants beyond any reasonable doubt. I therefore, set-aside the conviction and sentences of the appellants by giving them the benefit of doubt. This appeal is accordingly allowed and the appellants should be released forthwith from jail, if not required in other custody case.


JUSTICE AGHA RAFIQ AHMED KHAN
Chief Justice

Announced on 15-10-2010.
At Lahore.
F.Taj/*

Approved for reporting.


15/10/2010