

IN THE FEDERAL SHARIAT COURT
(Appellate/Revisional Jurisdiction)

PRESENT:

Mr. Justice Agha Rafiq Ahmed Khan, Chief Justice
Mr. Justice Syed Afzal Haider
Mr. Justice Shahzad Shaikh

Criminal Appeal No. 96/L of 2003

Javed Iqbal son of Muhammad Din,
Caste Arain, resident of Chak No.73/S.B,
District Sargodha.

---Appellant

Versus

The State

--- Respondent

Murder Reference No.14/L of 2003

The State Versus Javid Iqbal

Counsel for the Appellant --- Ch. Muhammad Ameen Javed,
Advocate.

Counsel for the State --- Mr. Tassarwar Ali Khan Rana,
D.P.G.

FIR No. date &
Police Station --- 46/02 dated 04.02.2002
Satellite Town, District Sargodha

Date of Judgment of
the trial Court --- 25.03.2003

Date of Institution
of Appeal --- 31.03.2003

Date of Hearing --- 13.10.2010

Date of Judgment --- 15.10.2010

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JUDGMENT:

Justice Agha Rafiq Ahmed Khan, Chief Justice: Appellant

Javed Iqbal through Criminal Appeal No.96/L/2003 has challenged the judgment dated 25.03.2003 delivered by learned Additional Sessions Judge, Sargodha whereby he was convicted and sentenced as under:-

- i) Under section 364-A of : Death sentence
the Pakistan Penal Code
- ii) Under section 302-B of : Death sentence
the Pakistan Penal Code
- iii) Under section 10(3) of : 25 years rigorous
the Offence of Zina imprisonment
(Enforcement of Hudood)
Ordinance, 1979

The learned Additional Sessions Judge, Sargodha has also moved a murder reference, registered in this Court as Murder Reference No.14/L of 2003, which has been put up for confirmation of death sentence along with the main appeal.

2. The prosecution case in brief is that complainant. Muhammad Anwar PW.8 lodged the first information report Ex.PG on 04.02.2002 at police Station Satellite Town, Sargodha stating that

on 03.02.2002 when he returned home from his job his wife Mst. Robina, PW.9, informed him that his (Bhanja) nephew Javed Iqbal, had come at noon time and stayed for about half an hour, whereafter his daughter Mst. Aksa aged 8/9 years was found missing. The search for missing child was futile. The complainant consequent alongwith Khalid Mehmood and Muhammad Aslam, went towards Lorry Adda in her search where Muhammad Munir and Muhammad Akram informed them that at about 2.30/3.00 p.m. they had seen Javed Iqbal accused and Mst. Aksa while boarding in a buss bound for Bhalwal-Ajnala. The complainant further stated that he continued the search and suspected that Javed Iqbal accused had abducted his daughter for commission of zina with her. Hence FIR No.46/02 Ex.PG was registered at police station Satellite Town, Sargodha on 04.02.2002 under section 364-F of the Pakistan Penal Code.

3. Investigation ensued as a consequence of registration of crime report. During investigation accused Javed Iqbal was arrested who, during interrogation, confessed that he abducted Mst. Aksa,

took her in the Kino orchard near 33-Phattak Mitha Lak Road, Sargodha where he committed zina with her and then strangulated her to death. On his pointation the police recovered dead body of Mst. Aksa in naked condition alongwith her wearing clothes lying nearby the dead body. The police took the dead body and clothes into possession. Then the police added section 302 of the Pakistan Penal Code and section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 in the crime report. The dead body was sent for postmortem. The accused was sent to judicial lock up on 05.02.2002. After completion of investigation the Station House Officer submitted report under section 173 of the Code of Criminal Procedure before the trial Court on 11.02.2002 requiring the accused to face trial.

4. The learned trial Court framed charges against the accused on 15.06.2002 under section 364-A of the Pakistan Penal Code, under section 10(3) of the Offence of Zina (Enforcement of

Hudood) Ordinance, 1979 and also under section 302 of the Pakistan Penal Code. The accused did not plead guilty and claimed trial.

5. The prosecution produced thirteen witnesses in order to prove its case. The gist of the deposition of the witnesses is as follows:-

- (i) PW.1 Ghulam Mustafa had identified the dead body of Aksa Bibi on 04.02.2002 at the time of post-mortem examination.
- (ii) PW.2 Muhammad Arshad MHC stated that on 04.02.2002 the Investigating Officer handed over to him one sealed envelope and one sealed phial which he kept in Malkahana of Police Station intact and on 28.03.2002 he handed over the same to Muhammad Arshad Constable for onward transmission to the office of the Chemical Examiner, Rawalpindi.
- (iii) PW.3 Muhammad Arshad Constable had deposited one sealed envelope and a sealed phial in the office of the Chemical Examiner, Rawalpindi on 29.03.2002 which were handed over to him by Muhammad Arshad MHC on 28.03.2002.
- (iv) PW.4 Ghulam Hussain Constable stated that on 05.02.2002 he got medically examined Javed Iqbal accused. After his medical examination, the Medical

Officer handed him over medico-legal report which he produced before the Investigating Officer on the same day.

(v) PW.5 Muhammad Aslam, Revenue Patwari, had prepared site plans Ex.PA and Ex.PA/1 on the instruction of the police and on the pointation of the PWs.

(vi) PW.6 Lady Doctor Rehana Rashid had conducted post-mortem examination on the dead body of Mst. Aksa and observed as under:-

“External appearance

A naked girl of aged about 10 years wrapped in a chadder of brown colour, both eyes slightly opened alongwith congestion of congestive. Mouth was widely opened and froth was coming from nostrils. Tongue was bitten with teeth. There was oozing of blood from right side of mouth post mortem staining was present on dependents parts. Rigor mortus was present.

External Injuries

1. An abrasion 1cm x 2 cm on right side of neck extending from neck to laterally.
2. Multiple abrasions of small sizes scattered in an area of 9 cm x 7 cm on front and lower part of chin and left side of lower face.
3. An abrasion 1 cm x 1 cm on upper part of right side of face.
4. An abrasion 4 cm x ½ cm on the top and outer side of right shoulder.

5. An abrasion 1 cm x ¼ cm on back of right lower chest.
6. Multiple abrasions in an area of 4 cm x 4 cm on right upper chest part.
7. Contusion mark of size 3 cm x 1/2 cm on back of right knee joint.
8. Contusion mark of size 3 cm x 1 cm on inner side of right knee joint.
9. Contusion mark 1 cm x 1½ cm on back of left knee joint.

Examination of Perianal area

Fresh blood oozing which had stained wrapped chadder from perianal area. Few clots were adherent to labia majora.

On examination of vagina

Hymen was torn and urethral orifice had completely damaged. Vaginal tissues damaged badly alongwith laceration of labia majora posteriorly and oozing out blood present from the vagina. Three vaginal swabs were taken by me and were sent to the office of the Chemical Examiner, Rawalpindi for detection of semen and serology.

Dissection under injuries No.1 & 2

There was deep congestion of underline subcutaneous tissues and muscles below injury No.1 and 2. There was ecaemosis of underneath injury and blood oozed from deep layers. Small blood vessels underneath the injuries were damaged. Pornue of hyoid bone intact underneath rest of the injuries, underlying

tissues were congested. Stomach contained semi solid food material. Small intestines contained liquid material and gas. Large intestine contained faecal matter and gas. Rest of the organs were healthy.

OPINION

In my opinion cause of death in this case is due to sustain pressure on the neck leading to asphyxia which leads to cardio pulmonary arrest and death due to injuries No.1 and 2. These injuries were sufficient to cause death in the ordinary course of nature. All other injuries also had additive effect. Injuries No.1 & 2 were occurred due to pressure in neck area, and were ante mortem. Three vaginal swabs were taken by me and sent to the Chemical Examiner, Rawalpindi for detection of semen and serology.

Probable time that elapsed in between injuries and death was half an hour and in between the death and P.M. examination was within 48 hours.

Note

I have also given a note in my P.M. report. After P.M. examination of Aksa the well stitched dead body was handed over alongiwth P.M. report, police papers and the last worn clothes of the deceased to constable Muhammad Mumtaz 1362.

Ex.PB is the correct carbon copy of my P.M. report. I had also endorsed sketches Ex.PB/1 and Ex.PB/2 prepared and signed by me.

I have also endorsed injury statement Ex.PC and inquest report Ex.PD.

I have seen the report of the Chemical Examiner Ex.PE. According to it, the swabs were stained with semen and blood.

In my opinion, rape had been done.”

- (vii) PW.7 Doctor Farhat had medically examined Javed Iqbal accused on 05.02.2002 and found him sexually potent.
- (viii) Complainant Muhammad Anwar appeared as PW.8 and endorsed the contents of his crime report Ex.PG.
- (ix) PW.9 Mst. Robina supported the version of her husband Muhammad Anwar complainant PW.8.
- (x) PW.10 Muhammad Mumtaz Constable had escorted the dead body of Mst. Aksa deceased to the DHQ Hospital Sargodha for postmortem examination on 04.02.2002 and after postmortem examination the doctor handed him over the well stitched dead body of the deceased alongwith postmortem report, police papers and the last worn clothes of the deceased which he produced before the Investigating Officer on the same day who took the

same into possession through recovery memo Ex.PH which was attested by him and Molazam Hussain.

- (xi) PW.11 Arshad stated that he, Muhammad Siddiq and Muhammad Anwar joined the investigation of this case. During interrogation accused Javed Iqbal conceded that he abducted Mst. Aksa and took her to General Bus Stand, Sargodha and boarded a bus bound for Bhalwal and deboarded from the bus alongiwth Mst. Aksa near 33-Railway Crossing where he committed zina with Mst. Aksa and thereafter murdered her and threw the dead body of the deceased Aksa under a Kinno tree. The witness further stated that the accused got recovered shalwar P.1, qameez P.2, Chadder P.3, pair of shoes P.4 which were taken into possession by the police through memo Ex.PI which was attested by him and Muhammad Siddiq. Thereafter the accused got recovered dead body of Mst. Aksa from a Kinno tree of the garden of Shaukat Piracha near Railway Crossing.
- (xii) PW.12 Muhammad Akram stated that he alongwith Munir had seen Javed Iqbal accused with Aksa boarding on a bus at 1/1.30 p.m. He further stated that Khalid Mahmood, Aslam, Muhammad Anwar met him at night time and he told them about the occurrence.
- (xiii) Muhammad Arshad Head Constable appeared as PW.13 to identify the handwriting and signatures of Nazar

Hussain Sub Inspector/Investigating Officer who had died. He stated that on 04.02.2002 Nazar Hussain Sub Inspector visited the place of occurrence and prepared site plan Ex.PJ, took into possession clothes and shoes of Mst. Aksa deceased and prepared recovery memo Ex.PI, prepared recovery memo Ex.PH regarding postmortem report, police papers, one sealed phial and sealed envelope, prepared site plan Ex.PK regarding recovery of dead body of Aksa, prepared site plan Ex.PL, prepared injury statement Ex.PC, inquest report Ex.PD and recorded statements of PWs under section 161 of the Code of Criminal Procedure. The witness also identified the signatures of Nazar Hussain Sub Inspector in various documents in case diary.

6. The prosecution closed its evidence on 25.02.2003.

Thereafter the learned trial Court recorded statement of the accused under section 342 of the Code of Criminal Procedure on 18.03.2003.

The accused denied the allegations leveled against him and in answer to question "Why this case against you and why the PWs have deposed against you?" stated as under:-

"Prosecution case has been lodged against me on the basis of suspicious story and no solid reasons

and evidence have been given against me. PWs are related to each other and with the complainant, and also due to family friction I have been involved in this false case. No direct evidence is against me. ”

7. The learned trial Court after completing codal formalities of the trial returned verdict of guilt. Conviction was recorded and sentence awarded as mentioned in the opening paragraph of this judgment.

8. We have gone through the file. Evidence of the prosecution witnesses as well as statement of the accused has been perused. The relevant portions of the impugned judgments have been scanned. We have also heard learned Counsel for the contending parties.

9. Learned Counsel for the appellant has raised the following points for our consideration:-

- i) that the impugned judgment is bad on account of misreading and non-reading;

- ii) that there is no evidence to connect the accused with the alleged crime;
- iii) that the prosecution evidence does not inspire confidence;
- iv) that the story of the prosecution is not probable;
- v) that there are material contradictions in the prosecution version;
- vi) the recoveries have been planted; and
- vii) the occurrence was infact no witnessed by any one.

10. The learned Counsel for the State on the other hand supported the conviction and sentence on the grounds:-

11. The reasons that prevailed upon the learned trial Court in recording verdict of guilt:-

- i) that the appellant is nephew of the complainant and there is no enmity between the two families. It is not possible to involve falsely the son of a sister in such a serious offence;

- ii) Muhammad Akram PW.12 had seen the deceased with the accused while boarding a bus which fact was also disclosed to the police in his statement;
- iii) that the dead body and the last worn clothes were discovered on the pointation of the accused; and
- iv) that the allegation of zina-bil-jabr has also been medically corroborated.

12. We have considered the arguments of the contending parties as well as the findings of the learned trial Court. Our observations are as follows:-

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- i) that there is no inordinate delay in laying information to the police. There is nothing on the record to suggest that the complainant party consulted different quarters before registration of the case;
 - ii) the accused was nominated in the FIR;
 - iii) the accused is the real nephew of the wife of the complainant. There is nothing on the record even to suggest

that the relationship between the family of the complainant and the family of the accused nourished any grudge against each other;

iv) the accused was arrested on 04.02.2002 and on his pointation the dead body was recovered. The last worn clothes of the victim were also got recovered on the pointation of the accused;

v) the medical evidence corroborates the version of the prosecution;

vi) the report of the Chemical Examiner Ex.PE also establishes that the swabs taken from the private parts of the victim were stained with semen and blood. It is also in evidence that the appellant was potent;

vii) no doubt the conviction may not be maintained on the sole testimony of a *waj-takar* who has last seen the accused alongwith the victim but in this case the last seen evidence was given by Muhammad Akram PW.12 who is brother-in-

law of the complainant and belongs to the same caste and he identified the victim as well as the accused when he saw them together. There is no suggestion to this witness that he did not know the accused before the incident;

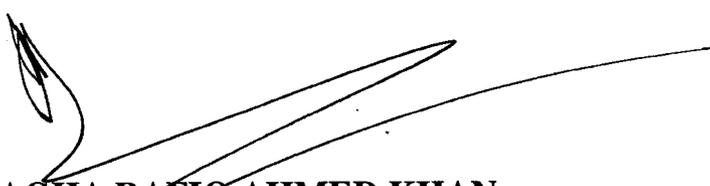
viii) the argument advanced by the learned Counsel for the appellant, that the formalities required under section 103 of the Code of Criminal Procedure were not adopted, is not applicable in cases where discovery of facts is the result of the pointation of the accused;

ix) there is no doubt about the identity of the accused and the factum of rape has also been established. There is no enmity between the parties and it is not possible to nominate real nephew immediately after the incident in order to save an outsider;

13. We have however considered the last argument of the learned Counsel for the appellant who pleads mercy. On a Court question why capital punishment should not be awarded, the learned

Counsel submitted that the appellant is a young man and is a first offender. There is no direct evidence in this case and the case depends upon circumstantial evidence alone.

14. In this view of the matter we maintained the convictions recorded by the learned trial Court vide impugned judgment dated 25.03.2003. His sentence of 25 years rigorous imprisonment under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 is maintained. However we convert the death sentences awarded to him on two counts i.e. under section 302(b) and under section 364-A of the Pakistan Penal Code into life imprisonment on each count. All the three sentences shall run concurrently with benefit of section 382-B of the Code of Criminal Procedure.


JUSTICE AGHA RAFIQ AHMED KHAN
CHIEF JUSTICE

Sauaidan
JUSTICE SYED AFZAL HAIDER


JUSTICE SHAHZADO SHAIKH

Dated Lahore the
15-10-2010
Imran/*

Approved for reporting.


15/10/2010