

IN THE FEDERAL SHARIAT COURT  
( APPELLATE JURISDICTION )

Present

MR. JUSTICE ZAFAR PASHA CHAUDHRY, JUDGE.

CRIMINAL APPEAL NO.41/L OF 2003.

Muhammad Asghar son of  
Faqir Muhammad,  
caste Gujjar, resident of  
Chak No.3/GB, Attanwali,  
Tehsil Nankana Sahib,  
District Sheikhpura.

.....Appellant.

Versus

The State

.....Respondent.

For the appellant

Miss Gulzar Butt,  
Advocate.

For the complainant

Mr. Abdul Karim Sheikh,  
Advocate.

For the State

Ch. Nazir Ahmad,  
Advocate.

No. & Date of  
private complaint

No.143, 27-5-1999  
P.S. Nankana Sahib,  
District Sheikhpura.

Date of judgment  
of the trial court

15-1-2003

Date of institution  
of appeal

7-2-2003

Date of hearing

23-7-2003

Date of decision

23-7-2003

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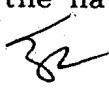
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JUDGMENT

ZAFAR PASHA CHAUDHRY, J.- Appellant Muhammad-

Asghar was sent up to face trial in the court of Ch. Abdul Hafeez, Additional Sessions Judge, Nankana Sahib in a complaint case No.143/1999 under section 10(3) of the Offence of Zina(Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the Ordinance). The learned judge on holding him guilty under section 10(3) of the Ordinance sentenced him to undergo R.I. for ten years. According to learned judge, lenient view was taken because the accused was a young boy and was not a previous convict.

2. The prosecution case has a bit queer history. Initially F.I.R. No.192/98 was lodged with Police Station Saddar Nankana Sahib on the application addressed to the SHO by Muhammad Yousaf, father of Mst. Shabana Begum, the victim. It was stated interalia that Shabana left her house to buy ice. When she was passing by Haveli of Muhammad Asghar, appellant, she was intercepted by Muhammad Asghar who was standing in the door of his Haveli. She was caught hold from her hair and was dragged inside the haveli. Blow of pistol butt was given to her and<sup>he</sup> threatened her that if some alarm was raised he will shoot her dead. Shabana was taken in a room inside the haveli and Muhammad Asghar kept on committing zina-bil-jabr with her. She raised alarm. On hearing the same the complainant, Altaf, Aslam (his brother) and Taj Din rushed towards the place of occurrence. No sooner did they enter the haveli they saw that Muhammad Asghar



was committing zina-bil-jabr with his daughter Shabana. On seeing the witnesses approaching him the accused left the victim and fled away with his pistol and holding his shalwar. He threatened them that if someone came near he will be shot dead. As such he succeeded in escaping. The complainant and the witnesses removed Shabana in injured condition to the house of the complainant. The parents of the appellant and respectables of the village implored for forgiveness. As the complainant's daughter has been subjected to extreme excess, matter was reported to the police.

3. After recording of the F.I.R. investigation was initiated and was taken up by Ashraf Zaidi, Inspector, CW.1. During investigation the appellant Muhammad Asghar as well as Mst. Shabana, victim were found guilty of the offence of commission of zina. As per statement of Ashraf Zaidi, Inspector made in court as CW.1, the investigation was also conducted by DSP, Ferozewala, Inspector Ghafoor, DSP Circle, Sheikhpura and ASP Saddar Sheikhpura and all of them declared that Mst. Shabana was guilty, therefore, the investigating officer Ashraf Zaidi submitted challan against Muhammad Asghar, appellant as well as Shabana. Both were arrayed as accused persons in the challan.

4. Complainant Muhammad Yousaf not being satisfied with the result of the investigation and submission of challan against Shabana as well, filed a private complaint under section 10 of the Ordinance in the court of Illaqa Magistrate, which was entrusted to the learned

Additional Sessions Judge, Nankana Sahib. In the private complaint and the facts narrated in the FIR were repeated, /as such absolutely identical narration of facts was made. It was however added that the report submitted by police (under section 161 Cr.P.C.) was against law & facts and unjust, therefore, he was constrained to institute a private complaint. The learned trial judge commenced the trial in the manner as laid down by the Hon'ble Supreme Court in Noor Ellahi's case. The complainant case was taken up first, preliminary evidence was recorded and thereafter charge was framed under section 10(3) of the Ordinance against the present appellant Muhammad Asghar. The prosecution evidence was called upon.

5. The prosecution in support of its case examined five witnesses. Muhammad Yousaf, complainant was examined as PW.1. Mst. Shabana, daughter of Muhammad Yousaf, victim was examined as PW.2. Both the witnesses made similar statement. They reiterated the facts already contained in the FIR and the private complaint except that Mst. Shabana stated that the investigating officer in collusion with accused Asghar implicated her as accused on which an application was submitted to the DIG who ordered the SSP to investigate the case who found Asghar guilty and was directed to be challaned. Muhammad Boota, Head Constable, PW.3, Mehdi Khan, Constable, PW.4, Muhammad Latif, PW.5 are just formal witnesses. Muhammad Latif, Dispenser, PW.5 was examined because Dr. Shahnaz Javed who had medically examined Mst. Shabana was not available. Muhammad Latif

who had worked with the lady doctor identified the handwriting and signatures of Dr. Shahnaz Javed on Ex.PC.

6. The investigating officer being a necessary witness was examined as CW.1. He described various facts and functions performed by him during course of investigation. He inspected the place of occurrence,xxx recorded statements of the witnesses, arrested the accused/appellant and got him medically examined. During cross examination by the complainant, he admitted that the complainant, the victim and the PWs supported the prosecution story as narrated in the F.I.R. During cross examination conducted by the accused/appellant Muhammad Asghar he stated that after recording the F.I.R. he asked the son of the complainant to produce the complainant, the victim and the PWs for their examination but the same was not done as according to the complainant's son both the complainant and the victim had gone to Kahna Kacha. From 15-6-1998 to 20-6-1998 no PW appeared before him. He also stated that he found during investigation that the complainant and his family did not enjoy good reputation. Clothes of Mst. Shabana alleged to be stained with semen were not produced before him. Lastly it was admitted by him, as noted above, that investigation was held by DSP, Ferozewala, Inspector Ghafoor, DSP Circle, Sheikhupura and DSP Saddar, Sheikhupura. All of them declared Mst. Shabana guilty, therefore, she was challaned as accused.
7. It is submitted by the learned counsel for the complainant that a supplementary challan was submitted in court wherein Muhammad-



Asghar figured as the only accused. The copy of the supplementary challan could not be traced in the file. However, learned counsel for the complainant showed to the Court copy of the same. Its correctness has not been disputed by the learned counsel for the appellant.

8. The learned counsel for the appellant addressed arguments and the main contention raised by her is that no such occurrence took place. The appellant has been falsely implicated. In support of her contention she pointed out extremely minor and insignificant discrepancies in the statements of the two witnesses i.e. the complainant and the victim. Her main stand of force was that there were three more witnesses cited by the prosecution in the F.I.R. but none of them were produced. With-holding of the witnesses mean that they would not have supported the prosecution version. When the learned counsel was confronted with the medico legal report and the report of the Chemical Examiner Ex.PF which positively proved that Mst. Shabana had been subjected to sexual intercourse, she could not satisfactorily explain as to how and under what circumstances she had sexual intercourse.

9. Conversely the learned counsel for the complainant laid much stress on the question of minority of the victim. According to him she was 15 years of age and as such she was minor and offence of zina-bil-jabr committed by the appellant stand proved. According to the learned counsel neither the complainant nor the victim had any motive or rivalry to falsely implicate the accused/appellant. The



appellant's learned counsel during course of arguments had referred to an observation made by the learned trial judge that the appellant was a young boy and therefrom she inferred that the appellant was also minor. Learned counsel for the complainant anyhow seriously refuted the same and submitted that there is no evidence or other material brought on the record to show that the appellant was minor at the time of alleged occurrence. He supported the judgment and argued that the appellant's conviction was just and lawful. Learned counsel for the State practically adopted the arguments advanced by the learned counsel for the complainant.

10. After hearing the learned counsel for the parties and going through the evidence and other record, I find that the complainant and the victim have no enmity, motive or any other malice against the appellant to have falsely implicated him in the present case. The appellant when examined under section 342 Cr.P.C. as well, could not explain as to why the complainant and the PWs deposed against him. Mere assertion that it was a false complaint and he was involved due to party faction does not in any manner explain or absolve the appellant atleast from pointing out the reason or circumstance due to which he was implicated. The appellant did not appear as his own witness nor adduced any evidence in his defence. The statement of the victim to the extent that she was subjected to sexual intercourse is supported by the medical report, according to which her physical examination abundantly reveals that she had been subjected to sexual intercourse.

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The doctor obtained three vaginal swabs and sent to the Chemical Examiner for analysis. The report of the Chemical Examiner Ex.PF described the swabs to be stained with semen. The physical condition of the victim coupled with the result of the Chemical Examiner's report, ~~xxxxx~~ leaves no doubt that sexual intercourse had not been performed with her.

11. Next question remains to be determined is whether the victim was subjected to zina-bil-jabr or the same amounts to zina-bil-raza. To determine the same, relevant facts, the reports and attending circumstances have to be assessed and considered. The victim's medical report without going into indecent details clearly indicates that she had been previously subjected to sexual intercourse. The examination is suggestive of the fact that she was a girl of easy virtue. Although during course of investigation a number of investigating officers found the victim to be a consenting party yet there opinion is not binding on the court nor the same can be treated as evidence, however, the same may be considered as one of the circumstances in support of the observation or examination carried out by the experts such as the Medical Officer and the Chemical Examiner. The other supporting facts such as the victim was hesitant to appear before the investigating officer and did not appear for more than six days and that no marks of violence was found on her body or other relevant part and that no recovery of weapon was effected from the accused person. All these facts and

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circumstances when summed up together leave no doubt to draw inference that Mst. Shabana was a consenting party to the commission of zina. The contention raised by the complainant's counsel that Mst. Shabana even according to medical report was 15 years was minor and her consent will be no consent in the eyes of law. The contention loses its force when viewed with the definition of "adult" contained in section 2(a) of the Ordinance which reads as under:-

"adult" means a person who has attained, being a male, the age of eighteen years or, being a female, the age of sixteen years, or has attained puberty;"

is  
The last ingredient/<sup>is</sup>that she would be treated as adult if she has attained puberty. In the present case, medical report of Mst. Shabana is fully suggestive of the fact that the victim had attained puberty and therefore was adult within the meaning of section 2(a) of the Ordinance. The contention of the complainant's counsel as such cannot be accepted and is repelled.

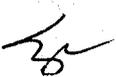
12. As a result of the above discussion, it is held that appellant Muhammad Asghar did commit zina with Mst. Shabana but the same would amount to zina-bil-raza and not zina-bil-jabr. Therefore, the appellant's conviction under section 10(3) of the Ordinance is set aside and the same is recorded under section 10(2) of the Ordinance. To determine the quantum of sentence, it has been found from the record that the appellant was arrested on 1-7-1998, admitted to bail on 8-3-2000 and convicted on 15-1-2003 and till today he has remained in prison and judicial lockup for two years, two months and fifteen days. As benefit



of section 382-B Cr.P.C. has been allowed, therefore, the entire detention will be treated as imprisonment. I find that the term of imprisonment already undergone by the appellant will be sufficient punishment to be awarded to the appellant. He is, therefore, sentenced to the period of imprisonment already undergone by him. He is ordered to pay fine of Rs.5000/-, in default thereof to undergo three months R.I.

13. Before parting with the judgment, it would be relevant to observe that it has been noticed in the present case as well as in a number of other cases that no earnest attention is paid to record the age either of the victim or of the accused. In this case, the age of the accused/appellant has not been recorded anywhere i.e. while framing the charge or recording the statement under section 342 Cr.P.C. It is imperative on the learned trial judge to record the age both of the accused as well as the victim as accurately as possible. In case the age given by the accused does not appear to be correct, the learned trial judge may record his own observation with regard to the same. Efforts should be made to specify the age as accurately as possible. It does not, however, imply that a separate inquiry should be initiated but assessment can be made on the basis of available record if any or necessary documents or report may be called for.

14. Needless to observe that determination of age has acquired immense importance because under the present system i.e. Hudood Laws or even under the PPC if an accused is minor within the meaning of relevant provisions of Hudood Laws or PPC, the very nature of the



even  
offence or/complexion of the entire case is changed.

15. The office will issue a circular notifying the above  
observation to all the learned Sessions Judges, learned Additional  
Sessions Judges and trial courts.

  
( Zafar Pasha Chaudhry )  
Judge

Lahore:23-7-2003.  
M. Khalil

Approved for reporting.



