

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

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PRESENT

MR.JUSTICE AFTAB HUSSAIN	..	CHAIRMAN
MR.JUSTICE CH. MUHAMMAD SHIDDIQ	..	MEMBER
MR.JUSTICE MAULANA MUHAMMAD TAQI USMANI		MEMBER

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CRIMINAL APPEAL NO.23/L of 1981.

Mohammad Latif	...	Appellant
	Versus	
The State	...	Respondent
Counsel for the appellant	..	Mr.M.R. Jan, Advocate.
Counsel for the Respondent	..	Advocate General,
Date of hearing	..	9th August,1981.

JUDGMENT

AFTAB HUSSAIN, CHAIRMAN: This is a case of incest since the charge against the appellant is that he committed sexual intercourse with his own sister Asia who is five years old. The appellant was convicted by the learned Additional Sessions Judge, Lahore, on the 16th of May, 1981, under section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, and sentenced to rigorous imprisonment for a period of five years only. He did not even sentence him to whipping. The appellant has now come up in appeal to challenge his conviction as well as sentence.

2. Mst. Hanifan P.W.5, mother of the appellant lodged the first information report on the 20th of August, 1980, complain-ing of two different occurrences of violation of the chastity of her daughter Asia by

the appellant. She complained that about 4 days ago the appellant who is a spoiled child came to her and demanded money. He asked her to pledge his wrist watch. Mst. Hanifan left the house with the watch and returned after about half an hour and gave the appellant a sum of Rs.5/-. He left saying that he had to go to Kasur. On the evening of the same day he found the under-wear of her daughter Asia soaked with blood and she was informed about the first occurrence but she did not take any step against the appellant since in this ugly affair her own son and daughter were involved. On the date of report also she had gone out of her house. When she returned she found Mohalladars assembled at her house. She was informed that Asia had been violated again by the appellant and her Shalwar was full of blood. She again wanted to drop this matter but had to file the complaint in view of the insistence and whisperings of the Mohalladars.

3. Asia was medically examined on the 20th of August, 1980, at 11.30 A.M. by Dr. Akhtar-un-Nisa Gillani, P.W-1, who found that she was about five years of age and had been subjected to sexual intercourse since her vagina was torn and stitching had to be administered to it. Ex.PW.1/1 is the correct corban copy of the medical legal report.

4. The appellant after his arrest was medically examined by Dr. Muhammad Siddique, Medical Officer, P.W-8, on the 22nd of August, 1980, at 12.30 P.M. He found him to be a 16 years old young male adult of average built with brown moustaches. His pubic and auxillary hair were thick. His penis and testes were

were well developed and of adult size. In his opinion there was nothing to suggest that he was not capable of performing sexual intercourse. In this way P.W-8 found the appellant to be an adult who had attained puberty despite the fact that his age was less than 18 years.

5. The shalwar (P.1) of Asia was taken into possession by Abdul Aziz, A.S.I, P.W-7. He made a sealed parcel which was taken to the Office of the Chemical Examiner and handed over there by Nazir Ahmad, Constable, P.W-3. The seal of the parcel was not tampered with. The Chemical Examiner found (vide his report Ex.PA) the above shalwar to be stained with semen and blood.

6. The prosecution examined three witnesses in support of the prosecution story. Jamil Mirza P.W-4, stated that about 8 months ago he was at his house when he heard the noise of Asia who was weeping. He saw that her shalwar was soaked with blood. He told him that her brother Latif had injured her after which he left. The witnesses also saw Latif appellant running from the spot. According to him the mother of Asia was not present at the time. The witness was cross-examined but nothing could be brought on record to shake his veracity.

7. P.W-5, Hanifan tried to shield the appellant which is quite natural in view of her relationship with him but in the cross-examination by the Assistant Public Prosecutor she owned the contents of report Ex-5. In cross-examination she made certain concessions but they are not

material since it is established fact that at the time of occurrence or when the witnesses came at the spot she was not present in her house. It is clear from this evidence also that she had made an attempt to drop the matter in view of the fact that her son and daughter were involved in this case.

8. Muhammad Rafiq, P.W-6, also stated that he was attracted to the spot and found Asia bleeding. He further stated that her mother was summoned and she said that her son had committed a mistake. The persons at the spot got the case registered. He also witnessed the recovery by the police of the shalwar, Ex.P.1, by memo Ex.P.W.4/1. In reply to a Court question he stated that he enquired from Mst.Asia as to what had happened and she told him that Latif had done something to her. In an attempt to confuse this matter a question was put to him by the defence whether his testimony was on the basis of Qayas. The witness answered in the affirmative but when the word Qayas was explained to him by the learned Additional Sessions Judge he denied the implication.

9. The learned counsel for the appellant contended that this was a case of no evidence as no one has seen the occurrence. We are, however, satisfied that the circumstantial evidence against the appellant is extremely strong and proves the commission of offence of zina by the appellant without any shadow of doubt. The evidence of Jamil which is straightforward proves that not only Asia had informed him about the commission of offence by Latif but he had also seen Latif running from the spot. It is no doubt true that Muhammad Rafique reached the spot later and did not see the appellant but before him also Asia made the said

statement implicating the appellant. This evidence is sufficient to bring home the guilt to the appellant.

10. It appears that the learned Additional Sessions Judge without saying so considered the appellant to be an adult within the meaning of section 2(a) of the above Ordinance, which defines the term as meaning ~~of~~ a person who has attained, being a male, the age of 18 years or, who has attained puberty. We have also no doubt that though the appellant might be of less than 18 years of age but he had attained puberty. It is clearly established by the evidence of P.W-8, who had called him to be an adult ~~who was~~ capable of performing sexual intercourse. The report of the Chemical Examiner proves that the shalwar of Mst.Asia was not only soaked with blood but was also stained with semen. In this view of the matter the appellant is an adult and was not entitled to the benefit of section 7 which provides a sentence of 5 years or fine or both as well as whipping not exceeding 30 stripes in case a person guilty of zina or zina-bil-jabr is not an adult. The appellant's case falls under section 10(3) of the Ordinance which provides for a minimum sentence of 4 years ~~and the maximum sentence of 4 years~~ and the maximum sentence of 25 years. A case of incest according to sharia, is liable to be punished with death. In these circumstances and particularly when the offence has been committed upon a child of nearly 5 years of age, there was no extenuating circumstance to favour the appellant who should have been sentenced by the learned Additional Sessions Judge to the full term of 25 years imprisonment and should also have been

awarded the punishment of whipping numbering 30 stripes. We are not able to follow the ground of leniency which in the present case influenced the learned Additional Sessions Judge. Unfortunately there is no appeal either on behalf of the complainant or on behalf of the state for enhancement of the sentence. The court is also not vested with any suo moto power to enhance the sentence. In these circumstances we are forced to let the appellant go with this nominal sentence passed against him by the learned Additional Sessions Judge. The appeal therefore, fails and is dismissed.

11. Copies of this order should be sent for proper guidance to the Sessions Judges and Addl: Sessions Judges in the country.

Aftab Khan
CHAIRMAN

F. Sadiq
MEMBER III

[Signature]
MEMBER VII

approved for reporting
Aftab Khan