

# IN THE FEDERAL SHARIAT COURT

( Appellate Jurisdiction )

PRESENT

MR.JUSTICE ZAFAR PASHA CHAUDHRY.  
MR.JUSTICE S. A. RABBANI

CRIMINAL APPEAL NO.237/L OF 2004  
CRIMINAL APPEAL NO.260/L OF 2004  
CRIMINAL APPEAL NO.289/L OF 2004

1. Qaiser son of Muhammad Akram Ansari,  
Resident of Jalal Baggan,
2. Maqsood Ahmad son of Abdul Rashid,  
R/O Usman Park,
3. Muhammad Imran son of Hadayat Ullah,  
Resident of Akbarian,
4. Muhammad Jameel son of Noor Ahmed,  
Resident of Usman Park, &
5. Muhammad Shahbaz S/o Muhammad Yousaf  
Resident of Wazir Colony,  
Tehsil and District Gujranwala. Appellants

Versus

The State	---	Respondent.
Counsel for the Appellants.	--- ---	Mian Sarfraz-ul-Hassan & Mian Muhamamd Ismail, Advocates.
Counsel for The State	--- ---	Raja Akhtar Nawaz, Advocate
F.I.R No. date & Police Station	--- ---	No.310 dated 26-06-2001 P.S Satellite Town District Gujranwala.
Date of Order of Trial Court	---	15-07-2004
Date of Institution	---	31-07-2004, 12-08-2004 & 14-09-2004 respectively.
Date of Hearing	---	01-03-2005
Date of Decision	---	01-03-2005

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**JUDGMENT**

**ZAFAR PASHA CHAUDHRY, J:** - The detailed reasons in support of the short order dated 1-3-2005 are given below:-

Criminal Appeal No.289/L/2004 is filed by Muhammad Shahbaz, convict whereas Criminal Appeal No.237/L/2004 is on behalf of three convicts namely Qaiser, Maqsood Ahmad and Muhammad Imran and Criminal Appeal No.260/L/2004 is on behalf of Muhammad<sup>Jameel</sup>. All the four appellants in Cr.A.No.237/L/2004 and Cr.A.No.260/L/2004 have been acquitted. However, Muhammad Shahbaz, appellant in Cr.A.No.289/L/2004 who had been convicted under section 11 and 10(3) of the Offence of Zina(Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the Ordinance) has been found guilty under section 16 of the Ordinance and awarded sentence for five years R.I. with fine of Rs.20000/-. His conviction under section 10(3) of the Ordinance has been maintained. However, his sentence of 25 years R.I. has been reduced to 10 years R.I. Both the sentences under sections 16 and 10 (3) of the Ordinance have been ordered to run concurrently. Benefit of section 382-B Cr.P.C. has been allowed.

2. As all the aforesaid three appeals, i.e. Criminal Appeal No.289/L/2004, Criminal Appeal No.237/L/2004 and

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Criminal Appeal No.260/L/2004 arise out of the same judgment dated 15-7-2004 passed by Mr. Muhammad Masroor Zaman, Additional Sessions Judge, Gujranwala, the same have been taken up together and decided by this common judgment.

3. Five accused persons namely Muhammad Shahbaz, Qaiser, Maqsood Ahmad, Muhammad Imran and Muhammad Jameel were sent up to face trial under section 11 of the Ordinance for abduction of Mst. Fatima Naureen and under section 10(3) of the Ordinance, Qaiser, Muhammad Imran along with Muhammad Shahbaz and Muhammad Jameel; appellants were indicted for committing Zina-bil-jabr with Mst. Fatima Naureen. All the five accused persons after having been convicted under section 11 of the Ordinance were sentenced to suffer imprisonment for life (each) and to pay fine of Rs.50,000/- each, in default of payment of fine, to suffer one year R.I. each. Qaiser, Muhammad Imran, Muhammad Shahbaz and Muhammad Jameel were convicted under section 10(3) and each one to undergo 25 years R.I. All the sentences of the appellants were ordered to run concurrently. Benefit of section 382-B Cr.P.C. was extended.

4. The prosecution story as narrated by Mst. Fatima Naureen, the victim is that she was present in her house alone on 18-4-2001. At about 2.00 p.m.(afternoon), Maqsood Ahmad,

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Muhammad Jameel, Muhammad Imran, Qaiser and Muhammad Shahbaz came to her house and enticed her to accompany them. When she came in the street she was made to board a car, which was parked in the street. They all proceeded towards Sialkot. On reaching a village in Sialkot, Muhammad Shahbaz committed Zina-bil-jabr with her. She was detained for four days. Thereafter she was removed from place to place. During her abduction all the accused persons kept on committing Zina-bil-jabr with her one after the other. She was kept by the accused persons for one month and three days. Muhammad Shahbaz prepared a nikahnama and Mst. Fatima Naureen was coerced to affix her thumb impression on the same although she had not consented to the niakh. Muhammad Shahbaz stayed with her maternal aunt wherefrom she managed to escape and reached her parents. She alleged that all the accused persons under a pre-planned scheme succeeded in alluring and enticing the victim. She was as such abducted and subjected to Zina-bil-jabr thereafter. An application was moved by her on 26-6-2001 on the basis of which formal FIR No.310 was registered with Police Station Satellite Town, Gujranwala. The FIR was as such registered after lapse of about two months and eight days.

After registration of the FIR, usual investigation ensued. Thereafter all the five accused persons were sent up to

face trial. They were all charged under sections 11 and 10(3) of the Ordinance. On pleading not guilty by all the accused, the trial commenced against them.

5. The prosecution examined eight witnesses in support of the charges against the appellants. Mst. Fatima Naureen appeared as PW.5. She narrated the same story as had been described by her in her application to the police. She gave her age as 19 years and explained that she was taken out of the house on a false pretext that her mother was calling her. She was made to sit in a car wherein Jameel and Maqsood were sitting in the front whereas Imran and Qaiser were sitting in the rear seat. Shahbaz accused in fact made her to board the car forcibly. She was taken to a village in Sialkot wherein Imran, Shahbaz, Jameel and Qaiser committed Zina-bil-jabr with her. They repeated the same with her during course of abduction. She was ultimately brought to village <sup>Blaggan</sup> Jalal/ in Gujranwala in the house of aunt of Shahbaz. Her signatures on nikahnama in between her and Shahbaz were obtained forcibly. She was made to sign some papers under threat. Apart from that her signatures and thumb impression were obtained on plain papers. She, however, managed to escape from the custody of the accused persons and joined her parents.

During course of cross examination, she admitted that her father and father of Shahbaz accused are cousins interse. As such Shahbaz accused is related to Mst. Fatima Naureen as her second cousin. She also admitted that Shahbaz was on visiting terms with her. However, the rest of the accused never came to her house prior to the occurrence. She also admitted that her house comprised of two rooms and on the day of occurrence, members of the whole family were present in the house. She was kept by the accused for a period of one month and three days. She is educated upto middle class. During her detention she was taken by Shahbaz to a photographer but she did not disclose to him that she in fact had been abducted. She was subjected to an extremely lengthy cross examination which is mainly directed to show that she had not been abducted forcibly rather she accompanied the accused especially Shahbaz of her own accord.

Muhammad Arshad, PW.4 aged about 26 years is a witness of the abduction as according to him he saw that a car had been parked in the street and Shahbaz accused was dragging Mst. Fatima Naureen into the car and as such he forcibly made her to board the car. This witness after seeing this incident left away inspite of the hue and cry raised by the victim Mst. Fatima Naureen.

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Mst. Fatima Naureen was medically examined by lady doctor Najma Mubashir, PW.6. On external examination, no injury, laceration, abrasion on her body was seen. Her hymen was ruptured completely with thick irregular margins. Vaginal swabs were taken and dispatched to the Chemical Examiner. The swabs were not found to be stained with semen.

Abdul Razzaq, ASI, PW.7 carried out the investigation and on completion of the same challaned the accused/appellants to court. The investigation was partly conducted by Khalid Mahmood, ASI as well.

6. On close of the prosecution case, all the appellants were examined under section 342 Cr.P.C. All of them denied the allegations against them and pleaded their false implication being friends of Shahbaz. Shahbaz also denied the allegations and pleaded that he had been implicated at the instance of Muhammad Akram, uncle of Mst. Fatima Naureen who was inimical towards him. On a question whether he intended to appear as his own witness under section 340(2) Cr.P.C., he replied in affirmative. However, subsequently after examining three witnesses in his defence i.e. Muhammad Aslam, DW.1, Muhammad Yaqoob, DW.2 and Abdul Ghaffar, DW.3. He stated that he did not intend to appear as his own witness.

Muhammad Aslam, DW.1 a private witness stated that police had declared Qaiser to be innocent. Muhammad Yaqoob, DW.2 proved nikahnama Exh.DC and stated that the same had been performed by him after obtaining consent of Mst. Fatima Naureen on 3-5-2001. The nikahnama was got registered by Abdul Ghaffar, DW.3, Nikah Registrar. Abdul Ghaffar, DW.3 stated that he was Nikah Registrar of Union Council, Civil Lines, Gujranwala, which was got registered by him, and the same bore his signatures.

7. After holding the trial, the learned Additional Sessions Judge held all the accused/appellants guilty under sections 11 and four of them under section 10(3) of the Ordinance as detailed above. They were awarded sentences as noted supra.

8. The learned counsel appearing on behalf of the appellants in the aforesaid three appeals submit that the prosecution has not been able to prove the charge against the appellants, the evidence is deficient and the prosecution story is totally unconvincing and unbelievable. As against that, the learned counsel on behalf of the State supports the judgment and as such submits that the appellants' conviction and sentences have been rightly awarded. We have heard the

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learned counsel at the bar and have gone through the evidence with their assistance.

9. To start with, Mst. Fatima Naureen is an educated girl studied upto middle class. She is adult, as on her own saying she was 19 years old at the time of her examination and as such adult at the time of alleged abduction. According to her, she was enticed away by the appellants on a false pretext that her mother was calling her. She was forcibly abducted by all the five appellants and as such was forcibly made to board the car, which had been parked in the street. The story of forcible abduction as narrated by her is totally unbelievable. Had there been any forcible abduction and that too during broad day light i.e. at about 2.00 p.m. (afternoon), she would have resisted the same by raising alarm and also by using the possible force in order to avert her forcible abduction. Her statement in this regard is rampant with inconsistencies and improbabilities. In support of abduction, the prosecution examined Muhammad Arshad, PW.4. He, according to him, was attracted to the scene of occurrence and saw that Mst. Fatima Naureen was being dragged into car. He after seeing the girl being forcibly dragged did not make any attempt to rescue her. Had he seen such an incident he or for that matter, any human being would have raised alarm and would make possible attempt to rescue the victim. This witness

did not make any effort in this behalf rather according to him, after seeing this incident he left away and did not even inform any one. Mst. Fatima Naureen admitted in her cross examination that at that time all the family members were present in the house. Had she offered any resistance or at least made some hue and cry, which would be a natural reaction, her inmates or neighbours would have been attracted to the scene and would have tried to thwart the abduction. Nothing as such was done. All these circumstances abundantly reflect that Mst. Fatima Naureen was not forcibly abducted by the appellants as alleged by her.

10. In this case, taking away of Mst. Fatima Naureen has been denied by all the accused except Shahbaz. Shahbaz has not come forward with mere denial rather he has set up a counter plea of entering into marriage with Mst. Fatima Naureen. According to him and his witnesses, Mst. Fatima Naureen entered into nikah with him. He produced Nikah Khawan as well as Nikah Registrar. In view of this plea of entering into nikah, Shahbaz appellant as such accepts that Mst. Fatima Naureen had gone with him and remained with him till 3.5.2001. Even if this plea is admitted just for the sake of consideration, the appellant Shahbaz could not escape from the liability of commission of Zina-bil-jabr by him. Mst. Fatima Naureen had not accepted the



validity of her nikah with Shahbaz. Her statement is supported by the fact that nikah was not performed in the house of her parents nor her father or for that matter any of his relations participated in the performance of nikah. Shahbaz appellant is related to Mst. Fatima Naureen. Had the nikah been performed with consent of Mst. Fatima then she could have owned the same and the marriage could be solemnized with blessings of her parents. It may be contended that the parents of Mst. Fatima were not willing to marry her to Shahbaz, therefore, she eloped with Shahbaz and subsequently entered into nikah with him with her free will and consent. This possibility could have been examined but according to Mst. Fatima she managed to escape from the custody of Shahbaz and thereafter joined her parents. This assertion made by her remains un-rebutted. Had she been a consenting party and she was aware that her parents would not be willing to marry her to Shahbaz, she would not have joined her parents. She very conveniently could have continued to remain with Shahbaz. Nothing has come on the record to controvert that she in fact did not escape from the custody and thereafter joined her parents rather she was recovered by the police or some other agency. In absence of any evidence to the contrary, the statement made by Mst. Fatima on oath, i.e. she herself managed to escape, cannot be discarded.

According to her, she escaped and joined her parents. She deposed on oath that she was abducted and was subsequently forced to marry Shahbaz against her will and consent. As accused Shahbaz has come forward with his counter plea of valid marriage then he has to substantiate the same. It is true that two witnesses have been examined by Shahbaz in defence but in view of denial by Mst. Fatima the prosecution and the defence plea has to be kept in juxta position and whichever appears to be more sound and weighty has to be accepted. The prosecution evidence is supported by the reliable witnesses and also by the attending circumstances. If viewed from another angle that according to Shahbaz he entered into nikah with Mst. Fatima on 3-5-2001 even then this plea cannot exonerate him of the offence. Mst. Fatima was abducted on 18-4-2001. From 18.4.2001 upto 3-5-2001 she remained in custody of Shahbaz. She was admittedly not married to him. Shahbaz is not related to her within prohibited degree. The allegation by Mst. Fatima that she was subjected to forcible sexual intercourse in absence of any motive to falsely implicate, has to be accepted. Although as discussed above the forcible abduction in the manner as alleged by the prosecution may not be there but the element of **enticement** on the part of Shahbaz appellant cannot be ruled out. Mst. Fatima was not willing to leave the house of her

parents. She was made to desert them by Shahbaz and subsequently he subjected her to sexual intercourse against her will. Therefore, offence under section 10(3) of the Ordinance is squarely constituted.

11. Learned counsel has very forcefully argued that ingredients of section 11 are not fulfilled, therefore, the conviction under section 11 is not tenable. Learned counsel for the State ~~and~~ to the contrary has argued that even if offence under section 11 may not be made out, the same undoubtedly comes within the purview of section 16 of the Ordinance. The learned defence counsel has not been able to repel the argument as to why the offence would not fall under section 16, as element of enticing away of Mst. Fatima does exist and has been successfully proved by the prosecution.

12. After taking stock of all the facts and circumstances of the case, participation of Qaiser, Maqsood Ahmad, Muhammad Imran and Muhammad Jameel, appellants in the commission of the offence is not free from doubt, therefore, they are acquitted of the charges against them. Criminal Appeal No.237/L/2004 and Criminal Appeal No.260/L/2004 are as such allowed. They have been ordered to be released from jail vide short order dated 1.3.2005.

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13. As regards Muhammad Shahbaz, in the light of the above discussion he has been found guilty under section 10(3) of the Ordinance. However, in the circumstances of the case and considering the gravity of the offence, sentence of 25 years R.I. is on the face of it excessive and is not commensurate with the gravity of the offence. The same is reduced to 10 years R.I. The conviction under section 11 of the Ordinance is altered to one under section 16 of the Ordinance and awarded sentence of five years R.I. thereunder with a fine of Rs.20000/-, in default whereof to suffer six months S.I. Criminal Appeal No.289/L/2004 on behalf of Muhammad Shahbaz, appellant as such is partly allowed in the above terms. Both the sentences of imprisonment shall run concurrently with benefit of section 382-B Cr.P.C.



S. A. RABBANI  
Judge



ZAFAR PASHA CHAUDHRY  
Judge

Approved for reporting.

Lahore: 1-3-2005  
M.Khalil



Judge