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IN THE FEDERAL SHARIAT COURT.

( Appellate Jurisdiction )

PRESENT

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

CRIMINAL APPEAL NO.69/I OF 2003

Zahoor Ahmad son of Lal Khan,  
Caste Awan, resident of Kachi Abadi,  
Sector G-8/4, Islamabad. Appellant.

Versus

1. Mumtaz Khan )  
2. Gul Taj Khan ) sons of Shah Zarin  
3. Riaz Khan )  
all Awan by caste,  
residents of Kachi Abadi,  
Sector G-8/4, Islamabad.  
4. The State. Respondents

Counsel for the Appellant Mr. Sanauliah Zahid,  
Advocate

Counsel for the Respondents Mr. Riaz Ahmad Khalil,  
Advocate.

Counsel for the State Mr. Fazal-ur-Rehman Rana,  
Advocate

Case F.I.R. No. date & Police Station. No.38. dated 31-1-2001  
P.S. Margalla. Islamabad.

Date of Judgment of Trial Court. 15-2-2003

Date of Institution 10-4-2003

Date of Hearing 11-11-2003

Date of decision 11-11-2003

**JUDGMENT:**

**ZAFAR PASHA CHAUDHRY,J:-** Appellant Zahoor

Ahmad father of child Azra Bibi assailed judgment dated 15-2-2003 passed by Ch. Muhammad Younis, Additional Sessions Judge, Islamabad whereby he acquitted all the three respondents namely Mumtaz Khan, Gul Taj Khan and Riaz Khan sons of Shah Zarin from case FIR No.38 dated 31-1-2001 registered with Police Station, Margalla, Islamabad under section 11 read with section 10(4) of the Offence of Zina(Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the Ordinance).

2. The prosecution case as initially set up by complainant Zahoor Ahmad in the FIR is that he was resident of Kachi Abadi, G-8/4, Islamabad. On 31-1-2001 he was shifting his residence to a new house and was transferring household goods there. He left his daughter Azra Bibi aged about nine years to keep watch on the goods lying in the house.

When Zahoor Ahmad and his wife returned to their old house, they found Azra Bibi missing. She was searched in the

vicinity but could not be found. The complainant thought that she might have left the house to play outside. After about two or three hours, a police van of Rescue-15 reached the complainant's house alongwith Azra Bibi. They informed that someone had subjected Azra Bibi to criminal assault and thereafter left her in the jungle. According to complainant, he believed that Mumtaz Khan, Riaz Khan and Gul Taj Khan had abducted his daughter to get her subjected to criminal assault by themselves or by someone else.

3. On his complaint, a criminal case under section 10 of the Ordinance was registered on the same day i.e. 31-1-2001 at 5.20 P.M. by Abdul Jabbar, ASI (PW.6) Investigation was taken up by Abdul Jabbar, ASI. He completed the preliminaries such as preparing site plan, getting Azra Bibi medically examined and also effecting recovery of incriminating articles such as blood stained clothes of Azra Bibi etc. He arrested Mumtaz Khan and Gul Taj Khan accused on 3-2-2001. He recorded the statements of the witnesses under section 161 Cr.P.C. and also received the defence evidence produced by the accused persons. On 15-2-

2001, the investigation was transferred from him to Muhammad Ashraf, S.I., PW.9. He partly conducted the investigation, inspected the place of occurrence and collected blood stained pieces of newspaper and empty packets of cigarettes etc, which were secured, vide memo Ex.PC. He got the statement of Azra Bibi recorded under section 164 Cr.P.C. On collection of sufficient incriminating material, challaned all the three accused to face trial.

4. The trial was conducted by Ch. Muhammad Younis, Additional Sessions Judge, Islamabad on receipt of challan (report under section 173 Cr.P.C.). The charge was framed against all the three accused i.e. Mumtaz Khan, Gul Taj Khan and Riaz Khan under two heads, firstly under section 11 of the Ordinance for kidnapping Azra Bibi in order to force her to illicit sexual intercourse, and secondly after kidnapping Azra Bibi they committed Zina-bil-jabr with her and thereby committed offence under section 10(4) of the Ordinance. The accused pleaded not guilty and as such claimed trial.

5. The prosecution in support of its case examined 11 witnesses. PW.1 Lady Dr. Nasira Tasneem medically examined Azra Bibi on 31-1-2001. She recorded her age as nine years. She observed as under: -

"On genital examination, there was tear in the posterior fourchette measuring 1 x 1 c.m. There was excessive bleeding from the tear and also from the vagina. Clots were found in the vagina. On examination under anesthesia, a tear of about 4 c.m. length was found in the right lateral vaginal wall with fresh bleeding from the tear. Vagina contained clots of about 100 m.l. blood."

6. PW.2 is Zahoor Ahmad, complainant and father of victim Azra Bibi. He reiterated the statement already made by him in the application Ex.PB to the police. He, however, added that the accused persons by touching his feet implored that the FIR may not be lodged.

7. PW.3 is the most important and vital witness being victim of the criminal assault. She being of tender age was subjected to intelligence test by putting a number of questions. She replied the questions intelligently. She was found to be intelligent and capable enough to make statement and narrate the incident occurred to her. She stated that she was present in her house alone when Mumtaz, Riaz and Taj Gul came to her and

took her alongwith them on the pretext that her father wanted; nail (کیر). She was taken to a jungle where a bridge and houses fell on the way. Mumtaz threatened her to shoot her. He tied her legs, arms and eyes and thereafter committed ziadati with her. He performed a shameful act with her. She started weeping whereafter her hands were untied. She started for her house but lost the way to her house. She gave a call bell at a house. The woman present in the house wanted to take her to hospital but the other woman prevented her lest she may not land in trouble. However, the woman showed her the bridge wherefrom she traced access to her house. In the market a policeman met her. He called the rescue police at 15. The police party took her to her father. She was taken to the hospital. Her shalwar P.1 was kept by the doctor, which she had identified to the same in court. Azra Bibi specifically stated that the two accused stayed back and only Mumtaz accused had taken her to the jungle.

She was subjected to fairly lengthy cross-examination but she could not be detracted from her statement nor any of her assertion could be falsified.

8. PW.4 Haji Muhammad Farooq is a witness of securing blood stained papers from the place of occurrence. He attested the memo Ex.PG.
9. PW.5 Dr. Muhammad Naseer testified the potency of the accused including Mumtaz Khan, respondent. He submitted three medical reports Ex.PC, PD and PE.
10. Abdul Jabbar, ASI, PW.6 is the investigating officer. He stated about various acts performed by him during investigation. During cross-examination, he referred to some statements which according to him were made by the victim or some other persons. The bulk of the statement in cross-examination is not even admissible in evidence. The same will be discussed in the lower part while assessing the prosecution evidence. Abdul Sattar, ASI is a formal witness who kept the sealed parcels in the malkhana and dispatched for their examination. PW.8 Muhammad Azam is a police constable. He carried the parcel to the office of the Chemical Examiner and also collected parcel from the doctor, which had <sup>been</sup> handed over to him.

11. PW.9 Muhammad Ashraf, S.I. partly performed the investigation and got recorded the statement of Azra Bibi under section 164 Cr.P.C. by Syed Muzaffar Ali Shah, Judicial Magistrate, who himself was examined as PW.10. He proved the statement under section 164 Criminal Procedure Code as Ex.PH and certificate thereon as Ex.PH/1.

12. PW.11 Dr. Muhammad Tariq Khan, Assistant Chemical Examiner is a formal witness who produced in court original report Ex.PJ by the Chemical Examiner. With that the prosecution closed its evidence.

13. Mumtaz Khan, respondent aged about 27 years was examined under section 342 Criminal Procedure Code. He denied the allegation of kidnapping or Zina. He in reply to the question as to why the case against him stated that he being neighbour of the complainant reprimanded him as to why strangers were visiting his house, on which a quarrel took place in between them. As a result of the same, false case was arranged against him and the other accused i.e. Gul Taj Khan and Riaz. He also denied other allegations and pleaded innocence.

14. After going through the evidence and hearing the parties, the learned trial judge acquitted all the three accused of the charges against them. The relevant discussion in support of his judgment is contained in paragraph No.19 of his judgment. As per his discussion, the prosecution case is mainly based on the testimony of the child witness. According to him, the first version is recorded by Abdul Jabbar, PW.6 on 2-2-2001. She did not specifically nominate any of the three accused but stated that one person resident of kothies committed Zina after taking her to jungle. The learned trial judge in order to ascertain the truthfulness of the statement consulted the police diaries. The police diary so discerned, according to him, indicated that she had not seen the culprit earlier and he was only one. She did not name that person. According to this investigating officer (PW.6), the victim was again examined on 5-2-2001 and she came up with a different version from the one contained in the FIR, wherein she leveled allegation of Zina against all the three accused. The matter, according to him, was entrusted to Masalhati Committee (conciliation committee) of the Mohallah

who examined the victim on 8-2-2001. This time, statedly the victim made a different statement before the Committee and gave the name of the accused as Ali.

15. Lastly the statement of the victim was recorded by Syed Muzaffar Ali Shah, Judicial Magistrate where she made statement, which in substance is the same as made by her in trial court. According to the impression gathered by the learned trial judge, the statement before trial court might have been tutored to her by the complainant. In this behalf, the main reference has been made to the statement of Abdul Jabbar, ASI, PW.6. After recording the so-called contradictions in the statement of the victim and thinking that the statement might be the result of tutoring, observed in paragraph No.20 of the judgment that prosecution version had become doubtful, therefore, by extending benefit of doubt to the accused, they were acquitted of the charge. The learned trial judge appears to have fallen in serious error by relying upon the statement made by PW.6 Abdul Jabbar, ASI during his cross examination, which in nutshell relate to constitution of Masalhati Committee and

according to Masalhati Committee, the victim made some statement before them which was different from the one made in court. It has further been observed that there are contradictions between various statements made by the victim during course of investigation. These observations are not borne out either from the record or from the evidence. Abdul Jabbar, ASI, PW.6 has referred to some statements made by the victim before him and also before members of the Masalhati Committee. No statement has either been recorded in this regard by the ASI or by any member of the Masalhati Committee. None of the members of the Masalhati Committee appeared in court nor they were examined in defence by the accused persons. ASI Abdul Jabbar and two other investigating officers were examined by the prosecution but it was nowhere pointed out that any statement different or contrary to the consistent prosecution version was anywhere available on record. It is not understandable as to how the so-called oral statement made before the police officer can be admissible in evidence. The statement is not even hearsay because the persons before whom the same had allegedly been

made have not come forward to prove or endorse the same. To carry out investigation is a legal duty of the police or other authorized agencies. This power cannot be delegated to any private person or body. The very constitution of Masalhati Committee, if any, was totally illegal and unjust. In the present case, the position is much worse. No member of the so-called Masalhati Committee was examined in court or even during course of investigation. The learned trial judge has based his finding of acquittal on totally inadmissible part of evidence of ASI Abdul Jabbar, PW.6. Judgment of acquittal based on the material which is not even a part of evidence nor the same has come on record in any manner, is not only illegal but would be treated as perverse and arbitrary.

16. The prosecution evidence as referred to above comprises of the statement of the victim, which of course is the most important piece of evidence. The victim is aged about nine years. She made rational reply to all the questions put to her before examining her as a witness. She made a consistent statement. The very perusal of the statement inspires

confidence. The victim has given all the details of the manner she was taken by Mumtaz Khan on a false pretext. She was removed to a jungle. The victim gave all the details of the passage leading to the jungle. She narrated the incident that her legs and hands were tied by Mumtaz Khan. Her eyes were also covered. She was subjected to sexual act in an extremely brutal manner. After she was released, she furnished each and every detail as to how she came back and was rescued by the police officials who carried her to her house. Her father lodged the report without any delay. The truthfulness of the victim is manifest from the very fact that although the father laid suspicion on three persons yet the girl stated that two of the accused stayed back and she was taken to the jungle only by Mumtaz.

17. Her statement is fully supported by the medical examination conducted by the lady doctor. The doctor's statement has been referred to above. Her private parts had been severely damaged. Grave injuries had been inflicted on the genitals. She was bleeding even at the time of medical

examination. Her swabs obtained by the doctor were found to be stained with blood. All these pieces of evidence taken together lead us to believe that the victim made a true narration of facts. Apart from the deposition in court, the victim during course of investigation was examined under section 164 Criminal Procedure Code by Judicial Magistrate Syed Muzaffar Ali Shah, PW.10. He fulfilled all the formalities required under section 364 Criminal Procedure Code. Statement Ex. PH is on the file. This statement is in conformity with the statement made by the victim in court. According to the Magistrate, the statement had been made voluntarily without any external pressure or persuasion. Contents and the details of the statement do not imply that the same could be result of any tutoring or prompting. The young girl was under such a severe pain that under that state of mind she could not possibly make a false statement at the behest of any one else. She remained with the offender for quite long time. She was taken away, was tied down and subjected to criminal assault. She could not in any way miss or forget the identity of her assailant. The father too could not

even think to spare the real culprit and falsely rope in an innocent person.

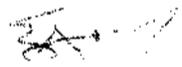
18. By taking stock of all the evidence and material on the record, we have no doubt in believing that victim Azra Bibi had been kidnapped by Mumtaz Khan accused/respondent and was subjected to Zina-bil-jabr. He as such has committed offence punishable under section 11 of the Ordinance. He by subjecting her to Zina-bil-jabr also committed offence covered by section 10(3) of the Ordinance.

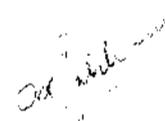
19. After carefully considering and assessing the evidence and the relevant circumstances, we are of the view that the sentence of 15 years R.I. under section 11 with a fine of Rs.10000/-, in default of payment of fine to undergo further six months R.I. and under section 10(3) sentence of 15 years R.I. will commensurate with the offence. He is thus convicted and sentenced accordingly. Both the sentences of imprisonment will run concurrently. Benefit of section 382-B Criminal Procedure Code shall be allowed.

20. Thus the appeal filed by Zahoor Ahmad against judgment of acquittal dated 15-2-2003 passed by Ch. Muhammad Younis, Additional Sessions Judge, Islamabad is allowed to the extent of Mumtaz Khan son of Shah Zareen, resident of Kachi Abadi G-8/4, Islamabad.

21. As regards respondents Gul Taj Khan and Riaz Khan, the victim herself has stated that neither of them accompanied Mumtaz Khan to the jungle nor they committed any other offence. The appeal to their extent is dismissed.

22. Mumtaz Khan, accused/respondent is present in Court. He be taken into custody and remanded to jail to serve out his sentence.

  
ZAFAR PASHA CHAUDHRY  
Judge

  
S. A. RABBANI  
Judge

Islamabad:11-11-2003  
M.Khalil

*Approved for Reporting*  
