

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE AGHA RAFIQ AHMED KHAN **CHIEF JUSTICE**
MR. JUSTICE SHAHZADO SHAIKH

JAIL CRIMINAL APPEAL NO.14/I OF 2008

Al-Ameer s/o Agha Muhammad ... Appellant
Caste Pathan r/o Afghanistan,
Presently Shumali Mohallah, Jhelum

Versus

The State ... Respondent

Counsel for the appellant ... Mr. Javed Aziz Sindhu,
Advocate

Counsel for the State ... Ch. Muhammad Sarwar Sindhu,
Additional Prosecutor General

FIR No. Date and ... No.184/2006 dated 22.08.2006
Police Station ... P.S. City Jhelum

✓ Date of trial Court ... 30.01.2008

Date of Institution ... 08.02.2008

Date of hearing ... 10.01.2011

Date of decision ... 10.01.2011

JUDGMENT

JUSTICE AGHA RAFIQ AHMED KHAN, Chief Justice :- This jail appeal filed by appellant Al-Ameer is directed against judgment dated 30-01-2008, delivered by learned Additional Sessions Judge, Jhelum whereby he was convicted under Section 12 of the Offence of Zina (Enforcement of Hadood) Ordinance,1979 and sentenced to Life Imprisonment and a fine of Rs.50,000/- or in default of payment to further undergo 6 months Rigorous Imprisonment. He was further convicted under section 377 Pakistan Penal Code and was sentenced to Rigorous Imprisonment for ten years with a fine of Rs.10,000/- or in default of payment to further undergo 6 months Rigorous Imprisonment. Accused was given benefit of Section 382-B Code of Criminal Procedure.

2. Precisely stating, facts of the case as given in the complaint Exh. PB are that the complainant Mohammad Sarfraz stated before the Police that he is tailor by profession and used to live in Machine Mohallah No.1 Jhelum . On 22.09.2006 at about 9.30 a.m. when he was present outside his house for going to his shop, he heard sound of weeping of a child

coming from an under construction house, situated in front of the complainant's house. The complainant alongwith Muhammad Shahbaz and Waqar Ahmad went inside the house and saw that one Pathan namely Al-Ameer son of Agha Muhammad Afghani presently living in Shumali Mohallah, Jhelum was committing sodomy with the son of complainant, namely Noman Sarfraz. On this statement of complainant, FIR No.184 of 2006 dated 22.08.2006 under section 377 Pakistan Penal Code and section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 at the Police station City, District Jhelum was registered and after due investigation the above named accused was found guilty and challan against him was submitted in the Court of competent jurisdiction. Charge was accordingly framed against the accused on 13-11-2006 to which he pleaded not guilty and claimed trial.

3. During the trial, the prosecution in order to prove the charge and substantiate the allegation leveled against the accused, produced ten witnesses:-

- i. P.W-1, Muhammad Siddique, took the victim to hospital for Medical Examination. After the medical examination, the doctor handed over to him sealed envelope which he delivered to Investigation Officer who took the same into possession vide recovery memo Exh.PA.
- ii. PW-2 Mohammad Sarfraz is the complainant of this case. He stated the same facts as narrated in his complaint Exh.PB.
- iii. PW-3 Noman Sarfraz is victim of this case. He deposed that after taking the breakfast he went to the street. The accused, who was Pathan, caught hold of him and took him to the room which was situated in front of victim's house. The appellant committed sodomy with him. He cried and on listing, his father, his brother Shahbaz and his uncle came there. The appellant ran away after taking his shalwar.
- iv. PW-4 Ahmad Raza, constable deposited the sealed envelope in the office of the Chemical Examiner, Rawalpindi on 4.9.2006 The envelope was handed over to him by the Moharrir of said Police Station.
- v. PW-5 Waqar Ahmad is an eye witness of the occurrence. He narrated the same facts as narrated by the complainant in his application Exh.PB .
- vi. PW-6 Mohammad Tufail, constable who received the sealed parcel from Bahli Khan Sub-Inspector, for safe custody on 22.8.2006. He kept the same in Malkhana and later on handed over the same to Ahmad Raza, constable PW-4 for its deposit in the office of Chemical Examiner, Rawalpindi.
- vii. PW-7 Muhammad Asghar, chalked out formal FIR Exh.PB/1 on the receipt of complaint Exh.PB.
- viii. PW-8 Dr.Hafiz Abdul Rehman, Medical Officer conducted the medical examination of Noman Sarfraz victim. He issued the MLR Exh.PC and also received the report from the office of Chemical Examiner Exh.PD which was positive.
- ix. PW-9 Dr.Shabbir Shah, Medical Officer examined the appellant Al-Ameer and found him fit to perform sexual act.
- x. PW-10 Bali Khan, Inspector is Investigation Officer of this case.

4. After the close of prosecution evidence in the trial under consideration, the statement of the accused was recorded under Section

342 Code of Criminal Procedure in which he denied the allegations and professed his innocence. The accused did not record his statement under section 340 (2) Code of Criminal Procedure on oath nor produced any witness in his defence.

5. After hearing the arguments of the learned counsel for the parties the learned trial Judge convicted and sentenced the appellant vide judgment dated 30-01-2008, which was assailed before this Court.

6. We have heard learned counsel for the appellant and learned Additional Prosecutor General for State and have perused the entire record with their assistance, carefully.

7. Learned counsel for the appellant contended that no evidence was available to believe that the appellant ever intended to abduct Noman Sarfraz victim forcibly and commit an offence of sodomy with him. Hence, section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 is not attracted in present circumstances of the case since there is no abduction. As regards Section 377 Pakistan Penal Code, the same is also not proved as the penetration was necessary for this act as

described in this Section which is not proved as per MLR Exh.PC.

Lastly, the learned counsel prayed for reduction in the sentence. The

following cases were cited at the bar during the course of hearing of the

above appeal:-

1. "1985 SCMR 1822 (Shams Saeed Ahmad Khan Vs. Saifullah)"
2. 1986 SCMR 533 (Muhammad Akhtar Vs. Muhammad Shafique and another)

8. Learned counsel for the State on the other hand opposed this appeal on the ground that it had been proved on the record through the statements of the witnesses that the appellant Al-Ameer forcibly took the victim Noman Sarfraz in the under construction house in order that the victim be subjected to un-natural lust as such Section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance,1979 is fully proved. So far as Section 377 Pakistan Penal Code is concerned, as per record of the case the appellant has committed sodomy with victim Noman Sarfraz as all the eye witnesses heard sound of weeping of victim from the under-construction house, they went inside the house and saw that the appellant was committing sodomy with victim Noman Sarfraz and there is no

contradiction in their statement so far as the commission of offence is concerned. The medical evidence is also a conclusive proof as the doctor sent the swabs and shalwar of the victim to the chemical examiner and the report thereof Exh.P.D. is positive. The victim has fully supported the prosecution case. The witnesses had no enmity or grudge to falsely implicate the appellant in the present case.

9. After taking everything into our full consideration and studying the case from all angles, we are fully satisfied with the guilt of the appellant, who committed sodomy with the victim. Both the eye-witnesses had provided a true and undiluted account of the occurrence and their evidence has inspired our confidence. We have not found any material contradiction between the eye-witnesses. The prosecution to prove its case produced Muhammad Sarfraz as PW-2 who was also complainant of this case. He is real father of the victim Noman Sarfraz. He has no enmity or strong motive to falsely implicate the appellant in this case. It is rare phenomenon that a father of the victim would substitute the culprit of the case. He has reasonably explained the presence of the appellant at the

place of occurrence in objectionable condition with the victim and we see no reason not to accept the statement of this eye-witness, which has not been shattered. There is yet another eye-witness of the case, namely Waqar Ahmad, PW-5, who appeared before the learned trial Judge in support of the prosecution case. He is an independent witness and he has also no animosity with the appellant to falsely depose against him. He also remained consistent on testimony despite his cross-examination to which he was subjected during the trial. He corroborated the statement of the above eye-witness on the main points. He has also reasonably proved the presence of appellant at the spot, which is neither particularly denied by the appellant, nor any defence witness was produced in support of his defence plea. This Court sees testimony of the prosecution witnesses to be worthy of credence.

10. The analysis of the entire record of this case coupled with anxious consideration given to the submission made at the bar by the learned counsel for the respective parties and application of independent judicial mind would lead us to an irresistible conclusion that the prosecution has

proved its case against the appellant through independent and unimpeachable evidence. The result of the above discussion is that the case against the appellant stands fully proved in the most convincing and logical order. Even single ambiguity or doubt could not be convincingly urged in the entire prosecution version in the trial. However, as far as section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 is concerned, it comprises of two parts, first part pertains to kidnapping or abduction for commission of offence of unnatural lust. Offence under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 would not be covered when the first part, i.e. kidnapping or abduction is not satisfied. Use of force has not been alleged in taking the victim for the offence of unnatural lust. There is no evidence at all as far as the alleged kidnapping or abduction is concerned.

11. The learned counsel for the appellant's plea that the appellant had no intention or planning and that the victim was not removed away from the vicinity of his house at any distance which could amount to removing him away by use of force, or even show of weapon, or keeping him in

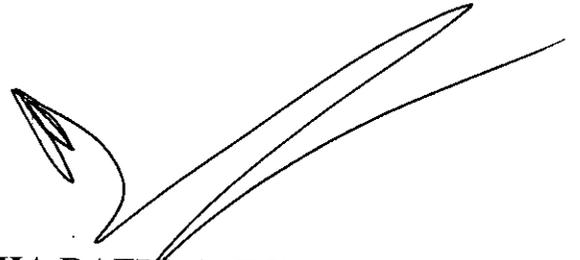
confinement for the purpose of the alleged commission of offence of unnatural lust, rests squarely on the judgments of the honourable apex court, cited in Para 7 above.

12. In this view of the matter, it was not safe to convict the appellant under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 in absence of direct and concrete evidence qua kidnapping and abduction. Conviction/sentence under this section of law recorded by trial Court against the appellant, without satisfying as to the proof beyond any shadow of doubt about kidnapping or abduction, is not sustainable in law. Charge against appellant under section 12 of the Offence of Zina (Enforcement or Hudood Ordinance, 1979 is not proved. Therefore, conviction and sentence recorded by trial Court under this section of law is set-aside. However conviction passed by the learned trial Court under section 377 Pakistan Penal Code is fully proved against the appellant. However it is considered that sentence of seven years R.I. with fine of Rs.10,000/- or in case of default to further 6 months S.I. will meet the ends of justice. The benefit of section 382-B Code of Criminal

Procedure, is already extended to the appellant, which shall remain intact.

With above modifications in the conviction and sentences, the appeal is partly allowed accordingly. These are the reasons of our Short Order

dated 10-01-2011.



JUSTICE AGHA RAFIQ AHMED KHAN,

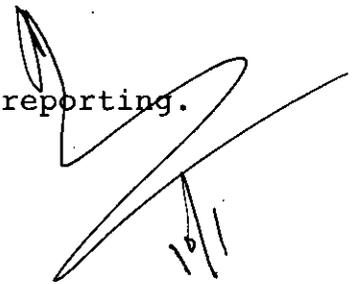
Chief Justice



JUSTICE SHAHZADO SHAIKH

Islamabad the
January, 10 2011
*Abdul Majeed/**

Approved for reporting.



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