

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

22

PRESENT

MR. JUSTICE NAZIR AHMAD BHATTI, CHIEF JUSTICE.

JAIL CRIMINAL APPEAL NO.171/I OF 1994.

Israr Hussain son of Khan ... Appellant
Muhammad resident of
Aba Khel Nowshera Kalan
(now confined in Central
Jail Peshawar)

Versus

The State ... Respondent

Re

For the appellant ... Mr.Nazir Ahmad Bhutta,
Advocate

For the State ... Mr.Muzammil Khan,
Advocate

No.& Date of F.I.R
Police Station ... No.13,dt.20.1.1992,
P.S Akora Khattak.

Date of order of
the trial court ... 2.5.1994.

Date of Institution ... 26.7.1994.

Date of hearing
and decision ... 24.10.1994.

23

JUDGMENT

NAZIR AHMAD BHATTI, CHIEF JUSTICE.- Mst.Safia Gul

aged about 16/17 years, unmarried daughter of complainant Sarwar Shah went to fetch water on 19.1.1992 at about noon time but she did not return back. Her father complainant Sarwar Shah searched for her and was informed that she had been abducted by their domestic servant Israr Hussain appellant herein, who was their servant and used to live in their baithak. The complainant went to Police Station Akora Khattak on the next day and recorded F.I.R No.13 at 2045 hours. The alleged abductee Mst.Safia Gul came back from Karachi to the house of her parents after about 5 months of the occurrence and she was produced before P.W.8 Shaukat Ali, ASI/Investigating Officer on 8.6.1992 who recorded her statement under section 161 Cr.P.C. She was medically examined by P.W.4 Lady Dr.Amina Saleha on the same day, according to which her hymen was ruptured and healed. The lady doctor took two vaginal swabs which had found stained with semen on chemical analysis. Mst.Safia Gul informed her parents that she had been abducted by the appellant. The ~~alatterant~~ was also arrested in village Akora on 22.9.1992 by the investigating officer. The appellant also made a confessional statement on 24.9.1992 before P.W.7 Mr.Amin Ullah Khan Magistrate Ist Class.

...3...

2. After investigation the appellant Israr Hussain was sent up for trial before the Sessions Judge Nowshera who charged him under sections 11 and 10 of the Offence of Zina(Enforcement of Hudood) Ordinance,1979 to which the appellant pleaded not guilty and claimed trial.

3. Eight witnesses were produced by the State in proof of the prosecution case. The appellant made a deposition under section 342 Cr.P.C and also produced an affidavit of Mst.Safia Gul sworn before Assistant Commissioner/Additional City Magistrate Karachi on 29.1.1992 and a nikahnama dated 30.1.1992.

4. After the conclusion of the trial the learned Additional Sessions Judge Nowshera, who was by then seized with the matter, convicted the appellant for both the offences under sections 10 and 11 of the Hudood Ordinance and for each of both the offences sentenced him to undergo rigorous imprisonment for 7 years, to suffer 30 stripes and to pay a fine of Rs.2000/- or in default to further undergo rigorous imprisonment for 3 months. The convict has challenged his conviction and sentence by the appeal in hand,sent from jail.

5. I have heard learned counsel for the parties at length and have very minutely gone through the entire record of the case.

6. The alleged abductee Mst.Safia Gul, appearing as P.W.6, deposed that the appellant took her to the house of his uncle at Pabbi on the pretext that his father was ill, that they both spent

25

a night at Pabbi from where he took her to Lahore in the house of an other uncle where they spent 5 nights and then he took her to Karachi where his parents and brothers were residing, that after spending 4 days at Karachi the relatives of the appellant performed her nikah with him and she used to reside with them, that the appellant used to commit sexual intercourse with her, that she spent 2 months with the appellant there, and then the appellant invited some persons at Karachi for selling her to them but his brothers came to know about it and they took her to Railway Station Karachi and seated her in a Peshawar bound train and so she returned to her home. In cross-examination she admitted her signatures on the affidavit dated 29.1.1992, copy Ex.D/2, which she had sworn before a Magistrate at Karachi. She also admitted that she had affixed her photographs on the affidavit. She also admitted that she had seen her signatures over the Nikahnama, copy Ex.D/1, which was duly filled at the time of performance of her nikah with the accused and she also admitted that she was not married to any other person before the said nikah. She further admitted that two months after the occurrence her mother came to Karachi and stayed with her for 2 days but she returned alone to Akora because the parents of the appellant were not allowing her to accompany the mother. Mst.Safia Gul did not deny the execution of affidavit as well as the nikahnama but she stated that she did not recognize the appellant as her husband.

26

7. The appellant in his deposition under section 342 Cr.P.C. stated that Mst.Safia Gul had accompanied him voluntarily and had married him with her own consent. He further stated that the confessional statement was obtained from him through torture. He also made the following statement:-

"I am innocent and falsely implicated in the present case. Mst.Safia was laready engaged with me, but her parents were interested in her marriage without her consent. I had gone to Karachi to visit my parents who were already settled there. When Mst.Safia came to know about her engagement by her parents with some one else, she came after me to Karachi and narrated the story to me and thereafter he performed a valid nikah. The copy of the nikah nama and affidavit are already on the file which are Ex.D-1 and Ex.D-2."

Ne

However, he neither produced any defence evidence nor made any deposition on oath.

8. The minute perusal of the deposition of alleged abductee Mst.Safia Gul revealed that she did not accuse the appellant for abducting her, that although she was taken to various places by the appellant and she also lived with him for about 4/5 months in Karachi but she did not complain to any person that she had been abducted by the appellant without her consent. She also did not accuse the appellant for subjecting her to sexual intercourse before the performance of her nikah with him. She did not controvert the affidavit and the nikah-nama. She was a girl of about 20 years of age and had attended puberty and she voluntarily entered into marriage bond with the appellant. She was neither abducted nor raped by him,

67

-6-


but she voluntarily accompanied him. It is also a fact that she refused to recognize the appellant as her husband after she came back to the house of her parents. All the aforesaid circumstances will clearly reveal that Mst.Safia Gul voluntarily accompanied the appellant and she voluntarily married him and her nikah was performed with the appellant by her own consent. She lived with the appellant as his wife voluntarily. It shall thus be seen that neither the offence under section 11 nor the offence under section 10(2) of the Hudood Ordinance was proved against the appellant. In fact Mst.Safia Gul was the legally wedded wife of the appellant and she lived in his company with her own consent and without any force from the appellant.

9. Consequently the appeal is accepted. The conviction and sentence of the appellant recorded on 2.5.1994 by the learned Additional Sessions Judge-I, Nowshera are set aside and he is acquitted of the offence for which he was convicted and sentenced. He shall be set at liberty forthwith if not wanted in any other case.


CHIEF JUSTICE

Islamabad,
24th October, 1994.
M.Akram/

FIT FOR REPORTING.


CHIEF JUSTICE