

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE DR. FIDA MUHAMMAD KHAN

MR. JUSTICE SYED AFZAL HAIDER

Jail Criminal Appeal No.229/I of 2006

Zahid Hussain son of Shabbir Hussain, Caste Jatt Warraich, resident of Chak No.62/DB, Tehsil Yazman District Bahawalpur

..... Appellant

Versus

The State Respondent

Cr. Revision No. 40/I of 2006

Mst. Abida Parveen d/o Muhammad Ashraf r/o Chak No. 62/DB, Tehsil Yazman District Bahawalpur

Petitioner

Versus

1. Zahid Hussain son of Shabbir Hussain r/o Chak No.62/DB, Tehsil Yazman District Bahawalpur
2. The State Respondents

Counsel for appellant M/S. Raja Ikram Ameen Minhas & Ch. Razaqat Ali, Advocates

Counsel for Complainant Nemo

Counsel for State Mr. Asjad Javed Ghural
Deputy Prosecutor General

FIR. No. Date & Police Station 384, 24.08.2004
Yazman Distt. Bahawalpur

Date of judgment of trial court 26.08.2006

Dates of Institution 07.09.2006 & 19.10.2006
Respectively

Date of hearing 06.05.2008

Date of decision 12.05.2008

JUDGMENT

SYED AFZAL HAIDER, JUDGE.- Zahid Hussain, appellant has, through this appeal, challenged the judgment dated 26.8.2006 delivered by learned Additional Sessions Judge, Bahawalpur in Hudood Case No.18/2005 whereby he has been convicted under section 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and sentenced to five years rigorous imprisonment with a fine of Rs.50,000/- and in default whereof to further undergo one year simple imprisonment for committing zina-bil-jabar with PW 2, Mst. Abida d/o Muhammad Ashraf resident of Chak No.62/DB Tehsil Yazman District Bahawalpur. He has also been convicted under section 452 of Pakistan Penal Code for house trespass and sentenced to four years R.I. with fine of Rs. 20,000/- and in default of non payment of fine the appellant will suffer additional six month's simple imprisonment. Both the sentences have been ordered to run concurrently. Benefit of section 382-B, of Code of Criminal Procedure has been allowed to the appellant.

2. Linked with this appeal is the Criminal Revision registered as 40/I of 2006 filed by Mst. Abida Perveen against the same judgment praying therein for enhancement of sentence of the appellant. Despite service there was no one to prosecute the Revision Petition.

3. Brief facts of the case are that Mst. Abida Perveen P.W.2, complainant, submitted a written application Ex.PB before PW 6 Sharafat Ali Khan, Inspector/SHO of Police Station Yazman on the basis of which FIR No. 384 was registered at the Police Station on the same date i.e. on 24.08.2004 at 8.15.p.m. The story as narrated in FIR Ex.PB/1, by complainant P.W.2 is to the following effect:-

“On the night between 23/24-8-2004 I, alongwith my mother was sleeping in the courtyard of our house. My father was sleeping outside the house. At about 11.00/12.00 (midnight) Zahid Hussain accused after scaling over the wall entered the courtyard of our house and put his hand on my mouth. He took out his pistol and commanded me not to make noise. I was frightened. Zahid Hussain then laid me under the tree of sirs, situated in our courtyard, removed my shalwar forcibly and after removing his own shalwar started committing zina-bil-jabr with me. In the meanwhile his hand slipped from my mouth and I raised hue and cry, upon which my mother, who

was sleeping nearby, and my father came running at the spot. Zahid Hussain brandishing his pistol shouted threats that whosoever come near shall not be spared. Thereafter he ran away by scaling over the wall. Due to shyness and in view of our honour we did not report the matter that night. Now I alongwith my parents submit written application so that necessary proceedings are initiated”.

4. The case was investigated by Sharafat Ali, Inspector/SHO P.W.6. On 24.8.2004 he recorded the FIR, got the victim PW 2 medically examined from Tehsil Headquarter Hospital Yazman through PW 4 Muhammad Sharif, constable. He took the swabs in possession vide memo Ex.PF and raided the house of accused on 10.9.2004. The accused joined investigation as he was on interim bail. The I.O. got the accused medically examined for his potency on the same day. On 18.10.2004 the interim bail application of the accused was rejected. He was declared proclaimed offender on 25.10.2004 as he had absconded and was finally arrested on 7.12.2004. The I.O. submitted incomplete charge before the court on 21.12.2004 for trial of the appellant.

5. The trial court on 22.3.2005 framed charge against the accused under section 10(3) of Offence, of Zina (Enforcement of Hudood) Ordinance VII of 1979 as well as section 452 of the Pakistan Penal Code. The accused did not plead guilty and claimed trial.

6. The prosecution produced as many as eight witnesses to prove its case. On Court's call Talib Hussain and Muhammad Ilyas were examined as CW 1 and CW 2 respectively. Mst. Abida Parveen appeared as PW2. By and large she repeated the same story as narrated by her in the written application Ex.PB submitted by her before the SHO on the basis of which FIR Ex. PB/1 was registered. Mst. Razia Bibi, mother of the victim appeared as PW3. She supported the version of the victim Mst. Abida Parveen. Dr. Bushra Tariq, WMO appeared as P.W.1 who had medically examined the victim on 24.8.2004. While giving the details of medical examination of the victim she stated that vulva and vagina was normal. A small laceration measuring 5 x 75 cm below the vagina was present. She also stated that "two fingers passed into the vagina. Hymen was not intact. Torn edges of hymen were red in colour and slight blood was also present on the torn edges". She opined that it was a case of rape. The statement of

the Investigating Officer has already been mentioned above. The evidence of remaining PWs is of formal nature.

7. The statement of appellant was recorded under section 342 of Code of Criminal Procedure on 21.06.2006 wherein he took the plea that he was a married person and did not commit any offence. He claimed innocence and false involvement and stated that the witnesses are related interse and no independent witness was produced. He also stated that Muhammad Ashraf father of the victim, tried to grab the plot of the appellant which attempt he resisted repeatedly. Hence this false case. The appellant neither produced any evidence in his defence nor made statement on oath under section 340(2) Cr.P.C. Learned trial court at the close of the prosecution evidence found the appellant guilty after appraisal of evidence. Resultantly he was convicted and sentenced as noted above. Hence this appeal.

8. We have gone through the evidence and also perused record of the case with the assistance of learned counsel for the parties. I had asked the learned counsel for the appellant to formulate points which he wished to convass while challenging the verdict of guilt recorded by learned trial

court. The learned counsel stated that (a) unexplained delay is fatal to the prosecution case, (b) enmity between the father of the appellant and the father of victim on the issue of ownership of plot is an admitted fact, (c) Appellant was allegedly armed with a pistol but no recovery was effected, (d) the chemical examination report relied upon by the prosecution is not reliable to this case, and (e) the occurrence as stated by PW 2 is highly improbable as no one would commit rape when parents of the victim are sleeping nearby; f) It was also contended that the punishment of fine is not sanctioned in sub section 3 of section 10 of Ordinance VII of 1979 and the judgment to that extent is illegal; g) the learned counsel also relied upon certain reports and canvassed that the witness is not worthy of credence if there are certain contradictions in her statement; h) in the end the learned counsel argued that the Court witnesses could not be confronted by the prosecution with their previous statements in view of section 162 of the Code of Criminal Procedure. The learned counsel also suggested that according to medical examination the hymen was not intact. However he was confronted with the observation of the Doctor that torn edges of hymen

were red and blood was also present on torn edges. There were two scratches at the back of victim and a laceration below the vagina.

9. Learned counsel for the State on the other hand supported the judgment and canvassed that ocular and medical evidence are mutually corroborative and the delay of just one day has been explained on the basis of honour issue. It has been further stated that the father of the victim would not go to the extent of exposing the honour of his daughter to satisfy his enmity on the question of plot. The copies of the F.I.R. Ex. DA dated 4.11.2004 and F.I.R. Ex. DB dated 28.06.2003 have no relevance with the present controversy. He also stated that the positive report of the Chemical Examiner Ex.PK supports prosecution version. Learned counsel relying on the testimony of PW 7, Muhammad Yasin 1192-HC, stated that as per school leaving certificate Abida victim was born on 05.01.1992 which means that at the time of rape she was about 12 years and that Zahid Hussain appellant was challaned in three other cases as per report Ex.P.J. The submission therefore was that the prosecution has successfully proved the case against the appellant who does not deserve sympathy at all.

10. The contention that the appellant was also involved in three other cases does not advance the case of the prosecution because Muhammad Yasin 1192-H.C. PW 7 while appearing as a witness on 20.5.2006 stated that he prepared a report Ex.PJ giving details of three cases against the appellant but the record shows that the appellant was examined by the trial court under section 342 of the Code on 21.6.2006 and no question was put to him to explain what had been stated in Ex.PJ. In this view of the matter we would not attach any importance to this argument.

11. In so far as the objection of learned defence counsel regarding the report of the Chemical Examiner is concerned we are already conscious that the date of dispatch of the packet as indicated in the document Ex. PK as 24th March, 2004 whereas Sarfraz Hussain, PW 8, states that he submitted the packet on 22nd February 2005. We are not considering this piece of evidence as of any corroborative value but it is not possible for us to discard the medical evidence of Lady Doctor PW 1. Her statement on the question of the condition of private parts of PW 2 and her opinion that it was a case of rape was not challenged by the appellant while

examining the Lady Doctor. In so far as the question of enmity is concerned it is a double edged sword. The defence has not been able to establish the enmity with the victim so as to raise reasonable doubt about implication of the appellant. The element of delay is not fatal. The evidence of victim, Pw 2, is direct and very clear. She is supported in her evidence by the testimony of her mother PW 3, who woke up after hearing the cries of her daughter PW 2 and saw the appellant run away. The impact of this shock was so grave that the family of the victim migrated from the village 4-5 days after the unfortunate incident.

12. We have also considered the impugned judgment of the learned trial court and there is nothing to disagree with the reasoning adopted therein. The inferences and conclusions arrived at by the learned trial court are based upon facts and circumstances of the case. However, the learned trial court while awarding sentences under section 10(3) proceeded to impose a fine of Rupees 50,000/- and in default of the payment of fine ordered the appellant to undergo an additional period of one year simple imprisonment which sentence he was not empowered to impose because such a penalty is not contemplated in sub-section (3) of section 10 of

Ordinance VII of 1979. This sentence is therefore being set aside. The convictions on both the counts and the other sentences are maintained. Resultantly the jail criminal appeal No.229-I-2006 filed by Zahid Hussain appellant is dismissed with the above mentioned modification. Both the sentences are to run concurrently and benefit of section 382-B of the Code of Criminal Procedure already granted to him is hereby maintained.

13. The connected case registered as Criminal Revision No. 40-I-2006 entitled Mst. Abida Parveen Versus Zahid Hussain etc, seeking enhancement of the sentence awarded to the respondent is also dismissed for lack of prosecution.

Sruaidar

JUSTICE SYED AFZAL HAIDER

Fida Muhammad

JUSTICE DR. FIDA MUHAMMAD KHAN

Sruaidar

Announced in open Court
on 12-5-2008 at Islamabad
Mujeeb-ur-Rehman/*

File for reporting
Sruaidar