IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SHAHZADO SHAIKH

JAIL CRIMINAL APPEAL NO. 112/I OF 2009

Muhammad Aslam s/o Muhammad Ali Caste Joyia r/o Chak No. 229/E.B, Tehsil Burewala District Vehari	...	Appellant
	Versus	
The State	...	Respondent

Counsel for the appellant	...	Mr.Muhammad Sharif Janjua, Advocate
Counsel for the State	...	Ch.Muhammad Sarwar Sidhu, Addl: Prosecutor General
FIR No. Date and Police Station	...	No.245/04, dated 17.07.2004, P.S. Gaggo District Burewala
Date of trial Court	...	11.08.2009
Date of Institution	...	07.09.2009
Date of hearing	...	04.03.2011
Date of decision	...	04.03.2011

JUDGMENT

SHAHZADO SHAIKH, J:- The appellant Muhammad Aslam has filed this jail criminal appeal against the judgment dated 11.08.2009 delivered by the learned Additional Sessions Judge, Burewala whereby he has been convicted under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to ten years Rigorous Imprisonment. He has also been convicted under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to ten years Rigorous Imprisonment. Both the sentences have been ordered to run concurrently. The benefit of section 382-B of the Code of Criminal Procedure has been extended to the appellant.

2. The brief facts arising out of FIR No. 245 dated 25.07.2004 at Police Station Gaggo, District Vehari are that complainant Mst. Ayesha Bibi had got conducted Sharai Nikah of her daughter Mst. Parveen Akhtar with Muhammad Zaheer son of Muhammad Ishaq , one year prior to the incident but Rukhsati had not taken place. Complainant further submitted that since accused Muhammad Tanveer developed illicit

relations with complainant's daughter Mst. Parveen Akhtar, he (the accused) was forbidden by the complainant from visiting her house. 10/12 days before lodging the complaint, when the complainant was not present in her house, the said Muhammad Tanveer came to complainant's house alongwith a camera. He made snaps of all her three daughters. Then he had been showing the snaps of Mst. Parveen Akhtar to other people of the village by propagating that he had illicit relations with Mst. Parveen Akhtar. On 17.07.2004 at 5.00 a.m. Mst. Aasia came to the complainant's house and asked Mst. Parveen Akhtar that her father was calling her. The said accused (Mst. Aasia) also got Rs.5000/- and ten suits, tied up the same in a bundle, and enticed away the complainant's daughter Mst. Parveen Akhtar. She took her (Mst. Parveen Akhtar) on the road where accused Muhammad Aslam and Muhammad Tanveer were also present alongwith shot gun and pistol respectively who abducted Parveen Akhtar. Hence this case was registered against them.

3. Investigation ensued as a consequence of registration of crime report. On 25.07.2004 Manzoor Ahmad ASI was assigned the

investigation. He called complainant and accused party. The complainant party did not turn up while only accused Tanveer appeared before him alongwith 9/10 persons and joined the investigation. Then he Investigation Officer declared accused Tanveer Ahmed innocent. The remaining accused did not join the investigation. On 31.12.2005 Sub-Inspector Falak Sher on receiving spy information that Mst. Aasia (P.O) of this case and Mst. Parveen the abductee of this case were present at Adda Qaurter, upon which he alongwith other police personnels reached at Adda Qaurter and took both the ladies into custody and produced them straight away before the duty Magistrate Burewala who sent Mst.Aasia accused to Judicial Lockup and directed to produce Mst.Parveen Bibi, the abductee, before the learned Illaqa Magistrate who on 05.01.2006 did not record statement of abductee under section 164 of the Code of Criminal Procedure and considered the statement of abductee Mst. Parveen Akhtar under section 161 of the Code of Criminal Procedure as sufficient. On 03.01.2006 the I.O. arrested accused Muhammad Aslam who was previously declared proclaimed offender and got his physical

remand from the Court of Illaqa Magistrate on 4.1.2006. On 09.01.2006 the learned Illaqa Magistrate sent accused Muhammad Aslam to Judicial Lockup. On 14.01.2006 this Investigation Officer recorded statements of HC-970 Abdul Ghaffar and Constable No.191 Ali Ahmad under section 161 of the Code of Criminal Procedure. After completing investigation, Police submitted a report under section 173 of the Code of Criminal Procedure requiring the accused to face trial.

4. After having completed legal formalities, challan was submitted against the accused before the learned Court of competent jurisdiction and thereafter the charge was framed against the appellant on 16-02-2007, which was denied by him and he claimed to be tried.

5. The prosecution in order to prove its case examined as many as eight witnesses. The gist of prosecution evidence is as follows:-

i. Mst. Parveen Akhtar abductee appeared as PW-1. She corroborated the statement of complainant. She further deposed that the accused persons took her to unknown place where accused Tanveer and Aslam kept on committing zina with her. Both accused obtained her thumb impression on blank papers. After about 1-1/2 years of the occurrence, she alongwith the accused Aasia were dropped by the accused Aslam and Tanveer from a car near Adda Quarter. The abductee on seeing Police ran towards them and told the Police about the accused. The police then arrested Mst. Aasia

accused and she (Mst. Parveen) was handed over to her father and thereafter she was medically examined.

ii. Mst. Ayesha Bibi complainant appeared as PW-2. She deposed the same facts as narrated in the crime report.

iii. PW-3 Rab Nawaz corroborated the statement of the complainant.

iv. HC-970 Abdul Ghaffar appeared as PW-4. On 31.12.2005, he received one sealed bottle containing swabs from Sub-Inspector Falak Sher which he handed over to C-II/691 Ali Ahmad on 12.01.2006 for onward transmission to the office of Chemical Examiner, Multan.

v. Ahmed Ali, PW-5 received one sealed parcel from Muharrar/HC-970 Abdul Ghaffar and deposited the same with Chemical Examiner, Multan intact on 13.1.2008.

vi. ASI Manzoor Ahmad was first Investigating Officer. His role has already been mentioned in para No.3 of this judgment.

vii. Sub-Inspector Falak Sher was PW-7. He was second Investigation Officer and his role has been mentioned in para No.3 of this judgment.

viii. Dr. Saira Zafar appeared as PW-8. She conducted medical examination of abductee Mst. Parveen Akhtar on 31.12.2005.

6. After closing prosecution evidence, statements of accused were recorded under section 342 of the Code of Criminal Procedure. They neither got their statements recorded under section 340(2) of the Code of Criminal Procedure nor produced any witness in their defense. In reply to question No.5, "why this case against you and why the PWs have deposed against you? the accused, Muhammad Aslam, deposed as under :-

> "Since abductee contracted marriage with me with her free consent and her parents had grudge in their mind. So, due to that grievance false case was got registered against me. In fact in the house of father of victim dacoity was committed and father of abductee moved an application on 17.04.2004 to SHO/P.S.City. Next date of said occurrence, the mother of abductee filed a new application to SHO by nominating me and other co-accused in false case. It is in the evidence that other accused Mst. Aasia and Tanveer found as proclaimed offender for the last 1-1/2 years."

7. After hearing both the parties the learned trial Court convicted and sentenced the appellant as mentioned in opening para of this judgment.

8. I have heard learned counsel for the parties at length who also let me through entire record of the case. During the trial, the accused/appellant Muhammad Aslam in statement under section 342 of Code of Criminal Procedure claimed that Nikah was performed with abductee Mst. Parveen Akhtar. According to PW-8 Dr. Saira Zafar, age of the abductee was 16 years at the time of medical examination of abductee, and on defense side there is no cross-examination of PW-8 about the age of the abductee, at the time of medical examination. The alleged performance of Nikah of Mst Parveen Akhtar, abductee, with Muhammad Aslam, accused, was not legally transparent as none of her parents or relations were associated in the process, which could legally

and in Shariah render apparent support to the claim of the appellant/accused. The accused/appellant has not produced any of the witnesses of alleged Nikah, nor produced Nikah Khawan in support of plea of Nikah, nor any other record regarding registration of the same as he had to prove validity of alleged Nikah with abductee. Therefore, plea of accused/appellant has no legal value or weight that Mst. Parveen Akhtar contracted her Nikah with accused appellant with her free consent, which renders the commission of intercourse with the victim by the accused/appellant within the mischief of definition of zina-bil-jabr. I have considered this aspect of the matter very anxiously.Although the accused/appellant claimed that he performed Nikah with Mst. Parveen Akhtar with her free consent, but the victim was only about 16 years of age, at the time of her medical examination, which took place about one and half years after the alleged abduction and alleged Nikah, i.e. she had not attained legal capacity as major under the Child Marriage Restriction Act 1929, where following are very relevant in this case for consideration:

"Section 2 Definition. ---In this Act, unless there is anything repugnant in the subject or context:-

(a) "child" means a person who, if a male, is under eighteen years of age, and if a female, is under [sixteen] year of age;

(b) "child marriage" means a marriage to which either of the contracting parties is a child;

(c) "contracting party" to a marriage means either of the parties whose marriage is or is about to be thereby solemnized; [and]

(d) "minor" means a person of either sex who is under eighteen years of age;

[(e) "union council" means the Union Council of the Town or Union Committee constituted under the Basic Democracies Order, 1959 (P.O. No.18 of 1959), within whose jurisdiction a child marriage is or is about to be solemnized]."

On the other hand, the accused/appellant was more than 44 years of age and he could well be of the age of her father. In such a circumstance, the question of free consent and intelligent choice of the girl did not arise.

9. Awareness about marriage encompasses more serious matters than mere *carnal knowledge* (relating to physical feelings and desires of body). Therefore, Islam *places conjugal consent over high pedestal of* morality rather than *carnality*. Consequently *consenting adult* is a person who has come of age enough, and therefore responsible enough, to decide and understand consequences of marriage.

10. Marriage involves a consent which is quite distinct in definition and in differentiation from all types of other consent, e.g., common consent, mutual consent, or implied or express consent. Consent for marriage is eloquent and declaratory, being more specific and expressive. Consent for marriage has deeper and wider implications for criminal, civil, and family laws, e.g., inheritance, etc. Therefore, *free consent,* for marriage, does not mean just *acceding to* or saying *'yes'* to the circumstantial or situational dictate. While analyzing quality, value or worth and features of such a free consent, following need to be considered:

-Ability of exercising free choice:

--capacity (legal capacity: not only sane, but mature mind, i.e., not only puberty, mere majority but age of responsive and conscious consent),

--capability to use that capacity,

--depending upon capacity, impediments to or assistance available for application of mind e.g., availability of

assistance of *wali* and *wakil* (guardian-counsel and supporter-protector),

--in one's own interest or benefit,

-extent of free availability of possible options to choose from,

-environ of freedom.

Because of such an importance, its registration as formal 'Nikahnama', not mere notarization, is essential, in the interest of concerned individuals, family and society, which leaves no room for admission of mere oral assertion or averment, particularly by one party when the other party vehemently denies it.

11. According to the Ordinance No. VII of 1979, The Offence of Zina (Enforcement of Hudood), the definition of the term "Zina-bil-jabr", specified under its section 6 is reproduced as under:-

> "6. Zina-bil-Jabr (1) A person is said to commit zina-bil-jabr if he or she has sexual inter-course with a woman or man, as the case may be to whom he or she is not *validly* married, in any of the following circumstance, namely:-
>
> (a) against the will of the victim;
> (b) without the consent of the victim;
> (c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt, or
>
> (d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and

> that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married."

In the circumstances of the case, it shall, therefore, be seen that even if alleged consent of victim was obtained by putting her in fear, it was not a free consent and freely considered choice for the Nikah but it (the Nikah itself) would be under duress and coercion and any sex offence committed against the victim Mst. Parveen Akhtar would be that of zina-bil-jabr and not a validly permissible performance of conjugal right. The accused was a man of advanced years, and the victim was quite a young girl under 16 years of age, at the time of occurrence. She could neither avail of the opportunity of well considered assistance and advice of parents or *wali,* nor was she herself so well educated and enlightened to safeguard against the decoy and exercise her free will to give a valid consent.

12. The learned Additional Sessions Judge, Burewala has convicted the appellant under section 10(3) and 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced him 10/10 years Rigorous

Imprisonment on both counts, as some of the ingredients of section 11 ibid are asserted by the victim, Mst. Parveen Akhtar, that the appellant Muhammad Aslam was armed with gun at the time of occurrence, as such, element of show of force is apparent in this case. The learned trial Court has observed that so far the case of Mst. Aasia is concerned, it appears that she has been involved in this case being wife of Muhammad Aslam, the main accused, and it is not believable that she (Aasia) would help her husband, Aslam, the main accused, in kidnapping/abduction of Mst. Parveen Akhtar for commission of zina-bil-jabr. Consequently, learned trial Court acquitted her by giving her benefit of doubt and appeal against her acquittal has not been filed by prosecution. The reasons of her acquittal from the charge of abduction do not suffer any illegality as observed in para-16 of judgment of the trial Court. This aspect of the case against the accused/appellant Muhammad Aslam, has also to be kept in view in the light of the evidence on record.

13. In this view of the matter, I have come to the conclusion that offence committed by the appellant against the victim was that of

kidnapping and zina-bil-jabr. As already discussed, the accused was a person of advanced years, and victim was not a major, in circumstances which were illicitly developed around her immature person amounting to kidnapping for the purpose of illicit intercourse.

14. The co-accused Muhammad Tanveer was already declared a proclaimed offender; if tried later, the findings in this case would not affect the merit of his case.

15. I am, therefore, of the considered view that the prosecution has proved the guilt of accused Muhammad Aslam, beyond any reasonable doubt, and he stands rightly convicted under sections 10(3) and 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 by the trial Court.

16. I, therefore, maintain the conviction of the appellant under sections 10(3) and 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, by the trial Court.

17. So far the quantum of the sentence is concerned, I feel that the same also requires consideration by this Court, keeping in view the peculiar circumstances of this case.

18. Earlier Nikahnama of Mst. Parveen Akhtar with Muhammad Zaheer as a legally relevant document was not produced and proved. The appellant however took the plea of Nikah with the victim and tendered copies of Nikahnama and the writ petition No. 19058/2004 titled Mst. Parveen Bibi vs. SHO Police Station etc. in this regard. It is perhaps under these circumstances that the learned trial Court has awarded sentence of 10 years R.I. under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, which, in fact, it could not. This section reads as follows:

> " Kidnapping, abducting or Inducing women to compel for marriage etc. Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment for life and with whipping not exceeding thirty stripes, and shall also be liable to fine; and whoever by means of criminal intimidation as defined in the Pakistan Penal Code, or of abuse of authority or any the method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid."

It would be seen from the above that the prescribed sentence under section 11 Offence of Zina (Enforcement of Hudood) Ordinance, 1979, is "imprisonment for life" and not less, as done by the learned trial Court in

its judgment, dated 11.08.2009 by awarding R.I. for 10 years only although it was not empowered as such. Furthermore, fine is also mandatory under this section. The learned trial Court, has, however, considered it fit enough to award R.I. for 10 years only and not life imprisonment. The extenuating and mitigating circumstances, and the fact that family of the appellant, particularly his wife, Mst Aasia, have also been made to suffer for no fault of theirs, and continuing the separation of the accused would make life of entire family more miserable than his own life imprisonment, alongwith the fact that no Petition has been filed by the complainant for enhancement of the sentence of 10 years Rigorous Imprisonment, awarded by the learned trial Court need to be considered. Neither complainant nor State/prosecution at the stage of pronouncement of judgment by the trial Court raised any objection that the appellant could not be awarded sentence lesser than life imprisonment without having recourse to the amendment of the charge. Even at the stage of appeal, no one came forward with such a request. Furthermore towards the conclusion of the hearing of the appeal when the complication

arising from the lesser sentence of 10 years R.I. awarded by the learned trial Court under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, was pointed out, no such plea was raised on this account. The cardinal principle of dispensation of justice that prolongation of litigation must of necessity be avoided to bring harmony and peace in the society, should be kept in view while resolving technical lacuna and removing complications, so that no excess should be committed. In this peculiar situation, it would not be appropriate and safe judiciously to go for enhancement of present sentence and that also for life imprisonment because no other option in between is available within section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

19. Therefore, I feel inclined that the sentence of 10 years R.I. awarded by the learned trial Court on this account be also converted into already undergone, to resolve the complication created by the judgment of the learned trial Court by not awarding the prescribed sentence, and also to

safe guard against any element of injustice, with all the concerned, and for ensuring justice, in the totality of the circumstances of the case.

20. In this view of the matter and on consideration of the extenuating and mitigating circumstances the sentence of the appellant, has appropriately been reduced, on both counts from 10 years R.I. to the one having been already undergone.

21. Appellant, Muhammad Aslam, is in jail. He be released forthwith if not required in any other custody case.

22. Resultantly this appeal stands partly accepted with the above modification in the sentence. Copy of this judgment shall be sent to Mr. Muhammad Zubair Cheema, the then Additional Sessions Judge, Burewala for future guideline. These are reasons of my short order dated 04-03-2011.

JUSTICE SHAHZADO SHAIKH

Islamabad, the
4th March,2011
Abdul Majeed

Fit for reporting.

JUSTICE SHAHZADO SHAIKH