

**IN THE FEDERAL SHARIAT COURT**  
(APPELLATE/REVISIONAL JURISDICTION)

**PRESENT**

**MR. JUSTICE DR. SYED MUHAMMAD ANWER**  
**MR. JUSTICE AMEER MUHAMMAD KHAN**

**JAIL CRIMINAL APPEAL NO.04-I OF 2024**

Sultan Ali Khan S/O Fateh Sher, Caste Mahar, R/O Golley Wali, Quaid Abad.

APPELLANT

**VERSUS**

1. The State
2. Haji Dost Muhammad.

RESPONDENTS

COUNSEL FOR THE APPELLANT	...	MR. ARSHAD ZAMAN KAYANI, ADVOCATE.
COUNSEL FOR THE STATE	...	MIRZA ABID MAJEED, DEPUTY PROSECUTOR GENERAL, PUNJAB
COUNSEL FOR THE COMPLAINANT	...	MALIK AWAISALAM, ADVOCATE.
FIR NO. DATE AND POLICE STATION	...	170OF 2004, 10.09.2004 WAN BHACHRAN, DISTRICT MIANWALI
DATE OF JUDGMENT OF TRIAL COURT	...	04.10.2023
DATE OF INSTITUTION	...	28.3.2024
DATE OF HEARING	...	09.10.2024
DATE OF JUDGMENT	...	23.10.2024

## JUDGMENT

AMEER MUHAMMAD KHAN, J:This appeal has been preferred through Jail Superintendent by the convict Sultan Ali Khan, the Superintendent Jail Mianwali forwarded the same to the Deputy Registrar Judicial Lahore High Court Lahore on 23.10.2023 within the limitation period of 60 days for filing the appeal against conviction and sentence, the superintendent proceeded under Rule 90 of the Pakistan Prison Rules and Section 420 of the Code of Criminal Procedure, 1898, provide procedure when appellant in jail according to which when the appellant is in jail he may present his petition of appeal and copies accompanying the same to the officer incharge in jail who shall there upon forward such petition and copies to the **proper appellate Court**. This appeal has been received from the Hon'ble Lahore High Court Lahore vide order dated 18.03.2024. The Superintendent Jail Mianwali had not forwarded this appeal to the proper appellate Court that is the Federal Shariat Court as provided under Section 20 Offence of Zina (Enforcement of Hudood) Ordinance, 1979, therefore, the delay cannot be attributed to the appellant beside that as per proviso provided in Rule 18 sub-clause (a) of the Federal Shariat Court Procedure Rules, 1981, this Court may for sufficient cause extend the period, therefore, forwarding this jail appeal by the Superintendent Jail to the High Court instead of the Federal Shariat

Court is a sufficient cause for extension of the time period therefore the delay is hereby condoned.

2. As per Rule 19 of the Federal Shariat Court (Procedure Rules),1981, the present appellant has been provided a counsel for his defence on state expenses.

3. This jail appeal has been preferred against the conviction and sentence for life imprisonment, RI with fine of Rs. 1,00,000/- and in default thereof to further undergo six months Simple Imprisonment vide judgment dated 04.10.2023 recorded by Mr. Noor Muhammad Bismal Additional Sessions Judge, Mialwali with benefit of Section 382-B Cr.P.C.

4. PW-1 Haji Dost Muhammad lodged the FIR on 10.09.2004 at 02:30 p.m regarding the occurrence taking place on the midnight on 03/04.09.2004 stating therein that his daughter Shamim Akhtar was married to Muhammad Ramzan about 15/20 days of the lodging of the FIR and rukhsati has not yet been taken place, the appellant Sultan Ali Khan had visiting terms with him who developed illicit relationship with the said daughter and on the mid night of 03/04.09.2004 when he had gone to irrigate his crops, on return to his house Shamim Akhtar was not found present, he made a search when Muhammad Khan and Muhammad Iqbal sons of Muhammad Zaman interacted him and informed that they had seen his daughter when she was boarded in a coach along with

Sultan Ali Khan, the appellant, Muhammad Iqbal and Muqrab the co-accused since acquitted while proceedings towards Quaidabad.

5. The present appellant was arrested by PW-4 Muhammad Sher ASI on 22.11.2022 and he submitted the report under Section 173 Cr.P.C, thereafter the formalities were completed and on 28.01.2023 the present appellant was charged sheeted for the abduction of said Shamim Akhtar for commission of illicit intercourse and applied sections 10/11 of the Offence of Zina(Enforcement of Hudood) Ordinance, the accused denied the charge and claimed trial.

6. The prosecution evidence was summoned and recorded the gist of which is as under.

7. PW-1 Haji Dost Muhammad is the first informer who reiterated the story as mentioned in the facts beside that he stated that her daughter Shamim Akhtar herself reached home after escaping from the custody of the accused after 5/6 days of the occurrence he produced her before the police where her statement was recorded under Section 161 Cr.P.C and also was medically examined, after  $\frac{3}{4}$  days returned to home she was murdered by her maternal uncle namely Muhammad Khan by firing upon her. He lodged the FIR for murder of her said daughter before the police station Wan Becharan. PW-2 Muhammad Iqbal is the witness of Waj-takkar who claimed seeing the Shamim Akhtar Abductee on

the midnight of occurrence while he and his brother Muhammad Khan were present at Adda Shadia. PW-3 Ghulam Shabbir Inspector, this PW on 19.11.2004 obtained nonailable warrants of arrest of Sultan Ali Khan Appellant and on 26.11.2004 obtained proclamations under Section 87 of Criminal Procedure Code of the said Sultan Ali Khan. PW-4 Muhammad Sher ASI, this PW arrested Sultan Ali Khan on 22.11.2022 and produced and forwarded the report under Section 173 Cr.P.C. PW-5 Dr. Raheela Tariq Niazi medically examined Shamim Akhtar abductee on 14.09.2004 while she was posted as WMO at RHC Wan Bacharan District Mianwali and proved the MLC Ex-PB and finally opined that act of sexual offence had been committed with Shamim Akhtar vide her report Ex-PB/1 . PW-6 Atta Ullah, this PW recorded the FIR Ex-PA on 10.09.2004 while he was posted as Mohrar Wan Becharan and on 14.09.2004 he received a sealed parcels of swabs from Manzoor Ahmed SI, I.O since dead and got the same transmitted on 16.09.2004 through Raza Muhammad 572/C to office of Chemical Examiner Rawalpindi, this PW also claimed acquaintance with hand writing of Manzoor Ahmed SI and confirmed that the application for medical examination Ex-PC of Shamim Akhtar abductee, site plan of the place of occurrence Ex-PD, recovery memo of swabs Ex-PE. On 08.07.2023 the learned prosecutor gave up Muzaffar Ali 239/C and Muhammad Raza 472/C being dead, on 05.08.2023 the learned ADPP for state gave up Shamim Akhtar

abductee, Manzoor Ahmed SI being dead and PWs Zafar Hayat 428/C and Inayatullah 749/C as unnecessary and tendered the report the chemical examiner Ex-PF. Then on 12.09.2023 he gave up Muhammad Khan, Sher Muhammad and Munir Muhammad PWs as unnecessary and closed the prosecution case. On 15.09.2023 statement of the appellant/accused Sultan Ali Khan was recorded under Section 342 Cr.P.C, he did not opt for defence nor opted to appear his own witness for stating on oath in his defense as provided under Section 340(2) Cr.P.C.

8. Thereafter conviction and sentence was passed vide this impugned judgment, hence, this appeal.

9. Learned counsel for the appellant Mr. Arshad Zaman Kayani appointed on the state expenses contended that the burden to prove the charge was upon the prosecution and prosecution has failed to prove the charge against the appellant. The judgment suffers with mis-reading and non-reading of the evidence, the prosecution violated the procedures and the inadmissible evidence has been considered by the learned trial Court and passed the conviction and sentence without any legal justification and also tendered the written arguments. He further stated that appeal of the Sultan Ali Khan was well in time, but with the fault of the Superintendent District Jail Mianwali forwarded the same to the

Hon'ble Lahore High Court violating the provision of Section 420 of the Cr.P.C, he also requested for condonation of the said delay.

10. On the other hand learned Deputy Prosecutor General with the assistance of Malik Awais Alam, Advocate for the complainant vehemently opposed the contentions and categorically stated that the accused was an absconder and the prosecution has succeeded to prove the charge against him without any shadow of doubt.

11. Arguments heard. Record perused.

12. Prosecution evidence hinges upon following pieces of evidence.

i. Abduction

ii. Waj-Takkar

iii. Abscondence

iv. Medical evidence

13. PW-1 Haji Dost Muhammad, father of abductee Shamim Akhtar nominated the present appellant/convict on the basis of information extended to him by Muhammad IqbalPW-2 and Muhammad Khan PW. Muhammad Khan PW has been given up by the prosecution as unnecessary. Therefore, PW-2 Muhammad Iqbal is the only witness who advanced the evidence of waj-takkar.

14. It is in evidence that Muhammad IqbalPW-2 and Muhammad Khan PW since given up are brothers inter-se, both are maternal uncles of Shamim Akhtar abductee. The said

Muhammad Khan PW committed her murder on 20.09.2004 as per the FIR Ex-DA where in PW-1 Haji Dost Muhammad father of the abductee stated about the Shamim Akhtar that "after  $\frac{3}{4}$  days of her return to home she was murdered by her maternal uncle Muhammad Khan and he got the case registered under Section 302 PPC, police Station Wan Bechran. Later on the parties reached a compromise inter-se which by itself discloses their scheme.

15. PW-2 Muhammad Iqbal, the star witness of the prosecution has not adduced any reason for his presence on the midnight of  $\frac{3}{4}$  September, 2004 at Adda Shadia, the Bus Stop where he claims seeing Sultan Ali Khan, the present appellant along with Muhammad Iqbal and Muqrrab both since acquitted accused along with one unknown person, taking along Shamim Akhtar abductee in a coach forcibly to Quaidabad.

16. The evidence of waj-takkar is considered a weak evidence and the prosecution has to prove on record plausibly the presence of the witnesses at the concurring place, in this case no reason whatsoever has been advanced by PW-2 Muhammad Iqbal, no specific or approximate time of his presence at the bus stop has been advanced in evidence. He stated that "he did not know the accused Sultan Ali Khan prior to registration of the case" he also admitted that his brother Muhammad Khan was alleged for the murder of Shamim Akhtar abductee, he also admitted that he had come to the court with Haji Dost Muhammad meaning thereby



that they did not develop strain relationship inter-se over the murder of Shamim Akhtar.

17. The conduct of PW-2 Muhammad Iqbal is not acceptable when he claimed that the culprits were not known to him then the source of revelation of their names to him while extending information to Haji Dost Muhammad PW-1 remains a mystery throughout the prosecution evidence, the prosecution was bound to provide plausible evidence of waj-takkar, in this case the conduct of the PWs due to the murder of Shamim Akhtar with a collusive inference make their deposition doubtful and unnatural, the prosecution failed to adduce a reliable piece of evidence in the form of waj-takkar, had they seen the abductee, their niece with the appellant and others in the midnight their conduct would be entirely different at the spot, therefore, on the face of it, it seems a cooked up story.

18. Manzoor Ahmed SI was the investigating officer of this case who recorded the statement of Shamim Akhtar abductee under Section 161 Cr.P.C and appeared as PW-7 on 05.07.2005 in the previous trial of the co-accused and introduced the statement of Shamim Akhtar as Ex-PK as dying declaration. Manzoor Ahmed SI PW died before commencement of the instant trial but the prosecution in the present trial failed to adduce his evidence so preserved under Section 512 Cr.P.C read with Article 47 of the Qanoon-e-Shahdat Order 1984 rather opted to

adduce Attaullah729/MHC as PW-6 for proving the hand writing and signatures of said Manzoor Ahmed SI since died and produced application Ex-PC for medical examination of Shamim Akhtar, the site plan of the occurrence Ex-PD and recovery memo of the Swabs Ex-PE in evidence as recorded in the hand writing and signatures of said Manzoor Ahmed SI since dead. No other statement if recorded by the Manzoor Ahmed SI has been adduced in evidence and the learned prosecutor closed the prosecution case on 12.09.2023.

19. As per Section 353 Cr.P.C, the evidence has to be recorded in the presence of the accused, reproduced as under:-

*“Evidence to be taken in presence of accused. Except as otherwise expressly provided, all evidence taken under Chapters XX, XXI, XXII and XXII-A shall be taken in the presence of the accused or when his personal attendance is dispense with, in presence of his pleader”.*

20. But Section 512 Cr.P.C provides the criteria and the manner for recording of evidence in absence of the accused and is an exception to the Section 353 Cr.P.C ibid.

21. In the previous trial of the co-accused namely Muhammad Iqbal and one other, Manzoor Ahmed SI was recorded as PW-7 on 05.07.2005 and stated about the recording of her statement under Section 161 Cr.P.C as Ex-PK. The prosecution opted to omit the statement of the abductee who had died after her statement was

recorded and the investigating officer who had recorded her statement had also died subsequent to recording the statement.

22. The prosecution failed to adduce said evidence and did not submit for transposition of the said evidence into the present trial as per requirements of Section 512 Cr.P.C, the preserved evidence had the status of a substantive piece of evidence rather the prosecution opted for introducing secondary evidence as per Article 78 of the Qanoon-e-Shahdat Order, 1984.

23. The question arises as to whether the prosecution could withheld the substantive piece of evidence deemed preserved in the previous trial in accordance with section 512 Cr.P.C and could opt for introducing secondary evidence and that in a casual manner. The answer is that the prosecution was bound to adduce available evidence of the prosecution witnesses under Section 512 Cr.P.C could be deemed as the best evidence in the circumstances.

24. Abscondence of the accused is a question of fact and the prosecution was bound to prove the same in this trial. PW-3 Ghulam Shabbir Inspector claimed that on 19.11.2004 while he was posted at Police Station Wan Bhachran he submitted an application before the Area Magistrate for obtaining nonailable warrants of arrest of Sultan Ali Khan appelliant accused, nonailable warrants of arrest were issued against him, he then on 26.11.2004 vide an application obtained proclamations under Section 87 Cr.P.C of the said Sultan Ali Khan. During his statement this PW Ghulam

Shabbir stated that **“it is correct that documents that is applications, warrants of arrest and proclamations regarding which he gave evidence today, are not with me at present time and not in the file”**. As per Section 87 (3) Cr.P.C:-

“a statement in writing by the court issuing the proclamation to the fact that proclamations was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with and that the proclamations was published on such date”.

25. Therefore when the prosecution failed to produce any required evidence comprised of warrants and the proclamations, the fact that the appellant/accused was absconding stood Not proved.

26. The testimony of Dr. Raheela Tariq Naizi that sexual offence had been committed to Shamim Akhtar by itself cannot be considered as a connecting evidence against the appellant in absence of any other substantive prosecution evidence. As discussed above the prosecution failed to produce any reliable evidence against the appellant.

27. Therefore, we are of the considered view that prosecution has absolutely failed to connect Sultan Ali Khan accused with the charge therefore, this appeal for this reasons stated hereinabove is allowed. The conviction and sentence vide the impugned judgment

dated 04.10.2023 being not maintainable, is hereby set aside, he is acquitted from the charge, he be released forthwith if not required in any other case.

**JUSTICE AMEER MUHAMMAD KHAN  
JUDGE**

**JUSTICE DR. SYED MUHAMMAD ANWER  
JUDGE**

Dated, Islamabad the  
**23.10.2024**