

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT

MR.JUSTICE SALAHUDDIN MIRZA
MR.JUSTICE MUHAMMAD ZAFAR YASIN

JAIL CRIMINAL APPEAL NO.21/K of 2007

Shahzad Masih son of Appellant
Mushtaq Masih Caste Ranybe
resident of MBS Colony near Lucky Star
Saddar, Karachi South.

Versus

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Respondent

The State

Counsel for the appellant

....

Mr.Masood Shahryar
Advocate.

Counsel for the State`

....

Syed Agha Zafir Ali
A.A.G.

No. & Date of FIR and
Police Station

....

183/06, 15-07-2006
Saddar Town, Karachi

Date of decision of the
trial Court

....

08-01-2007

Date of Institution

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08-03-2007

Date of hearing

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15-01-2008

Date of decision

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15-01-2008

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JUDGMENT


SALAHUDDIN MIRZA, J: - These are the reasons for the short order passed on the conclusion of the hearing on 15.01.2008 by which the appeal had been accepted.

2. This appeal is directed against the judgement dated 08.01.2007 whereunder learned V-Additional Sessions Judge, Karachi (South), has convicted appellant Shahzad Masih as follows:

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| 1). Under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. | 5 years' R.I. |
| 2). Under section 11 of Zina Ordinance, 1979. | Life imprisonment + fine of Rs. 50,000/- or one month's imprisonment in lieu of fine (but nature of imprisonment, whether simple or rigorous, is not clarified). |

3. Complainant Parvez Masih is the resident of House No- 40, MES Colony, Karachi. According to the FIR lodged by him on 15.07.2006 at 1130 hours at Police Station Saddar, Clifton Town, Karachi, his daughter Hina, aged 15 years, worked as a maid-servant at the house of Commander Haseeb and on 12.07.2006 at 1000 hours she left her house to go to the house of Commander Haseeb but at


1130 hours he received telephonic call from the house of Commander Haseeb that she did not report for duty that day. On receiving this information he searched her in hospitals and made inquiries from the people of the mohalla and learnt that appellant Shahzad, with the help of his friend Ramesh, had persuaded Hina to go with him and marry him. He then reported the matter to the police.



4. The police investigated the matter, arrested Shahzad Masih on 16.07.2006, and, after the completion of investigation, sent him up for trial and the Court on 12.12.2006 charged him under sections 10 (3) and 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, and eventually convicted the appellant as indicated above. It is not clear either from the record or from the impugned judgement as to what action had been taken against co-accused Ramesh who was nominated in the FIR or whether he was found innocent during the course of investigation. However, one Matloob Hussain, who was not named in the FIR, is shown as absconder in the challan and the impugned judgement also shows that he was declared

proclaimed offender and perpetual warrants of arrest had been issued against him.

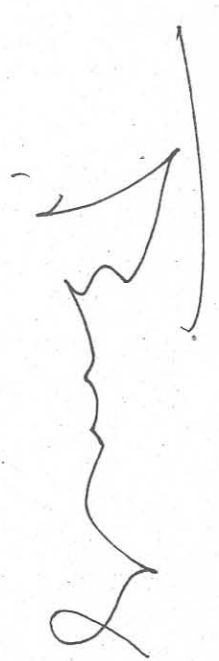
5. The prosecution has examined the following witnesses in support of its case:



1. PW-1 Parvez Masih: He is the complainant. After reiterating the contents of his FIR, he said that the next day of the incident, (13.7.2006) one Sajjad told him that he had seen Hina in the company of Shahzad whereupon he met father of Shahzad and in the presence of 8-10 persons he asked him to return his daughter but he did not though he had promised. He then lodged the report on 15.07.2006 which he produced as Ex. 6-A. The police then visited his house vide Memo Ex. 6-B. On 16.07.2006 Inspector Riaz (I.O.) called him at police station and took him to the Edhi Centre where his daughter and appellant were present and were taken in custody and on 19.07.2006 his daughter was handed over to him. In cross examination he denied a suggestion that the girl had gone with the appellant with her consent and both, appellant and Hina, wanted to marry and that both of them had embraced Islam. The complainant did not say a word about 'Ramesh' whom he had named in the FIR as the friend of appellant Shahzad and with whose help Mst. Hina had been kidnapped.

2. PW-2 Mst. Hina (the victim). : She supported the prosecution story that when she was on way to her job on 12.07.2006 Shahzad and Mukesh met her and they took her in a rickshaw to an un-known place from which Mekesh went away and the appellant committed rape with her and converted her to Islam under duress and got her thumb impressions on various papers in that connection. Thereafter Mukesh and Shahzad took her to

Edhi Centre and handed over her custody to its authorities where she was granted asylum. She did not disclose the address of her parents there at the insistence of the appellant. Thereafter the police reached the Edhi Centre and took her to the police station where her statement was recorded and thereafter her 164 Cr.P.C. statement (Ex.7-A) was also recorded before the Judicial Magistrate who, at her request, handed over her to her parents. She denied in cross examination that she had gone with Shahzad with her own free will. *(It is interesting to note that, while according to the FIR, appellant Shahzad had committed the crime with the help of his friend Ramesh, Mst. Hina says that the name of the said friend was 'Mukesh' whereas complainant Parvez Masih had named neither Ramesh nor Mukesh in his deposition).*

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3. PW-3 Iqbal Masih. He is a relative of the complainant who called him and Iqbal went to him on 13.07.2006 and the complainant informed him that Shahzad had abducted his daughter. At this Iqbal called father of Shahzad and asked him to return the girl but in vain. After the recording of the FIR the I.O. called him and the complainant at the police station on 16.07.2006 from where the I. O. Muhammad Riaz took them, alongwith Siddiq and Rafiq, to the Edhi Centre at Sohrab Goth where they found both the abductee and Shazad who were taken into custody vide mushirnama Ex.8-A which he signed as musheer. He repelled a suggestion that the abductee had falsely implicated Shahzad at his and complainant's insistence.
 4. PW-4 Shahzad. He is son of PW-3 and said that while he was going on his duty on 12.07.2006 at 10 or 11 in the morning he saw accused Shahzad following Hina and he also met Mukesh on the road and 'when he came ahead the street all three of them were missing'. He acted as musheer of place of wardaat which was a gali on Faisal Road near Hockey Stadium and he

acknowledged his thumb impression on Ex.6-B. The next morning (16.07.2007) he learnt that father of Mst. Hina was searching her and then (on 16.07.2006) he informed him that he had seen Shahzad and Hina together in the gali of Hockey Stadium.

5. Dr. Farida Ayaz. She was WMLO at Civil Hospital Karachi on 17.07.2006 when Mst. Hina was produced before her for medico-legal examination and she reported as follows:

“Height was five feet, weight 30 kilograms, Teeth 7-7/8-8, her age of minarghe was 13 years, last menses was on 18th of June 2006, her secondary sex characters was well developed and there was no mark of violence on any part of body. She was conscious and well oriented at the time of examination. On vaginal examination, pulva vagina was normal, vestibural not congested, hymen torn, vagina admit two fingers.”

Her MLC is Ex. 11-A. She was not virgin. For fresh sexual act the lady doctor sent the vaginal slide to the Chemical Examiner (but his report has not been produced). On the basis of the report of Radiologist, the lady doctor estimated the age of the girl between 19-20 years and produced her certificate as Ex. 11-B.

6. PW-6 Inspector Riaz. He is the investigating officer. He recorded 161 Cr.P.C. statements of witnesses. On 16.7.2006 he learnt that both, accused Shahzad and abductee Mst. Hina were staying in the Edhi Centre, Sohrab Goth, and he went there alongwith the complainant and secured the custody of both and got them medically examined at Civil Hospital, Karachi. Later, he got recorded the 164 Cr.P.C. statement of Mst. Hina by the Judicial Magistrate on 19.7.2006 (Ex. 7-A). Co-accused Mukesh was an army employee and the I. O. intimated his

Commanding Officer and asked him to take action against him vide letter dated 20.7.2006 (Ex. 12-I).

7. PW-7 Khushi Muhammad, Judicial Magistrate (South). He recorded the 164 Cr.P.C. statement of Mst. Hina on 19.7.2006 which was again produced by him as Ex. 13-A (It is already on record as Ex. 7-A). In cross examination he conceded that accused Shahzad was not present in Court when the 164 Cr. P.C. statement was recorded.

6. In his 342 Cr.P.C. statement, the appellant/accused claimed false implication in the case and stated that Mst. Hina had herself come to him and had asked him to *take shelter in Edhi Home from where police arrested me*". It is however surprising that questions were put to him which are contrary to facts. For example:

1. Under Question No.2 he was asked "It has come in evidence that on 12th day of July, 2006 in between 10.00 to 11.30 a.m. on the abetment of absconding co-accused Matloob Hussain you alongwith co-accused Mukesh forcibly abducted Mst. Hina daughter of complainant Pervez Masih aged about 19-20 years from House No.40, M.E.S. Colony, main Gali, near Rehmania Masjid, Karachi, and kept her at some unknown place where accused Mukesh (who is an Army Personnel) committed Zina-bil-jabr with her, what you have to say". However, it had not come in evidence that the abduction had taken place from House No.40. According to the evidence the abduction had taken

place from a gali near Hockey Stadium off Shahraah-e-Faisal. Nor it had come in evidence that Mukesh committed rape upon Mst. Hina. No witness made such allegation, including Mst. Hina.

2. Under Question No. 3 the appellant was asked "It has also come in evidence that you and accused Mukeshi (who is an Army Personnel) compelled the said abductee girl to convert her religion from Christianity to Islam in a Masjid and thereafter you kept her in the house of absconding co-accused Matloob Hussain where you attempted to commit Zina with her, what you have to say". Again, there is no evidence on record that Mukesh had also taken part in forcing Mst. Hina to convert to Islam. The allegation is only against Shahzad but here also 'masjid' does not figure at all. It has also not come in evidence that Mst. Hina was kept in the house of absconding accused Matloob Hussain. In fact, the name of Matloob Hussain does not appear in the evidence of any prosecution witness.

3. Moreover, whereas the appellant was charged under sections 10/11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and evidence had come against him that he had committed zina-bil-jabr with Mst. Hina but no question to that effect was put to him; on the contrary, no evidence had come on record that he '*attempted*' to commit zina- bil-jabr with Mst. Hina but such question was put to him in his 342 Cr.P.C. statement.

7. Be that as it may, the appellant did not lead any defence evidence nor examined himself on oath under section 340(2) Cr.P.C.

8. We have gone through the record with the help of learned counsel of the appellant and learned State counsel.

9. A perusal of the impugned judgement shows that the learned Additional Sessions Judge framed the following two points for decision:

Point No.1: Whether accused Shahzad alongwith absconding co-accused Matloob Hussain abducted Mst. Hina and committed zina-bil-jabr with her.

Point No.2: What offence/offences, if any, have been committed by accused persons?


10. Under the heading "FINDINGS" she observes that Point No.1 has been proved. This means that according to her it has been proved that accused Shahzad and absconding accused Matloob abducted Mst. Hina and both of them committed zina-bil-jabr with Mst. Hina. There is however not even an iota of evidence against Matloob Hussain. Neither complainant Parvez Masih nor his daughter, the alleged victim Mst. Hina, nor any other witness even named

Matloob Hussain in his deposition and yet learned trial Judge holds that it has been proved that Matloob Hussain had not only abducted the girl alongwith Shahzad but had also committed Zina-bil-jabr with her. The finding is not only against the facts on record but extremely perverse and untenable.


11. Evidence has, however, come against accused Shahzad and Mukesh but even this is insufficient to bring home their guilt.

12. Appearing as PW-1, the complainant stated that the only person who saw his daughter with Shahzad was Sajjad but, even though the FIR was recorded a day after Sajjad had so informed him, yet the FIR is silent on this aspect and the name of Sajjad does not appear in it. More importantly, this Sajjad would have been an important witness for the prosecution but he has not been examined as a witness. A presumption therefore arises that had he been examined in the Court he would not have supported the prosecution case.


13. Mst. Hina (PW-2) alleges that Shahzad forced her to embrace Islam. However, Shahzad is also Christian just like Mst. Hina and we fail to digest the allegation that he forced Mst Hina to convert to Islam. In her 164 Cr.P.C. statement she even said that Shahzad, Mukesh and one other person took her to a mosque for this purpose though this allegation of 'taking her to a mosque' was not repeated by her in her deposition as PW-2. On top of it, in her 164 Cr.P.C. statement recorded before Judicial Magistrate (PW-7 Khushi Muhammad) she has got her religion recorded as 'Islam' and if this is explained by saying that it was due to the inadvertence of the Judicial Magistrate, the sanctity of 164 statement is gone; what is the guarantee that the rest of the contents of the 164 Cr.P.C. statement have not been recorded due to inadvertence. Mst. Hina further says in her deposition as PW-2 that accused Shahzad had obtained her thumb impression on a number of papers but none of these papers could be recovered by the investigating agency and has not been produced in evidence.




14. It is highly unlikely that a person abducts a girl for purposes of zina, commits zina with her and then gets himself and the girl admitted in Edhi Centre but this is what the prosecution alleges in this case. Both the prosecution and defence admit that the appellant and abductee were recovered by the police from the Edhi Centre, Soharab Goth. Under these circumstances it was necessary for the prosecution to examine relevant staff from the Edhi Centre alongwith the relevant record but this has not been done. Mst. Hina admits that while getting admitted at Edhi Centre, she did not give her address as that of her parents but some fictitious address due to the threats of Shazad but there was no need to feel threatened in Edhi Centre where a lot of staff was available which would surely have come to her rescue had she informed them that she had been abducted and brought there against her will. This would rather suggest that she had come to Edhi Centre with Shahzad of her free will and without any intimidation from anyone and both she and Shahzad sought refuge there.



15. After critically examining the evidence, we are left with no alternative but to hold that the entire prosecution case is untenable and the impugned judgement is perverse. Questions were put to the accused/appellant which were contrary to the evidence on record as described above in Para-6(1) to para 6(3). Complainant wrongly implicated Ramesh in the FIR and his malafide is proved by the fact that he did not say a word about him in his deposition nor any other witness said anything about him. Mst. Hina also falsely implicated Mukesh. Evidence on record does not at all show that he had taken any part in the commission of the crime. It is not clear how Matloob Hussain has been declared by the learned trial Judge as a co-accused and a proclaimed offender. He does not figure anywhere in the case. Neither his name has been given in the FIR nor any witness, including the complainant and the alleged abductee, has implicated him in the commission of the crime. People do not get themselves admitted in Edhi Centre for committing zina-bil-jabr or even zina-bil-raza. The fact that the appellant and the abductee had got themselves admitted



in Edhi Centre and were recovered from there is proof enough of the fact that the appellant had not abducted Mst. Hina for committing zina with her or for any other immoral purpose and that Mst. Hina had gone with the appellant with her free will and both of them intended to marry each other. Mst. Hina is not 15-year old, as mentioned by the complainant in the FIR, but a 19/20-year old girl as opined by the lady doctor on the basis of radiological test. She obviously committed perjury under the pressure of her parents when she said that she had been abducted by the appellant. Even commission of zina-bil-raza has not been proved. No one saw them committing this offence and the mere fact that the appellant and Mst. Hina had taken refuge in Edhi Centre is no proof that they committed zina-bil-raza. According to the lady doctor, she found the vagina of Mst. Hina in normal condition and 'vestibural' was not congested. The lady doctor had taken vaginal slides and had handed over the same to the investigating officer for transmitting the same to the Chemical Examiner for his examination and report but the report of the Chemical Examiner has not been



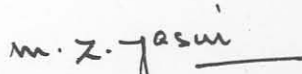
produced to show as to whether the slide was found stained with semen. Again, presumption would arise that had it been produced it would have shown that it was not stained with semen. Thus, it has not been established that Mst. Hina had committed zina in the near past. No doubt, the lady doctor also found that the hymen was torn and the vagina admitted two fingers. This may mean that the girl was not virgin and had experienced sexual intercourse in the past but still the appellant cannot be held to be the person who had sexual intercourse with the girl because there is no evidence to that effect.

Only if the slide had been found to be semen-stained and the semen of the appellant had been sent to the serologist for comparing it with the stains on the slide and the report of the serologist had been positive could it be said that the appellant was guilty of committing zina-bil-raza but since this is not the position, offence of zina-bil-raza has also not been established against the appellant.

16. We had, therefore, accepted the appeal, set aside the impugned judgement and acquitted the accused by a short order on the conclusion of the hearing on 15.01.2008.



JUSTICE SALAHUDDIN MIRZA



JUSTICE MUHAMMAD ZAFAR YASIN

Islamabad, the
Dated 15-01-2008
ABDUL MAJEED/