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IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

HON:MR.JUSTICE ABDUL WAHEED SIDDIQUI

Jail Criminal Appeal No.17/P/1996.

Akbar Hussain s/o Shah Hussain r/o Malakand Agency	.....	Appellant
	Versus	
The State	.....	Respondent
Counsel for the appellant	.....	Mr.Mushtaq Ahmed Khan Advocate
Counsel for the State	.....	Mr.Aziz-ur-Rahman Khan Advocate
FIR No. Date and Police Station	.....	56 dated 23-3-95 P.S Levy Post Dargai
<i>Subscribed</i> Date of Judgment of the trial court	.....	31-1-1996
Date of Institution	.....	17-3-1996
Date of Hearing	.....	4-5-1998
Date of Decision	.....	3-8-1998

JUDGMENT:

ABDUL WAHEED SIDDIQUI, J:- Appellant has assailed a judgment dated 31-1-1996 delivered by the Court of Additional Sessions Judge, Dargai Malakand Agency whereby he has been convicted under section 377 P.P.C and sentenced to R.I for 10 years and fine of Rs:5000/-. In case of default of payment of fine he has to undergo an R.I for 6 months more. Benefit of section 382-B Cr.P.C has not been extended.

2. One Said Zaman aged 16/17 years lodged an FIR at P.S Dargai District Malakand on 23-3-1995 at 20-00 hours alleging therein that at about 1900 hours he was in the company of his friend Zafar Ali, that he was asked to go to the baithak of Inayat Ali. They went there and found appellant and many other persons there. Then the appellant and Zafar Ali went out of the baithak and had some secret talks. After that Zafar Ali told the complainant/first Informer to go out and have some walk here and there. All

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the three then started having a walk, but at particular
place of incident, Zafar Ali went back and appellant
pointed a kilashikov towards him and demanded of him to
open his string. On refusal, appellant himself opened
the complainant's string forcibly and made him to lie down.
Appellant removed his own shalwar and committed sexual
intercourse against the order of nature with him. After
having satisfied his lust, appellant directed the victim
to rebound his string and also demanded of him to meet him
once in a week in his village Salgro Bandah otherwise he
shall see him (i.e. punish him). Then both of the offender
and victim returned to the baithak where Zafar Ali asked the
offender/appellant as to whether the job was accomplished.
Appellant/replied "O.K". Then the victim started for his
home but was in doubt that some one might have seen the
incident. Consequently he came to the police station and
made the complaint as FIR which was read and explained to him
in his mother-tongue Pashto. After satisfaction, the victim

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signed in Urdu. The FIR was lodged under article 12 of Offences of Zina (Enforcement of Hudood) Ordinance, 1979, hereafter referred to as the said Ordinance read with section 109 P.P.C and alongwith appellant, Zafar Ali was also challaned. Appellant was charged under section 377 P.P.C and his acquitted co-accused Zafar Ali was charged under section 109 read with 377 P.P.C to which both the accused did not plead guilty.

3. To prove its case, prosecution examined 7 witnesses.

Said Zaman (PW-1), the victim boy, has deposed as per his complaint per FIR. However he has not made any reference to a KK and has deposed that the appellant slapped on his cheek and committed forcible sodomy with him and then directed him to go to him once a week otherwise he shall be murdered. Then he went to his father, reported to him and alongwith him he had come to the police station. Anzar Gul, (PW-2) Subedar levy post kot has deposed that appellant was already in custody in some other case when he arrested him

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formally on 19-7-1995. He obtained the Report from Laboratory Ex.P-1/2 and after completing investigation he submitted final challan on 25-7-1995. Brother (PW-3), moharrir, has deposed that in his presence sement-stained swabs were handed over by the commander of the post to the I.O. Shirin Zada (PW-4) has stated that the warrants of arrest under section 204 Cr.P.C were handed over to him for execution on the appellant. He could not trace out the appellant and returned back the warrants. Ali Khan (PW-5), moharrir, has deposed that he wrote FIR on 23-3-1995 @ 20 hours and it was chalked out in the presence of post commander Umer Hassan. He prepared injury report of the victim and escorted him to the hospital for medical examination. The doctor handed over to them a sealed bottle containing swabs. Next day he prepared site plan on the pointation of the victim. He arrested co-accused Zafar Ali, but the appellant was absconding. Later on appellant was arrested after an exchange of fires with the police. Umer Hassan (PW-6) post commander Dargai, has deposed that he was

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supervising entire investigation and it was done by the moharrir under his directions. Under his directions FIR was prepared and signed by him as the commander of the post. After his retirement the remaining investigation was completed by Anzar Gul (PW-2). Dr. Akbar Hussain (PW-7), Medical Officer Civil Hospital Dargai has deposed that he examined victim on 23-3-1995 and observed that on his body there were no stains of blood or semen. He obtained rectal swabs on which semen could be seen and it was with faecal material. According to him, it was possible that the sodomy was committed with the victim on the point of a gun. During cross he replied to certain suggestions that he had observed the anus of the victim who was found not/be habitual. During his statement under section 342 Cr.P.C, the appellant has denied the occurrence and to a question about his abscondence he has replied that he was not in the knowledge about the present case and had gone to Karachi. On return he was arrested. He has declined to be examined on oath and has not produced any witness in his defence.

4. I have heard the counsel for appellant and State.

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The first contention for the appellant is that the swabs were sent on 22-5-1993 i.e with a delay of 2 months, and the report was received back on 17-7-1993 i.e with a further delay of 2 months. Hence there is a doubt in the case, I do not agree with this contention because Umer Hassan (PW-6) has replied to a question during cross as under:

لیبارٹری کو جو پارسل ہم نے ارسال کیا تھا۔ اس پر ہم نے اپنا سبیل نہیں کیا تھا۔ اور ڈاکٹر نے منظر کھینچا تھا۔ ڈاکٹر نے بوتل کو سلاشن ٹیپ سے بند کیا تھا۔ میں نے بوتل/سٹیشن اپنا مالا بعد اس کے تجزیہ کیا۔ اس کے بعد اسے کھلوا دیا اور اسے کھینچا تھا۔

But even if the positive report of chemical examiner is indicative that he received the swabs on 22-5-1995 in a sealed form through F.C No.3353 and then he finally signed his report on 17-7-1995, I do not suspect its veracity because no such suggestion or allegation has been made that the sealed bottle containing swabs was tampered with.

5. Another contention for the appellant is that there is violation of mandates created by sections 154,341, 361 and 543 Cr.P.C. All the four sections are reproduced as below:

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Section 154 Cr.P.C:

"Information in cognizable cases: Every information relating to the commission of a cognizable offence if given orally to an officer-in-charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be entered in a book to be kept by such officer in such form as the Provincial Government may prescribe in this behalf."

Section 341 Cr.P.C:

"Procedure where accused does not understand proceedings:- If the accused though not insane, cannot be made to understand the proceedings, the Court may proceed with the trial; and in the case of a Court other than a High Court, if such trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit."

Section 361 Cr.P.C:

"Interpretation of evidence to accused or his pleader: (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him.
(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader it shall be interpreted to such pleader in that language.
(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as

appears necessary.

Section 543 Cr.P.C:

"Interpreter to be bound to interpret truthfully: When the service of an interpreter are required by any Criminal Court for the interpretation of any evidence or statement , he shall be bound to State the true interpretation of such evidence or statement."

It has been vehemently argued that the appellant is a Pushto speaking person, does not understand Urdu and therefore there is a clear violation of the above-mentioned sections of Cr.P.C . So far as section 154 Cr.PC. is concerned, it relates to the complainant/first informer and has no nexus with the accused/appellant. So far as other sections are concerned, I do not find any violation as the record proves that the appellant understands Urdu. He has signed the charge sheets in Urdu and has replied in affirmative that he has been read over the charge, has understood it and does not plead guilty. All the Pws have been cross examined in Urdu and no where any objection appears about the interpretation of the deposition in Pushto. The appellant has thumb-marked his statement under section 342 Cr.P.C

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and has replied all the questions in Urdu. In his memo of appeal sent from Jail in Urdu, no where he has complained that he could not understand the proceedings during trial. Consequently this contention is repelled.

6. Appellant's counsel has made a reference to certain conflicts and discrepancies between FIR and deposition of the victim boy, PW-1, but these discrepancies between FIR and deposition of the victim boy, PW-1 ~~appear~~ appear to be minor in nature and do not dislodge the very occurrence specially when the victim is completely corroborated by the medical evidence and report of chemical examiner. This way the objection that no report about the verility of the appellant has been obtained is misconceived as the appellant has himself shown his age to be 35 years in his statement under section 342 Cr.P.C and has stated in a forwarding letter attached with the memo of appeal that he belongs to a gentle family and is father of children. No where in the trial court such plea was ever raised that he is impotent or emasculated.

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7. It has been contended that in the baithak of Inayatullah many persons are said to be available who could have been incorporated as PWs, but it has not been done. This contention is repelled for the simple reason that the victim is completely corroborated by expert evidence and in the present day expert evidence has such a force that a reference book on Forensic Sciences vol.I para No.1.01 (publication New York, 1981) has to declare as under:

"1.01 Admissibility of Expert Opinion

Expert testimony has become such an important factor in many trials, both civil and criminal, that rulings on the admissibility of such testimony often determine the outcome of the case."

8. In view of the above-mentioned discussion, the impugned judgment is upheld and the appeal is dismissed. However benefit of section 382-B Cr.P.C is also extended to the appellant.

(Abdul Waheed Siddiqui)
Judge

Fit for reporting

Judge

Announced in the open
Court today the 3rd August, 1998.

Judge

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