

**IN THE FEDERAL SHARIAT COURT**  
(Appellate Jurisdiction)

**PRESENT**

**MR. JUSTICE SHAHZADO SHAIKH**  
**MR. JUSTICE DR. FIDA MUHAMMAD KHAN**  
**MR. JUSTICE RIZWAN ALI DODANI**

**JAIL CRIMINAL APPEAL NO. 138/I OF 2009**

Zulfiqar Ali son of Inayat Ali,  
R/o Chak No.410-TDA Chaubara,  
District Layyah.

Appellant

Versus.

The State

Respondent

**CRIMINAL MURDER REFERENCE NO.04/I OF 2011**

The State

Appellant

Versus

....

Zulfiqar Ali son of Inayat Ali,  
R/o Chak No.410-TDA Chaubara,  
District Layyah.

Respondent

Counsel for appellant	....	Mr. Muhamamd Sharif Janjua, Advocate
Counsel for complainant	.....	Ms. Nuzhat Yasmeen, Advocate
Counsel for State	....	Ch. Muhammad Sarwar Sidhu, Additional Prosecutor General
FIR, Date & Police Station	.....	114/2009, 24.04.2009 Chaubara, Layyah
Date of Judgment of trial court	.....	03.11.2009
Dates of Institution	.....	20.11.2009 & 15.3.2011 Respectively
Date of hearing	.....	25.10.2011
Date of decision	.....	25.10.2011

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## **JUDGMENT**

**DR. FIDA MUHAMMAD KHAN, Judge.-** This appeal filed by Zulfiqar Ali is directed against the judgment, dated 3.11.2009, passed by learned Additional Sessions Judge, Layyah, whereby he has convicted him under section 376 PPC and sentenced him to death, on three counts, with fine of Rs.100,000/-, for each Offence separately or, in default thereof, further one year S.I.

The learned Additional Sessions Judge, Layyah has duly submitted Murder Reference which has been registered as Criminal Murder Reference No. 4/I of 2011. Since the Jail Criminal Appeal and the Murder Reference arise out of one and the same judgment, we are disposing both the matters by this single Judgment.

2. Brief facts of the case as stated by Mst. Aqsa Bibi in complaint (Exh.PB), which was subsequently incorporated into FIR, are that about six months prior to the lodging of FIR, her father Zulfiqar Ali took her along to the fields on the pretext of cutting grass and then he



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committed rape upon her. She duly complained about the matter to her mother who later on disclosed this fact to Bushra Iqbal, sister of accused, but, keeping in view the family honour and after assurance given by the accused by taking oath on Holy Quran, the matter was hushed up. Thereafter, on 29.3.2009, when all other family members had gone to attend a marriage ceremony, the accused Zulfiqar once again committed rape upon her in his house. On her protest, the accused gave her beatings and the matter was hushed up again. On 15.4.2009 the accused Zulfiqar, after beating her with a handle of hatchet, subjected her to zina-bil-Jabr. She raised hue and cry which attracted her maternal uncle Faqeer Sain, her mother Tanvir Bibi and her brother Qasim Ali. They all rushed to the place and witnessed the occurrence. However, accused Zulfiqar Ali, after wearing his shalwar and taking along his hatchet ran away. The complainant further alleged that she was sick of the attitude of her father and could not tolerate it any more. Hence, she lodged the instant report which forms basis of the formal FIR which was registered on 24.04.2009

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at Police Station Choubara District Layyah, with the request to take legal action against the accused/appellant.

3. Investigation ensued as a consequence of registration of FIR.

PW.8 Faiz Muhammad Sub Inspector was assigned the charge of investigation. He sent Mst. Aqsa Bibi for her medical examination. She was duly escorted by Muhammad Iqbal ASI, and her mother as well as maternal uncle to the hospital. On 24.4.2009, Muhammad Iqbal, ASI produced before him MLC alongwith sealed two phials and three parcels.

He took that into possession vide recovery memo (Exh.PE), duly attested by Faqeer Hussain and Tahir Hussain, constables. He recorded statements of PWs under section 161 Cr.P.C. and inspected the spot, on 25.4.2009, where he prepared rough site plan (Ex.PF). He recorded statement of witnesses in this regard and arrested the accused on 25.4.2009. On 29.4.2009, on disclosure and pointation of the accused, he recovered the hatchet (P-1) which was lying in the standing reeds near his house. That was taken into possession vide recovery memo (Ex.PD), duly attested by

Muhammad Iqbal, ASI and Abdul Shakoor, constable. On 28.04.2009 he

At

produced the accused in the laboratory for conducting his DNA test. After

receiving the parcels from office of Chemical Examiner Multan, he

submitted challan to the Court requiring the accused to face trial.

4. At the trial, the prosecution produced ten witnesses in all.

The detail of their depositions is as under:-

- \* PW-1 Dr.Fiaz Kareem Laghari, Medical Superintendent  
deposed that on 30.4.2009 when he was posted at THQ Hospital  
Chaubara he medically examined Zulfiqar Ali son of Inayat Ali,  
aged about 40 years, r/o Chak 410 Union Council, Rafiq Abad.  
He recorded his marks of identification as follows:-

“No.1. Cut mark on right thumb nail,  
No.2. Cut mark on right index finger”.

He found him fit to perform sexual intercourse.

- \* PW-2 Muhammad Ashraf, ASI deposed that on 24.4.2009 when  
he was posted as duty Officer at P.S. Chaubara, he received  
complainant (Ex. PB) and accordingly he formally drafted FIR  
(Ex. PB/1) and signed the same.

- \* PW.3 Dr. Sajida, WMO, deposed that on 24.4.2009 when she  
was posted at DHQ Hospital Layyah, she medically examined  
Mst. Aqsa Bibi, aged about 14/16 years. She found no signs of  
violence present on any part of her body. She made the following  
observations:-

“Examination for Rape Vulva and Vagina



Normal, healthy looking. No sign of violence were found present on her private parts.

In lithomy position labia majora was not covering the labia minora. Vaginal orifice was visible. Old healed tags were present. Hymen was not intact. On P/V examination one finger loosely passed. Whitish discharge was present. Three vaginal swabs were taken for DNA test and three for chemical analysis."

Report of the DNA results and conclusion is as follows:-

"DNA profile obtained from sperm fraction of **item 1.0** (vaginal swabs of victim) is partial and inconclusive. DNA profile obtained from the E.cell fraction of item 1.0 matches with DNA profile of victim Aqsa Bibi (item 2.0).

The vaginal swabs of victim Aqsa Bibi (item 1.0) did not generate any conclusive male DNA profile; therefore no comparison could be made with DNA profile of accused Zulfiqar Ali son of Anayat Ali (item 3.1)"

Report of the Chemical Examiner reveals:-

"The above swabs are stained with semen".

- \* P.W.4 Ghulam Mustafa, Head Constable stated that on 24.4.2009 when he was posted at P.S. Chaubara as Muharrar, Faiz Muhammad, SI/I.O. handed over to him two sealed phials and three sealed envelopes which he kept in Malkhana for safe custody. Thereafter, on 27.4.2009 one sealed phial and two sealed envelopes for DNA test were also handed over by Faiz



Muhammad SI. On 28.4.2009 he handed over one sealed phial and one sealed envelope to Abdul Shakoor, Constable, for onward transmission to the office of Chemical Examiner, Multan and he deposited that in the said office on the same day.

- \* Aqsa Bibi, complainant appeared as P.W.5 and reiterated her statement as mentioned hereinabove.
- \* Tanweer Bibi, mother of victim/complainant is an eye witness of the occurrence. She appeared as P.W.6 and fully corroborated the statement made by Mst. Aqsa Bibi complainant.
- \* PW-7 Muhammad Iqbal, ASI deposed that on 24.4.2009 when he was posted at police station Chaubara, he alongwith Faiz Muhammad SI was present at Turko Adda where Aqsa Bibi (victim) alongwith her mother got recorded her statement before Faiz Muhammad SI (Ex.PB). He accompanied Mst. Aqsa Bibi victim to DHA Hospital Layyah for her medical examination. After her medical examination, the doctor handed over to him three sealed envelopes and two phials alongwith MLC which he handed over to Faiz Muhammad, I.O. in presence of PWs.
- \* Faiz Muhammad, SI who investigated the case appeared as P.W.8 and deposed about the details of investigation conducted by him in the case. The same have already been mentioned herein above.



- \* PW-9 Abdul Shakoor, Constable stated that on 29.4.2009 when

he was posted at P.S. Chaubara, he joined the investigation of this case. During the course of interrogation, the accused present in the Court made disclosure that he could lead the police party to the recovery of hatchet which was used in the occurrence and accordingly he led the police party to the place of occurrence and got recovered hatchet (P-1) from the standing reeds. That was taken into possession by I.O. vide recovery memo (Exh. PD). The said recovery memo was duly testified by the witnesses.

- \* PW-10 Tahir Hussian, Head Constable stated that on 24.4.2009 when he was posted at P.S. Chaubara. In his presence Muhammad Iqbal, S.I. received, from the doctor, two sealed phials and three sealed envelopes for chemical examiner and DNA test and he handed over that to the I.O. The same were taken into possession by him vide recovery memo (Ex. PE).

5. The learned trial court, after close of the prosecution evidence, recorded statement of accused under section 342 Cr.P.C. wherein he pleaded innocence and denied the allegations. In answer to the question, "why this case against you and why the P.Ws have deposed against you?" he stated as follows:-

"I am innocent. The PWs are closely related interse and inimical to me, therefore, they have deposed falsely





against me. I being father even cannot think to commit Zina-bil-jbr with my daughter Aqsa Bibi. In fact mother of the complainant was sitting outside the room of the house whereas Aqsa victim and her paramour Sohail were present in the room having illicit relations. Further that when I came back to the house and entered into the room despite restraint of complainant, had seen Aqsa Bibi victim with her paramour Sohail in compromising position upon which I became infuriated, picked up hatchet and tried to murder mother of the complainant, victim Aqsa and her paramour Sohail but they all fled away. Further more, in order to save their skin and to remove me from their way, they have falsely concocted the present story and it is the talk of the town that Aqsa and Sohail were caught red handed by me. No recovery of hatchet was effected from me and police has falsely planted the same against me in order to strengthen the case.

It is notable that neither he opted to make statement on oath under section 340(2) Cr.P.C. nor produced any evidence in his defence. The learned trial Court, after examining all incriminating material brought on record by the prosecution, came to the conclusion that the appellant/accused was guilty of commission of offence under section 376 PPC. Therefore he

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convicted and sentenced him as mentioned hereinabove. Hence the present appeal.

6. We have heard the learned counsel for the parties and have perused the record with their assistance.

Learned counsel for the appellant contended that there are contradictions and discrepancies regarding the time of return of the family members of complainant to the house and about the appellant/accused as to whether he had fled away or was handed over to the police. He also submitted that learned trial court has ignored the defence plea raised by the appellant regarding the relations of complainant with one Sohail.

Learned counsel for complainant, however, contended that there are no material contradictions; that the quality of evidence brought on record is convincing and credible; that in his first version the appellant had admitted his guilt; and that the offence committed by the appellant is very grave and he deserves no leniency.



Learned Additional Prosecutor General also supported the impugned judgment and contended that the appellant has been rightly convicted and sentenced.

7. Before embarking on discussion about the facts of this case, we consider it pertinent to mention that Islam regards commission of illegitimate sexual intercourse a very great sin and heinous crime. If proved guilty, Islam prescribes severe punishment for such criminals. It is also worth-noticing that Islam considers both fornication as well as adultery equally serious offences and makes no distinction between them in their nature as offences against human society. The gravity as well as the sentences of the offence, however, varies according to the marital status of the offender. If the offender is unmarried, the quantum of punishment is somewhat less than that of the married one. The offence in the later case is considered more severe for the reason that legitimate means to satisfy his urge were available to such a person but even then he preferred and resorted to unlawful means. Since according to Islamic Injunctions, the commission of zina is a cognizable crime, it has not only



prescribed severe punishments but has introduced a number of reformatory and preventive measures as well. The legal sanctions and deterrent punishments are, in fact, promulgated as a last resort to curb the evil and purify the society. It is also notable that there are some prohibited degrees in the inter-personal relationships by means of affinity, consanguinity and fosterage, where not to speak of commission of illegal sex, even contract of marriage is strictly forbidden.

8. Incest which in other words means sexual intercourse between person falling in the said specified degrees of consanguinity or affinity or fosterage is a very great sin. The Holy Quran has given detailed and very clear injunctions in this respect. For example, Islam prohibits marriage with mother, daughter, grand daughter, sister, niece, foster-mother, foster-sister, mother-in-law, daughter-in-law etc. Incest within these prohibited degrees of relations is therefore considered a grievous and ignoble offence. The gravity of this offence increases manifold, as compared to that of zina simpliciter, when a person is proved guilty of commission of incest by cogent, trustworthy and reliable



evidence. It is very unfortunate that instances of incest abound in the modern world and, besides the so-called civilized countries, also found increasingly alarming in the Muslim societies as well.

9. Here we also consider it pertinent to mention that the Holy Quran has emphasized that while inflicting punishment on any male or female who is proved guilty of commission of zina, no leniency be observed. The verse enjoins upon the believers:

”وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ مِنْ دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ...”  
(سورة النور: ٢)

“Let not compassion move you in their case, in a matter prescribed by God, if ye believe in God and the Last Day:”  
(24: 2)

More over according to Islamic law even marrying any woman falling in the prohibited degrees of marriage is void ab-initio and a great criminal offence which entails exemplary punishment. As mentioned in the authentic collections of Ahaadith by Abu Daud, Nasai and Ahmed Ibne Hanbal, people found guilty of this offence by credible evidence were punished by the Holy Prophet (ﷺ) with death and confiscation of property. It appears from a Hadith related by Ibn ‘Abbas that the Holy

Prophet (ﷺ) had emphasized the following general rule:

” مَنْ وَقَعَ عَلَى ذَاتِ مُحَرَّمٍ فَاقْتُلُوهُ ”

‘Kill whosoever commits sexual intercourse with a woman forbidden to him’ (see Ibne Majah; ‘Hudud’, Ahmed Ibne Hanbal, *Musnad*, vol.1, p. 300—Ed.) There is some minor disagreement among jurists, however, on an aspect of this question. While Ahmed Ibne Hanbal is of the opinion that such a convicted person should be put to death and his property be confiscated, Abu Hanifa, Malik and Shafi are of the opinion that if a person commits sexual intercourse with a woman within the prohibited degrees he should be punished for adultery only; and if he merely marries (but does not actually commit sexual intercourse), he should be subjected to deterrent punishment.

10. In the instant case we find that Mst. Aqsa Bibi was subjected to zina, thrice, on various dates with some intervals in-between. The statement made by her inspires confidence. It appears but natural that she did not report the matter to police on the first two occasions but the reason, as discussed above, is obvious. At that time she was unmarried

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and had naturally considered its future repercussions against her father.

She was also conscious of the honour of her family as stated by her. The family pressure in such matters is always apparent. In her own words when she got sick of the attitude of her father, she had no other option but to report the matter to police.

11. The first and foremost circumstance that can be looked for in cases of rape is the evidence of resistance which one would naturally expect from a woman un-willing to yield to sexual intercourse forced upon her. Such a resistance may lead to the tearing of clothes, infliction of personal injuries and even injuries on the private parts. In the instant case Mst. Aqsa Bibi has made a very convincing statement. All the three times after her rape, she protested and complained about the occurrence to her mother. Her statement is fully supported by medical evidence and further corroborated by report of the Chemical Examiner. As mentioned above, there is nothing on record to show that she was either a girl of easy virtue or had any bad reputation in her community. The appellant/accused has alleged about her relations with one Sohail but that is a bare allegation and



has not been substantiated by any piece of evidence. He took no action against Sohail. He neither raised lalkara nor chased to apprehend him even. He had a hatchet but he spared said Sohail and let him run away. He did not even lodge any FIR against the said accused. Had the allegation been actually true, his whole family would have come to his help. He has not even bothered to make statement on oath in this respect. No one from his family member has supported his allegation against his daughter. The first version of the appellant wherein he admitted his guilt is also considerable. Mst. Aqsa Bibi though teenager seems a girl of maturity and full understanding and she cannot be expected to tell lies against her own father.

12. Regarding the delay in FIR we would like to mention that mere delay per-se is not at all fatal to the case of prosecution if the other evidence inspires confidence and delay is plausibly explained. Normally the delay is considered to create doubts about a case when it is used for deliberation, manipulation, maneuvering evidence or settling some score of enmity or widen the net to implicate innocent people. In the instant





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case, the delay has been plausibly explained. The mental agony of the young teenager girl can be well-imagined. She was raped by her real father. Virtually, after her rape, she was between the devil and the sea. But even then she protested each time. She was raped thrice. First of all the occurrence of rape took place in the crop field about six months before lodging of the report. She deposed that at that time she was tortured and subjected to zina-bil-Jabr whereafter she narrated the occurrence to her mother who went to her paternal aunt and she rebuked the accused who then repented after putting his hands on Holy Quran. At that time she kept silent in order to avoid danger to family honour. After her rape on second time she again informed her mother but her father gave beating to her mother and also extended threats of death in case the matter was report or disclosed to any one. At the third time of rape, he gave beating to her with the handle of hatchet and raped her. It was on this occasion that she raised hue and cry which attracted her maternal uncle Faqeer Sain, her mother and her brother Qasim Ali over there. They all were threatened by him with hatchet and thereafter putting on his shalwar, he fled away. It



was after this third incident, that the family members could not tolerate his attitude any more and handed him over to police.

13. As is evident, it was a matter that involved the family honour as well as the future of an unmarried 14/15 years old girl. Her own father who was supposed and duty bound to give her due protection and patronage had himself turned into a beast. The whole family had to lose its guardian in case the matter was reported or disclosed. There is only one single nominated accused. Therefore the delay plausibly explained is natural and reasonable and does in no way damage the prosecution case.

14. Regarding the discrepancies and contradictions about time in return of the inmates to their house after marriage, it suffices to mention that these are very trivial in nature and do not affect the main version about the occurrence.

15. The defence plea taken by the appellant/accused, about relations of Mst. Aqsa with one Schail, as also suggested to her, is baseless, un-substituted and, appears, rather criminal. No cogent piece of evidence or any DW is available to support that allegation.

*AK*

16. The deposition of victim Mst. Aqsa Bibi, P.W.5 finds full support from the testimony of P.W.6, Mst. Tanveer Bibi, her mother. Both the statements are fully consistent in material particulars, ring true and inspire confidence. They have stood firm in the lengthy cross examination and no dirt whatsoever has been caused in their evidence. The report of the Chemical Examiner as well as the DNA report, reproduced hereinabove, lend corroboration. The MLR submitted by PW.3 does not at all show the victim to be a girl of easy virtue and confirms her testimony.

17. We may also mention that though it may not be imaginable to find a real father subjecting his own daughter to rape but it is also unbelievable that a real daughter would ever charge her own father for committing such a heinous offence, without any rhyme or reason.

18. In this view of the matter we have come to the irresistible conclusion that the prosecution has proved its case against the appellant/accused to the hilt and, keeping in view the gravity of the offence, he deserves an exemplary deterrent punishment. He has been rightly convicted and sentenced and the impugned judgment calls for no



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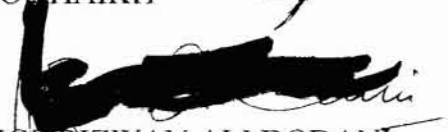
interference whatsoever. Consequently for the reasons stated above we  
maintain the conviction and sentences awarded to the appellant/accused  
Zulfiqar Ali by the learned trial court and dismiss his Appeal.

19. The Criminal Murder Reference No. 04/I of 2011 is  
confirmed and answered in affirmative.

20. These are the reasons for our short order dated 25.10.2011.

  
JUSTICE DR. FIDA MUHAMMAD KHAN

  
JUSTICE SHAHZADO SHAIKH

  
JUSTICE RIZWAN ALI DODANI

Islamabad the 19 November, 2011.

Umar Draz/\*

*Fit for Reporting*

  
JUSTICE DR. FIDA MUHAMMAD KHAN