IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER
MR. JUSTICE SHAHZADO SHAIKH

JAIL CRIMINAL APPEAL NO. 153/I OF 2009

1. Muhammad Aslam alias Saif son of Muhammad Ramzan, R/o Chak No.224, Abadi Fateh Din Wali, District Faisalabad

2. Asif Ali son of Muhammad Shafi
R/o House No.73, Street No.3, City Nankana Sahib

Appellants

Versus.

The State

Respondent

Counsel for appellants	....	Mr. Anees Muhammad Shahzad Advocate
Counsel for State	.....	Ch. Muhammad Sarwar Sidhu, Advocate
FIR, Date & Police Station	.....	211/05, 17.6.2005 Mangtanwala
Date of Judgment of trial court	.....	12.12.2009
Date of Institution	.....	24.12.2009
Date of hearing	.....	13.01.2011
Date of decision	.....	13.01.2011

.....

JUDGMENT

SYED AFZAL HAIDER, Judge.- Muhammad Aslam alias Saif and Asif Ali have challenged the judgment dated 12.12.2009 delivered by learned Additional Sessions Judge, Nankana Sahib whereby they were convicted under section 10 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to 07 years rigorous imprisonment each twice. Benefit of section 382-B of the Code of Criminal Procedure has also been granted to both the appellants.

2. Brief facts of the case on the basis of which FIR. No. 211/2005 registered on 17.06.2005 at Police Station Mangtanawala District Sheikhupura are that Mst. Allah Mafi aged about 10 years, daughter of complainant, worked as an apprentice in a carpet weaving unit in Kot Daulat since last two years alongwith some other girls. The accused persons i.e. Saif Ali alias Kala and Asif Ali were incharge in the said factory as trainers. Consequently social relationship developed between both the accused and the complainant. The accused Saif Ali alias Kala had introduced himself as Muhammad Aslam resident of Foward Chowk Faisalabad. Saif Ali alias

Kala and Muhammad Asif accused used to visit complainant and Mushtaq Ahmad. On 03.04.2005 the sister of the accused Saif Ali alias Kala namely Mst. Yasmeen Bibi and Muhammad Afzal went to the house of Mushtaq Ahmed and stayed there for night. On the next morning they visited the complainant and had breakfast there. Thereafter Mst. Allah Mafi daughter of complainant aged about 11 years and Uzma Bibi aged 11 years daughter of Mushtaq Ahmed accompanied Mst. Yasmeen Bibi, Muhammad Afzal and Saif Ali to the factory. From there at about 1.00.p.m. Saif Ali alias Kala took away Mst. Uzma Bibi and Allah Mafi alongwith his sister Mst. Yasmeen towards Lahore Jarranwala Road. This part of the occurrence was witnessed by Suleman and Allah Ditta. Asif Ali had allegedly gone to his house a day before the occurrence according to the plan. The complainant alleged that accused had abducted both the girls for the purpose of committing zina with them and the complainant had apprehensions that both the abductees would be sold for illicit purposes. Hence the above mentioned FIR. was got registered on the charge of abduction with the object of initiating legal action against the accused.

3. The investigation process ensued as a consequence of the registration of crime report. Ihsanul Haq Inspector Conducted the investigation. The accused were apprehended on 19.06.2005. The abductees were also recovered whereafter offence under section 10 of Ordinance VII of 1979 was added as the original FIR was recorded under section 11 ibid only. The accused were found involved in the crime and hence sent to judicial lock up. On 28.06.2005 incomplete report under section 173 of the Code of Criminal Procedure was sent to the Court. Muhammad Afzal and Mst. Yasmin were placed in column No.2 as they were not found to be involved in the crime. The initial report was submitted on 16.04.2007. Final report was sent in court on 28.06.2005.

4. The learned trial court, after receiving the report, proceeded to frame charge against the accused under section 10/11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

5. The prosecution in order to prove its case at the trial produced 11 witnesses. The gist of deposition of witnesses for the prosecution is as under:-

i. P.W.1 Muhammad Khalid, Constable No. 805, stated that he received one sealed parcel containing swabs for onwards transmission to the Office of Chemical Examiner, Lahore and he deposited the above articles in the said office;

ii. Abdul Ghafoor, ASI appeared as P.W.2 to state that complainant appeared before him alongwith complaint Ex.PA and he drafted formal FIR. Ex.PA/1;

iii. Mukhtar Ahmad, complainant appeared as P.W.3. He endorsed the contents of his complaint Ex.PA.

iv. P.W.4 Mushtaq Ahmad corroborated the statement made by Mukhtar Ahmad P.W.3;

v. Allah Ditta P.W.5 is a wajtakkar witness. He had seen the accused accompanying the girls;

vi. Evidence of Suleman P.W.6 is of the same nature like P.W.5;

vii. The victim, Mst. Uzma Bibi appeared as P.W.7 and gave details of her abduction alongwith Mst. Allah Mafi. She corroborated the statement of the complainant P.W.3 apart from alleging rape to both the accused;

viii. Mst. Allah Mafi daughter of Mukhtar Ahmad appeared as P.W.8.She corroborated Mst. Uzma Bibi and alleged rape to both the accused;

ix. Mst. Shahida Parveen, Inspector Traffic Police appeared as P.W.9 to depose that on 21.06.2005 she accompanied Mst. Allah Mafi and Mst. Uzma Bibi for medical examination; and

x. Dr. Najma Parveen, WMO District Headquarter Hospital Nankana Sahib as P.W.10 stated that on 21.06.2005 she conducted medical examination of both the girls and issued MLR. The reports were handed over to the police. She further stated that in her opinion it was an old case of rape. By "old case of rape" she meant one weak old. Swabs were also taken by the doctor.

6. After close of the prosecution evidence the learned trial court examined both the accused under section 342 of the Code of Criminal Procedure, who made similar statement. They stated stating that they were falsely involved in this case with ulterior motive and both the females were neither abducted nor were subjected to zina-bil-jabr. Both of them neither made statement on oath under section 340(2) of the Code of Criminal Procedure nor produce any evidence in their defence. The learned trial court after completing codal formalities of the trial returned a verdict of guilt and recorded conviction and sentence under section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. Offence under section 11 ibid was not found proved because "no weapon was used, no threat was caused, no vehicle was even used." Hence the present appeal.

7. We have gone through the file. The evidence placed on record as well as statements of accused have been perused. Relevant portions of the impugned judgment have been scanned. The points requiring determination have been considered. The arguments of contending parties have been heard.

8. Learned counsel for the appellants has raised the following points:-

i. That there is element of delay in reporting the offence of Zina;

ii. That the allegation of abduction had not proved against the appellants and they were consequently acquitted. It is therefore not proper to convict them for committing rape;

iii. That there is no ocular evidence available on file to support the allegation of rape;

iv. That the prosecution evidence does not inspire confidence;

v. That it has not been proved that Asif accused had accompanied the victims at the time of abduction; and

vi. That there is no site plan of the place of occurrence.

9. Learned Additional Prosecutor General on the other hand supported the impugned judgment and submitted further that the two victim girls have fully implicated the appellants.

10. Our observation after a careful consideration of the facts and circumstances of the case are as follows:-

i. There is no element of delay in reporting the offence of rape. The police was duly informed that the two minor girls were missing. The persons accompanying the victims had been identified and mentioned in the FIR which was initially registered under section 11 which deals with kidnapping/Abduction. It was only after the recovery of both the victims and the arrest of appellants on 19.06.2005 that the offence of Zina-bil-Jabr was added in the FIR. There is therefore no force in the argument advanced by learned counsel for the appellants.

ii. The fact that allegation of abduction has not been proved or that the learned trial court acquitted the appellants from the charge of abduction does not necessarily lead to the conclusion that rape was not committed. The arguments of the learned counsel for the appellants are therefore devoid of force particularly when we look at the ages of the victims and the appellants. The two female victims were 10/11 years old at the time of occurrence. There was no history of menses which means that on both the scores the girls were minors. Element of force is not essential in the case of kidnapping. The basic ingredient of the offence of kidnapping is the element of *taking* or *enticing* a minor out of the keeping of lawful guardian of such minor without his consent. The girls in this case were found to be not only under 16 years of age but had also not attained puberty. The appellants were grown up persons; Muhammad Aslam accused was aged 28/29 years while Asif Ali accused was around 45 years. This is indeed cruel debauchery. It shocks human conscience that a minor girl, under training of a grown up

person will be molested and subjected to rape for days. I would not comment on the finding of the learned trial court given under section 11 of Ordinance VII of 1979 because appeal against acquittal under section 11 was not filed by the complainant.

iii. In the facts and circumstances of this case in particular and cases of rape in general, committed within four walls of a secure building, it is futile to look for ocular evidence which should corroborate the allegations of the victim. The medical evidence duly supported by the report of chemical examiner is sufficient corroboration of the factum of sexual intercourse which account has been provided by the two victims in this case. The allegation of rape against the appellants, the age factor of the victims, the medical evidence or for that purpose the veracity of the chemical report was never challenged while cross-examining the victims or the lady doctor. Direct and unassailed evidence of rape against the appellants is available on record. The identity of the appellants were never doubted. The evidence therefore inspires confidence.

iv. The appellants have not explained the reason why witnesses for the prosecution including the two victims implicated them in the heinous offence of rape. There is no evidence of enmity between the accused and the complainant party to impel the latter to involve the appellants falsely and thereby risk the future of minor girls.

v. It was brought on record that on account of their capacity as trainers the appellants had gained confidence of the complainant and were frequent visitors in his house. Muhammad Aslam had however already given a wrong name and place of occurrence to avoid apprehension. None of these facts deposed to by prosecution witnesses were challenged. The cumulative

effect of all these circumstances is that rape was committed with minor girls violated the trust and confidence reposed in them by the parents of sthe minor victims and hence the appellants do not deserve any concession or sympathy.

vi. The argument that Asif accused did not accompany the victims at the time they were being abducted does not mean that he is not responsible for rape after they reached Faisalabad particularly when both the victims alleged rape to both the accused and this allegation remained un-assailed. An allegation which happens to be the main ingredient of an offence when made during examination-in-Chief has to be met by the accused in cross-examination. An allegation of a serious nature if not challenged in cross-examination would be deemed to have been admitted; and

vii. The argument that the site plan of the place of occurrence was not made does not demolish the direct evidence of rape. Site plan is not a substantive piece of evidence.

11. In view of what has been stated above the factum of Zina-bil-Jabr by appellants with the two minors has been proved by the prosecution. The points for determination in this case were whether penetration had taken place and whether the offence could be related to the accused. Both the points have been proved. The verdict of the learned trial court is therefore maintained.

12. We have perused the impugned judgment delivered by learned Additional Sessions Judge, Nankana Sahib dated 12.12.2009.We have noticed

a general trend that while writing judgments the provisions of section 367 of the Code of Criminal Procedure are not observed. According to this section a judgment must contain the point or points for determination, the decision thereon and the reasons for the decision. The provisions of section 367 ibid are mandatory and are intended to constitute the substance as distinguished from mere form of judgment. This section is based upon good and substantial ground of public policy which is fundamental to the administration of justice. The object of this section is to let the accused and the appellate courts know that the trial judge applied his mind on the ingredients of the offence, gravamen of the charge as well as the related points requiring judicial determination. This section has been interpreted in a number of reports. Reference may however be made to the cases of:

i. Abdul Rasheed Munshi and 03 others Vs. The State PLD 1967 SC 498;

ii. Ashiq Hussain and another Vs. The State and 02 others 2003 SCMR 698;

iii. Abdul Sattar Vs. Sher Amjad and another 2004 YLR 580; and

iv. Sahab Khan and 04 others Vs. The State and others 1997 SCMR 871.

Let a copy of this judgment be sent to the learned trial court for perusal and guidance for future. A copy of this judgment be also sent to the Registrars of

Provincial High Courts as well as Islamabad High Court for necessary action.

13. As a result of what has been stated above Jail Criminal Appeal No.153/I of 2009 is dismissed. The impugned judgment dated 12.12.2009 delivered by learned Additional Sessions Judge Nankana Sahib in Hudood case No.44/2006 Hudood Trial No.05/2007 is hereby maintained. Arguments were heard on 13.1.2011. The appeal was dismissed. The reasons for dismissal of the appeal are hereby recoded in this judgment.

Sd/- [redacted]

JUSTICE SYED AFZAL HAIDER

Sd/- [redacted]

JUSTICE SHAHZADO SHAIKH

Islamabad the 13th January, 2011

Mujeeb-ur-Rehman/*

Fit for reporting.

Sd/- [redacted]

JUSTICE SYED AFZAL HAIDER