IN THE FEDERAL SHARIAT COURT

(Appellate/Revisional Jurisdiction)

PRESENT

MR.JUSTICE SHAHZADO SHAIKH
MR.JUSTICE MUHAMMAD JEHANGIR ARSHAD
MR. JUSTICE SHEIKH AHMAD FAROOQ

JAIL CRIMINAL APPEAL NO. 52/I of 2009

Muhammad Ishaq son of Zargoon Shah, ... Appellant
Caste Qureshi, r/o Boribangi Khel,
Tehsil Isakhel, District Mianwali.

Versus

The State .... Respondent

CRIMINAL MURDER REFERENCE NO. 1/I of 2009

The State Vs. Muhammad Ishaq

Counsel for the appellant	.....	Malik Amjad Pervaiz, Advocate
Counsel for the complainant	.....	Mian Muzaffar Ahmad, Advocate
Counsel for the State	.....	Mr. Muhammad Awais Mazhar, D.P.G.
FIR No., Dated Police Station	.....	24/89 Dated 10.06.1989 Bangi Khel, District Mianwali
Date of judgment of Trial Court	.....	15.04.2009
Date of Institution Appeal	...	22.04.2009
Date of hearing	....	12.07.2012
Date of decision	....	12.07.2012

-:-

JUDGMENT:

Shahzado Shaikh, Judge.- Through Jail Cr. Appeal No.52/I of 2009, Muhammad Ishaq has challenged the judgment dated 15.04.2009 delivered by learned Additional Sessions Judge, Mianwali/Isakhel whereby he was convicted under section 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and was sentenced to **Death** subject to confirmation by the Federal Shariat Court. He was also convicted under section 16 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and was sentenced to 7 years rigorous imprisonment with fine of Rs.1,00,000/- (one lac), in default whereof to further suffer simple imprisonment of 1½ years. However, he was extended benefit of section 382-B of the Code of Criminal Procedure.

The Additional Sessions Judge, Mianwali has also submitted a Murder Reference, which was registered in this Court as Criminal Murder Reference No.1/L of 2009 for confirmation of death sentence awarded to Muhammad Ishaq by the learned trial Court. We intend to decide both the above mentioned matters through this single Judgment.

2. Brief facts of the case are that complainant Rukan-ud-Din got recorded complainant Ex.PC before the police on 10.06.1989 wherein he stated that on 09.06.1989 at Peshi Wela, his daughter-in-law Mst. Bibi Fatima, (victim) alongwith his wife Mst. Shaheena Bibi went to the well for fetching water. When they filled up the water, accused Muhammad Ishaq, Muhammad Ismail both armed with rifles and Attique-ur-Rehman armed with knife emerged there. Muhammad Ismail raised "lalkara" that

they had come to take revenge of their insult. His wife Mst. Shaheena Bibi beseeched the accused but the accused Muhammad Ismail forced them to remain silent under the threat of firing. Accused/Muhammad Ishaq and Muhammad Ismail dragged Mst. Bibi Fatima and took her in their house and detained in a room. Accused/Muhammad Ismail laid her on the ground by pulling her legs, while accused Attique-ur-Rehman removed her Shalwar by cutting the string with a knife. First, accused Muhammad Ishaq committed Zina bil Jabr with her and then Attique-ur-Rehman accused committed Zina bil Jabr with her while accused Muhammad Ismail continued to hold her. Muhammad Ishaq committed Zina bil Jabr with her second time. After about one hour, the accused released her. The motive behind the occurrence was that a few days earlier, Zaheer-ud-Din, son of the complainant had teased Mst.Shamshad Bibi wife of the accused Muhammad Ishaq and in revenge whereof the accused committed Zina bil Jabr with daughter-in-law (present victim) of the complainant. The complainant further stated that when he came to his house in the evening after offering Juma prayer, he was told, about the occurrence by his wife and daughter-in-law. Hence, FIR No.24/89 was registered at Police Station, Bhangikhel, District Mianwali on 10.06.1989 under sections 16 and 10 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

3. Consequent upon the FIR, investigation ensued. During investigation, all the accused were found guilty of the offence. Only accused Muhammad Ishaq was sent up to face trial while his co-accused Attiq-ur-Rehman and Muhammad Ismail were declared proclaimed offenders.

4. The learned trial Court on receipt of the report under section 173 Cr.P.C. framed charges against accused Muhammad Ishaq on 05.03.2008 under section 10/16 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. The accused did not plead guilty and claimed trial.

5. The prosecution, in order to prove its case, produced 10 witnesses at the trial. The gist of evidence of the witnesses is as under:-

i) PW-1 Constable Ghulam Shabbir stated that he took Mst.Bibi Fatima, victim to Kalabagh Hospital for her medical examination on 10.06.1989 where the lady doctor was not available, therefore, on the instruction of Dr. Sher Ali M.O. of Kalabagh Hospital he brought her to DHQ Hospital, Mianwali where she was medically examined. After her medical examination, the lady doctor handed over to him MLC dated 10.06.1989, a sealed parcel, shalwar and Qameez of Mst. Bibi Fatima, which he produced before the I.O. who took the same into possession through memo Ex.PB.

ii) PW-2: Muhammad Sher Inspector stated that on 17.07.2007 he received information that Muhammad Ishaq accused, who was declared absconder, was available in Peshawar Jail in connection with other criminal case. He took the custody of accused Muhammad Ishaq from Political Agent Khaiber House Landi Kotal and transported him to Police Station, Kalabagh. He obtained three days physical remand of the

accused but no recovery was effected from him during the said period.

iii) PW-3: Anayatullah MHC stated that on 10.06.1989 he received a written complainant Ex.PC which was sent to him by Muhammad Yar, ASI and he reduced the same into FIR No.24 Ex.PD.

iv) PW-4: Constable Muhammad Maeer transmitted a sealed parcel said to contain swabs to the office of Chemical Examiner, Rawalpindi and during that period, no body tampered with the parcel.

v) PW-5: Muhammad Ashraf ASI stated that on 29.07.2007 during interrogation, the accused in his presence as well as in the presence of Rajmeer ASI and Muhammad Daud Constable, got recovered a rifle 8 MM alongwith four cartridges from western wall of a room of his house. The Investigating Officer prepared recovery memo (Ex.PE) signed by him as well as by Rajmeer ASI.

vi) PW-6: Dr. Talat Mehmooda medically examined the victim Mst.Bibi Fatima and her observations are as under:-

"1. Multiple bruises on back of chest and central part of different sizes ranging from 3 x 5 cm to 7 x 10 cm. These were in area of 15 x 20 cm.

2. A laceration over front of ring finger middle part 3 x 1 cm.

3. A laceration on front of left index finger middle part 3 x 1 cm.

Hymen was torn. Uterus was a/v. Normal adenexa were clear. Milk secretion was present. Nature of the injury was simple."

vii) PW-7: Zafar Iqbal Inspector was entrusted with the investigation on 28.07.2007. During investigation, he got conducted potency test of the accused Muhammad Ishaq; effected recovery of rifle 8 MM (P-3) and four live cartridges (P/1-4) from western room of his house buried in the ground beside the west wall of the said room wrapped in plastic paper; the recovery was made by digging the earth in presence of aforementioned Police officials; he prepared site plan of the place of recovery Ex.PG; he prepared the recovery memo Ex.PE; he also recorded the statements of witnesses about the said recovery. He also sent complaint about recovery of illicit weapon to the Police Station through Constable Muhammad Daud. On 30.07.2007 he sent the accused on judicial remand to jail by orders of the Illaqa Magistrate and submitted challan against him on 05.08.2007.

viii) PW-8: Doctor Sajid Hussain conducted potency test of accused Muhammad Ishaq and found him fit to perform sexual act.

ix) PW-9: ASI Muhammad Yar recorded statement of the complainant Rukan-ud-Din. Then he sent the complaint through Constable Abdullah for registration of the case to Police Station Bangikhel. He prepared the injury statement of

Mst.Bibi Fatima and sent her through Constable Ghulam Shabbir for medical examination. Then he proceeded to the place of occurrence, prepared the rough site plan and endorsed notes 1 to 3 on the said site plan. Then he recorded the statement of Mst.Shaheen Bibi. After this he took into possession Shalwar P-1 and Qameez P-2 through recovery memo Ex.PA; he also recorded statement of Ghulam Shabir and Bibi Fatima. He searched for the accused but they were not found in the vicinity of Tehsil Isakhel, whereafter he got warrants of arrest of Muhammad Ishaq, Muhammad Ismaeel and Attiq-ur- Rehman which were handed over to Constable Muhammad Ameer. He also recorded the statement of the victim Mst.Shaheena Bibi under section 161 of the Code of Criminal Procedure. Then he was transferred and he handed over the file of the case to Moharrir of the said Police Station.

x) PW-10: Mst.Bibi Fatima is victim of the case. Since she was "Pushto" speaking, Mr. Muhammad Ahsan Khan Niazi Advocate was appointed as her interpreter, who was fully conversant with the Pushto, Urdu and Punjabi. She while supporting the occurrence, reiterated the contents of the FIR.

CW-1: Mumtazullah Constable stated that he went to the abodes of witnesses Rukan-u-Din, Mst. Bibi Fatima, Mst.Shaheena Bibi, and ASI Muhammad Yar. As per his report, PW Rukan-ud-Din was murdered and in this regard, FIR No.27 dated 15.07.89 was

registered under section 302 of the Pakistan Penal Code at Police Station Bhangikhel. He also reported that PW Mst.Shaheena had died. ASI Muhammad Yar could not be served due to his residence in District Khushab.

6. The learned trial Court after recording the prosecution evidence examined the accused Muhammad Ishaq under section 342 Cr.P.C. In reply to question, "Why this case against you and why the P.Ws have deposed against you?, the accused Ishaq stated as follows:-

> **"PWs are inimical to me and my family as we had land dispute with the complainant party. On this account, PWs have deposed falsely against me and my brother."**

7. The learned trial Court, after completing the requirements of the trial, convicted and sentenced the appellant as mentioned in opening paragraph of this judgment. Hence, this appeal.

8. Malik Amjad Pervaiz, learned Counsel for appellant Muhammad Ishaq raised the following points:-

i) In tribal society, it is not possible that three real brothers would jointly commit such an immoral crime.

ii) The victim was accompanied by her mother-in-law. Neither the victim raised any hue and cry nor her mother-in-law did any thing to save the victim from the accused nor she reported the matter to any one in the vicinity to attract them for help.

iii) There were many houses in the vicinity and it was not possible for the accused to commit such a crime in the locality in tribal system.

iv) None of the articles like 'Balti' and 'Dabba' were recorded or produced.

v) The statements of the prosecution witnesses were recorded after about two decades.

vi) On the point of absconsion, he argued that there was enmity between the parties which is evident from the murders and other inter-se disputes and the appellant had migrated to Landi Kotal.

vii) There is no corroborative evidence. Even in the MLR, the lady doctor had attributed the injuries to friendly hand.

viii) The report of Chemical Examiner is not helpful in this case because the victim was a married lady and matching/grouping of the same was not done.

ix) The prosecution did not produce any witness to support the motive of the occurrence, especially when motive was alleged by the prosecution itself. Learned counsel in this respect has placed reliance on 2010 SCMR 97.

x) The victim did not recognize the accused during the trial.

9. On the other hand, Mian Muzaffar Ahmad, learned Counsel for complainant Rukkan Din has made the following submissions:-

i) The testimony of Mst. Bibi Fatima, who is the victim, is confidence inspiring in its true perspective.

ii) The absconsion of the appellant as well as his co-accused was not properly explained by the defence side and it is a strong circumstance for involvement of the accused in the occurrence.

iii) No body was available/present at the well at the time of occurrence except the mother-in-law of victim and she was also under fear and coercion.

iv) The victim was under fear of the accused at the time of her statement before the trial Court and could not understand Urdu

language, therefore, after about 20 years it is not material that she could not recognize the accused, but explained all details of identification of the accused and their antecedents.

v) Substitution is a rare phenomena in such cases and in the present case, the complainant had nominated the accused in the FIR .

vi) Defence side did not prove any enmity with the complainant due to which the accused were falsely implicated in this case.

vii) No evidence is available on the record regarding land dispute between the parties.

viii) Medical evidence fully corroborated the allegation of zina, because the husband of the victim was not with her in those days as he was army personnel and was posted at Rawalpindi.

ix) The bruises on the back of the victim corroborate the version of the victim that she was dragged by the accused, who took her to their house for commission of zina-bil-jabr.

x) No one came forward to become a witness as the accused were desperate and criminal people.

xi) Although the Investigating Officer has not visited the place of occurrence i.e. the well, which is deficiency on the part of Investigating Officer but the same is not fatal for prosecution case.

xii) The facility of semen grouping was not available in the hospital at that time. This fact is also very much clear from the record.

xiii) It was the duty of Investigating Officer to recover/collect "dubba" and "balty" and take the same in possession for producing the same as evidence.

xiv) The prosecution case is fully proved from the evidence available on the record and the accused deserves no leniency.

Finally, the learned counsel for the complainant has pleaded that the conviction and sentence of the appellant may be upheld and the appeal filed by him may be dismissed.

The learned counsel for the complainant relied upon the following judgments in support of his arguments:-

1992 SCMR 1625

PLD 1978 SC.P1

10. Mian Muhammad Awais Mazhar, DPG appearing for the State also supported the impugned judgment and submitted that the prosecution has fully proved its case beyond any shadow of doubt. The impugned judgment passed by the learned trial Court is based on well reasoning. The solitary statement of victim is confidence inspiring. The learned counsel for the State relied upon the following judgments;-

(i). **2010 SCMR 625**

(ii). **PLD 2010 SC 47**

(iii). **PLJ 1997 FSC 77**

(iv). **2011 PSC 777**

(v). **2010 SCMR 1025**

11. We have heard the learned counsel for the appellant as well as the learned counsel for the complainant and the learned Deputy Prosecutor General in addition to examining/evaluating the record minutely. We have also scanned the relevant portions of the judgment with the help of the learned counsel for the parties.

12. The appellant was nominated in the FIR at the very first instance. Substitution is a rare phenomena in such cases. The appellant absconded from the date of occurrence. He was declared Proclaimed Offender. He was arrested subsequently on 17.07.2007 in some other case under sections 324, 353, 148 and 149 PPC registered on **28.09.1989,** from Peshawar. The appellant has not denied his absconsion.

In his statement recorded under section 342 Cr.P.C. while answering question No.10, he replied as under:-

> ***"All proceedings for the service of NBW and proclamation are fake and fictitious. After the occurrence I alongwith my family shifted to Landi Kotal. The complainant party is influential and desperate persons and they in connivance with local police wanted to murder me and my brother in police encounter so I avoided my arrest and preferred to shift to Landi Kotal"***

13. From above answer, it appears that the appellant admitted the occurrence as well as his absconsion. Reasons for such absconsion given by him in his answer were not convincing and the same provide a strong circumstance for believing his involvement in the case. It is sufficiently clear that he knew about the occurrence, that he knew that he was reported to be involved in it, and that he was required to face the law. There cannot be any doubt to draw a conclusion that he absconded to avoid his arrest, intentionally. He did not prefer to seek help of the law. The fugitive from law, loses relevant benefits of law. Following is very pertinent, in this regard:

> Fugitive from law would lose all the rights to which a normal person was entitled under procedural or substantive laws. Court was not to act in aid of a fugitive from justice. If a court was precluded from acting in aid of fugitive from justice, it was not conceivable that executive Authorities had got wider powers than the court. **[2005 YLR Lah. 2427].**

14. We are conscious of the fact and position of law on the point of absconsion that:

Abscondence, no doubt, is a weak type of evidence and the same *per se* is not sufficient to prove the guilt and sustain conviction, but it can be considered as one of the circumstances in the presence of sufficient direct or circumstantial evidence of unimpeachable character, to connect the accused with the offence and in such case it would furnish corroboration to the ocular testimony. **[2006 MLD Pesh, 104(c).**

Abscondance after occurrence has corroborative value and it must be judged according to circumstances of each case. **[2001 SCMR 177; NLR 2004 Criminal Lah. 37].**

15. Therefore, we have carefully considered different aspects of abscondence, such as the following:

Abscondence considerations. Antecedents of absconder, his occupational habits and limitations, period of abscondence, specific explanation for it; all such factors are to be considered in *juxta-position* with other evidence on record. **[1980 SCMR474].**

16. In the present case, the appellant/accused was not away because of his working or living compulsions, but in fact, he admitted in his statement under section 342 Cr.P.C., that he had fled from the place in order to avoid the consequences of this occurrence.

Abscondence - Distinction. There is distinction between a case in which an accused absconds immediately after the commission of the offence and a case in which he absconds at the stage of arguments in the trial court. Former being in close proximity with the commission of the offence and carry more evidentiary value as compared with the latter. **[1992 SCMR 1983].**

17. It is quite evident from the record and as admitted by the appellant that he absconded right from the time of occurrence.

Abscondence for a long time is a strong piece of corroborative evidence. **[1992 SCMR 1036].**

18. In the present case, the appellant/accused remained fugitive from law for a very long time. The occurrence took place on 09.06.1989, whereas he could be arrested only on 17.07.2007 in some other case which was also reported to be registered on 28.09.1989.

> Abscondance is of two categories. One in which absconder destroys the prosecution case/evidence and the other one is in which there is not such effect but the accused on account of certain circumstances or to save himself from harassment resorts to abscondance. In first category, the abscondance shall always adversely effect the grant of bail which in the second category the case is to be considered in light of facts and circumstances prevailing therein. **[PLJ 2007 Cr.C. (Karachi) 107(d)].**

19. As the case could not proceed/trial could not be held due to absconsion of the appellant/accused, very important witnesses died, in the meantime. But still the victim woman has withstood all the travails to see that she gets justice from trial of the appellant/accused, and she has been able to bring all facts and circumstances before the Court.

20. The victim was accompanied by her mother-in-law. If she was alive, the old lady could have perhaps explained her behavior for not raising any hue and cry, not reporting to any other person, and waiting for family male members to come and respond to the situation.

21. The statements of the prosecution witnesses were recorded after about two decades, as the appellant/accused could be arrested and brought before the law only after his such a long absconsion.

22. The point raised by the counsel for the appellant that the victim did not recognize the accused during the trial, is not fatal to the prosecution as the trial took place after about two decades. In the meantime, it is only natural that human features change with time. Furthermore, the illiterate victim was facing the frightful foes who had abducted her and was naturally and psychologically under fear, particularly when by that time two most important male members of the family, i.e., husband and father-in-law had died. Yet, she withstood the cross examination in all respects and explained all details of identification of the accused and their antecedents.

23. The delay in arranging medical examination of the victim by the Police was due to the non-availability of the lady doctor at such rural place of Mianwali.

24. Non-recovery of articles like 'Balti' and 'Dabba' does not affect any aspect of the commission of the offence.

25. Presence of appellant on the fateful day is proved by the letter Mark-DB of his officer about his proceedings on leave from the place of his duty on 08.06.1989. Therefore, presence of the appellant at the place of occurrence and time of occurrence was established by the prosecution beyond any shadow of doubt.

26. In view of the circumstances, we are satisfied that in the given circumstances the statement got recorded by the victim, which stood test of

cross examination has established her truthfulness, and is confidence inspiring.

27. However, we are not satisfied with the conclusion drawn by the learned trial Court in the impugned judgment that the act of accused of 'taking away' the victim woman fell within the ambit of section 16 of the Zina (Enforcement of Hudood) Ordinance, 1979. In fact, neither specific evidence has been brought on record nor analysed, as required, to prove the ingredients of section 16 of the said Ordinance. Section 16 of the Zina (Enforcement of Hudood) Ordinance, 1979, is reproduced below:

> **16. Enticing or taking away or detaining with criminal intent a woman:** Whoever **takes or entices away** any woman with intent that she may have illicit inter-course with any person, or conceals or detains with intent any woman, shall be punished with imprisonment of either description for a term which may extend to seven years and with whipping not exceeding thirty stripes, and shall also be liable to fine.
>
> **The word "Enticement" means:**
> -act of alluring, tempting, influencing, seducing, alluring, or soliciting a person, without direct or apparent effort, to do something wrong, ;
> **-attract or lead by exciting hope or desire, especially to evil. - deceive, mislead, beguile or tempt with less than honorable intentions.**
>
> -leading astray from right behavior into sinful ways.(Dictionary/Thesaurus: *The Century, Webster's*, Collins, The American Heritage)

28. In this regard, it may be pertinent to seek guidance from legal precept on the point:

> Even if a female accompanies the accused with **consent** the offence under section 16 of Zina (Huddod Ord.) VII of 1979 is made out. Word: "takes away any woman with intent...." includes the going of a female with **consent** or on her own request. Question was examined in the case. **[PLJ 1988 SC 552; PLJ 1993 SC 426; 1993 SCMR 1806].**
>
> **Word "take"** as used in section 16 of the Ordinance would mean **to cause to go, to escort or to get into possession. [2004 SCMR 482 (d)J.**

29. From the above, it is clear that main ingredients which could constitute 'enticement', in lexical or legal sense, are not found in the present case. In the social setting of the tribal society, particularly in the wake of on-going intense enmity between the accused and the complainant parties, there was no possibility of any contact between the accused and the victim woman, to allow such a development. It is neither alleged nor alluded, in any manner, from any side.

30. Nevertheless from the evidence available on record, we are of the considered opinion that the offence of abduction with intent that the woman will be forced to illicit intercourse as provided under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 is made out against the present appellant. In the present case, it is very clear that abduction was not a mere allegation. Motive of zina was not only attributed but also elucidated, in the circumstances, in the back drop of

intense enmity. For the sake of contradistinction. let us examine nuance and import of the term 'abduction':

Abduction means:

-act of taking someone away by force or cunning; kidnapping,
-criminal act of capturing and carrying away by force;
-act of seizure, capture, carrying, or taking of a person by force
(Dictionary/Thesaurus: *The Century, Webster's*, Collins, The American Heritage)

31. The record shows that the main witnesses, PW Mst. Shaheena mother-in-law and PW Rukan-ud-Din, father-in-law of Mst. Bibi Fatima victim during investigation, before their death, had remained very clear and consistent that the victim woman was abducted by force. The victim woman also remained unshaken with vivid description on each point and episode of abduction, duly corroborated by marks of injuries on her back and hands. In the circumstances of unabated enmity between the parties, insult was added to the enmity by open force, which was not possible otherwise.

32. In the present case, the only PW Mst. Shaheena/mother-in-law of the victim, who was with her at the time of the occurrence, has died. PW Rukan-ud-Din has also died. In the circumstances, the statement of the illiterate victim woman before the trial court, who withstood the anguish of cross examination, is very relevant. Consider the following:

Evidence of abductee is the only relevant testimony to prove such abduction. [2004 SCMR 425 (c)].

33. There was a time, in the social milieu, when the statement f victim girl was given so much importance, to the extent, that is was held th :t

it was for the "accused to rebut" the allegation, instead of the victim proving it. Examine following:

> **Intention under section 366, PPC** is to be inferred that the girl was abducted for illicit intercourse. Burden lies on the accused to rebut the presumption. **[PLD 1959 Dac. 956(DB)].**

34. However, in the circumstances of the present case, utmost care has to be taken, as laid down by the honourable apex Court, continuously, e.g., in the following:

> **Mere abduction** is not sufficient to establish the offence. Prosecution must prove that the woman abducted was to be subjected to illicit intercourse by use of **force** or seduction. **[1969 SCMR 491; 1969 PCr. LJ 1091].**

35. It is also clear that separate sentences can be awarded for abduction and rape; each being a separate offence. The following is very relevant in the present case.

> **Abduction and rape.** Separate sentences for abduction and rape can be passed and it is not contrary to Section 71, PPC. **[ILR 7 Lah. 484].**

Section 11 of the Zina (Enforcement of Hudood) Ordinance, 1979, reads as follows:

> **11. Kidnapping, abducting or inducing women to compel for marriage etc.:** Whoever kidnaps or **abducts** any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be ***forced or seduced to illicit inter-course***, or knowing it to be

likely that she will be forced or seduced to illicit inter-course, shall be punished with imprisonment for life and with whipping not exceeding thirty stripes, and shall also be liable to fine; and whoever by ***means of criminal intimidation*** as defined in the Pakistan Penal Code, or of abuse of authority or ***any other method of compulsion, induces any woman to go from any place*** with intent that she may be, or knowing that it is likely that she will be, ***forced or seduced to illicit inter-course*** with another person shall also be punishable as aforesaid.

36. MLR provides enough corroborative evidence, on material points of application of force, during abduction of the victim woman, she bore injuries on her fingers and her back as she was dragged away, etc. Furthermore, the testimony of Mst. Bibi Fatima, who is the victim, is confidence inspiring in its true perspective.

Section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, reads as follows:

10. Zina or zina-bil-jabr liable to tazir.

(1) Subject to the provisions of section 7, whoever commits zina or *zina-bil-jabr* which is not liable to *hadd*, or for which proof in either of the forms mentioned in section 8 is not available and the punishment of *qazf liable to hadd* has not been awarded to the complainant, or for which *hadd* may not be enforced under this Ordinance, shall be liable to tazir.

(2) ....

(3) .....

(4) When zina-bil-jabr liable to tazir is committed by two or more persons in furtherance of common intention of all each of such persons shall be punished with death.]

37. The victim woman remained unshaken in her statement that the appellant took her by force/dragged her to his house for the purpose of committing illicit intercourse with her. At this point, the charge of zina, within the mischief of section 10 (4) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, however, needs careful examination.

38. Although, the report of Chemical Examiner is positive, but, besides being a married lady, the offence of zina is alleged to three brothers, but matching/grouping of the semen was not carried out. Therefore, it would be highly unsafe to hold the appellant guilty of the said offence, in which, in fact, three real brothers are alleged to have committed the heinous offence, as a gang, in their own house, where other family members were around, by merely placing reliance on the solitary statement of the victim neither supported nor corroborated by any other independent evidence to this effect, specially when under the said section, no punishment other than capital punishment i.e. death could be awarded.

39. In tribal society, it is highly improbable that three real brothers would jointly commit such an immoral act, in their house, within the family compound, particularly when their other family members would be around. Even otherwise, the remaining two accused namely Muhammad Ismaeel and Atiq-ur-Rehman are absconder and neither they could be tried nor punished in absentia. Section 10(4) of the Ordinance, 1979 envisages the

conviction of zina-bil-jabr by two or more persons in furtherance of common intention. Therefore, the allegation under section 10 (4) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, has not been proved beyond reasonable doubt.

40. In view of what has been discussed above, Jail Criminal Appeal No.52/I of 2009 filed by appellant Muhammad Ishaq against his conviction ordered by learned Additional Sessions Judge, Mianwali through judgment dated 15.04.2009 is disposed of in the following terms:

(i). The conviction recorded by the learned trial Court through impugned judgment under section 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance,1979 is set-aside and the appellant is acquitted of the charge.

(ii). The conviction and sentence awarded under section 16 of the Offence of Zina (Enforcement of Hudood) Ordinance,1979 is converted into one under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and punishment of imprisonment for life with fine of Rs.1,00,000/- (Rupees one lac only) is imposed on the appellant and in case of default, the appellant shall undergo further S.I for one and a half year. However, benefit of section 382(b) Cr.PC as extended by the learned trial Court is maintained.

(iii). Resultantly, Reference No.1/L of 2009 sent by the learned Additional Sessions Judge, Mianwali for

confirmation of sentence of death is answered in the **negative** and **not confirmed**.

42. These are the reasons of our short order dated 12.07.2012.

JUSTICE SHAHZADO SHAIKH

JUSTICE MUHAMMAD JEHANGIR ARSHAD

JUSTICE SHEIKH AHMAD FAROOQ

Announced at Lahore
on 12.07.2012
Imran/*

Fit for reporting.

JUSTICE SHAHZADO SHAIKH