

# IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

## PRESENT

**MR. JUSTICE SHAHZADO SHAIKH**

### JAIL CRIMINAL APPEAL NO. 78/I OF 2010

Khadim Hussain s/o Muhammad Shafi ... Appellant  
Caste Ansari r/o Chak No.207/EB, Tehsil  
Arifwala District Pakpattan Sharif

Versus

The State ... Respondent

Counsel for the appellant ... Mr.Saliheen Mughal, Advocate

Counsel for the State ... Ch.Muhammad Sarwr Sidhu,  
Addl: Prosecutor General

✓ FIR No. Date and ... No.103/08, dated 08.05.2008,  
Police Station ... P.S. Ahmad Yar District  
Pakpattan Sharif

Date of trial Court ... 14.06.2010

Date of Institution ... 20.07.2010

Date of hearing ... 03.03.2011

Date of decision ... 03.03.2011

**JUDGMENT**

**SHAHZADO SHAIKH, J:-** This jail appeal filed by appellant Khadim Hussain is directed against judgment dated 14.06.2010 delivered by learned Additional Sessions Judge-II Arifwala District Pakpattan Sharif, whereby he was convicted under Section 376 Pakistan Penal Code and sentenced to ten years Rigorous Imprisonment and a fine of Rs.50,000/- or in default to further undergo six months Simple Imprisonment. Accused was given benefit of section 382-B of the Code of Criminal Procedure.

2. Brief facts of the case as reported in the crime report No.103/2008 Police Station Ahmad Yar are that on 08.05.2008 complainant Bashir Ahmad son of Sardar Muhammad caste Mochi lodged a report to S.H.O Police Station Ahmad Yar District Pakpattan stating therein that on 01.05.2008 at about 3.00 p.m. his daughter Mst.Samina Bibi aged about 9/10 years was at his house and complainant alongwith his other family members were busy in harvesting wheat crop. His above said daughter came to serve them lunch and after that she went back for home. When

she reached near house of Khadim Hussain (accused), he called her into his house. Accused Khadim Hussain took her into the room removed her/his shalwar and started zina- bil -jabr with her. Upon her hue and cry the PWs Shah Muhammad son of Lal Din, and Khalid son of Noor Muhammad, co-villager, were attracted there, who saw the occurrence. Seeing the PWs, the accused fled away from the spot. The PWs took the daughter of complainant namely Samina Bibi victim to the house of complainant in necked and unconscious condition. The accused Khadim Hussain continued beseeching the complainant but the complainant did not agree and registered this case against Khadim Hussain accused.

3. After having completed legal formalities, challan was submitted against the accused before the learned Court of competent jurisdiction and thereafter the charge was framed against the appellant on 05-11-2008 under section 376 Pakistan Penal Code, which was denied by him and he claimed to be tried.

4. The prosecution in order to prove the guilt of the appellant produced as many as 12 witnesses including Shahid Hussain Sub-

Inspector PW-6 Investigating Officer who investigated the case. Moharrar of Police Station Ahmad Yar handed over to him samples, three sealed parcels, one syringe containing blood, and one sealed envelope. The said articles were taken into possession by him through recovery memo Exh.PD. On the said date he visited the clinic of Lady Dr. Sajida Tabbasum and joined her and her employee Zubaida Bibi in the investigation of this case, and recorded their statement under section 161 Code of Criminal Procedure. On 02.08.2008, he obtained the report from gynecologist. He recorded the statement of Muhammad Aslam, constable No.815, who transmitted the sealed parcels intact to the office of the Chemical Examiner, Multan on 03.08.2008. On 23.8.2008, after getting permission from concerned quarter the I.O joined with investigation the accused, Khadim Hussain, as the accused was at the Police Station Dera Rahim District Sahiwal in connection with another case. The I.O received the person of the accused on 25.8.2008 with the permission of the court and was conducted the DNA test of accused Khadim Hussain on

27.8.2008, thereafter remanded the accused into judicial custody. The gist

of deposition of the remaining prosecution witnesses is as under:-

- i. Dr. Akhtar Hussain Nazar, Medical Officer appeared as PW-1 and stated that on 26.8.2008, the accused Khadim Hussain was brought before him for potency test. He deposed that he found the accused fit to perform sexual intercourse.
- ii. Muhammad Aslam, Constable No.815 who appeared as PW-2 stated that on 2.8.2008, he received sealed parcels and three boxes and one syringe for onward transmission to the office of the Chemical Examiner, Multan. As per this PW on 3.8.2008, he deposited one box in the said office intact. Remaining two boxes were returned to him for DNA test, which he returned to the Moharrar on the same date.
- iii. Muhammad Bashir, complainant appeared as PW-3 and reiterated the same facts narrated by him in his application Exh.PB.
- iv. Samina Bibi, victim appeared as PW-4. She deposed that two years back, she was going from the field to her house after providing lunch items to her parents in wheat crop and when she reached near the house of Khadim Hussain, (accused) the accused called her into his house and after removing her shalwar the accused started, forcibly, zina with her. She further deposed that when the accused was busy in committing rape with her, PWs Khalid and Shah Muhammad were attracted there. As per this PW she became unconscious and when became conscious she found herself under the treatment of lady Dr. Sajida Tabbassum. She further deposed that her statement was recorded by the police and she was also medically examined by the lady doctor.
- v. Shah Muhammad, appeared as PW-5 narrated facts on the ocular account of this incident and corroborated the statement made by complainant Bashir Ahmad PW-3.
- vi. Shahid Hussain, Investigation officer appeared as PW-6 who investigated the case and has given the details of investigation and other steps taken by him in this case. The same has been mentioned in an earlier paragraph of this judgment.
- vii. Mst. Sajida Tabbassum, LHV. appeared as PW-7 deposed that on 1.5.2008 at about 4/5.00 p.m. this witness was at her clinic. She checked Samina Bibi victim, who was semi-conscious, looking very weak. She only provided initial treatment to the victim and referred the victim to Tehsil Headquarter Hospital, Arifwala.

- viii. Ghulam Akbar, ASI appeared as PW-8 who received complaint Exh.PB on 8.5.2008 and on the basis of this complaint he chalked FIR Exh.PB/1 without addition or omission.
- ix. Mehmood Ali, SI appeared as PW-9 who also partially investigated the case like Shahid Hussain SI PW-6, gave the details and other steps taken by him in this case.
- x. Lady Dr. Saima Nawaz Khan, appeared as PW-10 and deposed that on 17.5.2008, as being Gynecologist at DHQ Hospital, Pakpattan, she examined Samina Bibi, daughter of Bashir Ahmad, aged about 10 years, caste Mochi, resident of 207/EB and observed as :-

MARKS OF IDENTIFICATION:-

A scar mark on the front of fore-head.

A scar mark on the left cheek.

EXAMINATION

On examination, victim was fully conscious, well-oriented, young girl with a history of sexual assault, approximately 17 days back.

There were no external mark of injury, volva and infantile (hair absent). Hymen torn, admit one finger easily. No bleeding or redness, her report is Ex.PG.

- xi. Ashiq Ali, Constable No.535 appeared as PW-11, who was Naib Moharrar on 31.7.2008 at Police Station Ahmad Yar and on the said date, Muhammad Jahangir No.474/HC Moharrar handed over three sealed parcels to Shahid Hussain I.O. in the presence of this witness.
- xii. Dr.Fareeha Manzoor, WMO appeared as PW-12. She deposed that on 9.5.2008 at about 12.35 p.m. Samina Bibi victim of this case was brought before her by Mehmood Ali Sub-Inspector for her medical examination. This PW medically examined the victim.

5. The learned trial court, after close of prosecution evidence, recorded statement of the accused under section 342, Code of Criminal Procedure, in which he pleaded his innocence. The accused did not opt to

make statement on oath under section 340(2) of Code of Criminal Procedure nor produced any evidence in his defence. After taking into consideration all aspects of the case and hearing the arguments advanced by both the parties, learned trial court convicted and sentenced the appellant as mentioned above. Hence this appeal.

6. I have gone through the file with the assistance of learned counsel for the contending parties. Evidence placed on the record including statement of accused have been perused. Relevant portions of the impugned judgment have been scanned, learned counsel of the parties have been heard at length.

7. Learned counsel for the appellant has argued that there is delay in medical examination of the victim and also delay of seven days in reporting the matter to Police, which created doubts about the veracity of prosecution story. He further contended that DNA report totally negated the version of the prosecution. He also contended that the occurrence took place on 1.5.2008 and parcel was deposited in the office of Chemical Examiner, Multan on 6.8.2008 and DNA test was conducted on 27.8.2008



after three months of the occurrence. This delay of about three months in this regard was not explained properly. There are material contradictions in the statement of prosecution witnesses. The Moharrar namely Jahangir who handed over the sample to investigation officer was given up and not examined as a prosecution witness. Therefore, the whole case became highly doubtful and prosecution failed to establish its case beyond shadow of doubt.

8. Learned Additional Prosecutor General for the State on the other hand supported the conviction under section 376 Pakistan Penal Code and argued that delay of seven days in reporting the matter is clearly explained in FIR and the same is immaterial. Similarly delay in recording medical evidence is a deficiency only on the part of Police. Medical evidence furnished by Sajida Tabbassum, LHV PW-7, Dr.Sima Nawaz Khan Gynecologist PW-10 and Dr.Fareeha Nawaz,WMO PW-11 strengthen the claim of prosecution that accused Khadim Hussain committed Zina-bil-Jabr with Samina Bibi victim, a minor girl. Prosecution has fully established its case beyond reasonable doubts.



9. I have given my anxious consideration to the submissions made by learned counsel for the parties and examined the record minutely. The ocular testimony of the prosecution witness is natural, reliable, satisfactory, and provides confidence inspiring evidence. The prosecution has fully proved the case against the appellant beyond any shadow of doubt. The defence has not proved any enmity, ill will or malice against prosecution witness. There is also ocular evidence in this case even otherwise sole testimony of the victim is enough for conviction if it is truthful and inspires confidence, which in this case the victim does. The trial Court in para -10, of impugned judgment, with sound and cogent reasons has repelled the contention regarding delay in the lodging of the FIR as well as delay in medical examination.

10. Notwithstanding the fact that DNA report about the swabs not matching with the profile of accused is on record, but the observation of the lady Dr. Sima Nawaz Khan, PW-10 and Lady Dr. Fareeha Manzoor, PW-12 are enough evidence of the fact that Mst.Samina Bibi victim in this case had been subjected to sexual intercourse. The opinion of the lady

Doctors lends corroboration to the statement of the victim that the appellant had subjected her to zina- bil- jabr. Apart from this fact, the other important aspect is that for proving commission of zina, penetration alone is sufficient for which the victim is always the best witness, because it is she who undergoes that assault. Mst. Samina Bibi victim categorically stated that the appellant had committed zina- bil- jabr with her and during that process she became unconscious. This fact is also verified by Mst.Sajida Tabbassum, LHV PW-7 who deposed that on 01.05.2008 she checked Samina Bibi victim who was semiconscious and looking very weak. This witness also disclosed that the hymen of the victim was ruptured; the clothes of the victim were blood stained and rape was committed with the victim. The statement of this PW in that regard was, sufficient to prove the act of penetration. In this connection, guidance is also sought from AIR 1934 Lah. 797: "Rupture of hymen is not necessary." In this case under consideration, the hymen of the victim was reported ruptured. Furthermore, even "Vulval penetration is sufficient to constitute offence." [AIR 1934 Lah. 797-]

That being so, I am satisfied that non receipt of matching report of DNA test, does not negate the ocular account furnished by PW-5 Shah Muhammad, and the observation of the lady Dr. Sima Nawaz Khan, PW-10 and Lady Dr. Fareeha Manzoor, PW-12, who had examined the victim, particularly in view of the connivingly unnecessary long delay of about 3 months in the DNA test. dated 11.2.2009, which completely destroyed its evidentiary value.

In connection with chemical and laboratory methods, guidance is also sought from following:

“Report of Chemical Examiner is not fool proof as it does not prove actual penetration and more over swabs were sent to Chemical Examiner after a delay of 11/12 days. [PLJ 1993 FSC 58].”

“Deoxyribonucleic acid commonly called the DNA - Utility and evidentiary value of the DNA Test was acceptable but not in a case falling under the penal provisions of Zina punishable under Hudood Laws having its own standard of proof, Principles. [PLD 2005 Lah. 589 (a)].”

“Penetration is necessary to prove the offence of zina but no oral”

“Penetration. Chemical analysis of the swabs is not the only manner of proving penetration. Opinion of medical expert that the victim sustained anal injury not challenged by cross-examination. Penetration held, proved. [1976 SCMR 338-339-A].”

“Penetration into thighs of victim amounts to carnal intercourse under section 377, PPC. [PLD 1961 Dacca 447 (DB)].”

“Even if there was no penetration, entry of male organ of accused into artificial cavity between the thighs of the victim amounted to penetration and to carnal intercourse. Absence

of semen on swabs is not sufficient to discard prosecution story as penetration is sufficient to constitute sexual intercourse for offence of *zina-bil-jabr*. [PLJ 1994 FSC 21 ref. 1986 SCMR 512].”

11. The non-production of Jahangir, Moharriar as a witness before the trial Court was also challenged by the defence, and no adverse presumption could be drawn for withholding his statement as the Naib Moharrar PW- 11, Ashiq Ali, No.535/C, had already appeared and had made his statement regarding sealed parcel in detail, so that the prosecution had given him up as unnecessary witness. It would not be out of place to mention here that the prosecution was not bound to produce all the PWs mentioned in the calendar of the witnesses, except which were necessary to prove the guilt of the accused. I, therefore, bursh-aside this objection.

12. Adverting to the defence version that the appellant was falsely implicated by the father of the victim with whom appellant had dispute over the residential plot, it is observed that it does not carry any weight and has no worth in the eye of law, because neither the accused/appellant himself had appeared as a witness of his own account to make a statement

on oath to substantiate the said version nor he had produced any defence witness for disproving the charge against him. Even otherwise in normal course of events if any false accusation was leveled against any innocent person, the first natural reaction could be, that he would swear or would make a statement on oath to get him exonerated of such an heinous charge, but the accused/appellant has not restored to any of the above alternatives, which reflected adversely on his conduct. The accused/appellant remained absconder for considerable period. His absconsion is another strong supportive factor in the allegations and pleas corroborating evidence in favour of prosecution. Even otherwise, without being prejudiced by this factor, I am of the view, that the defence version that the accused was falsely implicated was a mere assertion and thus had no substance in it to cast doubt on the version of the prosecution which stands proved through cogent, reliable and trustworthy evidence.

13. The resume of above discussion is that the prosecution has proved its case beyond any shadow of doubt against the accused/appellant. In my view appellant has rightly been held guilty, convicted and sentenced by

the trial court. There is no merit in this appeal, the same is dismissed.

Judgment of the learned trial Court is upheld. Conviction and sentence

awarded by the Additional Sessions Judge-II, Arifwala District Pakpattan

Sharif vide judgment dated 14.6.2010, against the appellant is maintained.

These are reasons of my short order dated 03-03-2011. The benefit of section 382-B Cr.P.C. shall remain intact.

 Seal -  
**JUSTICE SHAHZADO SHAIKH**  


Islamabad, the 3<sup>rd</sup> March, 2011  
Abdul Majeed-

Fit for reporting.

 Seal -  
**JUSTICE SHAHZADO SHAIKH**  
