

IN THE FEDERAL SHARIAT COURT  
(Appellate Jurisdiction)

PRESENT

**MR. JUSTICE SHAHZADO SHAIKH**

JAIL CRIMINAL APPEAL NO. 88/I OF 2010

Amjad Hussain son of Qaim Khan ... Appellant  
Caste Karlal, r/o Mohallah Rafiqueabad,  
Rawalpindi.

Versus

The State ... Respondent

Counsel for the appellant ... Mr.Aziz-ur-Rehman,  
Advocate

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

FIR No. Date and ... No.84, dated 22.01.2009,  
Police Station P.S. Sadiqabad, Rawalpindi

Date of trial Court ... 24.09.2010

Date of Institution ... 12.10.2010

Date of hearing ... 11.03.2011

Date of decision ... 11.03.2011

**JUDGMENT**

**SHAHZADO SHAIKH, J:-** The appellant Amjad Hussain has filed this Jail Criminal Appeal against the judgment dated 24-09-2010 whereby he has been convicted under section 377 of the Pakistan Penal Code and sentenced to ten years Rigorous Imprisonment with fine of Rs. 50,000/-. The benefit of section 382-B of the Code of Criminal Procedure has also been extended to the appellant.

2. The brief facts of the case arising out of FIR No.84, dated 22.01.2009 lodged at Police Station Sadiqabad, Rawalpindi by complainant Muhammad Riaz, are that on 22.01.2009 at 3.00 p.m when the complainant reached home, his wife Mst. Shakila Riaz told him that his son Maaz bin Riaz who had gone to get kite and thread at 1.30 p.m. had not returned home by then. Thereafter complainant alongwith his brother Muhammad Ilyas started searching his son Maaz. When they reached near Federal Government (Boys) School they heard cries and weeping. Thereafter complainant saw his son coming weepingly and his shalwar was also put off while a young boy who was later identified as Amjad Hussain ran away seeing them coming.

On enquiry, complainant's son told that Amjad Hussain had committed sodomy with him in a room on the pretext of giving him kite and string.

Hence this case.

3. Investigation ensued as a consequence of lodging FIR. Sub-Inspector Abdul Latif, PW-7, investigated this case. He prepared injury statement Ex-PC of victim Maaz bin Riaz and sent him to Benazir Bhutto Hospital Rawalpindi for his medical examination through constable Yasir Imtiaz who after getting the victim medically examined produced carbon copy of MLR No.126/2009 and sealed envelope which he took into possession through recovery memo Ex-PA attested by constables Yasir Imtiaz and Muhammad Irfan. He recorded statements of PWs under section 161 of the Code of Criminal Procedure. He visited place of occurrence on the pointation of victim Maaz bin Riaz and Muhammad Riaz, complainant and prepared site plan Ex-PE. He made efforts to arrest accused but he was not traceable to him. On 23.01.2009, the accused Amjad Hussain was arrested in this case. The accused was medically examined through Muhammad Boota 3679/C from Benazir Bhutto Hospital Rawalpindi through application EX.PF who

later produced MLR No.129/2009 before the Investigation Officer. The statement of Moharrar Malkhana Maqsood Ahmed was also recorded under section 161 of the Code of Criminal Procedure by the Investigating Officer.

On 24-01-2009 the accused was sent to judicial lock up by the orders of area Magistrate.

4. After completing investigation police submitted report under section 173 of the Code of Criminal Procedure requiring the accused to face trial.
5. The learned trial Court framed the charge against the accused on 24.08.2009 under sections 367-A and 377 of the Pakistan Penal Code to which he pleaded not guilty and claimed trial.
6. The prosecution in order to prove its case produced nine witnesses.

The gist of prosecution evidence is as follows:-

- (i) HC-4898 Maqsood Akhtar, appeared as PW-1, who received one sealed envelope from Sub-Inspector Abdul Latif on 22-01-2009 and handed over the same to C/6203 Muhammad Latif on 23-01-2009 for onward transmission to the office of Chemical Examiner, Rawalpindi.
- (ii) C-6203 Muhammad Latif, appeared as PW-2, who received one sealed parcel envelope from HC-4898 Maqsood Akhtar and deposited the same in the office of Chemical Examiner, Rawalpindi on 23.01.2009.
- (iii) C-7884 Yasir Imtiaz, appeared as PW-3. On 22-01-2009, he escorted victim Maaz bin Riaz to Benazir Bhutto Hospital, Rawalpindi for medical examination. After medical

examination of victim he received carbon copy of MLR No.126/2009 and one sealed envelope containing swabs which he produced before Investigation Officer who received through recovery memo Ex-PA, attested by him and HC-435 Muhammad Irfan.

- (iv) Dr. Muhammad Ijaz appeared as PW-4. He conducted medical examination of victim Maaz bin Riaz on 22-01-2009. He opined that sodomy has been committed upon him. In this regard this witness had issued MLR No.126/2009 Exh.PB.
- (v) Complainant Muhammad Riaz appeared as PW-5. He deposed same facts as he narrated in his crime report.
- (vi) Victim Maaz bin Riaz appeared as PW-6. Before his deposition some court questions were put to him for ensuring his capability of making statement on oath and after judging his capability to make his statement on oath, thereafter, his statement had been recorded. He deposed that when he reached the shop of accused Amjad Hussain to purchase kite and thread on 22-01-2009, the accused took him inside the shop and committed sodomy with him after bolting door of the shop. Thereafter he came out of shop where his father and uncle met him.
- (vii) Sub-Inspector Abdul Latif appeared as PW-7. He was Investigation Officer and his role has already been mentioned in para No.3 of this judgment.
- (viii) Dr. Malik Mazhar Hussain appeared as PW-8. He conducted medical examination of accused Amjad Hussain on 23-01-2009 and found him potent.
- (ix) Sub-Inspector Muhammad Mumtaz appeared as PW-9. He recorded formal FIR No.84/2009, Ex-PD/1.

7. After closing prosecution evidence, statement of accused was recorded under section 342 of the Code of Criminal Procedure. He did not produce any witness in his defence but made his statement on oath under section 340 (2) of the Code of Criminal Procedure which is as follows:-

“I have not committed the act of sodomy with Maaz bin Riaz, victim of present case, I have been implicated falsely in this case.”

In his cross-examination he stated as follows :-

“It is in correct to suggest that I was convicted in a sodomy case at Abbottabad. Volunteered that I have acquitted in a sodomy case at Abbottabad.”

8. After hearing both the parties the learned trial Court convicted and sentenced the appellant as mentioned in opening para of this judgment.

9. Learned counsel for the appellant stated that the accused is a young man of about 22 years. He further contended that the appellant is the only bread winner of his family and had come from Abbottabad to Rawalpindi for earning of his livelihood. He contended that the Investigation Officer took into possession dirty piece of cloth from the place of occurrence and prepared separate memo but the said recovery memo is not available on the file of the case, even the clothes of the victim were not produced by the prosecution and the trousers of the victim were not stained with semen. The medical officer has categorically stated that the rectal sphincter was not stained with blood and he did not observe any scratch on the private part or body of the victim, which is fatal for prosecution. There is no direct evidence except the statement of minor victim to prove the case against the

appellant beyond shadow of doubt in this case. The I.O. did not take into possession thread and kite from the place of occurrence which was necessary to prove the allegation against the appellant.

10. Learned counsel for the appellant stated that the accused is a young man of about 22 years, and the only bread earner, languishing in jail since arrest. In the end, his case may be considered on basis of mitigating circumstances also.

11. Learned counsel for the State on the other hand opposed the appeal and supported the judgment under challenge.

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12. With the help of the learned counsel for the parties, I have gone through the entire evidence. It is very clear from prosecution evidence that the appellant took the minor victim, Maaz bin Riaz, into the room, at the place of occurrence and committed unnatural offence with the victim who was only 12 years of age. Maaz bin Riaz the victim categorically supported the prosecution case as contained in the promptly lodged FIR and corroborated each and every material point of the case. The victim also corroborated medical evidence and the motive part of the prosecution story

narrated by the complainant Muhammad Riaz PW-5. Solitary statement of the victim of the sodomy, which is confidence inspiring and corroborated by medical evidence would be sufficient to prove the case and for maintaining the conviction under section 377 of the Pakistan Penal Code. There is no apparent reason and ulterior motive to involve appellant Amjad Hussain, in this case i.e. offence of sodomy with minor boy of 12 years, when there was no enmity between the parties so as to make such allegations which also stigmatize the minor victim for all his life. FIR of the case was lodged promptly. Although recovery memo regarding the dirty piece of cloth which was stated to have been taken into possession from the place of occurrence, is not available in the judicial file and clothes of the victim were not produced by the complainant, but it does not mean that his whole story is to be discarded. The established principal of law is that chaff is to be shifted from the grain. Therefore, it does not create any impact on the prosecution story specially when victim's allegation is completely corroborated by the medical evidence. It is a fault on the part of police, as on many occasions, even with motive. It is not substantial at all to discard the whole prosecution.



There is nothing on the record which may be considered as a source of mitigating factor in favour of appellant for lesser penalty, particularly in view of minority of the victim, and the accused's statement about his acquittal in similar charge against him in the past. The detention of the appellant as an under trial prisoner during the trial and as convict in the jail pending disposal of the appeal before this Court, would not be extenuating and mitigating circumstance to be considered for the purpose of reduction in quantum of sentence under section 377 of the Pakistan Penal Code. Reduction in sentence of imprisonment is not such a discretion, which should be exercised as a matter of routine, rather such discretion is to be exercised in a case in which circumstances so demanded in the interest of safe administration of justice. In fact, instead of sentence for life, under section 377, Pakistan Penal Code, the trial Court has already given lesser sentence of 10 years.

13. I have considered the contention raised by the learned counsel for the appellant and do not find any force in the argument for reduction in the sentence of the appellant.

14. On careful analysis of the entire evidence available in the case I have come to the conclusion that the case against the appellant stands proved beyond any shadow of reasonable doubt and he has been rightly convicted and sentenced under section 377 of the Pakistan Penal Code. The conviction and sentence of appellant Amjad Hussain are, therefore, maintained and the appeal having no merit is accordingly dismissed.

15. The learned trial Court while awarding the sentence of fine of Rs.50,000/- did not mention that in default of payment of fine how much further imprisonment the appellant had to undergo. It is, therefore, ordered that in default of payment of fine of Rs. 50,000/-, the appellant Amjad Hussain will have to undergo further 6 months Simple Imprisonment.

These are reasons of my short order dated 11-03-2011. The benefit of section 382-B Cr.P.C. shall remain intact.

Islamabad, the  
11<sup>th</sup> March 2011  
Abdul Majeed/\*

*Spl.*  
  
JUSTICE SHAHZADO SHAIKH  


Fit for reporting.

*Spl.*  
  
JUSTICE SHAHZADO SHAIKH  
