

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

JAIL CRIMINAL APPEAL NO. 130/1 OF 2008

Abdul Majeed son of Muhammad Hussain,
r/o Chak No.111/TDA, Fateh Pur,
Tehsil Karor, District Layyah

.... Appellant

Versus

The State

....

Respondent

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Counsel for appellant

Mr. Muhammad Saliheen Mughal,
Advocate

Counsel for the State

....

Raja Shahid Mehmood Abbasi,
Deputy Prosecutor General

FIR No. Date &
Police Station

....

315, 29.12.2005
Fatehpur, Layyah

Date of judgment of
trial court

....

13.11.2008

Dates of Institution

....

16.12.2008

Date of hearing

....

17.02.2009

Date of decision

....

17.02.2009

JUDGMENT

SYED AFZAL HAIDER, Judge.- Abdul Majeed, appellant

through this Jail Appeal has challenged the judgment dated 13.11.2008

whereby he has been convicted under section 10(2) of Offence of Zina

(Enforcement of Hudood) Ordinance, 1979 and sentenced to seven years

rigorous imprisonment with a fine of Rs. 20,000/- and in default of non

payment of fine to further suffer one month simple imprisonment. The

impugned judgment was delivered by learned Additional Sessions Judge

Karor, District Layyah. Benefit of section 382-B of the Code of Criminal

Procedure was extended to the appellant.

2. The crime report in this case was registered at Police Station

Fatehpur as FIR No.315 (Ex.PB/1) dated 29.12.2005 by Fazal Hussain ASI

PW4 on a written application Ex.PB of even date submitted by Muhammad

Hussain complainant P.W.6 regarding an occurrence alleged to have taken

place on 22.12.2005.

3. Brief facts of the case as stated in Ex.PB are that complainant

on the day of occurrence i.e.22.12.2005 went to Darya Khan on his tractor

trolley to drop sugarcane and came back home at about 11.00.p.m. As soon as he reached the outer gate of his house Muhammad Zakriya (closely related to complainant) and Muhammad Saeed (not produced) also reached there and all of them heard complainant's wife Mst. Bashiran Bibi wailing in the room. All the three entered the room and Mst. Bashiran told them that at about 9.00.p.m. she went to the outer door on hearing the call bell and found accused Abdul Majeed armed with pistol, Muhammad Rafique¹⁸ armed with rifle and Muhammad Shafique armed with gun standing outside the gate while in a white coloured car two unknown persons were sitting. The accused forcibly entered into the house by pushing Mst. Bashiran and held Mst. Zahida Bibi by her arm and forcibly dragged her to the car and fled away with the abductee with the object of committing Zina-bil-Jabr with her. On the next day complainant, Muhammad Zakriya and Muhammad Saeed P.Ws and other respectable of the area went to the accused and demanded the return of his daughter Mst. Zahida. The accused in the presence of the respectable promised to return her but later on

refused to honour their commitment. Thereafter the crime report was got registered at the police station.

4. Police investigation was taken up by Muhammad Azam Cheema, S.I. PW.12 after registration of the crime report. He visited the place of occurrence, inspected the spot, recorded statements of the witnesses under section 161 of the Code of Criminal Procedure and prepared rough site plan Ex.PD. He searched for the accused and on 30.12.2005 recovered Mst. Zahida and got her medically examined on the same day. On 31.12.2005 the victim was produced by him before the Illaqa Magistrate for recording her statement under section 164 of the Code of Criminal Procedure but the latter refused to record her statement with the "direction that whatever she stated under section 161 of the Code of Criminal Procedure is sufficient and also verified this factum by the abductee". On 01.01.2006 the accused Abdul Majeed was arrested and medically examined regarding his potency. Report under section 173 of the Code of Criminal Procedure was submitted after completion of the

investigation, by the local police in the court requiring the accused to face trial.

5. The trial court on 09.08.2006 framed charge against two accused under section 11 whereas charge under section 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 was framed against Abdul Majeed accused. The accused did not plead guilty and claimed trial. Accused Muhammad Shafiq had absconded and was declared proclaimed offender.

6. The prosecution in order to prove its case produced twelve P.Ws. at the trial. The gist of the prosecution evidence is as follows:-

- i. P.W.1 Mst. Nasreen Akhtar, Lady Constable No.10 produced Mst. Zahida before Women Medical Officer for her medical examination.
- ii. P.W.2 Muhammad Sharif, Head Constable accompanied P.W.1 Lady Constable to the Rural Health Centre Fatehpur for medical examination of the victim.
- iii. Muhammad Ashraf, Constable No.190 appeared as P.W.3 and stated that in his presence the accused got recovered pistol from his house and he signed the recovery memo of pistol.
- iv. P.W. 4 Fazal Hussain formally registered the crime report as FIR Ex.PB/1 on receipt of written application Ex.PB.

- v. Moti ullah Constable No.252 appeared as P.W.5 to state that after receipt of sealed phial he kept the same in safe custody in Malkhana. On 01.01.2006 he gave it to Muhammad Aslam for onward transmission to the Office of the Chemical Examiner.
- vi. Muhammad Hussain complainant appeared as P.W.6 and repeated the facts recorded in application Ex.PB. dated 29.12.2005.
- vii. Muhammad Zakriya P.W.7 endorsed the statement of complainant.
- viii. Muhammad Aslam Constable 387-C appeared as PW.8 to state that on 01.01.2006 he received one sealed envelope and one sealed phial for onward transmission to the office of the Chemical Examiner which were deposited by him intact on 02.01.2006.
- ix. Mst. Bashiran Bibi appeared as P.W.9 and Mst. Zahida Bibi abductee appeared at the trial as P.W.10. Both of them corroborated the statement of Muhammad Hussain complainant P.W.6.
- x. Dr.Rizwana Rafique P.W.11 deposed regarding medical examination of Mst. Zahida P.W.10.
- xi. Lastly Muhammad Azam Cheema, Investigating Officer appeared as P.W.12.The gist of his deposition has already been discussed above.

7. The prosecution case was closed on 08.03.2007 after the production of the report of the Chemical Examiner and recording of the prosecution evidence. Thereafter the learned trial court recorded statement of two accused under section 342 of the Code of Criminal Procedure on

04.04.2007 whereas the statement of Muhammad Shafique accused was recorded on 18.09.2007. In response to the question No.5 "why this case against you and why the P.Ws have deposed against you?" all the three accused stated as under:-

"I did my job with the complainant as labourer and on the payment of my labour some dispute was arose between the complainant and me so the complainant in connivance with the local police has falsely involved me in this case. Neither I have abducted Mst. Zahida nor subjected to zina with her. The victim Mst. Zahida had moved an application before the Hon'ble High Court Multan Bench as well as learned Sessions Judge, Layyah and Civil Judge, Karor wherein she has stated that neither they have abducted her nor subjected to zina with her and the present case against the accused present in court is false and fictitious. DSP Karor had also investigated this case and according to his findings neither we have abducted Mst. Zahida nor subjected to zina with her. We are innocent in this case. P.Ws have falsely deposed against me on the asking of the complainant".

8. The accused did not make statement on oath under section 340(2) of the Code of Criminal Procedure. Learned counsel for the accused on 02.11.2007 made the following statement:-

“Stated that after tendering certified copy of Writ Petition No.2839 of 2006 *Ex.D-D* certified copy of order of Hon’ble High Court Multan Bench dated 20.06.2006 *Ex.D-E*, certified copy of application for harassment *Ex.D-F*, certified copy of affidavit of Mst. Zahida Perveen *Ex.D-G*, copy of order of learned Sessions Judge dated 17.06.2006 *Ex.D-H* and copy of comments on Harassment petition *Ex.D-J*, I close the whole defence evidence.” (Emphasis added).

9. Affidavits of Muhammad Amin, Zahid Iqbal, Nazir Ahmad, Muhammad Ramzan, Allah Ditta and Noor Ahmed produced by defence are also part of the record, but their evidentiary value was not assessed by the learned trial court. The acquitted accused Muhammad Rafique also made statement under section 342 of the Code in line with the statement made by Abdul Majeed appellant.

10. The learned trial court after close of the evidence of the parties heard their arguments and found Abdul Majeed accused guilty under

section 10(2) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 alone and convicted and sentenced him as noted above. Accused Muhammad Rafique and Muhammad Shafique were acquitted of "abduction/enticement". Abdul Majeed was also acquitted of this charge. Hence the present appeal against conviction.

11. I have gone through the file and perused the statement of witnesses as well as the accused. I have also scanned the impugned judgment. I have also heard the learned counsel for the appellant as well as the learned Deputy Prosecutor General. Learned counsel for the appellant stated that the element of abduction or enticement has not been proved and that the statement of Mst. Zahida Bibi does not inspire confidence and that independent evidence has not been produced in the trial court. At the end it was stated that Mst. Zahida Bibi has been appearing before the High Court and even challenged her marriage with one Shoaib. She is not a reliable witness and there is no evidence of zina-bil-jabr or even zina in this case. Learned Deputy Prosecutor General stated that the accused has been nominated in the FIR with a specific role and that the pistol was recovered

from the accused and further that the Nikah of Mst. Zahida Bibi with the accused has not been established. He also relied upon the report of the Chemical Examiner which is positive and at the end learned DPG stated that it is a case of consent.

12. However for reasons mentioned below it is not safe to sustain the judgment dated 13.11.2008 delivered by the learned trial court. A
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i. That on the same set of evidence the learned trial court has not only acquitted the other two accused but also found that the "Prosecution has, thus, failed to prove forcible abduction/enticement of victim Mst. Zahida Bibi by the accused persons Abdul Majeed, Muhammad Rafique and Muhammad Shafique." (Paragraph 23 read with paragraph 25 of the impugned judgment).

ii. The learned trial court also found that the case was registered "after a delay of 6-7 days without explanation." (Paragraph 23 of the judgment of learned trial Court). It is worth noting that PW.6 Muhammad Hussain complainant, father of the allegedly abducted victim, stated in reply to a question put in the cross examination:-

"It is correct that my said daughter Zahida Bibi was again abducted by all the three accused of this criminal case resultantly another criminal case was also got registered by Muhammad Shoaib Case FIR

No.107/2006. *On the next day of registration of this case FIR No.315/05 my abductee daughter was returned to us by the accused present in court through police and after one month of her coming back she was married to”(Emphasis added)*

The recovery of the victim through police the next day i.e. 23.12.2005 is also stated by PW.9, mother of the abductee but the prosecution case as given in the FIR is that the victim was not back home even on 29.12.2005 at 8.15 p.m. i.e. the time of registration of FIR, the eighth day of her abduction. The Investigating Officer, PW.12 stated that she was recovered on 30.12.2005 from Adda of Chak 111/TDA where she was standing all alone. All these facts make the story mysterious.

iii. The copies of the judicial record produced by defence relates to the period 31.05.2006, 17.06.2006 and 20.06.2006 in which the complainant Muhammad Hussain PW.6 was impleaded as a respondent in the various petitions filed by his daughter PW.10 Mst. Zahida Bibi. The latter stated therein that she was never abducted. Apparently these documents relate to the second FIR 107/2006 but the same set of accused are alleged to have abducted her again this time when she was wife of one Muhammad Shoaib. It is precisely for those reasons that the learned trial found (Paragraph 23 of the judgment under consideration) that her statement was not confidence inspiring. The learned trial court had the occasion to watch the conduct of the alleged abductee in the court and I also agree that the prosecution story as a whole does not inspire confidence.

iv. As stated above the learned counsel of the accused produced certified copies of judicial record before the learned trial court on 02.11.2007 i.e. almost a year before the impugned judgment was delivered. The learned trial court referred to these documents "*Ex.DD to Ex.DI*" in paragraph 19 as well paragraph 23 of the impugned judgment. These documents very clearly disclose that 2 ½ years before the date when she moved the Hon'ble High Court and the learned Sessions Judge, she was living with her husband Abdul Majeed accused. A suggestion was also made to the father of the abductee, complainant Muhammad Hussain, and he admitted that "My victim daughter Zahida had also filed suit for jactitation of marriage at Karor against Shoaib." It clearly means that evidence of her marriage with appellant had been brought on record and the fact that she had challenged the legality of her second Nikah is incorporated in *Ex.D.G*. It is not understandable why this aspect was not considered by the learned trial Court. The factum of marriage at one stage of the dispute was admitted by the alleged abductee and therefore carnal relationship between the spouses during that period would not attract the mischief of section 10(2). The learned trial court however did not consider it feasible to determine the question of marriage in the light of the decision of the Family Court which at the stated point of time was seized of the matter. The learned trial court should have demanded the decision of the Family Court. The fact of the matter is that a big dent has been created in prosecution story because the element of marriage between appellant and Mst. Zahida and the filing of jactitation suit by Mst. Zahida against Shoaib

had come on record. Even the retracted acknowledgment of marriage by Zahida would entitle the accused to claim benefit of reasonable doubt.

v. I agree with the observation of the learned trial court that the conduct of PW.9 Mst. Bashiran, mother of victim, was strange in the sense that instead of reporting the matter to her relatives in the neighbourhood she “opted to sleep after her abduction.”

vi. It is admitted that appellant was a paid worker of the complainant but this fact was intentionally suppressed in the crime report. The learned trial court took notice of this fact.

vii. Learned trial court found that recovery of weapon of offence was effected from the appellant but PW.3 Muhammad Ashraf constable, the alleged recovery witness of pistol 30-bore P1, admitted in his cross-examination that though the house of the appellant was located in a thickly populated place yet neither the Lambardar or any other person was associated with the recovery episode. He also admitted that “it is a joint family residence” where brothers, sisters and parents were also residing. He also stated “It is incorrect that recovery was effected from the possession of accused Abdul Majeed.” In this view of the matter the element of recovery loses significance. This was a consideration for conviction by the learned trial court though he found that the car on which the abduction allegedly took place was not recovered and this non recovery found favour with the learned trial court while acquitting all the accused of the charge of abduction/enticement.

viii. It is admitted by the Investigating Officer that the alleged victim had filed petitions in the Hon'ble High Court and the Court of learned Sessions Judge against him for harassment in the criminal case lodged against the accused persons.

ix. The complainant had stated that on reaching home, when he entered his house, he was accompanied by PW7 Muhammad Zakariya and PW Muhammad Saeed (not produced by prosecution). The learned trial court in para 23 of its judgment found this assertion of the complainant party as false. The presence of the witnesses was found to be doubtful. This aspect further weakens the prosecution story.

x. Under these circumstances the court cannot be a mere spectator. All the pieces of the evidence have to be kept in view. The conduct of the prosecution is equally important. In fact the prosecution has to establish its case beyond reasonable doubt. The documents produced by accused certainly show that the deposition of the abductee should be examined with great caution. The mode of her recovery is also doubtful. She was allegedly abducted twice. Even the second time she was found by her father in the court by chance. It is a case which is not reassuring. The facts narrated do not lend certainty.

13. If the trial court comes to the conclusion that there was no element of abduction or enticement and the case was covered by the mischief of section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 then the punishment should be awarded to both i.e. the

male and female performer. It is not fair to convict a male actor or a female player alone. The court should not sit as a mute observer that the report under section 173 of the Code of Criminal Procedure has been sent against one actor alone. In the present case the "injured" person i.e. Mst. Zahida PW was allegedly abducted twice by the same set of persons and both the times she was located by chance: once on the lorry Adda, a congested place, and secondly in the court premises, another crowded area. It appears that she entered into marriage with Shoaib without seeking divorce from the accused if the contents of her petitions and applications have to be accepted on the face value. In this view of the matter can the provisions of sub-section (2) of Section 10 of Ordinance VII of 1979 be invoked for the appellant alone? Will it not amount to gender discrimination. The sub-section opens with the word "Whoever" and the definition of Zina, as given in section 4 of the Offence of Zina (Enforcement of Hudod) Ordinance, 1979 is: "A man and a woman are said to commit "Zina" if they willfully have sexual intercourse without being validly married to each other." Section 10(2) deals with the offence of Zina liable to tazir and the

trial court in fact takes cognizance of the offence and not the nominated offender alone. The words "taking cognizance of offence" occurring in section 190 of the Code of Criminal Procedure means taking notice of the offence or in other words an application of mind to the facts of a case in order to determine whether the facts disclosed constitute a triable offence.

14. In the case of Mahazalla versus The State, reported as 2000

PCr.LJ 534, a Division Bench of this Court held:

"Needless to point out that while dealing with a case, the court has to take cognizance of the "offences" and not the "Offenders" and if the record indicates that there were some other offenders as well, then the court while acting under section 190 or 265-D, Cr. P.C. or there after even, should have initiated proceedings against them."

15. Reference may also be made as the case of Raghubans Dubey versus State of Bihar reported as AIR 1967 Supreme Court 1167 (at page 1169 second column bottom) wherein it was held:-

"In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it

is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence.”

16. The trial court, in the instant case, after having come to the ^{6.}_{1.} conclusion that case under section 10(2) was made out against the accused, did not consider the option of summoning Mst. Zahida Bibi as a consenting accused which means that the learned trial judge was not satisfied about the veracity of her deposition.

17. In this view of the matter it is clear that the prosecution has not taken the court into confidence. Some important links are missing and there appears to be suppression of certain basic facts. The evidence has also not been considered in its proper perspective by the learned trial court. The result is that the benefit of doubt has been earned by the appellant. Consequently the judgment of learned trial court dated 13.11.2008, delivered in Hudood Case No.6/ASJ of 2006, Hudood Trial No.7/ASJ of

2006, convicting the appellant Abdul Majeed under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 is hereby set aside. The appellant is directed to be released forthwith unless required in some other case.



JUSTICE SYED AFZAL HAIDER

Islamabad the 17th February, 2009
MUJEEB UR REHMAN/*



Fit for reporting