IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

Jail Criminal Appeal No.209/I of 2007

Kazim Hussain alias Qazi son of Tahir Khan
R/o Chah Pushtey Wala Mouza Thatta Gaboolan
Tehsil and District Dera Gazi Khan .... Appellant

Versus

The State	....	Respondent
Counsel for appellant	....	Ch. Rafaqat Ali. Advocate
Counsel for State	....	Mr. Shahid Mehmood Abbassi, Deputy Prosecutor General
FIR. No. Date & Police Station	....	322, 21.11.2006 Choti, Dera Gazi Khan
Date of judgment of trial court	....	6.10.2007
Date of Institution	....	15.11.2007
Date of hearing	....	14.4.2008
Date of decision	....	18.4.2008

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JUDGMENT:

SYED AFZAL HAIDER, JUDGE.- Through this Jail Criminal Appeal, appellant Kazim Hussain alias Qazi has challenged his conviction and sentence passed by learned Additional Sessions Judge, Dera Ghazi Khan vide judgment dated 6.10.2007 whereby the appellant has been convicted under section 377-PPC and sentenced to three years R.I. with fine of Rs.20,000/- and in default whereof he will undergo one month S.I. Benefit of section 382-B, Cr. P.C. has also been extended to the appellant.

2. Brief facts of the case as given out in the FIR are that the informant Riaz Hussain, P.W.6 appeared before PW.5 Muhammad Asghar ASI, while on duty at Chowk Choti, and made statement Ex.PA which was recorded as formal FIR Ex.PA/1 by PW.1 Wajid Hussain ASI at Police Station Choti, District Dera Ghazi Khan. P.W. Riaz Hussain alleged that on 21.11.2006 at about 2.45.p.m. while he was returning home from his agricultural land he saw near his house his son Sohail Ahmed, aged five years crying and blood was flowing from under his shalwar. Abdullah son of Sardar Khan, P.W.7 and Hussain Bakhsh (given up P.W.) were also present there. These witnesses, it is further stated by the complainant, informed him that Sohail

Abbas while playing with other children went near the place where Abdullah, P.W.7 was cutting wood. Kazim Hussain accused came there and stated that in order to save the child from random wooden splinters he would escort him to his residence. It is further stated that he took the child into the nearby cotton crops and started committing sodomy with him. On hearing the cries of the child Abdullah and Hussain Bukhsh P.Ws rushed to the spot where accused Kazim Hussain was busy in the un-natural act with the victim while the child was crying. After completing the un-natural act and on seeing the P.Ws the accused fled away from the place of occurrence and the child Sohail lost his senses.

3. FIR. No.322 was registered at police station Choti on 21.11.2006 at 3.45 p.m. The case was investigated by Muhammad Asghar ASI who appeared in the trial Court as P.W.5. He sates that he got the victim medically examined from Rural Health Centre Choti through PW3 Abdul Majeed Constable, though the witness does not disclose this fact. The Investigator, thereafter visited the spot, prepared site plan Ex.PF, recorded statements of the P.Ws under section 161 of the Code and arrested appellant

on 22.11.2006. Incomplete report was submitted by him under section 173 of the Code of Criminal Procedure in the trial Court on 5.12.2006.

4. The trial court framed charge against the appellant under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (Ordinance No.VII of 1979) as well as section 377 of the Pakistan Penal Code on 28th March 2007. The accused did not plead guilty and claimed trial.

5. The prosecution produced as many as seven witnesses in support of their allegations. The accused Kazim Hussain was examined under section 342 of the Code of Criminal Procedure wherein he took up the plea that he has been involved in this case due to criminal and civil litigations between his family and the complainant. He claimed innocence but he did neither opt to make statement under section 340(2) of the Code of Criminal Procedure nor produce any witness in his defence. The trial court after assessing the prosecution evidence found the appellant guilty under section 377 of the Pakistan Penal Code. He was consequently convicted and sentenced as noted above. Hence this appeal which is being disposed of through this judgment.

6. I have perused the evidence and the record with the assistance of learned counsel for the appellant and listened to his comments. Thereafter I

asked Ch. Rafaqat Ali Advocate, learned counsel for the appellant to formulate his points. His first contention was that Abdullah Khan, PW.7 is a solitary eye witness of this crime which the prosecution has chosen to produce. The witness appeared before the learned trial Court on 7th September, 2007 and was declared hostile. Hussain Bukhsh was the other alleged eye witness mentioned in the FIR. He was, however, not produced. According to the learned counsel for the appellant, the prosecution has therefore utterly failed to connect the accused with the offence alleged by the prosecution side as there is no direct evidence available on record. The learned counsel further argued that the semen matching was not got done by the prosecution. The report of the chemical examiner does not establish that the external and internal swabs taken from the victim, though stained with semen, matched with semen of the appellant. In the absence of group matching it is not possible to fix responsibility upon the accused. The learned counsel then argued that the prosecution is bound to prove its case beyond any shadow of doubt. The prosecution cannot rely upon the weaknesses of the defence. Learned counsel further argued that the accused

is entitled to benefit of doubt because benefit can be given even on a single circumstance if it creates reasonable doubt in the prudent mind.

7. Mr. Shahid Mehmood Abbasi, learned Deputy Prosecutor General for the State argued that a heinous offence was committed wherein a child aged five years was subjected to sexual perversion. The factum of sodomy has been proved medically and the report of the chemical examiner is also positive. With particular regard to the presence of semen on the swabs taken from the anal region of the victim, the learned counsel argued that the case of the prosecution stands established on this fact alone. He also stressed the fact that the accused was nominated by father of the victim. PW6 the informant, it was argued, had also talked to the eye witnesses before lodging the F.I.R. who confirmed that convict Kazim Hussain was the real culprit. Learned counsel also laid stress on the fact that PW.7 Abdullah though unreliable, has stated that the accused took the child from the place of occurrence. The witness had also stated that victim was sitting besides the tree when the accused came there. Under these circumstances, the learned counsel for the State argued the burden of proof shifted and the appellant

was required to establish that he was falsely implicated and wrongly substituted.

8. I have given anxious thought to the facts and circumstances of this case particularly because the victim is of tender age. In such a case of brutal conduct if the allegation is proved the accused does not deserve leniency and maximum sentence should be awarded. It is however strange that learned trial Judge having found that the accused Kazim Hussain aged 20 years was guilty of heinous offence beyond reasonable shadow of doubt yet he sopted to award sentence only for three years.

9. In the case of Abid Javed alias Mithu Vs. The State, reported as 1996 Pakistan Criminal law Journal 1161 the Division Bench of the Federal Shariat Court held that semen found on the swabs was of no evidentiary value where the semen of the accused was not sent to the Serologist for semen grouping. The Hon'ble Judges remarked as follows:-

> "This Court even earlier in the case of Mst. Ehsan Begum v. The State PLD 1983 FSC 204 emphasized on the Investigating Officers and Medical Officers the importance of obtaining material evidence by having matched the semen of the alleged culprit with the semen found on the vaginal swabs. It was observed, "It is not understandable why the Medical Officers examining the male for potency should not obtain the specimen

of semen of the accused so that no doubt be left about the identity of the person committing Zina or Zina-bil-Jabr. The Police Officers in their reference to the Medical Officers should also in such cases invariably request the doctor concerned to take the specimen of semen of the male accused. They should send them for chemical examination and serology alongwith vaginal swabs and clothes/cloth etc., having seminal stains." Copies of the judgment were sent to the Secretary interior, Secretary Department of Law, Home Secretaries and Inspector-General, Police of the Provinces but the Investigating Officers have shown no interest in complying with the said direction and requiring the Medical Officers to obtain specimen of semen of the accused for comparison with semen found on the vaginal swabs or the clothes both etc. having seminal stains. This is high time that these directions are followed in letter and spirit as this important piece of evidence will remove doubt if any with regard to the identity of the person committing Zina or Zina-bil-Jabr".

10. Learned counsel for the appellant relied upon the case of Muhammad Aslam Vs. Shakeel Liaqat reported as 2006 SCMR 348. It was a case decided by the Supreme Court of Pakistan in the Shariat Appellate Jurisdiction. One of the reason for recording acquittal, even though both the accused were apprehended at the spot and the semen also detected, was that matching of the detected semen with the semen of the accused had not been done.

11. Learned counsel for the appellant also relied upon the case of Amanat reported as N.L.R 1995 S.D. 320. This authority is not relevant to the controversy under discussion because it is the bounden duty of the prosecution to prove the case against accused beyond any shadow of doubt. In so far as burden of proof is concerned article 117 of Qanun-e-Shahadat Order, 1984 stipulates:-

> (1)"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> Illustrations.
>
> (a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed."

12. As regards the other argument, it is true that the defence plea is to be considered in juxtaposition with prosecution case. The Hon'ble Supreme Court in the case of Ashiq Hussain Vs. The State reported as 1993 S.C.M.R. 417 at page 427, held as follows:-

> "It is needless to repeat that it is bounden duty of the prosecution to prove the case against accused beyond doubt and this duty does not change or vary in the case in which any defence plea is taken. Burden of prosecution to prove its case beyond doubt remains the same. Of course, defence plea is to be considered in juxtaposition with prosecution case and in the final analysis if defence plea is proved or accepted then

prosecution case would stand shattered and discredited. It would be enough if plea is substantiated to the extent of creating doubt in the credibility of the prosecution case. If defence plea is not substantiated, no benefit accrues to the prosecution on that account and its duty to prove the case beyond doubt would not be diminished even if defence plea is not proved or is found to be palpably false. In support of the proposition, reference can be made to the case of Ali Sher v. State reported in PLD 1980 SC 317."

13. Learned counsel for the appellant finally relied upon the case of Tariq Pervez Vs. The State reported as1995 SCMR 1345 to stress the point that it is not necessary that there should be many circumstances creating doubts. It is enough if a single circumstance creates reasonable doubt in the prudent mind about guilt of the accused. Benefit of doubt should go to the accused not as a matter of grace or concession but as a matter of right.

14. It is however strange that the prosecution did not deem it expedient to produce victim Sohail Abbas to substantiate the allegation of sodomy against the appellant. It is not in evidence that the victim child is not of sound mind. Even the learned trial court did not think fit to summon the child as court witness. He was direct affectee of the gruesome crime and hence essential and a natural

witness. His statement could have clinched the whole issue. Article 3 of the Qanoon-e-Shahadat Order, 1984 does not at all contemplate age limit for a person to be a legally competent witness. Every person is competent to testify unless, in the opinion of the court, the witness fails in the test stipulated therein. Child witness should have been summoned particularly when one eye witness was given up and the other had resiled.

15. The trial courts should keep the judicial pronouncements in view while deciding such cases. In the case of State Versus Farman Hussain reported as P.L.D. 1995 SC. 1 the Hon'ble Supreme Court has cautioned that the evidence of child witness should be assessed with care and caution. In the case of Muhammad Ismail Versus State reported as PLJ. 1996 SC. 805, at page 810 the Hon'ble Judges held that the evidence of child witness possessing sufficient understanding can be believed and relied upon for conviction. The Hon'ble Judges relied upon cases reported as 1968 SCMR. 852, 1969 SCMR. 76 and 1971 SCMR. 273 in arriving at that conclusion. In this regard reference may also be made to the case of Amjad Javed Versus State,

reported as 2002 SCMR. 1247, wherein it was found that the trial court had recorded the statement of the child witness after having found him intelligent enough to state the facts of the event. If the statement of a child witness is consistent, worthy of credence, straight forward and confidence inspiring then conviction can be based upon such evidence if it is corroborated by circumstantial, medical and recovery evidence. Trial court should, therefore, have examined the victim because the trial court, during the trial process, is the best judge to watch demeanour and conduct of various categories of the witnesses.

16. I have also seen the site plan Ex.PF. made without scale by the Investigating Officer on 21.11.2006. There is no indication as to who pointed the various points to the police officer and from which position the alleged eye witnesses saw the occurrence and from which place the victim was collected by whom. Even the distances are not mentioned. This sort of negligence on the part of Investigator in such a heinous crime and cruel act should not go un-noticed by senior police officers. It is indeed the duty of an investigator to collect best

possible evidence when it is in fact available. The doctor P.W.4 which performed the potency test of the appellant unfortunately failed in his duty to procure semen of the accused for the purpose of ascertainment whether it matched with semen found on the anal swabs of the victim.

17. The Office is directed to send a copy of this Judgment to the Inspector General of Police, the Punjab, to assess for himself whether investigation in such heinous and rare cases of un-natural lust involving minors should be entrusted to officers like Muhammad Asghar ASI. It is a case of culpable neglect and indifference on the part of Investigating Agency that an untrained junior rank police officer was asked to investigate such a case when the District Police Officer should have been vigilant and watchful of the gravity of the offence committed in his jurisdiction. It is well nigh impossible to do justice with such faulty investigation and criminal lack of assistance. Human conscience revolts against this sort of conduct.

18. However painful the incident reported to the police, the judge is duty bound to assess the evidence placed on record. In order to record

conviction the judge must be convinced that the prosecution has successfully established guilt of the accused without any shadow of reasonable doubt. The Holy Prophet (Peace be upon him) has cautioned that the punishments (Hadood) should be suspended whenever doubt creeps in the judicial proceedings.

19. In view of what has been stated above, I am not persuaded to agree with the finding of guilt recorded by learned trial Judge. PW7 was declared hostile and he does not support the prosecution version of sodomy. I cannot appreciate the line of argument of learned trial Court. The trial court finds that offence under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 is not proved yet he convicts the appellant under section 377 of the Penal Code. On the basis of evidence on record I am not convinced that the allegation of sodomy has been proved against the appellant. The incident of sodomy is of course proved but its nexus with the appellant is not established. The evidence placed on record and the manner in which the investigation was undertaken and the prosecution proceedings handled does not inspire confidence. Consequently the

conviction of the appellant recorded by learned trial court on 6.10.2007 under section 377 of the Penal Code whereby the appellant was awarded sentence of three years rigorous imprisonment with fine of Rs.20,000/- is set aside. The convict shall be acquitted and released from jail forthwith if not required in any other case.

JUSTICE SYED AFZAL HAIDER

Announced in open Court
on 18th April, 2008 at Islamabad.
*Mujeeb ur Rehman/**

Approved for reporting.

18.04.08