IN THE FEDERAL SHARIAT COURT
(Appellate/Revisional Jurisdiction)

**PRESENT**

MR. JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE
MR. JUSTICE SALAHUDDIN MIRZA
MR. JUSTICE MUHAMMAD ZAFAR YASIN

JAIL CRIMINAL APPEAL NO. 33/K OF 2005 L/W.
CRIMINAL REFERENCE NO. 5/K OF 2005.

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| Ahsanullah son of Qamar Ali Baz<br>r/o House No.Nil, St: No.6<br>Sector 8/A, Bilal Colony, Korongi,<br>Karachi. | --- | Appellant |
| | Versus | |
| The State | ... | Respondent |
| Counsel for appellant | ... | Mr. Muhammad Zubair, Advocate |
| Counsel for State | --- | Syed Agha Zafir Ali, Asstt: Advocate General, Sindh |
| FIR No., date and Police Station | --- | 03/2004, 3.1.2004<br>Qaidabad, Karachi |
| Date of the Order of Trial Court | ... | 25.6.2005 |
| Date of Institution | ... | 9.7.2005 |
| Date of Hearing | .... | 14.1.2008 |
| Date of Decision | ... | 14.2.2008 |

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JUDGMENT:

HAZIQUL KHAIRI, CHIEF JUSTICE.- Appellant Ahsanullah is aggrieved by the judgment of the learned 1st Additional Sessions Judge, Malir, who convicted and sentenced him under section 364-A PPC to death. He was further convicted and sentenced under section 18 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as "the said Ordinance") for two years R.I. with no benefit under section 382-B Cr.P.C.

2. The facts of the case according to FIR are that on 3.1.2004, at about 1815 hours, complainant Muhammad Shaukat, a Chowkidar, was busy in his work when at about 5.00 p.m. he saw a person sitting in the ditch alongwith one minor girl. He went near him and saw that a minor girl was sitting on his lap and he had given his penis in her hands. Both of them were without shalwar. He caught hold of the said person and also called Raheemullah who was working in a nearby field and with his help over-powered the appellant who was

taken to the Police Station alongwith Mst. Noureena Bibi aged about 4 years. He disclosed his name as Ahsanullah. After usual investigation the formal charge was made against him on 27.3.2004 to which he pleaded not guilty and claimed to be tried.

3. The prosecution examined Ahmadullah (PW.1) who produced memo of inspection of wardat, Abdul Qadir (P.W.2) who produced memo of arrest/personal search, Muhammad Shaukat (P.W.3) who produced copy of FIR and reiterated in his testimony what he had stated in F.I.R., Muhammad Shameem Khan (P.W.7) who produced memo of handing over the custody of victim, Ameer Nawaz (P.W.4), brother of the victim, who searched for her and found her at Quaidabad Police Station, Mst. Noureena Bibi (P.W.5) the victim 3-4 years old who recognized the appellant but was unable to understand the question put to her, Muhammad Ibrahim (P.W.6) who recorded FIR and Reheemullah (P.W.8) who was called by the complainant (P.W.3) and saw the appellant and victim in naked position and later on with the help of P.W.3 took the appellant to Police Station . The

appellant was examined under section 342 Cr.P.C. wherein he pleaded his innocence and stated that he used to live in the house of PW.5 Rehmatullah and had dispute with him on payment of rent, therefore, he was involved in the case. He declined to examine himself on oath under section 340(2) Cr.P.C. or to lead any evidence in his defence.

4. There is nothing on record as to how, where and when Noureena Bibi was kidnapped by the appellant and on what basis the learned trial court made out a case of her kidnapping by the appellant. On the contrary, according to the testimony of PW.4 Ameer Nawaz, brother of the victim, while his mother was cooking in the kitchen, his sister left the house.

5. As regards zina-bil-jabr, the learned trial judge was fully convinced and stated:-

> "In the light of this reported case (Muhammad Iqbal Vs. The State, PLD 1981 FSC 329), I am of the considered opinion that in the case in hand the accused had taken practical steps towards the commission of the offence, as he has got off his shalwar as well as shalwar of the victim put her on his lap and had given his male organ in her hand, as such he would have committed the offence of zina-bil-jabr, if not intervened by the complainant."

The learned trial judge further stated that he agreed with and owned each and every contention of the learned DDA including the following:-

> "Noureena Bibi was saved by timely and spontaneous action of the complainant Muhammad Shaukat by grace of Allah, otherwise accused was almost ready to have sex with her and she would have been killed thereafter and her dead body would have been available in the same ditch in the heaps of garbage."

6. Learned counsel for the appellant Mr. Muhammad Zubair candidly conceded that the appellant was shamefully indulging in his lust with the minor. He also did not dispute that PW.3 Muhammad Shaukat and PW.8 Reheemullah overpowered him and brought him to the police station. What he vehemently urged before us was that the appellant did not kidnap Noureena Bibi within the meaning of section 361 PPC so as to warrant sentence of death to him which on the face of it is perverse, illegal and uncalled for. Further, the reliance placed by the learned trial judge on PLD 1981 FSC 329 has no relevance or bearing to the facts and circumstances of this matter as in the case under reference there is irrebutable evidence of kidnapping of a nine

years girl whereas there is none in the present case. In the light of foregoing discussion, it will be advantageous to refer to sections 361 and 364-A PPC as under:-

> ***"Section 361 PPC: kidnapping from lawful guardianship.***- Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, said to kidnap such minor or person form lawful guardianship.
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> **Explanation:** The words lawful guardian in this section include any person lawful interested with the care or custody of such minor or other person.
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> **Exception**: This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody, of such child, unless such act is committed for an immoral or unlawful purpose."
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> ***Section 364-A. Kidnapping or abducting a person under the age of ten.***- Whoever kidnaps or abducts any person under the age fourteen in order that such person may be murdered or subjected to grievous, hurt, or slavery, or to the lust of any person or may be so disposed of as to be put in danger of being murdered or subjected to grievous hurt, or slavery, or to the lust of any person shall be punished with death or with imprisonment for life or with rigorous imprisonment for a term which may extend to fourteen years and shall not be less than seven years."

7. In order to invoke the provisions of section 364-A, it is incumbent upon the court to first see whether there was kidnapping

7. In order to invoke the provisions of section 364-A, it is incumbent upon the court to first see whether there was kidnapping within the meaning of section 361 PPC which envisages co-existence of three elements contained therein namely (i) The minor was taken or enticed away by the kidnapper. (ii) The minor was out of keeping of the lawful guardian (iii) The keeping of the minor was without the consent of the guardian. Once kidnapping is established, the question under section 364-A would be as to whether the appellant intended to murder the victim or subject her to grievous hurt or lust.

8. The words 'takes' and 'entices away' used in section 361 PPC are key words to the offence of kidnapping implying some action on the part of the kidnapper to take or entice away the kidnapee followed by keeping the kidnapee out of the lawful guardianship of the guardian without his consent. In the case of ***Muhammad Sharif Versus The State (1983 P Cr.LJ. 1817)*** it was held.-

> "The expression "taking" and "enticing" call for some positive steps taken by the accused to remove the girl from the custody of her guardian. Neither section 361 PPC nor section 363 PPC would have any application if the girl of her own accord came

word 'kidnapping' connotes stealing away a child without the permission of a person under whose custody or care the child is'.

The Supreme Court of India in the case of ***T.D. Vadgama Versus State of Gujrat*** reported in ***(AIR 1973 Supreme Court 2313 (V 60 C 391)*** held:-

"Section 361 uses the expression 'whoever takes or entices any minor'. The word 'takes' no doubt, means physical taking but not necessarily by use of force or fraud. The word 'entice' seems to involve the idea of inducement or allurement by giving rise to hope or desire in the other, AND further

The two words read together suggest that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence of kidnapping. But if the guilty party has laid a foundation by inducement, allurement or threat, etc. and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him".

9. Learned counsel for the appellant also placed reliance on Phalla Masih-Vs-The State PLD 1989 FSC 72 and Abdul Hamid Vs. The State 1984 P. Cr. LJ 1089 in which the essential ingredients of charge of kidnapping were missing. We are also of the view that there is no iota of evidence adduced by the prosecution pointing out that it was a case of kidnapping of the minor girl. No step whatsoever was taken by

the appellant which amounts to taking or enticing her away out of the keeping of her lawful guardian. However, in order to invoke section 364-A, the first condition contemplated therein is kidnapping of a minor within the meaning of section 361 PPC in the absence of which other provisions contained in section 364-A PPC become redundant and cannot be resorted to.

10. It was next contended by him that the appellant neither committed Zina-bil-Jabr with the minor nor there was any attempt on his part to commit zina-bil-jabr with her. He never wanted to hurt the minor. The ditch was hardly a place to commit zina, therefore, it was not even a case of attempt to commit Zina or Zina-bil-Jabr. At the most the appellant could have been convicted of obscene act under section 294 PPC.

11. We do not agree with the proposition of learned counsel for the appellant. It was not merely an obscene act on the part of the appellant. What the prosecution has established is that both the appellant and the victim were without clothes while the victim was

sitting on the lap of the appellant holding his male organ. It has been held by our courts that when a culprit takes off the clothes of his victim that by itself would amount to a step towards attempt for zina-bil-jabr. Here it is much more. We, therefore, hold that the appellant is guilty of attempt to commit zina-bil-jabr under section 18 of the said Ordinance.

12. As a result, the death sentence of the appellant is set aside but his conviction and sentence under section 18 of the said Ordinance for two years' R.I. with no benefit under section 382-B Cr.P.C. is maintained.

The death reference is answered in negative.

JUSTICE HAZIQUL KHAIRI
Chief Justice

JUSTICE SALAHUDDIN MIRZA

JUSTICE MUHAMMAD ZAFAR YASIN

Announced on 14/2/08
At
M.Khalil

Approved for reporting