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IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE NAZIR AHMAD BHATTI, CHIEF JUSTICE.

JAIL CRIMINAL APPEAL NO.1/I OF 1996.

Muhammad Sadiq son of Tajjudin,resident of Chak No.241/TDA, P.S Fatehpur District Layyah.(now confined in New Central Jail Multan)	...	Appellant
	Versus	
The State	...	Respondent
For the appellant	...	Mr.Muhammad Aslam Uns, Advocate.
For the State	...	Mr.Saleheen Mughal, Advocate.
NO.& date of F.I.R Police Station	...	No.208/93, dt.14.10.1993, P.S Fatehpur
Date of order of the trial court	...	18.9.1995.
Date of Institution	...	2.1.1996.
Date of hearing and decision	...	23.9.1996.

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JUDGMENT

NAZIR AHMAD BHATTI, CHIEF JUSTICE.- Complainant Mst.Bilqees Akhtar minor unmarried daughter of Muhammad Ameen was a student of class 9th. On 14.10.1993 she was going back to her home from the school and when she reached Pulli Bhattianwali Chak No.241/TDA at 1230 hours on a katcha road she was confronted by accused Muhammad Sadiq who had hidden himself in the cotton field of Muhammad Sharif Bhatti. The accused dragged the complainant to the cotton field on the point of revolver and forcibly removed her shalwar and started committing zina-bil-jabr with her. The complainant raised noise whereby Muhammad Nazir and Naseer Ahmad were attracted to the spot who saw the occurrence. The accused threatened them also with the revolver and decamped from the spot. The complainant went to her house and narrated the occurrence to her father and then made a complaint in Police Station Fatehpur at 1445 hours on the same day.

2. Complainant Mst.Bilqees Akhtar was medically examined by P.W.1 Lady Dr.Safia Mubashar on 15.10.1993. The lady doctor found the hymen torn with two fresh lateral tears (with slight oozing) in behind and two fingers could be easily passed into the vagina. The lady doctor took two vaginal swabs which were found stained with semen by the Chemical Examiner. The lady doctor gave the opinion that Mst.Bilqees Akhtar had been subjected to sexual intercourse. However, the lady doctor did not find any mark of violence on the body of the complainant or on her private parts.

3. The accused was arrested on 17.10.1993 by P.W.10 Ameeruddin Lohdi Sub Inspector and after investigation he was sent up for trial before Additional Sessions Judge Lejah who charged him under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance,1979 to which he pleaded not guilty and claimed trial.

4. The State produced 10 witnesses in proof of the prosecution case whereas the accused made a deposition under section 342 Cr.P.C but he neither made any deposition on oath nor produced any defence evidence. After the conclusion of the trial the learned Additional Sessions Judge convicted the accused under section 10(3) of the Hudood Ordinance and sentenced him to undergo rigorous imprisonment for 7 years and to suffer 30 stripes. The convict has challenged his conviction and sentence by the appeal in hand sent from jail.

5. I have been taken through the entire record of the case by the learned counsel for the parties and I also heard them at length.

6. Complainant Mst.Bilqees Akhtar was unmarried girl aged about 14/15 years during the days of occurrence. Her medical examination clearly established that she was virgin before the occurrence as there were fresh tears of the hymen and some blood was also oozing from her vagina. She directly charged the appellant for subjecting her to sexual intercourse forcibly and without

her consent. Her testimony has been corroborated by P.W.3 Naseer Ahmad. The latter witness was not related to the complainant party but he was of the same bradari. In rebuttal there is only the simple denial of the occurrence by the appellant and that also without any oath. It was a day light occurrence and report was made in the police station very promptly within an hour and 15 minutes. There was no occasion for fabrication of any false case. The appellant had been correctly charged for the offence by the complainant.

7. The learned counsel for the appellant had laid much stress on the point that the complainant was medically examined on the next day but the lady doctor did not find any mark of violence either on her body or on her private parts and he contended that the offence of sexual intercourse with the complainant had taken place with her consent and the sentence awarded to the appellant was very harsh. I have considered this aspect of the matter very anxiously. No doubt no mark of violence was found on the body or private parts of the complainant but the absence of such violence would not necessarily prove that free consent was there. The complainant was only a minor girl aged about 14/15 years. On the contrary the appellant was more than 45 years of age and he could well be of the age of her father. In such a circumstance the question of free consent of the girl

did not arise. Even otherwise the presence of sign of force is not a pre-requisite in every case because according to the definition of the term 'zina-bil-jabr' specified under section 6 of the Hudood Ordinance ~~shows that~~ a person is said to commit zina-bil-jabr if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely;

(a) against the will of the victim,

(b) without the consent of the victim,

(c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt, or

(d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.

It shall, therefore, be seen that if a consent of the victim obtained by putting her in fear of death or of hurt would not be a free consent but it would be a consent obtained under duress and coercion and the offence committed against the woman would be that of zina-bil-jabr and not simple zina. In the case in hand it had been proved by the testimony of the complainant as well as P.W.3 Naseer Ahmad that the appellant had revolver with him when he was committing the offence and he had forced the complainant on the point of revolver and had also aimed the same at the ~~presence~~ of eye witnesses who had seen him committing the offence and had challenged him. I have, therefore, come to the conclusion

that the offence committed by the appellant against the complainant was that of rape and not of sexual intercourse simpliciter. He was a man of advanced years and he should have been dealt with very strictly by the learned trial court. However, since the learned trial court has discretion in the matter of sentence I would maintain it. No ground has been made out for showing the leniency in the matter of sentence.

The net result of the above discussion is that this appeal has no merit and is dismissed. However he shall be entitled to the benefit under section 382-B Cr.P.C.

CHIEF JUSTICE

Islamabad, 23.9.1996.
M.Akram/

FIT FOR REPORTING

Chief Justice