

IN THE FEDERAL SHARIAT COURT  
( Appellate jurisdiction )

PRESENT:

HON.MR.JUSTICE ABDUL WAHEED SIDDIQUI

Jail Criminal Appeal No.102/I/1996.

Meenhwassayo @ Khamiso  
s/o Uris Mallah  
Now confined in Central  
prison, Hyderabad.

.....

Appellant

Versus

The State

.....

Respondent

Counsel for the  
appellant

.....

Mr.Muhammad Jamshad  
Talat Khan, Advocate

Counsel for the  
State

.....

Raja Abdul Ghafoor,  
Advocate

FIR No. Date and  
Police Station

.....

116/92 dated 17-11-1992  
P.S. Badin

Date of judgment of  
trial Court

.....

23-5-1996

Date of Institution

.....

11-6-1996

Date of hearing

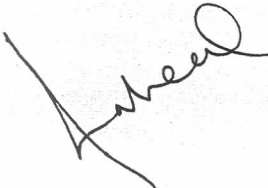
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10-04-1997

Date of Decision

.....

30-04-1997



JUDGMENT:

ABDUL WAHEED SIDDIQUI, J. This jail criminal Appeal

assails the judgment delivered by 1st Additional Sessions Judge, Badin on 23-5-1996 whereby he has convicted the appellant under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and has sentenced him to undergo rigorous imprisonment for ten years and whipping to ten lashes and fine of Rs:10,000/- and further imprisonment for one year in default in payment of this fine; has also convicted him under section 16 ibid and sentenced him to rigorous imprisonment for seven years and whipping upto ten lashes and fine of Rs:10,000/- in case of default further imprisonment for one year. Both convictions are to run concurrently. Benefit of section 382-B Cr.P.C. has also been given.

2. Story of prosecution, in brief, is that one Mohammad Uris (PW-1) lodged an F.I.R. at Police Station Badin on 19-11-1992 complaining therein that about 20 years back his sister Mst. Noor Khatoon was married with one Majnoon s/o Meenhwassayo alias Khamiso according to Shariat-e-Mohammadi and from the wedlock there were two minor children. About six months prior to the complaint, he (Muhammad Uris) accompanied by his brother Gul Muhammad, (PW-3) his sister Mst. Noor Khatoon (PW-4), her husband Majnoon (PW-5) and her father-in law, the appellant, shifted towards village Karim Bux Jamali and leaving Mst. Noor Khatoon and the

appellant behind went for labour towards Tando Mohammad Khan. Two days prior to the complaint, when all the three came back, they found both the appellant and Mst.Noor Khatoon alongwith two children missing. They searched them but failed. It was finally complained in FIR that Mst.Noor Khatoon was enticed and abducted by the appellant, her father-in-law, with an intention to commit zina with her.

3. According to a statement under section 164 Cr.P.C. of Mst. Noor Khatoon (Ex.7/A) before Mukhtiarkar and F.C.M. Badin on 21-11-1992 she was recovered on 21-11-1992 by police from the custody of the appellant, both of them were brought to the police station and she was of 35 years of age on the said date. She stated that her father-in-law Khamiso alias Wassayo informed her one week after the initial travel of other family members including Mst.Bachul, her mother, for labour that her mother was ailing and intended to arrange their meeting. With that purpose he took her to the village of Nawab Rashid and made her to live there and for about twenty days remained committing zina with her under a threat of murder.

4. Appellant was challaned. Prosecution examined 7 PWs, appellant gave statement under section 342 Cr.P.C., examined himself on oath and also examined 4 more D.Ws.

5. I have heard the learned counsel for appellant engaged for him on State expenses and counsel for State. Counsel for appellant has contended that the only name of the appellant is Khamiso and the name

Meenah Wassayo attached with him is a mischief of the prosecution; that medical evidence does not support prosecution; that FIR is delayed; that there are improvements in the version of the prosecution; that there are substantial contradictions; that Majnoon (PW-5) is wrongly claiming to be a son of the appellant and husband of Mst.Noor khatoon (PW-4); that the appellant is the real husband of Mst.Noor Khatoon (PW-4) and out of wedlock he has a son and a daughter; that the story of prosecution does not appeal to common sense in the circumstances of the case. The State counsel has supported the impugned judgment and has contended that this is a case of incest and incest do take place in every society although it is rare.

6. I have gone through the record of the case including police papers made available to me and have pondered about the contentions of both the counsel. At the outset the point which has agitated my mind is the version of the ages of Mst.Noor Khatoon (PW-4) and the two claimants of being her real spouse namely Majnoon (PW-5) and the appellant. In her statement under section 164 Cr.P.C. (Ex.7/A) Mst.Noor Khatoon has declared her age to be 35 years on 21-11-1992. On the same date she was examined by Dr.Naveed Akhtar (PW-6) who stated tentatively without obtaining Report of Radiologist that she was of 35 years as was told to her. One year later, on 14-12-1993, while deposing before the trial court Mst.Noor Khatoon still declares herself to be that of 35 years. According

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to entries in Register 5 of the Citizen Code Number maintained by the District Registration Office, Badin she was born in 1951 and she was issued a National Identity Card numbering 457-51-070295. If so, then in 1992 she was 41 +- and one year later at the time of her deposition 42 +-. The reason for subtracting her real age by 6 and 7 years before the courts is soon going to be highlighted. According to FIR lodged on 19-11-1992, when abductee was 41 +- years of age as per her N.I.C., she had led 20 years of married life with Majnoon (PW-5). It means that she married with Majnoon (PW-5) when she was 21 +- years of age. In his deposition on 14-12-1993 Majnoon (PW-5) is declaring his age to be 30 years. Naturally then, on the date of the institution of FIR he was 29 years of age and 20 years prior to that, at the time of his alleged marriage, he was only a boy of 9 +- years. But his bride Mst.Noor Khatoon (PW-4) was of 21 +- years as proved above.

On the other hand appellant, who is continuously insisting that he is Khamiso s/o Mohammad Uris by caste Machi and has nothing to do with the name Meenhwassayo or Wassayo by caste Mallah, has produced his original National Identity Card Numbering 457-36-070294 issued on 28-8-1976. During his statement under section 342 Cr.P.C., to a question by Court " Have you anything else to say", the appellant has replied ..... "Mst.Noor Khatoon is my legal wife. I produce my identity and according to which my name is Khamiso s/o Uris Machi but not Meenhwassayo . . . . . Name of Mst.Noor Khatoon is entered in B form which may kindly be called".

Fortunately this original NIC was taken on record by the trial Court and is available and intact in its original records as seen by this Court, yet no exhibit number is allotted to it. This is a procedural error which should have been avoided. Once any document is taken on the record for judicial consideration by the trial Court, it is a rule of prudence as well as in the interest of justice to allot an exhibit number lest it remains hidden into the heaps of papers and the course of justice takes wrong directions. Fortunately this non-exhibited substantial documents is corroborated by Ex: 14 A (Form A-Application for Registration under section 4 (1) (a) of the National Registration Act 1973) as exhibited by Muhammad Hussain (DW-1) Statistical Assistant, District Registration Office, Badin. Original of this exhibit 14-A was seen and returned by the trial Court as is mentioned in the deposition. This exhibit corroborates the entries in the NIC of the appellant with an addition of the date of application being 29-7-1976 on which date the appellant is declaring his age to be 40 years and status in column No.2 to be married. This being the state of affairs, the appellant was of 56 +- on the date of FIR, 36 +- years of age at the time of his alleged marriage with alleged abductee Mst.Noor Khatoon (PW-4) of 21 +- years at that time and another claimant Majnoon (PW-5) was 9 +- years of age. It is not the case of prosecution that a Nikah-e-Sharai was performed when the alleged bridegroom had not yet attained puberty, was minor, and the bride (alleged victim) was adult of 21 +- years of age and that Rukhsati or consummation of marriage had taken place later on. In the

absence of the production of Nikahnama by the prosecution and in the presence of a Nikahnama produced by the appellant, although not exhibited, (as is evident from the impugned judgment ) the case was to be dealt with utmost care both at the level of prosecution as well as at trial but this Court has noticed that the case has not been dealt with caution and care at both the levels.

7. Keeping aside this issue of ages of the bride and two claimant bride-grooms at the time of marriage in the drama of the whole show for the time being, if only the question of proper relationships of the complainant, the prosecutrix victim, and the two claimants of the victim lady being her sole legal spouse, inter se, had been resolved the trial Court would have saved itself from apparent errors. The allegation is that the appellant in 1992, when he was 56 +- years of age per his NIC, enticed, abducted and committed heinous crime of incest with his own daughter-in-law Mst.Noor Khatoon (PW-4) when she was 41 +- and her husband Majnoon (PW-5) was 29 +- years of age. During his deposition Mohammad Uris aged 38 years, (PW-1) is stating during his examination-in-chief:

" About 20 years back I have contracted marriage of my sister Mst.Noor Khatoon with Majnoon ..... about six months prior to this incident we had shifted and settled for labour purpose in the village Karim Bux Jamali where we have constructed katcha huts where I alongwith my brother-in-law Majnoon, Mst.Noor Khatoon, Mst.Phapi and accused Meenhwassayo my father-in-law were residing." (Parenthesis supplied) If the present appellant, whose only name according to NIC,

is Khamiso Machi, then who is that Meenhawassayo who is father-in-law of this PW-1/complainant? As per the set-up of this drama, Meenhanwassayo is father-in-law of the sister of this witness and not that of this witness himself. The mystery is unfolded when Mst.Noor Khatoon (PW-4) replies to a suggestion during cross, "It is incorrect that Majnoon is son of accused," meaning thereby that Majnoon is not the son of appellant Khamiso. Now as per set-up of this stage of a cunning drama, if Majnoon is not the son of the appellant then the appellant is not her father-in-law in any case. The secret is further unfolded when the set up of names is probed into. Appellant's another name Meenhawassayo first of all appears in FIR. It remains as such in the deposition of complainant Mohammad Uris (PW-1). It becomes Wassayo in the statement of Mst.Noor Khatoon (PW-4) under section 164 Cr.P.C. (Ex.7/A). It continues as such when Majnoon (PW-5) is declaring the name of his father as Wassayo in his deposition (Ex.8). During cross, this witness deposes: "I produce the photocopy of my NIC . . . . . My NIC was prepared after my marriage . . . . I have not given the name of my wife in my NIC but my wife has her own." Had the NIC of this witness been allotted an exhibit number, it would have assisted the trial and appellate courts substantially: but negligently, in violation of the rules of procedure and law, it has not been done. The NIC not exhibited, but kept in the record, indicates the name of the father of this witness to be Wassayo. This witness has admitted that his wife, allegedly Mst.Noor Khatoon, has her own NIC. However



he has not produced it. The same stands proved from Form A maintained under section 4 (1) (a) read with section 4(2) of the National Registration Act, 1973 as exhibited by Muhammad Hussain (DW-1) Statistical Assistant, District Registration Office, Badin and is a conclusive proof that on the date of application for NIC i.e. 29.7.1976 she was a married lady and the name of her husband was declared to be Khamiso Machi without any other alternative name like Meenhawassayo or Wassayo and that her year of birth was 1951 and that she was correctly declared to be of 25 years and the name of her father was declared as Jumo and she was Registered and allotted an NIC with Number 457-51-070295 in consecutive No.457-36-070294 as allotted to her spouse Khamiso Machi, the appellant. This piece of documentary evidence has gone unchallenged and, therefore, holds ground. Reliance in this respect has correctly been placed on PLJ 1988 Cr.C (Karachi) 39: Placentium D. w. . . . . Due to the non-exhibition of substantial documents, although produced, as proved above, this Court called for Original Control Register (RG-3) alongwith relevant original Records of the Registration Office Badin on 10.04.1997. I have thoroughly checked these original records, asked relevant questions from incoming officer, have brought photocopies of Register for the Citizen Code Number (RG-3) from consecutive numbers from 070281 to 070300 on the record, returned the original, and found the above record intact and with no interpolation, rubbing, changing, cutting, addition or alteration so far as consecutive numbers 457-36-070294 (NIC of Khamiso s/o M.Uris, Post Office Badin) and 457-51-070295 (NIC of Noor Khatoon w/o Khamiso) are concerned. I am satisfied that the two NICs were issued together more than two decades

ago and no such name like Meenhawassayo or Wassayo was attached with Khamiso s/o Mohammad Uris Machi and that Noor Khatoon had obtained NIC in her marital status declaring her spouse to be Khamiso Machi and not Meenhanwassayo or Wassayo. At this stage I am satisfied that the following passage appearing at page 6 and 7 of the impugned judgment is a clear proof of non-reading of evidence by the 1st Additional Sessions Judge Badin (Mr.Abdul Ghafoor Memon ):

" So far as Form "A" of one Noor Khatoon is concerned, the same does not read name of husband to show that she is the same Noor Khatoon and wife of present accused."

Although a photocopy of the Form "A" of Mst.Noor Khatoon is kept on the record as Ex.14-C as produced by Muhammad Hussain (DW-1), but its original was seen and returned by the trial court as is mentioned in the end of this deposition. Since this defence witness has not been crossed and shattered, whatever the document produced by him must have been presumed by the trial court as a genuine document under the provisions of article 92 of Qanoon-e-Shahadat Order, 1984. The trial court has not cared or , may be, has avoided to read column 2 and 8 of this form A (Ex:14-C). Column 2 is a declaration of Noor Khatoon that she is married and cloumn 8 is a declaration that the name of her husband is Khamiso Machi. This court cannot appreciate non-reading of such a substantial piece of evidence which would have taken the trial court to a safe and proper dispensation of justice.

Another passage of the impugned judgment at page 6, last para is as under:

"Nikah-nama is produced in defence to show that  
abductee/victim is wife of the accused but neither  
the Moulvi who performed the Nikah and registered  
the marriage nor any witness of the marriage is  
examined in defence."

This Nikahnama seems to have been produced at some stage  
by the defence, but I do not find any mention about it any where in  
the record. Neither it has been allotted any exhibit number by the trial  
Court. Where has gone this important piece of evidence which could have  
a corroborative or at least persuasive value? A document which has not  
been believed in the impugned judgment is missing. This conduct of  
the trial Court is highly regrettable. Inter alia the maxim "Justice should  
not only be done, but it should appear that it has been done" is violated here.

8. In arriving at the conclusion that Khamiso is not Meenhawassayo  
or Wassayo, I am also supported by the non-shattered and firm deposition  
of DWs. Muhammad Usman (DW-2) <sup>who</sup> has deposed during cross: "Khamiso had  
one son and one daughter from Mst.Noor Khatoon. So she is his wife. We  
had gone to attend khatna ceremony of son of Khamiso in village Yousif  
Soomro about 5 or 6 years ago. I do not know any Meenhawassayo. "Haji  
Noor Mohammad (DW-4) in his deposition (Ex.17) has stated "I know Khamiso  
Machi so also his wife Mst.Noor Khatoon. I know them since 7 or 8 years."  
During cross, he has deposed, "I do not know about any Meenhawassayo. It is not

correct to say that Khamiso is present accused Meenhawassayo of this case." The prosecution has failed to below dents in this deposition who has also deposed that he has remained as a councillor of Badin Municipality. Mohammad Siddique (DW-5) has deposed, " I know Khamiso Machi and his wife Noor Khatoon. I know them since 10 years. I know them because Khamiso was working as Hari with me. During his harapship Mst.Noor Khatoon all along was with him and had given birth to two children: One daughter and one son". To certain suggestions he replied," Khamiso had invited me for Aqiqa at the village of Yousif soomro about 5 years ago. Accused present in the court is Khamiso but not Meenhawassayo. It is not correct to say that he is Meenhawassayo." This witness has also gone intact. Appellant has appeared as DW-3 and his statement on oath under section 340 (2) Cr.P.C. is inspiring confidence. He deposes:

"Mst.Noor Khatoon is my wife. I have one son and one daughter who are alive from Mst.Noor Khatoon where-as two other children born from her were expired. I was residing in Badin and was working as Hari of Haji Khamiso Bhatti. I was also working as Hari in the village of Yousif Soomro. P.W Majnoon is Massat (son -of-sister) of my wife. Mst.Noor Khatoon is my wife but not of P.W Majnoon. This false case has been filed against me. The P.Ws including Mst.Noor Khatoon in collusion with



the police have filed this false case against me. I am innocent." (Brackets supplied )

9. Now I turn back to resolve the matter in terms of an effort of substantial subtractions of their ages on the part of Mst.Noor Khatoon (PW-4) and Majnoon (PW-5). As proved earlier, the documentary evidence is available that at the time of the alleged marriage of the two, the age of bride was 21 +- and that of the bridgroom 9 +- in case Majnoon is believed to be true in disclosing his age to be 30 years on 14-12-1993 in the trial Court. But the fact is that he has tried to substract considerably from his real age. The NIC which he produced in the trial court during deposition is available in the records. It proves beyond any shadow of doubt that Majnoon is son of Wassayo, is resident <sup>of</sup> /village Haji Darya Khan, Deh Kanwar Post Tando Jam District Hyderabad which place is about 100 kilometres distant from village Chuhar Jamali District Badin, the original village of Mst. No.452-53-147863 on Noor Khatoon, the appellant, the complainant and is in a different district. He was issued NIC/ 16-7-1978. It means he was born in 1953. If so, then on 14-12-1993 when he was deposing before the trial court he was of 40 +- years of age. He was substracting, intenionally indeed, his age by 10 years before the trial Court with a purpose to hoodwink it. He knew that at the relevant time the appellant was that of 57 +- years of age. He had the design in his mind to prove that the appellant was his father Wassayo, but in case he was disclosing his correct age i.e. 40 years, then it was creating doubts as to whether a poor shifting labour, like the appellant, could become a father at 17 years of age and could marry at the age of 16 years in the type of exploiting society he was barely existing. Mst. Noor

Khaton (PW-4) was ~~subtracting~~ from her real age 6 and 7 years, as discussed supra, because she was taking pains to show that she was not so elderly to her alleged husband Majnoon as it was appearing to be in case Majnoon was 30 +- . But in case a wrong year of birth was given in the NIC of Majnoon and he was correct in disclosing his age to be 30 years, then he was only 9 +- at the time of his marriage with the prosecutrix who was 21 +- or 22 +- at that time and at 9 +- males are not pubert at all. Taking this issue of ages of the three from any angle, it appears that there is a criminal conspiracy which has hatched up against the appellant to grab his legally wedded wife and two children.

10. The learned counsel for appellant has contended that in the absence of the Report of chemical examiner and violence against victim, the benefit of doubt should be given to the appellant. Dr.Naveed Akhtar (PW-6) has deposed: " No scratches or bruises on any part of body.

There are no marks of violence on the body of lady Mst.Noor Khaton.

In opinion the sexual intercourse not committed by force." But the prosecutrix is deposing as PW-4, "The accused used to maltreat me and confine me in the house and also committed rape with me forcibly." Dr.

Naveed Akhtar (PW-6) has also admitted that vaginal swabs were taken, but the chemical report was not received. The prosecutrix is admittedly a married lady since 20 years and had given birth to 4 children, out of who two were living. Her deposition that she was maltreated and rape

was committed forcibly is negated by medical evidence.

11. So far as contention of delay of two days in FIR is concerned

it has its own mystery. The complainant relates in FIR (Ex.4/A):

" On 17-11-1992 we all the three returned back to our house and found that my sister Mst.Noor Khatoon alongwith two children and her father-in-law Meenhawassayo alias Khamiso were not there. Then we remained in search for them, but nothing has happened. Now I have arrived here and do hereby lodge complaint." This complaint was lodged on 19-11-1992

i.e. 2 days after the <sup>alleged</sup> knowledge of the missing of the appellant etc;

abduction and rape and so on and so forth. Gul Muhammad (PW-3), a brother of the complainant and abductee deposed: " On enquiry my mother Mst.Phapi informed us that accused had taken away Mst.Noor Khatoon and both her children on the pretext of her treatment. Then we were searching Meenhanwassayo and Mst.Noor Khatoon and children. After six months we come to know that accused Meenhanwasayo is residing at village Yousif Soomro. Then I, Uris alongwith police went to village Yousif Soomro where police recovered Mst. Noor Khatoon from house of accused Meehanwasayo."

So far as the complainant PW-1 is concerned, he lodged FIR on 19-11-1992 after search of two days as alleged and the recovery of the alleged abductee, two children etc and arrest of the appellant was effected next day on 20-11-1992 vide recovery memo (Ex.5/B). In case the deposition of PW-3 is believed to be true, the delay in reporting is that of six months. Neither there is any explanation for the delay of two days nor, if PW-3 is believed,

for six months. The contention is found to be correct. In this context the learned counsel has rightly relied on the law enunciated by this Court and reported as PLD 1983 FSC 192.

12. Now comes the turn of the contentions about improvements which have been carried by the prosecution to the extent of substantial contradictions shattering the entire story. As per FIR complainant Mohammad Uris (PW-1), his brother Gul Mohammad (PW-3), his sister Mst.Noor Khatoon (PW-4), her husband Majnoon (PW-5) and father-in-law of Mst.Noor Khatoon (the appellant) had shifted from their original village Choochar Jamali to village Karim Bakhsh Jamali for labour. Then they left behind in their katcha huts only Mst.Noor Khatoon(with children) and her fatherin-law, the appellant, and all others went towards Tando Mohammad Khan for labour. In her statement under section 164 Cr.P.C. (Ex. 7/A), the alleged abductee Mst.Noor Khatoon is adding one more person in the list of those who had shifted from village Choochar Jamali. The person is Mst.Bachul, her mother. This Mst.Bachul is one of those who then left for Tando Mohammad Khan leaving behind the abductor and the abductee only and this Mst.Bachul is the lady about whom appellant informed the abductee that she was ailing and created a pretext to move her out from the house and then committed heinous crimes of incest etc. Gul Muhammad (PW-3) is adding his father Jumo and subtracting his mother Mst.Bachul from the list of those who had gone towards Tando Mohammad Khan leaving behind the couple and children. He is also deposing that after return and enquiry, his mother Mst.Phapi informed that the appellant had taken the abductee



on the pretext of her treatment i.e. the treatment of this very Mst.

Phapi. But this Phapi had not gone with the complainant and others,

was left behind, then whose ailment was made a pretext by the appellant?

This contradiction goes into the roots of the story of prosecution. Then

Gul Muhammad (PW-3) is deposing that they had returned after 4/5 days

and found the abductee etc missing. In contrast to this, in her statement

under section 164 Cr.P.C. the abductee is stating that one week after

their left over behind, appellant abducted her and for twenty days

remained committing Zina-bil-Jabar with her. In contradiction to both, the

complainant (PW-1) is stating that they returned 2/3 days afterwards and

enquired from his mother-in-law about appellant and Mst.Noor Khatoon

and was informed that she was taken alongwith two children for treatment.

Here Phapi is no more the mother of the complainant but becomes

mother-in-law. Then the reason for taking away the abductee does

not remain the pretext for mother's ailment but rather the ailment of the

abductee & her children as they were taken away for treatment. This very

witness has lodged FIR in which he has not made any reference to inform-

ation supplied by his mother-in-law but in the deposition he has improved.

Then in FIR he has shown search for two days and in deposition he improv-

es in the following words: " Thereafter we remained in search of accused

and Mst. Noor Khatoon and after some time we came to know that accused

alongwith Mst. Noor Khatoon is residing in village Yousif Soomro."

Gul Mohammad (PW-3) has spoken of search for six months and then

the knowledge that the appellant and abductee were in village Yousif

Soomro, but the abductee in her statement under section 164 Cr.P.C.

(Ex.7/A) is shattering both of her brothers, (P.W-1 & PW-3), while

stating that after the rape of 20 days, one Ajaz Khaskyali went to Tando

Mohammad Khan and informed her mother Mst. Bachul that she was kept

in the village of Nawab Rashid and then her mother lodged FIR at police

station Badin from where police came and liberated her and arrested the appellant.

In her deposition this very lady, the star witness, is changing substant-

ially as PW-4, and is deposing that the third one left behind was her mother-

in-law Mst. Fatima. In this deposition she has also improved on 164 Cr.P.C.

statement by aiding maltreatment and confinement. Another contradiction

noticed is that Majnoon (PW-5) shows his relation-ship with Gul Mohammad

(PW-3) to be that of brother during examination-in-chief. If so, then the

alleged victim lady becomes his sister and does not remain his wife.

13. The learned counsel for appellant has been found correct in

his ground that as per recovery memo (Ex:5)/B), the shalwar worn by

the victim was found stained with semen. It was taken into possession and

sealed. Khan Muhammad Hakro (PW-7), SI and Investigation Officer has

stated during examination-in-chief, "On 20-11-1992, I arrested accused

Meenhwasyo alias Khamiso from near Otak of Nawab Usman. I prepared

such mushirnama in presence of same mashirs Achar and Aroo and

I see Ex: 5-B and say that it is the same and bears my signature."

He is neither making any reference to the shalwar stained with semen

nor its recovery and sealing nor despatch for report of chemist nor

there is any such report on the record. This conduct of the Investigation

Officer who is a senior and experienced officer of police is indicative

not only of his inefficiency but involvement in a deep rooted criminal

conspiracy against the poor appellant.

14. The learned counsel for appellant has also contended that

the FIR and other evidence is making a reference to the kidnapping of

two children, but their names and ages are kept out of sight. Again

the Recovery Memo (Ex: 5/B ) is showing the recovery of the abductee

semen-stained  
lady Mst.Noor Khatoon, her/clothes etc but is mysteriously silent about

the recovery of the kidnapped kids. The challan / charge sheet

(Ex: 2 ) and the impugned judgment are mysteriously silent about this

heinous crime of kidnapping and the appellant has not been charged or

tried under the relevant provisions of law. If at all the story of prosec-

ution is not based on plot conspired against the appellant, then this silence

is indicative of the carelessness and inefficiency at all levels of investig-

ation, enquiry and trial.

15. Appellant's counsel has vehemently argued that Khan Mohammad

Hakro (PW-7), SIP and Investigation Officer of this case has hatched up

this conspiracy for ulterior motives. He has not caused to record the

statement of the appellant/accused under section 161 Cr.P.C. nor has he asked him about any defence the poor man could produce during investigation. He has dealt with the case in the most careless manner and has shown signs of high-handedness. During cross upon him, he deposes;

"I do not remember the time I had registered the FIR . . .

I do not remember the time I had reached the place of wardat.

I cannot say if it was morning time, after noon or evening time

when I had gone to the place of wardat. I had not recorded

statement of any nekmarks of that village about the fact that

accused used to reside in that village. I had gone to arrest

the accused at 4.00 P.M. It is correct that in the village Yousif

Soomro from where the accused was arrested there are houses

situated, but I can not give exact number of the houses. I can

not say if there is School and dispensary in that village. The

accused at the time of the arrest was sitting on the southern

side of Otak of Nawab Usman. He was sitting in his house. It

is correct that mashirnama of Arrest Ex:5-B does not give

mention that the accused was arrested while sitting in his house.

No persons from the village had gathered at the time of arrest

of the accused. It is correct that it is the busy road. It is

correct that in the 164 Cr.P.C. statement of Mst.Noor Khatoon

it is stated that she is wife of the accused. I had not made



enquiries whether Mst.Noor Khatoon was wife of the accused or not. I had not made enquiries or obtained proof from P.W Majnoon if Mst.Noor Khatoon was his wife.

It is not correct to say that I have intentionally with connivance of Nawb Usman have falsely registered the present case against the accused and have without any reason made him to remain behind bars for 2/3 years.

It is not correct to say that the complainant Mst.Noor Khatoon and P.W Majnoon are also in conspiracy with us. Complainant had brought the mashir Achar. Complainant and mashir Achar so also Mashir Aroo had accompanied me from the Police Station to the place of waradat."

This cross itself read with Zimnis in the police papers speaks in itself the spirit of callousness with which this witness is infested. He has admitted that the appellant was sitting in his house in the village Yousif Soomro when he was arrested. He has admitted that the two mashirs of recovery and arrest namely Achar and Aroo i.e. Haroon (Per Memo of Recovery Ex:5/B) were brought by he complainant at police station from where they had accompanied them. He had admitted that it was day time i.e.4 P.M. when he entered the house of the appellant and arrested in him and that/the village there are many houses. Now mashir Achar (P.W-2) has during deposition, declared his village to be phulloo Khaskeli. The second Mashir of the Memo of Recovery and arrest (Ex:5/B). Haroon has

shown his residence to be that same village where the appellant was residing. He has not been produced for examination before the trial Court although shown as a Reserved witness No.1 in the challn. In the absence of his deposition, it cannot be said as to whether he has correctly stated his village or not and as to whether he is respectable inhabitant of the locality in which the house of appellant searched was situated.

This is gross violation of section 103 (1) Cr.P.C. which reads:

"Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do."

The depositions of the witnesses for prosecution as well as defence are at least unified on one fact that the normal residence of the appellant was village Yousif Soomro, yet mysteriously he was searched for 2 days as PW-1 has deposed and for six months as PW-3 has deposed and has been discussed earlier. All these circumstances prove that this witness, the Investigation Officer, is the master mind behind the whole show which amounts to appalling callousness against the appellant.

16. Before parting with the case I have noticed that according to a Conduct Report issued by the Superintendent Central Prison Hyderabad on 8-10-1995 under NO.UTP/16729/95 the appellant was continuously in the said jail from 3-12-1992, there was no other case pending against

him in any other court of law except the present one and that he was not a dangerous, hardened, desperate and criminal type of prisoner or terrorist. In contrast to this favourable report by an authority in whose custody the appellant was since about three years, Mst.Noor Khatoon (PW-4), the prosecutrix, moved an application in Sindhi language before the trial court praying therein that the right for bail to which the appellant was entitled may not be conferred upon him as he was a dangerous criminal, a lauffer, a person of ill-repute and was sending her threats of abduction and murder. The application under section 497 Cr.P.C. was first moved before the trial court on 7-11-1994 in Sindhi but was not attended to. Another application for grant of bail was moved in English by the Advocate for appellant on 28-11-1994 mainly on the ground of statutory delay and was dismissed on 30-11-1994 on the grounds which are not intended by law to be the grounds for dismissal in case statutory delay is the major ground: Relevant provide No.3 to subsections<sup>(1)</sup>/of section 497 Cr.P.C. was added by Act No.XIX of 1994 notified in the Gazette of Pakistan, Extraordinary, Part I dated 14.11.1994 and the rights conferred by it were available to the appellant on 30-11-1994 (i.e. the date on which bail application was dismissed).

It reads:

" Provided further that the Court shall except where it is of opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf or in exercise of any right or privilege under any law for the time being in force, direct

that any person shall be released on bail-

(a) Who being accused of any offence not punishable with death has been detained for such offence for a continuous period exceeding one year and whose trial for such offence has not concluded: or

(b) Who being accused of an offence punishable with death has been detained for such offence for a continuous period exceeding two years and whose trial for such offence has not concluded:

Provided further that the provisions of the third proviso to this sub-section shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who in the opinion of the Court is a hardened, desperate or dangerous criminal or involved in terrorism".

The relevant para of the order dated 22-11-1995 dismissing application for bail reads:

" I have carefully considered the arguments advanced by both the sides and have gone through relevant case papers and the evidence that has come on the record. In this case P.W/abductee is per the FIR is daughter-in-law for the accused and P.W Majnoon son of the applicant/accused and husband of abductee Mst.Noor Khatoon P.Ws Majnoon and abductee Mst.Noor Khatoon have corroborated the FIR. So also has the W.M.O.who has though deposed in her cross examination that sexual intercourse in not committed by force, but this does not mean that sexual inter course was not at all committed. As per the FIR Mst.Noor Khatoon was abductee about six months prior there to, and that applicant/accused committed sexual intercourse under threat of murder. It may be pointed out that as per evidence of the abductee that accused had told her that she should accompany him to Tando Mohd Khan and that accused took her and her two children to Yousif Soomro. So, arguments of Mr.Jamali that Yousif Soomro is situated at distance of two miles from Badin and that had she been abductee, they would not have resided in Yousif Soomro village, has no force. In view of all above, I am of



the considered view that applicant/accused is not entitled to bail. His bail application is therefore, dismissed."

A third application in this regard was moved on 17-8-1995 by the Advocate for appellant stating that the appellant was in the jail since 2 years and 7 months and that no delay was occasioned by the appellant. It was again dismissed on 22-11-1995 after the receipt of positive Conduct Report issued by Superintendent Central Jail, Hyderabad dated 8-10-1995. The grounds for the said order of dismissal dated 22-11-1995 have no nexus with the mandate created by law quoted above.

These grounds read:

"Only two official witnesses viz the I.O. and the Mukhtiarkar & FCM, who had recorded 164 statements are to be examined. The victim has not denied recording of her 164 Cr.P.C. statement. In case these witnesses do not turn up in near future, the side of the prosecution can be ordered to be closed and prosecution evidence thereby will be completed. In the circumstance it is ordered that let the remaining PWs be examined and the case be completed and heard finally. The bail application therefore is dismissed at this stage."

Who is to be blamed for this blatant violation of the mandates and statutory rights created by law and to the effect that an innocent, poor, aged, citizen of the Islamic Republic of Pakistan is continuously kept in

the inferno of the C-class jail away from his legally wedded wife, but cruelly blinded by her satanic lust, and two children continuously for five years?

17. The negligent conduct of the trial court is to an extent that an application moved from jail indicating existence of substantial evidence in favour of the appellant addressed to Sessions Judge Badin and endorsed by him and sent to the trial court on 10-4-1995 properly signed and sealed remains unattended. It has never been disposed off this way or the other. It does not carry even an order for notice to State. It does not carry even an initial of any perons of the trial court. It is in Sindhi and the substantial part fo the same is reproduced below:

"Mst.Noor khatoon is my wife according to Shariat-e-Muhammadi.

I had married her in exchange of my niece Mst.Zubaidan, From this Mst.Noor Khatoon I got four children out of whom two have died and two are living. Son's name is Mohammad Saleh and daughter's name is Hoor. At this time the age of Mohammad


Saleh is 10 years and the age of my daughter is 12 years.

Both these children of mine are studing in the primary School of Yousif Soomro. Son is studing in class I and daughter is in class II and she also reads the Holy Quran. Showing mercy,

this honourable court may call for government record from the

village Yousif Soomro and see as to in whose name these children are admitted that what is the name for their father. My wife

Noor khatoon has got training being a Mid-wife (Da'ee) arranged by government. She is Da'ee in the village Yousif Soomro. She has been entrusted with necessary government articles. One belt of peetal with an allotted number has been given to her for wearing on the arms. This record may be called from the hospital of Badin and see that whose wife is this Noor Khatoon. The National Identity Card of my wife Noor Khatoon may be called from Card's office Badin and see what is the name of the husband of this Noor khatoon. The number of this Identity Card is (457) and was prepared in 1976 and I myself had got it prepared. I am a poor and Law-waris prisoner. I am in this Central Jail Hyderabad since about 30 months. This honourable court may call for the above-mentioned records of government and may decide. This shall be in the interest of justice."



I find this application properly thumb marked as L.T.I. of appellant and certified as "Before me" and signed and sealed by the Superintendent Central Jail, Hyderabad on 6-4-1995, despatched from the Post Office Sindh University Hyderabad under No.969 on 6-4-1995 and received by the learned Court of Sessions Judge on 9-4-1995 and after necessary endorsement by Reader of the Court, agreed by the Presiding Officer, despatched under No.811/95 dated 10-4-1995 to the trial Court and received accordingly. Had a judicial notice of the substan

tial documentary evidence existing in favour of the appellant been taken and had it been disposed off according to law, there is every possibility that the case could have become fit enough for acquittal of the appellant under section 265-K Cr.P.C. But it appears that the trial court has not even read it. This is highly objectionable and has prejudiced the entire proceedings after the receipt of this application on 10-4-1995.

I can understand that the reason for non-reading of the record is the poverty of the appellant, non-pursuation of applications and minority of his children. Even in this court <sup>appellant</sup> ~~the~~/has been represented by a counsel appointed for him by State. The societies in which law enforcing agencies discriminate between poor and rich, represented and unrepresented, represented by efficient but costly lawyers and by uninterested and inefficient lawyers is a doomed one. Blessed are the societies in which justice knocks at the doors of the weak, meek and needy.

18. The upshot of the discussion is that this is not only a case of benefit fo doubt to be extended to the appellant but callousness and criminal conspiracy which has hatched up against an aged, poor and weak appellant by the prosecution and non-reading and mis-reading of evidence, destruction or concealment of substantial documents and indifference towards the substantial material on the record at the level of the trial Court.

The appeal is accepted, the impugned judgment is set aside.

Appellant may be released, if not wanted in any other case. Certified

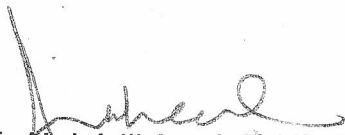


copies of the non-exhibited record and other documents discussed in

this judgment may be kept in safe custody alongwith the paper books and

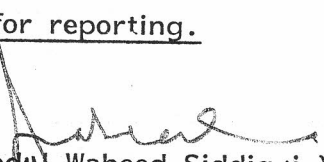
then the original record may be sent back to the trial court.

A copy of this judgment may be sent to the honourable High Court of Sindh Karachi and Secretary, Home, Government of Sindh for taking necessary legal actions against the delinquents.

  
( Abdul Waheed Siddiqui )  
Judge

Announced today the 30th April,  
1997 in the open Court.  
Islamabad.

Fit for reporting.

  
( Abdul Waheed Siddiqui )  
Judge

Zain/\*

