

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE MUHAMMAD ZAFAR YASIN
MR. JUSTICE SYED AFZAL HAIDER

JAIL CRIMINAL APPEAL NO. 3/I OF 2006 **Linked with**
JAIL CRIMINAL APPEAL NO.5/I OF 2006
JAIL CRIMINAL APPEAL NO.60/I OF 2006

1. Aazam son of Kaley Khan,
r/o Mauza Balara Dilawar
Arifwala.
2. Niaz alias Kaley Khan son of Rajab Ali
r/o Mauza Balara Dilawar, Arifwala
3. Riaz son of Sajwara,
r/o Mauza Arjin Tarab, Arifwala.

.... Appellants

Versus

The State

....

Respondent

Counsel for appellants

....

Mr. Muhammad Sharif Janjua,
Advocate

Counsel for the State

....

Mrs. Rukhsana Malik,
Additional Prosecutor General

FIR. No. Date &
Police Station

....

Complaint case dated 12.09.2003
P.S. Ahmed Yar, Arifwala

Date of judgment of
trial court

....

06.12.2005

Dates of Institutions

....

03.01.2006, 16.01.2006 and
18.03.2006 respectively

Date of hearing

....

23.02.2009

Date of decision

....

16 .03.2009

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JUDGMENT

SYED AFZAL HAIDER, Judge:- Through this Single Judgment we propose to dispose of Jail Criminal Appeal No. 3/I of 2006 filed by Azam, Jail Criminal Appeal No. 5/I of 2006 moved by Niaz alias Kaley Khan and Jail Criminal Appeal No. 60/I of 2006 initiated by Riaz against the judgment dated 06.12.2005 delivered by learned Additional Sessions Judge-II, Pakpattan in Hudood complaint case No.75/ASJ of 2005/Hudood Complaint Trial No.27/ASJ of 2005 whereby all the three appellants have been convicted under section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to imprisonment for life each with a fine of Rs. 20,000/- each and in default of payment of fine to further suffer another term of six months simple imprisonment each. All the three appellants have been granted benefit of section 382-B of the Code of Criminal Procedure.

2. The brief facts of the case as given out in the impugned judgment are that complainant Allah Yar PW.1 filed a private complaint against 11 male and 3 female persons including the appellants on the

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allegation that on 04.03.2003 at 3/4.00 p.m. the complainant alongwith his mother Gaman Bibi, Anwar Bibi and Sahib Bibi (sisters of the complainant), Raj Bibi, Said Bibi (wives of brothers of the complainant) and his father Mehmood were present in their house when the accused persons variously armed with deadly weapons entered their house and Kaley Khan raised lalkara that they had come to take revenge of abduction of his daughter. Due to fear the complainant and other inmates of the house to hide themselves went in the rooms and the accused persons started breaking the doors and challenged the inmates to come out. Accused Azam, Khadim, Riaz and Mumtaz climbed over the roofs of their house and set it on fire by sprinkling kerosene oil. Father of the complainant came out from the room, upon him Mumtaz, Riaz and Khadim shot fires which hit his head, face and neck, where after he fell down. The flames compelled the complainant and other family members to come out from the rooms and they raised hue and cry which attracted Bashir and Kameer, residents of the same village and many other co-villagers to the spot, who witnessed the occurrence. Within their view, Azam, Khadim, Kaley Khan after breaking the doors of their house

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caught hold of Mst. Anwar Bibi, the virgin sister and Mst. Gaman Bibi the mother of the complainant. Riaz and Azam accused snatched ear rings weighing 1½ tolas from the ears of Mst. Sahib Bibi. Kaley Khan accused snatched ear rings weighing one tola from the ears of Mst. Gaman Bibi whereas Kaley Khan and Riaz accused entered into their rooms and after broking the locks of iron box took out Rs. 16,000/- in cash, eight tolas of golden kangans, Gani, Nath, Tikka and 30 tolas of silver Patrian and bangles. Kaley Khan, Azam, Khadim and Alam Ali dragged Mst. Anwar Bibi about 5/6 acres and her kameez was torn. Azam forcibly put her on his back on a mare and took her in the house of Khan Muhammad resident of Mauza Sanattay Key District Bahawalnagar and confined her for fifteen days for committing zina-bil-jabar with her while the other accused persons fled away alongwith their respective weapons. Ultimately the accused persons returned Mst. Anwar Bibi through Panchait. The occurrence was there after reported at the Police Station Ahmad Yar but the police did not register the version of the complainant against the accused, hence the private complaint was filed before the Illaqa Magistrate, Tehsil Arifwala on 12.09.2003.

3. The trial court after preliminary evidence originally framed charges against the accused on 05.05.2005 and on 24.11.2005 amended charges were framed as follow:-

- i "Aazam, Riaz, Mumtaz son of Sajwara, Mumtaz son of Khan Muhammad, Shehbaz son of Khan Muhammad along with your co-accused persons Kaley Khan, Khadim, Alam Ali, Noor Ahmed, Sabir, Abbas, Rajan, Nasim, Nusrat (since P/O) under section 148 of the Pakistan Penal Code.
- ii. Aazam, Riaz, Mumtaz son of Sajwara, Mumtaz son of Khan Muhammad, Shehbaz son of Khan Muhammad along with your co-accused persons Kaley Khan, Khadim, Alam Ali, Noor Ahmed, Sabir, Abbas, Rajan, Nasim, Nusrat (since P/OS) under section 452, 149 of the Pakistan Penal Code.
- iii. That on the same date time and place you accused persons Aazam, Riaz, Mumtaz son of Sajwara, Mumtaz son of Khan Muhammad, Shehbaz son of Khan Muhammad along with your co-accused persons Kaley Khan, Khadim, Alam Ali, Noor Ahmed, Sabir, Abbas, Rajan, Nasim, Nusrat (since P/OS) under section 436, 149 of the Pakistan Penal Code.
- iv. That on the same date time and place you accused persons Aazam, Riaz, Mumtaz son of Sajwara, Mumtaz

son of Khan Muhammad, Shehbaz son of Khan Muhammad along with your co-accused persons Kaley Khan, Khadim, Alam Ali, Noor Ahmed, Sabir, Abbas, Rajan, Nasim, Nusrat (since P/OS) under section 392, 149 of the Pakistan Penal Code.

v. That on the same date time and place you accused persons Aazam, Riaz, Mumtaz son of Sajwara, Mumtaz son of Khan Muhammad, Shehbaz son of Khan Muhammad along with your co-accused persons Kaley Khan, Khadim, Alam Ali, Noor Ahmed, Sabir, Abbas, Rajan, Nasim, Nusrat (since P/OS) under section 354, 149 of the Pakistan Penal Code.

vi. That on the same date time and place you accused persons Aazam, Riaz, Mumtaz son of Sajwara, Mumtaz son of Khan Muhammad, Shehbaz son of Khan Muhammad along with your co-accused persons Kaley Khan, Khadim, Alam Ali, Noor Ahmed, Sabir, Abbas, Rajan, Nasim, Nusrat (since P/OS) under section 324/149 of the Pakistan Penal Code.

vii. That on the same date time and place you accused persons Aazam, Riaz, Mumtaz son of Sajwara, Mumtaz son of Khan Muhammad, Shehbaz son of Khan Muhammad along with your co-accused persons Kaley Khan, Khadim, Alam Ali, Noor Ahmed, Sabir, Abbas, Rajan, Nasim, Nusrat (since P/OS) under section 11 of

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the Offence of Zina (Enforcement of Hudood) Ordinance, VII of 1979.

viii. That after the above said abduction of Mst. Anwar Bibi you Aazam, Riaz, Khadim, Kaley Khan (since P/O) under section 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance, VII of 1979 read with section 109 of the Pakistan Penal Code.

4. The trial court framed an amended charge on 24.11.2005 against the above mentioned accused wherein section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 was also added.

5. The prosecution in order to prove its case produced three witnesses at the trial. Allah Yar, complainant appeared as P.W.1. He supported his version recorded in the complaint Ex.PA. P.W.2 Anwar Bibi victim narrated the facts about her abduction and zina by the accused. She also corroborated her brother Allah Yar complainant. Mehmood father of the complainant appeared as P.W.3 to corroborate the statement of Allah Yar complainant P.W.1.

6. The trial court after close of the prosecution evidence recorded statements of accused under section 342 of the Code of Criminal Procedure

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wherein they took up the plea of innocence and stated that the case against them was due to previous enmity. Niaz alias Kaley Khan had stated "It is a false case due to previous enmity. I have been implicated in this case because my daughter was abducted by complainant party. PWs are related inter se and inimical towards me". The other accused adopted the same defence. None of them opted to make statement on oath under section 340(2) of the Code of Criminal Procedure nor produced any evidence in their defence. The trial court after completing all legal formalities heard arguments of the parties and found the present appellants guilty and convicted and sentenced them as noted above while the remaining three accused were acquitted vide the same judgment. Hence the present appeal against conviction.

7. We have gone through the file and also perused the evidence as well as the judgment. We have also gone through the statement of Niaz accused. We have also heard learned counsel for the appellant as well as the State at some length.

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8. Niaz accused in reply to question No.7 stated that his daughter had been abducted by the complainant party and hence he has been implicated due to previous enmity. All the other accused have adopted this line of argument in their defence.

9. We agree with the finding of learned trial court recorded in the impugned judgment to the extent that "the prosecution has proved the commission of abduction of Anwar Bibi at the hands of accused persons Kaley Khan, Aazam and Riaz but the question for determination is whether it is a case of abduction under section 365 Pakistan Penal Code or abduction within the mischief of section 11 of the Offences of Zina (Enforcement of Hudood) Ordinance, 1979. The learned trial Court has however not given any reason as to why the accused were convicted under section 11 of Ordinance VII of 1979 particularly when the learned trial court in para 14 of the impugned judgment found: "from the close scrutiny of available evidence, prosecution failed to prove the charge of Zina against Azam, Kalay Khan and Riaz accused persons." The learned trial Court had in the same paragraph held that on account of delayed dispatch of contaminated

swabs for analysis the positive report of the Chemical Examiner was not helpful to the prosecution.

10. Section 365 of the Pakistan Penal Code reads as under:-

365. **“Kidnapping or abducting with intent secretly and wrongfully to confine person.** Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine”.

Whereas section 11 of Ordinance VII of 1979 reads as under:-

11. **“Kidnapping, abducting or inducing women to compel for marriage etc.** Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit inter-course, or knowing it to be likely that she will be forced or seduced to illicit inter-course, shall be punished with imprisonment for life and shall also be liable to fine; and whoever by means of criminal intimidation as defined in the Pakistan Penal Code, or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit inter-course with another person shall also be punishable as aforesaid”.

11. A comparison of both the sections show that the gravamen of the offence under section 365 is the offence of kidnapping/abduction with *the intent to keep the abductee in a secret wrongful confinement.* The intention has to exist at the time the offence is committed which can of course find manifestation in subsequent conduct. The intention can also be

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inferred from the later behaviour and ensuing action. The accused in this case intended and infact kept the detenue in confinement for a period of nineteen days without molesting her modesty. This conduct on their part is certainly covered by the mischief of section 365 of the Pakistan Penal Code and not section 11 of Ordinance VII of 1979 for the reason that the appellants neither compelled her to marry any person against her will, even though she was unmarried nor forced her to illicit intercourse. The medical evidence does not support the part of the prosecution story which alleges zina-bil-jabr. The motive for this offence is very clear. The complainant party had admittedly abducted the daughter of Niaz accused and returned her after a few days and in retaliation the accused party abducted Mst. Anwar Bibi and released her after 19 days of confinement.

12. Another intriguing factor is that the photo copy of the medico legal report of the lady doctor C.W.1 has been placed on record. The witness admitted that her original signatures are not available on the copy CW.1/A. It was not even an attested copy. She is also not aware whether the person examined by her was Mst. Anwar Bibi daughter of Mehmood or some other

woman. She also stated that “ it is correct that if the victim is habitual or married then her vagina admits two fingers easily”. In her examination-in-chief she had stated that vagina of the victim admitted two fingers easily.

13. In so far as the analysis of the swabs allegedly contaminated with semen are concerned the Chemical Report Ex.PB itself states that the swabs were despatched on 27th March, 2003 but were received by the Analyst on 06th May, 2003. Where were these swabs for almost 41 days in between? Out of the evidence of 14 witnesses on record not a single witness has come forward to state that a) he received the swabs from the lady doctor; b) the swabs were duly sealed; c) and were duly handed over to the Investigating Officer by the person receiving from the lady doctor, d) and were deposited in the Malkhana through the Muharrar; e) and were ultimately handed over intact to Muhammad Mubin Khan Constable No. 207/C who, f) in turn handed over the same intact in the Office of the Chemical Examiner at Multan. Each and every witness is required to account for the possession along with date when he received or handed over the crime property. In the absence of these links and coupled with the

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submission of photo copy of the medico legal report of the lady doctor, the very story of forced sexual intercourse is rendered doubtful if not false. This factor alone is sufficient for setting aside conviction under section 11 of Ordinance VII of 1979.

14. Mst. Anwar Bibi, P.W.2, the abductee was not recovered from the accused. She was produced by the complainant Allah Yar, P.W.1 before Asghar Ali, ASI who appeared at the trial as C.W.6. This witness stated that the “ complainant told that abductee was brought from the dera of Nazar Shah and after five or six days, she was produced before me. On the next day I produced the abductee before the learned Judicial Magistrate and she also mentioned the name of said accused and she also added some unknown persons. The house of Kaley Khan consists over one chappar and one room. I cannot tell the exact location of the door of the room. I cannot tell the exact location of the chappar”. Neither has the witness Nazar Shah been produced to confirm that the witness Mst. Anwar Bibi was recovered or “received” by him from the accused as a result of Panchait decision nor has the

Investigating Officer been able to tell us where was she confined by Kaley Khan.

15. The case of Shahzad alias Shadoo and others versus the State reported as 2002 SCMR 1009 was referred before us by the complainant that the solitary statement of the victim is sufficient to sustain conviction of the accused and no corroboration is required. The Honourable Bench, however, in para 6 and 7 of the Judgment observed as follows:-

“We would like to mention here at this juncture that corroboration is not a rule of law but that of prudence. There is no denying the fact that acid test of the veracity of the prosecutrix’s statement is the inherent merit of her statement because corroborative evidence alone could not be made a base to award conviction. It is well settled by now that “the extent and the nature of corroboration required may, no doubt, vary from witness to witness and from case to case, but as a rule it is not necessary that there should be corroboration in every particular, all that is necessary is that the corroboration must be such as to effect the accused by connecting or tending to connect him with the crime. The corroborative evidence should tend to show that the witness or witnesses’ evidence that the accused took part in the crime is true. To say that certain

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witnesses required corroboration and then to lay down that the corroborative evidence must show that the accused did not precise act attributed to him by the witnesses is tantamount to doing away with the evidence of those witnesses. And the same would be the result if the corroborative evidence required in such as is incompatible with the innocence of the accused. The true rule governing such situation is that the corroborative evidence should at least tend to show that the evidence of the witnesses when they name the accused as taking part in the crime is true. ¹⁶

Corroboration of the interested testimony should be such as would remove the doubt that the accused have been falsely implicated." Ramzan Ali versus the State PLD 1967 SC 545 and Ashraf versus Crown PLD 1956 FC 86).

We have examined the case in hand on the touchstone of the criterion as mentioned hereinabove. Generally speaking the statement of prosecutrix if considered trustworthy no corroboration would be needed and such need only arises in the circumstances indicating the possibility of her being consenting party to sexual intercourse which is a rare phenomena in cases of Zina-bil-Jabr. In such like cases the corroboration of evidence needs not be the direct evidence but it may be independent evidence of such a character which could connect the

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accused directly or indirectly with the alleged offence.”

16. It may however be observed that in this case the statement of Mst. Anwar Bibi is neither corroborated by medical evidence nor is the Chemical Examiner's report helpful to the prosecution nor was the abductee recovered from the accused nor was the person who had received the abductee, allegedly from the accused, produced in the court. In these circumstances it is not safe to rely upon the sole testimony of Mst. Anwar Bibi the alleged victim who incidentally is a woman of easy virtue. Moreover the complaint with an improved version was lodged on 12.09.2003 though the FIR had been registered on 05.03.2003 at Police Station Ahmad Yar District Pakpattan.

17. This part of the statement that Azam Ali accused and Kaley Khan accused i.e. father and the son both committed zina-bil-jabr with her while their women folk kept a watch over this obscene act, however does not appeal to reason. The part of the story initially disclosed by the complainant about mischief by fire or demolition of the roof by the appellant in complainant's house, has not been proved. The accused were not convicted

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under section 436 of the Pakistan Penal Code though they were charged for Mischief by fire because the learned trial court found that the allegation of mischief by fire was not mentioned in the FIR and was introduced for the first time in the complaint. Moreover there is no appeal file by complainant against the present appellants for their acquittal under section 436 of the penal Code. This part of mischief by fire is an improvement to aggravate the intensity of the offence of abduction. In view of what has been stated above ¹⁰ it is not safe to uphold the conviction and sentence recorded against the appellants under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 by learned trial court as the intention was neither to marry the abductee against her will nor to force her to illicit intercourse. The intention was merely to confine her in retaliation. The conviction recorded by the learned trial Court under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentence of imprisonment for life with a fine of Rs.20,000/- each is being altered to a conviction under section 365 of the Pakistan Penal Code. The sentence of the appellants is reduced to five years R.I. and a fine of Rs.10,000/- each and in default of

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payment of fine an additional term of three months simple imprisonment each. The benefit of section 382-B of the Code of Criminal Procedure has already been extended to the appellants by the learned trial court, which shall remain intact. We are told that the appellants have served more than five years. If this is the case then the Superintendent Jail will calculate the period and adjust it against the payment of fine if the period is more than three months. With this modification in the conviction and sentence, all the three appeals are being disposed of.

Syaidan

JUSTICE SYED AFZAL HAIDER

M. Z. Yasin

JUSTICE MUHAMMAD ZAFAR YASIN

Announced in Open Court
on 16.03.09 at Lahore.

Fit for reporting.

Syaidan

JUSTICE SYED AFZAL HAIDER