

IN THE FEDERAL SHARIAT COURT  
( APPELLATE JURISDICTION )

Present

MR. JUSTICE SAEED-UR-REHMAN FARRUKH  
MR. JUSTICE ZAFAR PASHA CHAUDHRY

JAIL CRIMINAL APPEAL NO.294/I OF 2004

Karam Hussain alias Karma,  
son of Allah Dad,  
caste Baloch, resident of  
Mouza Kondi, Tehsil and  
District Lodhran.

.....Appellant.

Versus

The State

.....Respondent.

For the appellant:

Mr. Arshad Ali Chaudhry,  
Advocate.

For the State

Mr. Shafqat Munir Malik,  
Assistant Advocate General.

No. & Date of FIR/PS

No.390 dated 17-9-2003  
P.S. City Lodhran.

Date of judgment  
of trial court

22-9-2004

Date of institution  
of appeal

19-10-2004

Date of hearing

15-12-2004

Date of decision

15-12-2004

.....

Σ

JUDGMENT

ZAFAR PASHA CHAUDHRY, J.- Jail Criminal Appeal

No.294/I of 2004 is being disposed of by this judgment, whereby

Karam Hussain alias Karma has assailed his conviction under sections 12 of the Offence of Zina(Enforcement of Hudood) Ordinance, 1979

(hereinafter referred to as the Ordinance) 377 PPC with and/the following sentences:-

- |      |                                    |  |
|------|------------------------------------|--|
| (i)  | Under section 12 of the Ordinance. | Twenty five years R.I. with a fine of Rs.25000/- in default to suffer six months R.I.and thirty stripes. |
| (ii) | Under section 377 PPC              | Ten years R.I. with a fine of Rs.25000/- in default to suffer six months R.I.                            |

Both the sentences were ordered to run concurrently. Benefit of section 382-B Cr.P.C. has been granted. The conviction was passed by Mr. Muhammad Aslam Chaudhry, Additional Sessions Judge, Lodhran vide his judgment dated 22-9-2004 in case FIR No.390 dated 17-9-2003 registered with Police Station City Lodhran.

2. The prosecution case as revealed from the statement of Fayyaz Mahmood, maternal uncle of Attaullah, the victim is that Fayyaz Mahmood is maternal uncle of Attaullah who was working as a servant of Dost Muhammad Jhandeer and used to reside with the complainant Fayyaz Mahmood. On 15-9-2003 Attaullah went to see his parents in Mauza Kondi after about one month. He was told to return within two or four days. On previous night which would fall on 16-9-2003 Attaullah disappeared from the house at about 8.00 p.m. He was searched for by Allah Bakhsh, father of Attaullah and

Mulazim Hussain etc. No clue of the boy could be found. Therefore, the complainant also joined the search. When the complainant alongwith his companions was in search of the missing Attaullah, they reached near cotton crop of Karam Hussain alias Karma (appellant). They heard alarm raised by Attaullah. It was night time i.e. about 10 p.m. They saw in the moonlight that Karam Hussain had removed shalwar of Attaullah and had laid him down prostate on the ground. He was committing unnatural offence with him. The raiding party also witnessed that Baqar Khan alias Baqra and Niaz Ahmed were sitting on the 'wat' of the field. All the offenders i.e. Karma appellant and aforesaid Baqar Khan and Niaz Ahmed on seeing them approaching fled away. Attaullah was half conscious. He was given water. On query he informed that Karam Hussain had sent him to buy sweet drops and when he brought the sweets the appellant complained that he did not bring all the sweet drops and gave him slaps and fist blows. Thereafter all the three accused took him inside the cotton crop and there Karma committed sodomy with him. The aforesaid two companions were sitting waiting their turn but they could not accomplish their desire because of arrival of the witnesses.

3. On the statement of Fayyaz Mahmood Exh.PC, formal FIR Exh.PC/1 was registered with Police Station, City Lodhran. After holding necessary investigation, the appellant alongwith his two companions i.e. Niaz Ahmed and Baqar alias Baqra were sent up to face trial. The learned Additional Sessions Judge framed

charge against all the three accused under section 12 of the Ordinance.

The appellant Karam Hussain alias Karma was also charged under section 377 PPC. All the three accused did not confess their guilt and as such they were put on trial.

4. The prosecution in support of its case examined eight witnesses. Dr. Altaf Ahmed Khan, PW.1 medically examined the victim Attaullah aged about 10/11 years. He observed multiple abrasions on the back of abdomen. Abrasions were also seen in front of chest. Walking was painful. Victim had not passed stools. On local examination, redness and abrasions were observed on inner mucosi at 12'0 clock, 1,2 and 6'0 Clock position. The examination was painful. On proctoscopy, inner mucosi of anus was red and congested. Four vaginal swabs were obtained and sent for examination to the office of Chemical Examiner. The doctor received the photostat copy of the report of Chemical Examiner and recorded his final report Exh.PB/1 and held that the victim had been subjected to sodomy.

5. Attaullah victim aged about 10/11 years appeared as PW.2. He fully supported the prosecution story as narrated by the complainant. He gave all the details how he was sent to buy some sweet drops and that Baqar and Niaz met him. Thereafter Karam Hussain alongwith Baqar and Niaz took him inside the cotton crop near Eidgah. His shalwar was forcibly taken off. It was about 9 p.m. Thereafter Karam Hussain forcibly committed sodomy with him. On alarm Fayyaz, Allah Bakhsh and Mulazim Hussain reached the spot.

He was cross examined but nothing substantive could be brought on the record except to show that the alleged abduction of Attaullah could not be established.

6. The complainant Fayyaz Mahmood appeared as PW.3. He reiterated his statement already made by him before the police. During cross examination, minor and insignificant discrepancies or variations were brought to light but none of them was significant or important which may belie the prosecution version.

7. Allah Bakhsh father of the victim was examined as PW.4. He also supported the complainant's version that his son was working as a servant of Mian Dost Muhammad Zafar Jhandeer and used to reside with his maternal uncle Fayyaz Mahmood. Rest of the narration is the same as already given by the complainant.

8. Dr. Riaz Ahmed, PW.5 examined Karam Hussain alias Karma and found him sexually fit and capable of performing sexual act.

The remaining witnesses are formal except PW.8 Abdul Bari, SI who carried out the investigation and he furnished the details of various functions performed by him during course of investigation.

9. On close of the prosecution evidence, the appellant was examined under section 342 Cr.P.C. In answer to Question No.4, he took up the plea obviously on instructions and legal advice that opinion of doctor was based on report of Chemical Examiner

which was in fact a photostat copy, therefore, the same was not admissible. On merits he pleaded that he was inimical towards Dost Muhammad Jhandeer, master of victim Attaullah. The appellant Karam Hussain was implicated at his instance. It may be noted here that during course of arguments we were shown the original report of Chemical Examiner which may be out of inadvertence or due to some misplacing could not be brought on the file. Be that as it may, the fact that Attaullah was subjected to sodomy is amply proved by the medical evidence itself. The report of Chemical Examiner is ordinarily required to supplement and authenticate the opinion of the doctor. To constitute the offence under section 377 PPC, mere penetration is sufficient. The anal examination of the victim fully proved that he had been subjected to commission of unnatural offence. The learned Additional Sessions Judge on conclusion of the trial acquitted both the co-accused of the appellant i.e. Niaz Ahmed and Baqar alias Baqra as according to learned trial judge no sufficient evidence was available to prove beyond doubt that Attaullah had been abducted or kidnapped therefore, the learned trial judge rightly extending benefit of doubt and to them/acquitted them of the charge under section 12 of the Ordinance. The appellant Karma was, however, convicted under section 12 as well as under section 377 PPC. The appellant has been awarded sentence of 25 years R.I. with fine of Rs.25000/- under section 12 of the Ordinance and ten years R.I. with fine of Rs.25000/- under section 377 PPC.

10. The learned counsel in support of his appeal argued that as far as commission of offence under section 12 of the Ordinance is concerned, there is no sufficient evidence brought on record which may justify the appellant's conviction under that section. According to learned counsel, there is no direct evidence to show that Attaullah victim was kidnapped or abducted from the shop where he was working. He further supplements his arguments by asserting that same evidence of abduction in order to attract section 12 had been adduced against the acquitted accused persons which had been produced against the appellant. The learned trial judge disbelieved the evidence or material viz-a-viz the two acquitted co-accused of the appellant but on the strength of the same evidence or material he proceeded to convict the appellant under section 12 of the Ordinance.

11. We have attended to the contention raised by the learned counsel in this regard and we find that the contention is not without substance. Although it has come in the evidence that the place of occurrence is at quite some distance from the place of work of the victim yet there is no positive and concrete evidence in this regard showing that the victim was taken or removed forcibly or he was enticed away by the accused persons. Of course there is strong presumption or inference may be drawn that the victim would have been brought from the place of his service to the place of occurrence but the presumption, however strong it may be, cannot be accepted as a substitute of evidence. The prosecution is bound under the law

to prove the charge beyond doubt. Any doubt if arises out of the prosecution version has to be extended to the accused persons. The learned trial judge acted with care and caution that evidence qua abduction or kidnapping of the victim by the accused persons was not legally sufficient to record conviction. He was, therefore, pleased to acquitt the two co-accused of the appellant. But the learned trial judge proceeded to convict the appellant. In our view, in absence of a direct and concrete evidence viz-a-viz abduction or kidnapping of the victim, it would be unsafe to convict the appellant for offence under section 12 of the Ordinance. The learned counsel for the State has also not been able to point out any evidence or material which may justify the appellant's conviction under section 12 of the Ordinance. It is true that the victim was subsequently subjected to unnatural offence and he must have been brought for the same purpose but abduction or kidnapping being independent offence requires legal proof to sustain a conviction thereunder. In the present case the rule of care and caution demands that although there are circumstances pointing and indicating that the victim must have <sup>been</sup> brought to the field under some allurement or some force but unfortunately there is no positive or tangible evidence brought on the record. We are, therefore, constrained to set aside the appellant's conviction under section 12 of the Ordinance. Accordingly the appellant's sentence to undergo 25 years R.I. with fine of Rs.25000/- under section 12 of the Ordinance is also set aside.




12. As regards commission of offence under section 377 PPC, Attaullah victim has made consistent and coherent statement. He has fully implicated the appellant for commission of unnatural offence with him. His statement is fully supported by the medical evidence. The same is further supplemented by the report of Chemical Examiner. The original report of the Chemical Examiner is present on the police file. Be that as it may, even in the absence of Chemical Examiner's report the commission of sodomy against the appellant is proved beyond doubt. The statement of the victim is supported by the two private witnesses i.e. the complainant and Allah Bakhsh, father of the victim. The defence put forward by the appellant is totally incredible being vague and general in nature. It is not believable that the victim or the complainant party would have fabricated a false case and that too of sodomy in order to falsely implicate the appellant at the instance of Dost Muhammad Jhandeer, the employer of the victim. The prosecution has, therefore, successfully discharged its onus by proving the charge under section 377 PPC against the appellant.

The appellant's conviction under section 377 PPC is, therefore, upheld and maintained. The sentence of 10 years R.I. with fine of Rs.25000/- does not appear to be excessive keeping in view the age of the victim Attaullah who is only 10/11 years old. He was very brutally subjected to unnatural offence which is evident from his clinical examination. Accordingly the appellant's appeal to the extent of his conviction and sentence under section 377 PPC is dismissed.

His sentence of 10 years R.I. with fine of Rs.25000/- or in default to undergo six months R.I. is upheld and maintained. Benefit of section 382-B Cr.P.C. will be allowed to the appellant.

The appeal is partly allowed inasmuch as the appellant's conviction under section 12 of the Ordinance is set aside. However, his conviction and sentence under section 377 PPC is upheld and maintained.

  
( ZAFAR PASHA CHAUDHRY )  
Judge

  
( SAEED-UR-REHMAN FARRUKH )  
Judge

Approved for reporting.

  
Judge

Islamabad:15-12-2004.  
M.Khalil