

IN THE FEDERAL SHARIAT COURT  
( Appellate Jurisdiction )

PRESENT

JUSTICE SYED AFZAL HAIDER  
JUSTICE MUHAMMAD ZAFAR YASIN

Jail Criminal Appeal No. 40/I of 2008 Linked with

Jumma son of Nabi Bakhsh Lishari r/o Mauza Noor Wahi, Tehsil &  
District Dera Ghazi Khan

..... Appellant

Versus

The State .... Respondent

Criminal Appeal No. 48/I of 2009

Muhammad Iqbal son of Ghulam Rasool Caste Langah r/o Mauza Noor  
Wahi Tehsil & District Dera Ghazi Khan

.... Petitioner

Versus

1. Jumma son of Nabi Bakhsh Lashari r/o Mauza Noor Wahi Tehsil &  
District Dera Ghazi Khan
2. The State

.... Respondent

Counsel for appellant

..... Mr. Muhammad Sharif Janjua,  
Advocate

Counsel for petitioner

.... Haji Muhammad Zafar Khan  
Gulzai, Advocate

Counsel for State....

Raja Shahid Mahmood Abbasi  
Deputy Prosecutor General

FIR. No. Date &  
Police Station

120, 04.06.2006  
Choti Distt. Dera Ghazi Khan

Date of Judgment of  
Trial court

24.03.2008

Dates of Institution

18.04.2008 & 17.04.2008  
respectively

Date of hearing

29.04.2009

Date of Judgment

13-05-2009

**JUDGMENT**

**SYED AFZAL HAIDER, Judge:**

**PRELIMINARY**

**CRIMINAL APPEAL NO.48/I OF 2009**

This appeal was filed on 17.04.2008. It was treated as Revision by office. On 26.03.2009 the learned counsel for the appellant in response to court question stated that in fact he had filed an appeal against acquittal of respondent No.2 from the charge under section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and had also prayed for enhancement of sentence awarded to respondent No.2 under section 10. In order therefore to rectify the error, learned counsel prayed for a short adjournment which was duly granted. An application was thereafter moved which was placed before us as Criminal Miscellaneous No. 29/I of 2009 on 21.04.2009. After perusing the application the learned counsel finally stated that he would only challenge the acquittal of respondent No.2 from the offence under section 11 of the Offence of Zina (Enforcement of Hudood)

Ordinance, 1979. It was made clear to him that in that event he would be precluded from a) arguing for enhancement of sentence recorded under section 10(2) as no separate Revision petition for enhancement has been made, and b) he would not be entitled to challenge the acquittal of respondent No.2 under 10(3) as he was convicted by the learned trial court only under section 10(2) of the said Ordinance. Consequently the necessary correction was allowed in Criminal Miscellaneous No.29/I of 2009 in the following terms:-

“Learned counsel for the applicant, through this application, has prayed that this Revision Petition be treated as an appeal against acquittal of the respondent Jumma from charge under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

Learned counsel for the applicant stated that in fact he had filed an appeal in this Court which was wrongly treated as revision petition. Hence this application, to treat this matter as an appeal instead of revision.

Criminal Misc. is allowed. The office is directed to treat this revision petition as an appeal and set down for

hearing alongwith Criminal Appeal No.40/I/2008 on 29.4.2009.

Criminal Miscellaneous application is disposed of accordingly.”

**PROSECUTION STORY**

2. This appeal arises out of an incident that occurred in village Noor Wali on 31.05.2006. The crime report about this incident was registered as FIR. No. 120 dated 04.06.2006 with Police Station, Choti on the statement of Muhammad Iqbal, complainant P.W. 8.
3. Facts narrated in the crime report reveal that on 31.05.2006 complainant Muhammad Iqbal was present in his house when his daughter Mst. Sakina Mai aged 15/16 years went out in the evening to collect fire wood. After a short while the complainant and his two nephews, Saeed Ahmad and Muhammad Ishaque (given up P.Ws), heard her wails and cries whereupon they rushed to the spot. They saw two persons emerging out of the abandoned “khola” and rushing eastward. One of them was identified as Jumma their neighbour, while the other could not be identified. On reaching the khola they found Mst. Sakina in tears who told them that as she had

come out of the house to collect stray wooden pieces, Jumma accused armed with churri and an unknown person abruptly came out of the khola. She was threatened that if she would raise noise she would be killed. She was dragged into the khola. Jumma took off her shalwar forcibly and started committing zina against her will. He had handed the churri to other person who stood guard pointing the churri towards her. Thereafter both went out and then she started crying loudly. It was further stated in the crime report that the accused party had been making efforts to seek pardon from the complainant but he did not agree. Consequently report was lodged at the Police Station against the accused persons.

### **POLICE INVESTIGATION**

4. The police investigation ensued as a consequence of registration of crime report. On 04.06.2006 Munir Hussain, S.I. P.W.7 recorded FIR. Ex.PC. On the second day the victim Mst. Sakina Mai was produced before him. He recorded her statement and got her medically examined vide application Ex.PE submitted to Women Medical Officer, Rural Health Centre Choti on 05.06.2006. He visited the place of occurrence, prepared

site plan Ex.PG, recorded statements of witnesses under section 161 of the Code of Criminal Procedure. On 08.06.2006 the accused Jumma voluntarily appeared before him but he did not arrest him as he had not formed opinion about his involvement in the case. Thereafter the investigation of this case was transferred to Investigation Cell.

5. Further investigation was then taken up by Zamin Abbas, Inspector P.W.5. On 17.08.2006 he arrested the accused after his pre-arrest bail application had been rejected. He sent the accused on judicial remand on 21.08.2006. Relying upon the previous statements of witnesses recorded by Munir Hussain, S.I. he found the accused guilty. Report under section 173 of the Code of Criminal procedure was submitted by the SHO of the Police Station in the court requiring the accused to face trial.

### THE TRIAL

6. After receiving the requisite report, the learned trial court proceeded with the trial of Jumma accused. Charges were framed against the accused under sections 10 and 11 of Offence of Zina (Enforcement of

Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

7. The prosecution in order to prove its case produced 08 witnesses at the trial. The gist of deposition of witnesses for the prosecution is as under:-

- i. Dr. Nazia Shahid appeared as P.W.1 to depose that she had medically examined Mst. Sakina alias Shakila on 05.06.2006 and issued medico legal report to that effect. She also obtained vaginal swabs and sent the same to Chemical Examiner through police. She had handed over to the escorting police constable three bottles of vaginal swabs, one sealed envelope and one sealed packet of shalwar of the victim.
- ii. Muhammad Ashiq, Head Constable No.535 appeared at the trial as P.W.2 and stated that on 05.06.2006 the Investigating Officer of the case handed over to him two sealed envelopes, one sealed parcel and three sealed phials containing semen swabs for safe custody. On 09.06.2006 he handed over these articles to Sher Shah Constable No.171 for onward transmission to the Office of the Chemical Examiner Multan.
- iii. Raza Hussain, Constable No.519 appeared as P.W.3 and stated that on 05.06.2006 the lady doctor after conducting medical examination of the victim handed over to him two sealed

envelopes, three sealed phials containing vaginal swabs which were handed over by him intact to the Investigating Officer on the same day.

- iv. Sher Shah Constable No.171 appeared at the trial as P.W.4 and deposed that on 09.06.2006 the Moharrir of the Police Station handed over to him two sealed envelopes and three sealed phials said to contain semen. He deposited the articles intact in the Office of Chemical Examiner on 10.06.2006.
- v. Zamin Abbas, Inspector appeared as P.W.5 and deposed about the steps taken by him in the investigation of this case. His role has already been mentioned in paragraph 5 of this judgment.
- vi. Mst. Sakina alias Shakila appeared as P.W.6. She supported the statement of his father Muhammad Iqbal P.W.8 regarding the occurrence and nominated accused Jumma as the culprit who had committed rape.
- vii. Munir Hussain, Sub Inspector appeared as P.W.7 and stated about the initial investigation conducted by him in the case. The detail of his investigation has also been given in an earlier paragraph of this Judgment.
- viii. P.W.8, Muhammad Iqbal, the complainant, appeared at the trial and endorsed the facts recorded in the FIR.

8. After close of the prosecution evidence learned trial court recorded statement of accused under section 342 of the Code of Criminal



Procedure wherein he took the plea of innocence and in response to question No.5," Why this case against you and why the P.Ws have deposed against you?" stated as follows:-

"Mst. Sakina alias Shakila was on love affairs with co-accused Bashir. She used to go and come to Madrassa on his Rickshaw. He used to park his Rickshaw in front of my shop. I told Bashir that I would complain to father of Sakina about his objectionable movements. Mst. Sakina alias Shakila to save herself from torture of her parents and to teach him a lesson concocted the occurrence.

Prior to this occurrence Iqbal complainant gave beating to my mother. I went to police to report about that occurrence but due to influence and wealth of complainant party my case was not registered. My land where my house is situated is surrounded by land owned by complainant and his brother. He intended to garb my house with that land. Due to animosity complainant and victim have deposed against him."

The accused did not make statement on oath as permitted under section 340(2) of the Code of Criminal Procedure but produced two witnesses in his defence.

9. The learned trial court at the conclusion of trial heard the arguments of the contending parties. Learned trial court thereafter found that the charge under section 11 of Zina (Enforcement of Hudood) Ordinance, 1979 was not proved. However the learned trial court held that "the involvement of accused Juma stands proved beyond shadow of any doubt. He is convicted under section 10(2) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and as punishment is sentenced to 5 years rigorous imprisonment with fine worth Rs.10,000/-. In case of non payment of fine he shall suffer simple imprisonment for two months. Benefit under section 382-B of Code of Criminal Procedure is granted to him". Hence the present appeal by the complainant against acquittal under section 11 of the Ordinance VII of 1979.

#### **RE-EVALUATION**

10. We have gone through the file. The evidence both oral and documentary, adduced by the prosecution as well as statement of accused and the deposition of two defence witnesses has been perused. The relevant portions of the impugned judgment have also been scanned with the

assistance of learned counsel for the appellant. Arguments on behalf of the parties have been noted for consideration.

11. The main emphasis of the learned counsel for the appellant is that the accused/respondent has been illegally acquitted by the learned trial court under section 11 because a person who "removes or drags a woman even for a short distance to commit Zina is also guilty of kidnapping as mentioned in section 11 of the Ordinance". We tried to analyse section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and told the learned counsel that taking or removing a victim forcibly to a nearby field or an abandoned room to satisfy lust would not be covered by the mischief of section 11. It has been held repeatedly that taking a person to a nearby safe place would not be hit by the provision of section 11. If rape or anal sex is otherwise proved, the conviction would be maintained under section 10 of Ordinance VII of 1979 or section 377 of the Pakistan Penal Code as the case may be. Even otherwise it does not make sense to convict an accused under section 11 while recording conviction under section 10(2).

For reference sake the following precedent may be noted.

- i. Ali Nawaz alias Aliya & 5 others Vs. The State 1988 SCMR 601
- ii. Muhammad Akhtar Vs. Muhammad Shafique and another 1986 SCMR 533.
- iii. Abdul Wadood and another Vs. The State 1986 SCMR 1947 = PLJ 1986 SC 715
- iv. Shams Saeed Ahmad Khan Vs. Shafaullah and another 1985 SCMR 1822
- v. Zulfiqar Vs. The State PLD 1985 FSC 404
- vi. Muhammad Tufail Vs. The State NLR 1983 Cr. 445.

12. Learned counsel for the complainant then contended that the quantum of punishment awarded to the accused was on the lower side. This point cannot be agitated at this stage because the learned counsel was content with moving an appeal against acquittal. He had opted to argue an appeal against acquittal from the charge under section 11 of Ordinance VII of 1979. Revision for enhancement of sentence is not before us and consequently the question of considering argument for enhancement is irrelevant. Notice was not issued to respondent No.2.

13. Learned counsel for the appellant then contended that the conviction under section 10(3) of Ordinance VII of 1979 should have been

recorded and the conviction recorded under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 by the learned trial court, under the circumstances, was illegal. The learned counsel was again reminded of the fact that he shall confine himself to appeal against acquittal under section 11 of Zina Ordinance. In response to a specific question by court on both the dates, the learned counsel very clearly stated that he would be content with appeal against acquittal recorded under section 11 of Ordinance VII of 1979 above. It was also made clear to him that conviction recorded by learned trial court under 10(2) automatically meant that the accused had been acquitted of the charge of rape as contemplated by clause (3) of section 10 of Ordinance VII of 1979. There is no appeal against acquittal under section 10(3) before us.

14. Learned counsel for the appellant at the end stated that in fact an agreement had been arrived at between the parties whereby the accused had to pay monetary compensation to the complainant. It was because of this agreement that Mst. Sakina had sworn an affidavit exonerating the accused. Since the accused was not prepared to honour his part of the commitment so

the compromise between the parties automatically stood cancelled and consequently the respondent accused merited being convicted for Zina-bil-Jabr. We are unable to agree with this argument for the reason firstly: that the offence of rape is not compoundable under Hudood Ordinance even with the permission of the court; secondly there is no precedent in support of such a proposition; thirdly we, sitting as judges of the Federal Shariat Court, would never endorse a proposition which is ab-initio void according to Islamic Injunctions. A compromise in violation of Injunctions of Holy Quran has no value at all. It is even otherwise a revolting argument that since monetary compensation was not paid so a verdict of guilt with maximum sentence should be recorded; meaning thereby that if compensation had been paid it would no longer be an offence of rape. Is this compensation being demanded as Haq-e-Mehr? It is repulsive to demand money as price for withdrawing from prosecution. It was much better to settle the issue outside the court in the Panchayat and not involve the Courts in such hideous bargains where the honour of girls is put on sale.

15. In this view of the matter we are not persuaded to admit Criminal Appeal No.48/I of 2009 against acquittal for regular hearing. Consequently the same is hereby dismissed.

**JAIL CRIMINAL APPEAL NO. 40/I OF 2008**

16. We will now take up Criminal Appeal No. 40/I of 2008 as the office has put up the connected file before us under the original order dated 26.08.2008 as well as order dated 21.04.2009 of this Court that both the appeals would be heard together. This Judgment will therefore cover both the appeals.

17. We have heard the learned counsel for appellant Juma as well as learned Deputy Prosecutor General on behalf of the State. We find that the victim Mst. Sakina P.W.6 had alleged zina-bil-jabr but the learned trial court after appreciating the evidence was pleased to convict the appellant under section 10(2) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The report of the Chemical Examiner is positive and the evidence of the Lady Doctor P.W.1 shows that sexual intercourse had taken place. It means that the allegation of sexual intercourse stands corroborated through

medical evidence as well as through the positive report of the Chemical Examiner. The learned counsel for the State supported the impugned judgment. The learned counsel for the appellant at the end stated that he would be content if the sentence is reduced to already undergone and he would not challenge the conviction recorded under section 10(2) of the Ordinance. We find some weight in the plea advanced by learned counsel for the defence for the following reasons:-

- i. The accused is a first offender;
- ii. The accused is a young man;
- iii. The FIR was lodged with a delay of four days;
- iv. The Medical examination of the victim took place on the fifth day;
- v. The two witnesses mentioned in the FIR, who were first cousins of the victim were given up;
- vi. The victim was a consenting party;
- vii. The victim was not arrayed before the trial court as an accused person though she was equally guilty.

18. In this view of the matter we are inclined to reduce the sentence to three years rigorous imprisonment and also reduce the fine to Rs.2000/-.

In case of non payment of fine he will undergo an additional period of



simple imprisonment for one week. The benefit of section 382-B of the Code of Criminal Procedure shall remain intact. With this modification by way of reduction of sentence, the conviction recorded by learned trial court is maintained. The appeal is disposed of in the above terms.

Sd/- 

JUSTICE SYED AFZAL HAIDER

Sd/- 

JUSTICE MUHAMMAD ZAFAR YASIN

Announcement in open Court  
on 13.05.09 at ISLAMABAD  
*Mujeeb-ur-Rehman/\**

Sd/- 

FIT FOR REPORTING