IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE CH. EJAZ YOUSAF CHIEF JUSTICE
MR.JUSTICE DR.FIDA MUHAMMAD KHAN JUDGE

JAIL CRIMINAL APPEAL No.80/I OF 2004

Asghar alias Asghari son of Basharat Hussain, Caste Arien, Resident of Mohallah Kalupura, Gujrat City.	--	Appellant
	Versus	
The State	--	Respondent
Counsel for the appellant	--	Mr.Bilal Saeed, Advocate.
Counsel for the State	--	Mr.Shafqat Munir Malik, Asstt:Advocate General,
No.date of FIR and police station	--	No.973 dated 9.11.2002 P.S. Civil Lines.
Date of the order of trial Court	--	10.3.2004
Date of institution	--	30.3.2004
Date of hearing	--	20.5.2004
Date of decision	--	20.5.2004

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JUDGMENT

CH. EJAZ YOUSAF, CHIEF JUSTICE.- This appeal is directed against the judgment dated 10.3.2004 passed by the learned Additional Sessions Judge, Gujrat whereby the appellant was convicted under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as "the Ordinance") and sentenced to undergo twenty-five years R.I. alongwith a fine of Rs.25,000/- or in default thereof to further undergo one year S.I. The appellant was also convicted under section 377 PPC and sentenced to undergo ten years R.I. and a fine of Rs.10,000/- or in default thereof to further undergo S.I. for six months. Half of the amount of fine, on recovery, was ordered to be paid to the victim. Both the substantive sentences of imprisonment were ordered to run concurrently. Benefit of section 382-B Cr.P.C. was, however, extended to the appellant.

2. Facts of the case, in brief, are that on 9.11.2002, report was lodged by one Subedar Altaf Hussain with police station Civil Lines.

District Gujrat wherein, it was alleged that on 8.11.2002 at about 6.30 p.m. his son, namely, Waqas was on his way back home from Madrisa. His school mate, namely, Qadir Ali, whose house was in the way, was also with him. No sooner, the complainant's son, after leaving said Qadir Ali at his house, reached at the road, then Asghar, resident of Mohalla Kalu Pura, who was armed with a pistol, forcibly took him to a tube well situated near Road Banth. There, three persons, namely, Kalu, Soni and Yasir, duly armed, were present. They forcibly laid Waqas on the ground and committed sodomy on him turn by turn. In the meantime, complainant alongwith his sons, namely, Mudassar Hussain and Asad Hussain went in search of Waqas. Incidentally, on the alarm raised by Waqas they were attracted to the place of occurrence and saw that he was being subjected to sodomy. It was claimed that the occurrence was seen by the complainant and his companions in torch light. On the stated allegation formal FIR bearing No.973 dated 9.11.2002 was registered under section 12 of "the Ordinance" and section 377 PPC, at the said

police station and investigation was carried out in pursuance thereof. On the completion of investigation the accused persons were challaned to the Court for trial.

3. Charge was accordingly framed against the accused persons to which they pleaded not guilty and claimed trial.

4. It would be pertinent to mention here that the accused persons, on 20.6.2002, were initially charged under section 12 of "the Ordinance" and section 377 PPC, but subsequently, on 9.2.2002, the charge was amended and accused Qasim Nadeem was also charged under section 377 read with section 109 PPC for facilitating the appellant in committing the offence.

5. At the trial, the prosecution in order to prove the charge and substantiate the allegation leveled against the accused persons produced five witnesses, in all. P.W.1 Dr.Arif Nazir, Medical Officer, had, on 9.11.2002 examined the victim. He produced the MLR as Exh.PA. P.W.2 Altaf Hussain is the complainant. He, at the trial, reiterated the version contained in the FIR. P.W.3 Waqas Hussain is

the victim. P.W.4 Shahzad Asghar, Ex Sub-Inspector had, on the statement made by the complainant, registered the FIR, Exh.PD/2. P.W.5 Zahid Khan, ASI is the Investigating Officer of the case.

6. On the completion of the prosecution evidence the accused persons were examined under section 342 Cr.P.C. Both the accused persons in their above statements denied the charge and pleaded innocence. Appellant in answer to the question as to why the case against him stated that in fact complainant's daughter namely, Mst.Asia wanted to marry him which was not acceptable to her family members, therefore, he was falsely involved in the case.

7. After hearing arguments of the learned counsel for the parties the learned trial Court convicted the appellant and sentenced him to the punishments as mentioned in the opening para hereof. However, co-accused Qasim Nadeem was acquitted of the charge for want of proof.

8. We have heard Mr.Bilal Saeed, Advocate, learned counsel for the appellant and Mr.Shafqat Munir Malik, Assistant Advocate General, for the State.

9. Mr.Bilal Saeed, Advocate, learned counsel for the appellant has raised the following contentions:-

(i) That un-explained delay of 24 hours in lodging the FIR was fatal towards the prosecution case.

(ii) That on the same set of evidence co-accused person namely, Qasim Nadeem was acquitted of the charge. hence, the appellant too, could not have been convicted for the offence.

(iii) That solitary statement of the victim without corroboration was not sufficient to prove the charge.

(iv) That since on record it was not proved that victim was kidnapped or abducted, therefore, appellant's conviction under section 12 of "the Ordinance" was not sustainable.

Alternatively, it was pleaded that since appellant was the first offender, bread earner of his poor family and from the evidence it does not appear that he was guilty to commit the offence of abduction. therefore, a lenient view may be taken in the mater of his sentence.

10. Mr.Shafqat Munir Malik, Assistant Advocate General, for the State, on the other hand, while controverting the contentions raised by the learned counsel for the appellant, has urged:-

(a) That since the delay in lodging the FIR was satisfactorily explained, therefore, it was not fatal towards the prosecution case.

(b) That since co-accused Qasim Nadeem was acquitted of the charge for want of proof and not because of the fact that the prosecution evidence was disbelieved, therefore, the appellant was precluded to take advantage of his acquittal.

(c) That since statement of the victim was duly corroborated by the statement of the complainant as well as medical evidence, therefore, guilt of the appellant was fully brought home.

(d) That since the appellant, who was a boy of tender age was forcibly taken away from the road to a tube well at a distance of more than one kilometer, therefore, he having been abducted, conviction recorded against the appellant under section 12 of "the Ordinance" was justified.

11. We have given our anxious consideration to the submissions made by the learned counsel for the parties and have also gone through the relevant record with their assistance.

12. As to the first contention raised by the learned counsel for the appellant that the delay in lodging the FIR was fatal towards the

prosecution case, it may be noted here that though, in the instant case, there was a delay of about 24 hours in lodging the FIR yet, the same having been explained, the prosecution story could not have been disbelieved merely on account thereof. In the complaint/FIR i.e. Exh.DA, as well as in his statement, at the trial, it was categorically pleaded that the complainant could not lodge the report due to fear of the appellant and the explanation offered by him has been found satisfactory by the learned trial Judge who has, while taking the same into consideration, remarked that since charge was equally shameful for the complainant, therefore, the delay in lodging the report cannot be viewed with suspicion or render the charge as false and we do not see as to why a different view may be taken because in our society people are normally hesitant to make public their grievances, even if genuine, concerning women folk or children, involving family honour. The contention, therefore, is devoid of force.

13. As regards the next contention that since on the same set of evidence co-accused Qasim Nadeem was acquitted, therefore, the

appellant too, could not have been convicted, it may be pointed out here that co-accused Qasim Nadeem alias Soni was acquitted of the charge not because that the statements of PWs were found false but for the reasons that he having not actually participated in the crime and his presence, at the spot, being doubtful, his case was found clearly distinguishable by the learned trial Judge. Para 24 of the impugned judgment, which is reproduced herein below for ready reference, is explicit in this regard.

> "The case of co-accused Qasim Nadeem alias Soni is distinguishable and on different footings. He was not present at the place of abduction. He did not actively participate in the commission of offence of sodomy. His involvement and presence even at the spot seems to be doubtful and not born out from the record. From the perusal of whole prosecution evidence it reveals that he has been involved in the present case being companion of co-accused Muhammad Asghar alias Asghari. Resultantly, Qasim Nadeem alias Soni is acquitted from the charge against him by extending him benefit of doubt."

Since reasons weighed with the learned trial Judge in acquitting the co-accused are cogent and sound and case of the appellant is

altogether on different footings, therefore, we see no force, in this contention, as well.

14. Adverting to the next contention of the learned counsel for the appellant that solitary statement of the victim was not sufficient to prove the charge, it may be pointed out here that this contention too, appears to have been raised by the learned counsel for the appellant perhaps under some misconception because, in the instant case, statement of the victim has been duly corroborated by the medical evidence. The fact cannot be lost sight of that P.W.1 Dr.Arif Nazir, who had, on 9.11.2002 i.e. on the next day of occurrence, examined the victim has, at the trial, categorically stated that multiple scratches were found on the neck of the victim. There was also a reddish swelling 2x2 cm on his left cheek below the left eye, redness was also found on his anal area with tenderness and shalwar was also found stained with semen. Thus, it, by no stretch of imagination, can be said that statement of the victim, at the trial, remained uncorroborated. Even otherwise, it is well settled that conviction can be based on the

solitary statement of the victim if otherwise it is confidence inspiring because in cases of zina and sodomy occurrence is hardly seen by any other person. In this view, we are fortified by the following reported judgments:-

(1) Muhammad Abbas and another vs. The State (PLD 2003 SC 863).
(2) Rana Shahbaz Ahmad and two others vs. The State (2002 SD 425).
(3) Shahzad alias Shaddu and others vs. The State (2002 SCMR 1009).
(4) Mst.Nasreen vs. Fayaz Khan and others (PLD 1991 SC 412).
(5) Muhammad Akram vs. The State (PLD 1989 SC 742).
(6) Muhammad Ashraf vs. The State (2000 SCMR 741)
(7) Muhammad Akhtar Ali vs. The State (2000 SCMR 727).
(8) Saeed Akhtar vs. The State (2000 SCMR 383).
(9) Muhammad Ahmad and another vs. The State (1997 SCMR 89).
(10) Ziaullah vs. The State (1993 SCMR 155).
(11) Zar Bahadur vs. The State (1978 SCMR 136)
(12) The State vs. Mushtaq Ahmad (PLD 1973 SCMR 418).
(13) Allah Yar vs. Crown (PLD 1952 Federal Shariat Court 148)
(14) Malik Khan vs. King Emperor (721 A 305 Privy Council).

Only question relevant thus, is as to whether evidence produced, at the trial, was sufficient to prove the charge because it is not the number of

witnesses but quality and credibility of the evidence which is to be considered. Though, at times, keeping in view the principle of "safe administration of justice" the statement of a solitary witness is not considered enough to base conviction thereon, yet, generally where a witness is found completely independent and wholly reliable his testimony ipso facto is believed and corroboration thereof is sought for as a matter of prudence only. This view receives support from the following reported judgments.:-

(i) Gulistan and others vs. The State (1995 SCMR 1789).

(ii) Allah Bakhsh vs. Shamsi and another (PLD 1980 SC 225).

(iii) Bacha Said vs. The State (PLJ 1978 SC 144).

(iv) Ramzan and another vs. The State (1973 SCMR 245).

(v) Muhammad Khari vs. Ahmad and two others (1972 SCMR 620).

(vi) Shah Wali vs. Crown (1971 SCMR 273).

(vii) Muhammad Ashraf vs. The State (1971 SCMR 530).

(viii) Muhammad Siddique alias Ashraf and three others vs. The State (1971 SCMR 659).

(ix) Mali vs. The State (1969 SCMR 76)

(x) Ali Ahmad alias Ali Ahmad Mia vs. The State (PLD 1962 SC 102) and

(xi) Shabbir alias Kaku and two others vs. The State 2004 P.Cr.LJ 1039).

15. In order to supplement his last contention that since on record it was not proved that victim was kidnapped or abducted, therefore, appellant's conviction under section 12 of "the Ordinance" was not sustainable, the learned counsel for the appellant has submitted that since, as per prosecution version, intention of the accused persons primarily, was to commit sodomy and the victim was taken from the road to the tube-well in prosecution of the very object, therefore, section 12 of "the Ordinance" was not attracted. In this regard, it may be pointed out here that though in some cases (e.g. Shams Saeed Ahmad Khan vs. Shafaullah and anoher 1985 SCMR 1822 and Muhammad Akhtar vs. Muhammad Shafique 1986 SCMR 533 etc.) it has been held that if the victim is removed a few paces away and abduction is neither intended nor is the object of crime then section 12 of "the Ordinance" would not be attracted yet, the principle so laid cannot be applied to the instant case, because, as per record, the place

wherefrom the abductee for the purpose of sodomy, was forcibly taken to Banth Road, was situated at a distance of more than one kilometer, P.W.5 Zahid Hussain, the I.O. in his statement has pointed out that the distance between the place of occurrence and the house of the complainant was 1½ kilometer and, as per prosecution version the victim was close to the house, on his way back home, when abducted. Since in this case, the abductee was taken from the road to the tube well situated at Banth Road by the present appellant for facilitating the co-accused persons to commit sodomy on him, which otherwise would not have been possible, therefore, case of the appellant squarely fell within the ambit of section 363 PPC. We are, therefore, unable to subscribe to the contention that conviction of appellant, in the instant case, under section 12 of "the Ordinance" was bad in law.

16. In the instant case, the victim Waqas Hussain, P.W.3, has unequivocally charged the appellant for his abduction and it has also been, in view of the symptoms available on his body, especially the private parts, proved on record that he was subjected to sodomy and

veracity of his statement is not at stake, therefore, in the absence of any enmity or motive to falsely implicate the appellant in the crime, the appellant was rightly convicted for the offence. However, keeping in view the submissions made by the learned counsel for the parties, especially that the appellant is the first offender and bread earner of his poor family, the conviction recorded against him under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, by the learned trial Judge vide judgment dated 10.3.2004 is maintained. However, the sentence of imprisonment inflicted on him thereunder is reduced from twenty-five years R.I. to that of ten years R.I. in the hope that the indulgence shown to him would bring out of him a law abiding and respectable citizen. The sentence of fine of Rs.25,000/- or the quantum of sentence of imprisonment in default thereof on that count shall remain the same as ordered by the learned trial Judge. Conviction recorded against him under section 377 PPC is altered. It shall deem to be under section 377 PPC read with section 511 PPC. The sentence of imprisonment inflicted on him thereunder is,

however, reduced from ten years R.I. to that of five years R.I. The sentence of fine or the quantum of sentence of imprisonment in default thereof shall remain the same as ordered by the learned trial Judge. Both the sentences of imprisonment shall run concurrently. The amount of fine, if realized, be paid to the victim as compensation under section 544-A Cr.P.C. Benefit of section 382-B Cr.P.C. extended to the appellant by the learned trial Court shall remain intact.

With the above modification in the conviction and sentences of the appellant this appeal is hereby dismissed.

These are the reasons for our short order of even date.

(Dr.Fida Muhammad Khan)
Judge

(Ch. Ejaz Yousaf)
Chief Justice

Islamabad,dated the
20th May, 2004
ABDUL RAHMAN/**

FIT FOR REPORTING.

Chief Justice