

IN THE FEDERAL SHARIAT COURT.
(Appellate jurisdiction)

PRESENT

MR.JUSTICE ZAFAR PASHA CHAUDHRY

JAIL CRIMINAL APPEAL NO.62/I OF 2003

Abdur Razzaq son of
Ghulam Mustafa,
Caste Machi, resident of
Chak No.108/10-R,
P.S. Jehanian,
District Khanewal. --- Appellant.

Versus

The State --- Respondent.

For the appellant --- Prof. Musharaf Ali Jami,
Advocate.

For the State --- Mr. Fazal-ur-Rehman Rana,
Advocate.

F.I.R No, date and --- No.31, dated 31-1-2000,
Police Station --- P.S. Muzaffarabad,
District Multan.

Date of judgment --- 21-1-2003
Of trial court

Date of institution --- 29-3-2003

Date of hearing --- 29-03-2004

Date of decision --- 29-03-2004

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JUDGMENT

ZAFAR PASHA CHAUDHRY, J : - The appeal has been filed by Abdur Razzaq, appellant from jail. However, the record of jail as submitted by the authorities reveals that the appellant is confined in BI & J Jail, Bahawalpur i.e. he is confined in Borstal and Juvenile offenders jail. This fact has been mentioned because it has strong bearing on the merits of the case. The appeal is directed against judgment dated 21-1-2003 passed by Malik Azhar-ul-Haq Awan, Sessions Judge, Multan whereby the appellant has been convicted under section 364-A P.P.C and sentenced to suffer 10 years R.I. and also to pay an amount of Rs.30000/- as compensation under section 544-A Cr.P.C to Mst. Musarrat Bibi, the victim, in default whereof to suffer six months S.I. He has also been convicted under section 10.(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the Ordinance), and sentenced to 10 years R.I. Both the sentences of imprisonment have been ordered to run concurrently. Benefit of section 382-B, Cr.P.C has been extended.

2. Abdur Razzaq, appellant had been sent up to face trial alongwith three co-accused namely Ghulam Mustafa, Rashid and Ijaz Ahmad. All the three accused were acquitted, however, the appellant was convicted and sentenced as noted herein above.

3: According to prosecution, Mst. Musarrat Bibi aged about 12/13 years was living with her grandfather because her

father Munawar Ahmad was employed in Shalimar Weaving Mills Faisalabad. Mst. Musarrat Bibi left the house of her grandfather on 27.1.2000, as she wanted to see her father Munawar Ahmad, complainant. She did not reach the house of complainant's in-laws where he was staying on the day of occurrence, i.e. 27.1.2000. During search it transpired that Abdur Razzaq appellant alongwith his two companions Ijaz Ahmad and Rashid had brought Mst. Musarrat Bibi to the house of Ghulam Mustafa, i.e. father of Abdur Razzaq. Ghulam Mustafa was contacted. He in the first instance denied that Abdur Razzaq had visited the house alongwith Mst. Musarrat Bibi, however, subsequently admitted that Abdur Razzaq did visit his house and promised that he will return the girl and hand her over to Munawar Ahmad, complainant. The girl was not handed over to the complainant as promised, therefore, an application was submitted before the S.H.O, Police Station, Muzaffarabad, District Multan alleging inter-alia that Mst. Musarrat Bibi, student of 5th class had been abducted by Abdur Razzaq alongwith his co-accused. Abdur Razzaq's father was also accused of abetting the abduction and removal of Mst. Musarrat Bibi.

4. Case was registered under section 364-A/109 P.P.C. During course of investigation, it was found that Mst. Musarrat Bibi had been removed to Karachi by Abdur Razzaq from whom the custody of the girl was obtained by Edhi Centre, Karachi. The girl was obtained from the Edhi Centre and was handed over to Munawar Ahmad, the father and complainant. On investigation it was found that on 7.2.2000 Wali Ayaz, S.I, had produced the girl



Mst. Musarrat Bibi alongwith Abdur Razzaq in the court of Additional District Magistrate, Karachi. They were taken into custody under section 54 Cr.P.C. Statement of Mst. Musarrat Bibi was recorded under section 161 Cr.P.C. After collecting evidence and relevant material, it was found that Mst. Musarrat Bibi had been abducted by Abdur Razzaq alongwith his three accomplices, i.e. Ghulam Mustafa, Rashid and Ijaz.

5. All the four accused were sent up to face trial. The learned Sessions Judge framed charge against all the accused under two heads i.e. for abduction of Mst. Musarrat Bibi for the purpose of unnatural lust and then commission of offence under section 364-A P.P.C. Consequently Abdur Razzaq was charged for committing Zina-bil-jabr with her and as such committed an offence under section 10(3) of the Ordinance. The appellant as well as co-accused denied the charge and claimed trial. They were all put on trial.

6. The prosecution in support of its case examined 10 witnesses. Out of them, PW.2 Dr. Nabila Tariq is important as she medically examined Mst. Musarrat Bibi. Her age was noted as 12/13 years. On general examination, no marks of violence or signs of struggle were observed on any part of the body. On P/V examination it was noted as under: -

"V/V were healthy. Hymen showed multiple hold healed tears. Vagina admitted two fingers easily. Uterus was of normal size. Three high vaginal swabs taken and were sent to the Chemical Examiner. Final report was reserved till the receipt of result from

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Chemical Examiner, Multan. After examination, carbon copy of MLC alongwith a sealed vial and sealed envelope was handed over to Jamila 1275/L.C."

As per Ex.PA, report of Chemical Examiner, Mst. Musarrat Bibi had been subjected ^{to} sexual intercourse.

7. Next important witness is Zahoor Hussain, PW.5. He in substance narrated the same story as had been stated by the complainant in his application. According to him, when Mst. Musarrat Bibi was recovered, she was lodged in Edhi Welfare Centre, Karachi and appellant Abdur Razzaq was in the police custody.

8. Complainant Munawar Ahmad was examined as PW.6. He reiterated the statement already made by him in Ex.PC i.e. application moved by him before the police. He was examined at quite some length mainly to establish that Mst. Musarrat Bibi was not of the age as stated by the complainant, rather she was a grownup girl and had in fact left the house of her own accord.

Mst. Musarrat Bibi appeared as PW.8. She supported the prosecution inasmuch as that at the time of incident she was in the house of her grandfather. She left the house to see her father who was staying in the house of her maternal grand parents. Abdur Razzaq asked her when ^{he} had come to pick up the children from the school that he will take her to the Askari lake for excursion, where after she described the manner in which she was abducted and she was ultimately removed to Karachi,

She stayed in different places but she could not resist the appellant on account of fear. She alleged that Abdur Razzaq, appellant kept on committing Zina-bil-jabr during her stay in Karachi on pistol point.

9. PW.9 Muhammad Sadiq, S.I. is the investigating officer. He furnished the details of investigation and the other formalities completed by him. The remaining witnesses are more or less of formal nature.

10. On close of prosecution evidence, Abdur Razzaq was examined under section 342 Cr.P.C. He came up with the following defence plea: -

"I am innocent. I had been working at Karachi during the days of occurrence, where Mst. Musarrat Bibi met me accidentally. Mst. Musarrat Bibi told me about her whereabouts and she had come to Karachi due to maltreatment of her parents. She further told that she resides in Mauza Mehdipur, to which I also belong. Finding Mst. Musarrat Bibi helpless in Karachi, I took her to Edhi Welfare Centre, where she was admitted. I myself had informed the parents of the abductee, but the police and the parents of Mst. Musarrat have involved me in this case."

11. The learned trial judge on conclusion of the trial convicted the appellant under section 364-A P.P.C and also under section 10 (3) of the Ordinance. As noted above, the appellant was awarded 10 years rigorous imprisonment for both the offences. Both the sentences were, however, ordered to run

concurrently with benefit of section 382-B Cr.P.C.

12. On perusal of the prosecution evidence alongwith the documents, it stands proved that Mst. Musarrat Bibi had been kidnapped by Abdur Razzaq and was subsequently subjected to Zina-bil-jabr. Statement of Mst. Musarrat Bibi made in court has furnished the details as to how and in what manner she was taken to Karachi. The learned counsel for the appellant has, however, referred to various circumstances emerging from the prosecution case itself i.e. Mst. Musarrat Bibi was in fact a consenting partner and she had not been forcibly or deceitfully abducted or kidnapped. The learned counsel although in the first instance tried to address arguments to demonstrate that prosecution evidence is deficient to prove the guilt of the appellant, however, he has raised a plea in the interest of justice that the learned trial Judge fell in error not to advert to the age of the appellant Abdur Razzaq. According to the learned counsel, the school leaving certificate, which although has not been exhibited has been placed on the file. According to the learned counsel, the appellant is a pauper. He is confined in jail. Therefore, in order to dispense substantive justice, the appellant's omission to get the certificate properly exhibited may be condoned. According to the medical certificate, the age of the appellant at the time of occurrence comes to 17 years, 8 months and 13 days. The appellant therefore was not adult within the meaning of section 2 (a) of the Ordinance. According to the learned counsel, the authenticity of the certificate has neither been controverted nor disputed by the State. The argument is

further supplemented with an admitted fact that at the time of conviction the appellant was confined in Juvenile Jail, Bahawalpur. According to the learned counsel, the prisoners are admitted in Juvenile Jail after strict medical examination. The very admission and confinement of the appellant in Juvenile Jail abundantly prove that he is a minor. Taking into account the school leaving certificate of the appellant and the fact that he was confined in Juvenile jail, there remains no doubt that the appellant at the time of commission of offence was a minor. Although in the strict sense, joint photographs of Abdur Razzaq and Mst. Musarrat Bibi may ^{not} be a piece of evidence yet the same can be taken into consideration by applying the provisions ^{of} article 164 of the Qancon-e-Shahadat Order. Bare glance on the photographs indicates that both Abdur Razzaq and Mst. Musarrat Bibi are minors. With a view to do complete justice especially when the appellant is in jail, I am persuaded to accede to the arguments of learned counsel that the appellant would be minor at the time of commission of offence. If the appellant was minor, then his conviction under section 10 (3) of the Ordinance cannot be sustained. Section 7 of the Ordinance lays down that a person guilty of Zina-bil-jabr if not adult can be punished with imprisonment of either description for a term, which may extend to five years or with fine ~~with~~ or with both.

13. The learned counsel appearing for the State has not been able to controvert the plea raised by the appellant's counsel. The offence as such committed by the appellant would be covered by section 7 of the Ordinance. The appellant's

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conviction under section 10 (3) of the Ordinance, is therefore, altered to one under section 7 of the Ordinance. As regards quantum of punishment, the fact that the victim is a young girl and she was subjected to Zina-bil-jabr by the appellant who although may not be adult yet a grown up boy, he therefore, does not deserve any leniency. He is accordingly sentenced to undergo five years R.I. The appellant is admittedly a pauper; therefore, imposition of fine may not be justified.

14. The facts and circumstances abundantly reflect that Mst. Musarrat Bibi was not forcibly abducted or deceitfully taken out. In absence of either of the two, ingredients of section 364-A, P.P.C are not fulfilled. Therefore by extending the benefit of doubt the appellant's conviction under section 364-A, P.P.C is set-aside. As a sequel to the above discussion, the conviction and sentence under section 10 (3) of the Ordinance is set-aside, instead he is convicted under section 7 of the Ordinance and sentenced to five years rigorous imprisonment. The sentence of fine is set-aside. Benefit of section 382-B, Cr.P.C shall be extended to the appellant.


ZAFAR PASHA CHAUDHRY
Judge

Islamabad the
March 30, 2004.
M.Khalil.

Approved for reporting.



