(14)

IN THE FEDERAL SHARIAT COURT

PRESENT

MR. JUSTICE ZAHOOR-UL-HAQ — MEMBER-I
MR. JUSTICE PIR MOHAMMAD KARAM SHAH — MEMBER-V

CRIMINAL APPEAL NO. 155/I OF 1981

Nazir Ahmad ..... Appellant

V/S

The State ..... Respondent

For the Appellant — Sardar Mohammad Ishaq, Advocate

For the Respondent — Hafiz S.A. Rehman Advocate

Date of Hearing — 24-1-1982

(5)

ZAHOOR-UL-HAQ, MEMBER

This is an appeal against the judgment of Sessions Judge, Mianwali dated 30th of November, 1981 by which the appellant Nazir was convicted under Section 10(2) of Ordinance VII of 1979 and sentenced to undergo two years' R.I. plus 10 stripes and to pay a fine of Rs. 200/- or in default to suffer three months' R.I.

The relevant facts are disclosed in the F.I.R. lodged by the complainant Illamdin P.W.1 lodged on 28th of June, 1981 at 6.20 p.m. at Mankera Police Station, District Mianwali. The complainant stated that on 20th of June his wife Hameedan Bibi had gone out to ease herself and had sat in the bushes when apppellant Mohammad Nazir came there, his wife there upon stood up and asked Nazir that he should be ashamed of himself but Nazir caught hold of his wife and felled her down and put his hand on her mouth and there after took off her shalwar and inspite of resistence of his wife the appellant, who was in a barbarous mood, committed rape with his wife. His wife was ultimately able to shout upon which Wali Mohammad, Fakher Zaman, Mohammad Ashraf, Mohammad Ismaeel and Akbar Ali came there and saw the incident themselves and took off the appellant from the person of his wife. Since the complainant had gone to Okarah, Therefore a message was sent to him and when he came back the incident was reported to him by his wife and other

(16)

witnesses. The complainant referred the matter to the Panchayat and a number of persons including Mohammad Ramzan Lambardar formed the Panchayat. In the first instance Nazir and his father agreed to abide by the decision of the Panchayat and the Panchayat decided that Nazir's face shall be blackened and he shall be sat on an ass and taken around the village. But the appellant and his father did not carry out their decision and therefore, the complainant was forced to make the complaint.

P.W. 1 Illamdin proved the contents of the F.I.R. in a statement before the Court but he is not an eye witness and therefore, his statement is not of much consequence except on holding of Panchayat.

P.W.2 Mst. Hameedan is the most important witness in this case and she has given a coherent version of the incident as has been stated by the complainant in the F.I.R. She has admitted in the cross examination that her shirt was not torn. She asserted that she struggled with the accused to rescue herself and that she had received some scratches on her face and back but that she was not medically examined. She stated that her shalwar was lying near her ankle when the accused committed zina. She stated that she had not gone to the Panchayat and in this respect her statement is different from her husband Illam Din, who had stated that his wife had gone to the Panchayat.

To this extent the statement of this woman appears to be wrong. Because in the villages the woman do not go to the Panchayat. She denied the suggestion that the occurrence had not ~~been~~ taken place and the matter had been falsely reported on the instance of Ramzan Lambardar. No question was put to her suggesting any enmity between her husband and the accused or his family and it appears that this woman had no reason to falsely implicate the accused. She has made a coherent statement and the same appears to be ~~a~~ substantially true at least to the extent of intercourse. Only the forcible part of it has not been believed by the trial judge and there is some doubt in that respect .

P.W. 3 Wali Mohammad corroborated the statement of P.W.2 Mst. Hameedan and stated that he heard a call of woman at a distance of 10 karams and saw Nazir accused lying on Mst. Hameedan and giving jerks to his body. He however, did not see that the organ of the accused was inside the private part of Mst. Hameedan. They caught hold of the accused at the spot and Mst. Hameedan went to her house. They informed the Lambardar. He stated that the loin clothes of Mst. Hameedan and the accused were off. He was confronted with the Police statement in cross examination where he had not stated that they had informed the Lambardar or that he heard the woman calling bacho bacho or that he had seen the accused and Mst. Hameedan from a distance of 10 karams. These were however minor contradictions. He stated that there were struggle

(18)

marks on the spot and few finger marks on the face of Mst. Hameedan but no scratches. He stated that Illam Din reached the village 4,5,6 days after the occurrence and he only met him in the Panchayat. He admitted that Nazir accused is studying Holy Quran. He also admitted that Mohammad Ramzan Lambardar is from his brotherhood but is not his relative. He asserted that panchayat was held in the very evening. Illam Din complainant reached from Okara and in this respect he has fully supported the statement of the complainant Illam Din who deposed about the holding of Panchayat. He denied that the occurrence did not take place. There was no suggestion put to him in cross examination that he was in any way inimical to the accused nor any question was put to him as to how Ramzan Lambardar was inimical to the accused.

P.W.4 Fakher Zaman stated that on 20th of June, 1981 in the morning he was going to ease himself. On hearing the alarm he reached the spot and saw Wali Mohammad rescuing Mst. Hameedan from Nazir accused who were both naked and the accused was lying upon her. He however, clearly stated that he did not see the penetration of organ in the private part of the Mst. Hameedan. In cross examination he stated that shalwar of Mst. Hameedan was near her ankle. He also asserted that a panchayat was held in village about the occurrence at the house of Ramzan Lambardar, after three or four days on return of the complainant. He admitted that the father of the accused has retired from the

(19)

army and the family of the accused is respectable one. He did not know if the teacher Saifullh used to business of Bhang and Chars. This witness again was not put any question in cross examination as to whether he was inimical to the accused or not and thus there is no reason to disbelieve him.

The Investigating Officer P.W.5 Iftikhar Ahmad stated that he had prepared the sketch Ex. PB and had searched for the accused who was not available and later on he arrested him on 14-8-81. However, availability of the accused has not been denied by the P.Ws. and therefore, we cannot treat this statement as proving the absconcion. This witness admitted in cross examination that the occurrence had taken place 8 or 10 days back and therefore, he did not see any struggle marks at the spot. He stated that Mst. Hameedan was examined by him on 28-6-81 and he did not seen any scratches on her person. He admitted that Mst. Hameedan was not agreeable to get herself examined medically.

The appellant in his statement under Section 342 Cr.PC has denied the suggestion of Zina-bil-jabr and stated that after call to the morning prayers he went to the mosque but felt pain in his belly and so went out. Near the spot Fakhar Zaman P.W. hurled an earth piece upon him and started struggling with him. In reply to another question he stated that when Fakhar Zaman and he were struggling with each other, Mst. Hameedan raised an alarm and on this P.Ws. reached and leveled the allegation that he had committed zina. She went away from the spot.

(20)

The accused Nazir further stated in his statement that his father had come to the spot and gave him a beating as to why he quarrelled with Fakhar Zaman P.W.1 but not that he had committed zina. In the last answer he stated that they had taken land from a Pathan who was a Bhang addict and this offended the P.Ws and therefore, he has been falsely involved. But the last suggestion of the appellant was not put to any witness. Only suggestion put to witnesses was that they have involved the accused at the instance of Ramzan Lambardar but the appellant has not stated as to what enmity he or his father had with Ramzan Lambardar and therefore, there is no substantial suggestion as to why the P.Ws, who are residents of the same village, are out to involve, in a heinous offence, the accused who is only 18 years old boy from a respectable family of the same village.

The appellant did not examine any defence and the statement of ~~the~~ Mst. Hameedan appears to have been substantially corroborated by the statement of Wali Mohammad, Fakhar Zaman at least in respect of the position that the accused was lying on the body of Mst. Hameedan when the witness saw him and that Hameedan and the appellant Nazir were both naked at that time. Even the appellant in his own statement under Section 342 Cr.PC had admitted the presence of Fakhar Zaman P.W. at the spot and had also admitted that his father gave beating to him and thus the statement of Fakhar Zaman appears to be quite in line with the admission of the appellant. The appellant has thus admitted his presence at the spot and therefore, there is no

reason to disbelieve the statement of Mst. Hameedan, Wali Mohammad and Fakhar Zaman and the appellant had even admitted the presence of Mst. Hameedan and her shouts.

The learned counsel for the appellant argued that there was 8 days delay in lodging the F.I.R. and therefore, it was a result of deliberation and concoction We do not agree with this statement. The P.Ws had proved the absence of the husband of Mst. Hameedan on the date of incident and the efforts made by the prosecution in seeking ammends from the accused party. The holding of panchayat and its decision do take sometime and therefore, the delay in this case has not vitiated the case of prosecution.

The learned counsel also argued that the learned Sessions Judge in his judgment has observed that the appellant from his appearance and behaviour while in examination at the close of the trial, seemed to be a dullard type of man and perhaps mentally not very balanced and so a lenient view has been taken in sentence. The learned counsel argued that this observation of the learned Sessions Judge shows that the appellant was of an unsound mind and consequently incapable of making his defence and he should not have thereafter been tried by the learned Sessions Judge. The learned counsel has relied upon PLD 1960 Lahore page 111 where the learned Judges of the High Court have interpreted Section 165 Cr.PC. and Section 84 and 85 of PPC. However, in that case the High Court had come to the conclusion that the accused in their case was not a person of unsound mind. In any case it is a question to be decided by the trial court whether the person who is

(22)

being tried is of unsound mind and able to defend himself or not. However the observations appearing at page 121 of the above cited decision are more relevant in this respect and they are reproduced below:

> "One point to be kept in view in this connection is that medical and legal standards of sanity are not identical. From the medical point of view, it is probably correct to say that the act of murder by itself denotes an unhealthy and abnormal state of mind of the murderer, but from the legal point of view he is sane as long as he can understand that his act is contrary to law. If an accused person is aware that the act is one which he ought not to do and the act at the same time is contrary to law, he is punishable. Therefore, to establish successfully a defence on the ground of insanity, it must be proved that an accused person at the time of committing the act was labouring under such a defect of reason, from disease of the mind as not to know the nature of his act and that what he was doing was wrong and contrary to law. On this legal concept of insanity no amount of queerness in habit, morbidity of temper, peculiarities of character or eccentricities of behaviour, or even aberrations of mind resulting in abnormality will constitute insanity for the purpose of section 84 of the Pakistan Penal Code although they may be relevant factors for determining whether or not the accused was insane."

The learned Counsel also relied upon 1973 Pakistan Criminal Law Journal, 247, where it was held that trial is vitiated if the accused appears to the Court to be of unsound mind and thereafter the factum

(23)

of unsoundness of mind had not been tried as such before the trial of the offence. However, the facts of that case were entirely different from this case. In that case the Counsel of the accused had initially taken the plea that his client was insane and thereafter the Court had referred the accused to a Doctor who had stated that the accused was not of sound mind and thereafter the accused was sent to the Mental Hospital. But the accused had thereafter been tried on the basis of the report of the Doctor of the Mental Hospital without the factum of unsoundness of mind having been tried by the Court as such. In these circumstances the learned Judges of the High Court were of the view that Medical reports declaring the soundness of mind of the accused had not been properly proved before the court and therefore, the trial was vitiated. However the circumstances of the present case before us are entirely different. The defence has never taken the plea of any unsoundness of the mind of the appellant at any stage of the case. It should be remembered that the appellant was defended by a learned counsel of his own choice. It has also come on record that the appellant has a father who is living. It is also on record that his father was a retired military servant and in these circumstances if the appellant was of unsound mind then it would be reasonable to believe that such situation would have been pointedly brought to the notice of the Learned Sessions Judge. But that not having been done it shows that the appellant was not of unsound mind. To us the observations of the learned Sessions Judge, reproduced in the earlier part of the judgment, seem to have been motivated

(24)

on account of the admissions made by the accused in his statement under Section 342 Cr.PC. and that too only for the purpose of awarding a lenient sentence. Otherwise there is nothing on record to suggest any unsoundness of mind on the part of the appellant. The learned Sessions Judge at the initial stage has recorded the plea of not guilty of the appellant on 28-11-81 and at that stage he did not feel that the accused had any imbalance of mind, otherwise he would have noted the same. Thereafter also there is nothing on record from which it could appear that the learned Judge has made any note of the mental state of the appellant showing any unsoundness.
The observations of learned Judge are for short of the requirements of Section 465 of Cr.PC. In the first instance the learned Judge has used word "perhaps", showing that he was not sure in his mind whether the appellant was realy mentally unsound. An-other expression used by him in his observation is "not very balanced". The word "very" in this context is rather suggestive that the accused appellant had a balanced mind but it was not very balanced according to the standard of the learned Sessions Judge, who probably expected that the appellant would give intelligent answers and would avoid involvement of any criminal act on his part. This observation in our view does not show that the appellant at that stage had become of unsound mind and unable to make his defence. We may note here that the court has to come to the conclusion that a person is both of unsound mind as well as incapable of making his defence before the provisions of Section 465 of Cr.PC. could be attracted in the case. The observation of the learned Sessions Judge do not appear to suggest such a state of

(25)

mind of the appellant and we were, therefore, of the view that it was not necessary to adjourn the hearing of the case to have the unsoundness of the mind of the appellant tried as a question of fact. The appellant had always been able to pursue his defence and mere admissions made in his statement under Section 342 Cr. PC did not make him a person of unsound mind. In any case the observations of the learned Sessions Judge appear to have been made only for the purpose of giving a lenient sentence and hence applications of provisions of Section 465 of Cr.PC. was not really necessary.

The learned Counsel further stated that penetration was not proved but we do not agree with him. Penetration had been proved by Mst. Hameedan and even Wali Mohammad P.W.1 stated that appellant was lying on Mst. Hameedan and giving jerks to his body. Jerks to the body are a part of the intercourse and therefore, the statement of Mst. Hameedan is reasonably corroborated in respect of penetration.

The learned counsel also stated that there was no corroboration from medical evidence. But since the F.I.R. had been delayed by about 8 days on account of efforts at Panchayat and execution of its decision, therefore no purpose could be served by any medical examination of the lady at that stage. Otherwise the case had been fully proved by the three P.Ws. mentioned above. We are, therefore, of the view that the case has been proved against the accused. The learned Sessions Judge has taken a lenient view on the ground that there was some element of consent on the part of Mst. Hameedan therefore, he had sentenced

(26)

the appellant under Section 10(2) and gave him a lenient sentence of two years R.I. and a fine of Rs. 200/- or in default three months' R.I. The appellant has also been awarded 10 stripes. But in view of the fact that he is an 18 years old boy we will reduce the number of stripes to 5 but otherwise maintain the sentence. We will also direct that stripes shall be inflicted at a public place as required in Section 5-F of Execution of the Punishment of Whipping Ordinance, IX of 1979.

The appeal is therefore, dismissed with the modification in the number of stripes.

Member-I

Member-V