

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

Mr. JUSTICE AFTAB HUSSAIN, CHIEF JUSTICE
Mr. JUSTICE CH. MUHAMMAD SIDDIQUE
Mr. JUSTICE MAULANA MALIK GHULAM ALI

CRIMINAL APPEAL No.156/I OF 1982

Sarwar	---	Appellant
	Versus	
The State	---	Respondent
Counsel for the appellant	---	Mr. Muhammad Bashir Kiyani, Advocate.
Counsel for the State.	---	Mr. Q.H. Zahidi, Advocate.
Date of hearing & decision.	---	<u>15-2-1983</u>

JUDGMENT/

AFTAB HUSSAIN, CHIEF JUSTICE:

This appeal was heard by a Single Bench consisting of the Chief Justice on the 30th of January, 1983. After hearing the counsel for the parties, it was announced that the case was proved in its entirety against the appellant but he was entitled to the benefit of section 7 of the Offence of Zina (Enforcement of Haddood) Ordinance, 1979 (VII of 1979). The sentence was announced to be reduced to 5 years' R.I. thirty stripes and Rs.5000/- as fine (in default one year's R.I.). At the time of writing the judgment it was observed that though the appellant had given his age

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as 15 years in his statement under section 342 Cr.P.C. but there was the evidence of the Doctor, who found nothing on medical examination which could point out to an abnormality making him unfit for sexual intercourse. The other piece of evidence which clinches the matter is the positive report of the Chemical Examiner who found the vaginal swabs taken by the Lady Doctor from the prosecutrix to be stained with semen. Under these circumstances notices were issued to both the learned counsel for further arguments on this point. This could be done under the Law because the judgment had not been recorded and signed at the time of announcement.

2. The learned counsel for the appellant relied upon Muhammad Hussain Vs. Muhammad Ramzan (PLD 1982 FSC 11) in which the case was held to fall under section 7 despite positive report of the Chemical Examiner who found semen in the vaginal swabs. He, therefore, argued that this case was binding upon the Single Bench.

3. Faced with this decision it was considered advisable to refer the matter to a Full Bench. In these circumstances this matter has come up before this Bench only to consider the question whether any case in which there is evidence of the Doctor about capability of the male to commit sexual intercourse and the positive result of the analysis by the Chemical Examiner of the vaginal swabs taken by the Lady Doctor on examination of the victim of the sexual act, the male can be held to be a non-adult to claim privilege of the benefit of section 7.

4. We have heard both the learned counsel at length. It is clear from section 7 that a person

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becomes adult, in the case of male when he attains the age of eighteen years or attains puberty. The term "puberty" is defined in Sharia, in case of male as a stage of age when he may have wet-dreams or may ejaculate or impregnate. (See ^{Fat}ah-ul-Qadeer by Imam Ibne Hamam Vol.8 page 201 and Ainul Hidayah Vol.3 page 747). In these circumstances it cannot be denied that if there is any evidence of ejaculation by the male during intercourse, he is an adult and is not entitled to the benefit of section 7. The evidence of the Doctor about capability of the male for committing sexual intercourse alongwith the report of the Chemical Examiner on the analysis of the vaginal swabs taken by the Lady Doctor during medical examination of the victim is sufficient evidence of adulthood of the male. This was so held by a Full Bench of this Court in a case (PLD 1982 FSC 19 (21)). In that case it was held that on the date of occurrence the age of the convict could be only 16/17 years. The prosecution had not proved by medical evidence that he had attained puberty and this could have been proved by the Chemical Examiner's report on the swabs, if it had been positive. But that evidence was not forthcoming. In these circumstances it was held that the appellant was entitled to the benefit of section 7 because of the age limit of 18 years for adulthood. The above finding is sufficient to dispose of this matter.

5. During arguments some doubt was created on the question whether the word "puberty" used in section 7 is synonymous with the word "Buloogh". It is stated in Lane's Dictionary that "Buloogh" means to have puberty i.e. ^{استاء} (has wet dreams).

6. According to the Medical Dictionary also the meaning of puberty appears to be the same. In

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Butterworth's Medical Dictionary Second Edition (page 1408) puberty is defined as "the epoch in a person's life at which the sex glands become active. In the male, the testes enlarge and spermatocytogenesis begins. The external genitalia increase in size, hair develops on the face, trunk, the axillae and the pubic region; the larynx grows and the voice becomes deeper. There is considerable muscular development and body growth, associated with important psychological changes. In the female the ovaries, uterus and vagina enlarge, menstruation begins, the breasts increase in size and hair appears in ^{the} axillae and the pubic region. Psychological changes occur as the girl matures towards adolescence and womanhood."

7. So far, ^{as} a female is concerned, it is stated that her puberty begins from menstruation. The language of the definition proves that in the case of male also apart from physical development noted therein as well as growing of auxillary and pubic hair, enlargement of testes, one criterion is that spermatocytogenesis begins. Spermatocytogenesis is a fitness of a person to have sexual action which no doubt begins at ejaculation. Consequently the definition of puberty in Medical Dictionary is also not different.

8. Modi considers this question under the heading "Causes of impotence and sterility in the male" He says:-

"Boys are considered to be sexually potent at the age of puberty which usually occurs at the fifteenth or sixteenth year. Sexual intercourse is, however, possible at about the thirteenth or fourteenth year, as the power of coitus commences earlier and ceases later than the power of procreation.

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The changes which occur in a boy at puberty are the development of the genital organs, the ability to secrete semen, the growth of hair on the pubes, axillae and chin, and the increase in size of the larynx leading to the deepening of the pitch of the voice."

(Modi's Medical Jurisprudence and Toxicology 1979, 22nd Edition, page 303).

9. Potency and puberty in male are related terms. Potency is the ability to develop or maintain a penile erection sufficient to conclude coitus to orgasm and ejaculation. (See Ibid, Definition of impotency).

10. The answer to the question before the Full Bench is in the negative. There is no doubt that the sense of potency in the Medical Science and Bulough in Sharia is not different. This disposes of the reference.

Aftab Khan

CHIEF JUSTICE

M. F. Siddiq

JUDGE-III.

Sp. J. I.

JUDGE-IV.

Islamabad, the 15th February, 1983

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19/3/83

File for Reporting

Aftab Khan