JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT, BANNU BENCH

(*Judicial Department***)**

Cr.A No.01 -B of 2015

Noor Adam Vs The state etc

J U D G M E N T

Date of hearing 27.12.2016 .

Appellant (s) by: **Mr. Khush Amir Khattak, Advocate.**

Respondent: **By Qudrat Ullah Khan Gandapur, Asstt: AG.**

ISHTIAQ IBRAHIM , J.- Noor Adam, the appellant through present criminal appeal preferred under section 410 Cr.P.C has impugned the judgment dated 11.12.2014, passed by the learned Additional Sessions Judge-I, Bannu, whereby he was convicted and sentenced in case FIR No.24 dated 03.02.2014 under sections 365-B PPC, registered at Police station Town Ship, Bannu, the detail whereof is as under:-

i. ***Convicted under section 366 P.P.C, and sentenced to undergo seven years rigorous imprisonment with fine of Rs.50,000/- and in default of payment of fine, he shall further undergo for six months simple imprisonment.***

ii. ***Convicted under section 376 P.P.C and sentenced to Ten years rigorous imprisonment with fine of Rs. 100000/- and in default of payment of fine he shall further undergo for one year simple Imprisonment.***

iii. ***All the sentences were ordered to run concurrently with benefit of Section 382-B Cr.P.C which was also extended to the convict/ appellant.***

2. The prosecution version as disclosed in the ***Murasila*** (Ex:PW 2/1) lodged by the complainant Mst. Fehmida Bibi (PW-2) at the ***Baithak*** of Ghani Pir, situated at Addami Piran to the local police is that, on 03.02.2014 at 1830 hours, accused/ appellant, who is son of her paternal aunt, (***Phophizad***), brought her on the pretext of her mother illness to ***Adda*** of Mir Ali and after searching of her mother in the hospital of Mir Ali Agency, her mother was not found there and thereafter,

accused/ appellant brought her to Bannu in flying coach for searching and to inquire about her mother's health and she was taken to various places in a ***Richshaw***, however, they could not found her mother. Thereafter, the accused/ appellant brought her to a ***Baithak*** of Ghani Khan situated at Addami Piran and She was subjected to ***Zina–bil-Jabbar*** by the accused/ appellant in the said ***Baithak***. She charged the accused/ appellant for the same. Consequently on the report of complainant, ***murasila*** was drafted and sent to the Police station, on the basis of which F.I.R (Ex:PW 3/1) was registered against the accused/appellant.

3. After completion of investigation, complete ***challan*** was submitted before the trial court against appellant/ accused Noor Adam. Formal charge against accused/ appellant was framed to which he pleaded not guilty and claimed trial. Trial commenced. The prosecution in order to prove its case,

examined as many as seven (07) PWs. After conclusion of trial, statement of accused/ appellant U/S 342 Cr.P.C was recorded wherein he neither opted to examine himself under section 340 (2) Cr.P.C nor, wished to produce defence.

4. After hearing learned counsel for the parties, accused/ appellant was convicted and sentenced as above by the learned trial court, vide impugned judgment dated 12.12.2014, hence the instant Appeal for his acquittal.

5. The learned counsel for appellant made his submissions that the impugned judgment is against law and facts on record; that accused is falsely implicated in the present case; that the accused was charged after due deliberation and consultation; that complainant has patched up the matter with the accused outside the court and has got no objection on acquittal of the accused. He further argued that prosecution case is full of doubts and

contradictions and prosecution has badly failed to prove its case beyond reasonable doubt. He lastly argued that the complainant admitted that engagement/ ***nikah*** of accused has already been taken place with her.

6. On the other hand learned Asstt: A.G for the state vehemently opposed the arguments advanced by learned counsel for accused/ appellant and argued that accused/ appellant is directly charged in the report; that there is no mala fide on the part of complainant and prosecution; that medical report fully supports the version of the complainant; that prosecution has succeeded to prove the allegations leveled against the accused; that the offence for which accused/ appellant is charged with is not compoundable, hence, he does not deserve any leniency on the ground of compounding the matter with the complainant.

7. Arguments heard and record perused.

8. Perusal of the record reveals that the accused/ appellant is charged for enticing the complainant on the pretext of illness of her mother to the ***Baithak*** of one Ghani Khan, where she was subjected to ***Zina-bil-jabbar*** and allegedly on the information of a private person, the complainant and accused were found present in the said ***Baithak***, where she (complainant) reported the matter.

9. The complainant Mst. Fahmida Bibi appeared and examined as PW-2, she in her cross examination admitted that her engagement had taken place prior to the present occurrence. She further admitted it correct that during engagement, ***Nikah*** also recited in between her and accused. In such a situation, she was wedded wife of accused/ appellant. No doubt, the ***Rukhsati*** of complainant has not taken place at that time, but even then the sexual intercourse could not be termed as ***Zina,*** as the ***Nikah*** between the complainant and

accused/ appellant existed at that time. As the ***Zina*** constitutes when the marriage is not in existence between the parties and they commit sexual intercourse, willfully or with force from any side, while in the instant case, admittedly, prior to the occurrence a valid ***Nikah*** was in field between the parties. In Islamic law if once ***Nikah*** is recited between the parties, they become legally wedded husband & wife and can perform matrimonial obligations including sexual inter course. No doubt the engagement without reciting ***Nikah*** is not sufficient for the purpose, but here in the case in hand the situation is a little bit different, as in the instant case, prior to the occurrence, during the engagement ***nikah*** was recited, as admitted by the complainant, therefore, no case for the commission of ***Zina*** is made out against the accused/ appellant.

10. Neither in the first information report, nor in her statement, the complainant has stated that

sexual intercourse was performed forcibly, even medical report is silent about any signs of violence or bruises, therefore, it could not be said that she was subjected to ***zina bil jabbar***, as no ***jabbar***, violence, or force has been proved from the entire record. This aspect of the case was more happily dealt with in case of ***"Nazra Vs The State" (1970 P Cr.LJ 163.)*** the relevant paragraph deserves a verbatim reproduction which read as under:

> ***The additional circumstance urged is that there is complete absence of any injuries on her person or on her private parts if her statement is to be considered that she resisted sexual intercourse by the appellant and reliance is placed on Mahla Ram v. Emperor (A I R 1924 Lah. 669). The observations of Moti Sagar, J. :-***
>
> ***"Where there is no independent evidence in support of the statement of the complainant that she was raped by the accused, it would be most dangerous to base a conviction on her uncorroborated testimony alone; the***

first and foremost circumstance that can be looked for in cases of rape is the evidence of resistance which one would naturally expect from a woman unwilling to yield to a sexual intercourse forced upon her. Such a resistance may lead to the tearing of clothes, the infliction of personal injuries and even injuries on her private parts. Where there is absolutely no evidence on the record of any struggle having taken place nor were marks of any injuries found on the person either of the complainant or of the accused. Held that the accused cannot be said to have had connection with the woman without her consent."

There is no independent evidence to Mst. Irshad Bibi's evidence and the additional factor is that at no time has she stated that she was put in fear by the appellant. All these circumstances lead to the irresistible conclusion that being over 14 years of age Mst. Irshad Bibi had willingly eloped with the appellant, that she was a consenting party to sexual intercourse with him and the result must be that the appellant is guilty of no offence in

law for these reasons. In consequence, the appeal is allowed and the conviction and- sentence of the appellant is set aside. He is on bail. His bail bonds are cancelled and the sureties are discharged."

11. So for as the offence of abduction of complainant is concerned, the section 365-B P.P.C, entails as under:

"365-B. Kidnapping, abducting or inducing woman to compel for marriage etc.-- Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, shall be punished with imprisonment for life, and shall also be liable to fine; and whoever by means of criminal intimidation as defined in this code, or of abuse of authority or may other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with

another person shall also be punishable as aforesaid."

This provision provides that when there is intention to compel for marriage or forced to illicit inter course by the accused, the offence under section 365-B attracted, but in the instant case, they were already in Marriage and the prime witness, Mst. Fehmida Bibi, in her cross-examination has stated that:

"I was not forcibly taken away by the accused."

Again the complainant has not stated in her first information report and in her statement that she was compelled or forced, even in medical report there are no any signs of violence, therefore, the prosecution has failed to prove the offence under section 365-B P.P.C. The evidence of complainant does not support the prosecution version, for the reason that the complainant had patched up the matter with the accused/ appellant and was not interested in prosecution of the case,

therefore, in my humble view, due to this reason, she has not narrated the corroboratory facts, which may strengthen the prosecution case.

12. When the prime witness does not charge the accused/ appellant and is going to live with him as life partner of the accused and before the occurrence there was ***nikah*** between the parties, then in such a situation no case for conviction is made out against the accused/ appellant. The complainant in her cross-examination further stated that:

> ***"I do not want to further prosecute the accused and I would have got no objection if he is acquitted of the charges."***

Keeping in view the factum of compromise arrived at between the parties and attending circumstances of the instant case, in order to keep peace and tranquility in society to meet the end of justice, it may be considered and lenient view may be taken. Reliance is placed on

case titled, "***Shakar Vs the State", (PLJ 2012 Cr.C (Lahore 897).***

13. It is borne out from the record that the complainant has not lodged report to the local police at her own, albeit when the local police apprehended them, the accused/ appellant and complainant, in the baithak, the complainant lodged the report, meaning thereby that, if the local police would have not reached at the spot, no report would be lodged. Further the complainant in her statement has clearly mentioned that she was neither forced/compelled, nor medical report support any violence. Moreover, the person, from whose ***baithak*** they were apprehended has not been produced and examined either by the investigation officer or by the trial court, such peculiar facts and circumstances of the case, led to the inference that she was consenting party and in such situation, it is not rape under the law. Reference may be made to case "**Nazima**

Shahzadi and another Vs S.H.O and 4 others", (PLJ 2009 Lahore 405)

> ***The investigator and the Distt. Public Prosecutor did not bother to go through the provisions of Sections 375 and 376 P.P.C. A combined examination of these two provisions of law would show that only a man committing rape with a woman under the circumstances mentioned in Section 375 P.P.C. is liable to face trial under Section 376 of the Code. It is also manifest from these provisions of law that if a man has sexual intercourse with a woman with her consent, it is not rape under the law and at the most the offence of fornication is committed which is not a cognizable offence.***

14. The other prosecution witnesses are formal in nature, as neither the occurrence has been witnessed by any one, nor the accused/ appellant and complainant were arrested during the course of commission of ***Zina***, hence, their evidence is not sufficient for conviction of the accused/ appellant, again in absence of

corroboratory evidence of star witness, i.e. the complainant.

15. It is centuries old principle of criminal justice that prosecution is bound to prove its case beyond any shadow of doubt and if any reasonable doubt arises in the prosecution case, benefit of the same is to be extended to the accused, not as a matter of grace or concession, but as a matter of right. On reappraisal of evidence as discussed earlier, this court is of the firm view that appellant-convict is entitled to the benefit of doubt. Therefore, while extending the same benefit, this appeal was allowed and appellant was acquitted vide my short order of even date. These are the reasons for my short order, which is re-produced herein below:-

> ***"For the reasons to be recorded later, the instant Criminal appeal is accepted, the impugned judgment of conviction dated 11.12.2014 passed by the learned Additional Sessions Judge-I, Bannu is set aside and consequently the appellant Noor***

Adam is acquitted of the charges leveled against him. He be set at liberty forthwith, if not required in any other case."

Announced.
27.12.2016
Azam/P.S

J U D G E.