

IN THE FEDERAL SHARIAT COURT  
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE RIZWAN ALI DODANI  
MRS.JUSTICE ASHRAF JAHAN

CRIMINAL APPEAL NO. 06/P OF 2013 L.W

Zakirullah son of Abdul Mastan r/o ... Appellant  
Aman Dara, Batkhela, Malakand Agency  
Khyber Pakhtunkha

**VERSUS**

1. Mst.Safia Bibi w/o Falak Naz r/o  
Mohallah Akbar Abad, Bathela, Malakand  
Agency Khyber Pakhtunkhwa.
2. The State ... Respondents

JAIL CRIMINAL APPEAL No.29/I of 2013

Fazal Aziz s/o Asmatullah r/o Thana ... Appellant  
District Malakand.

**VERSUS**

- |                            |   |
|----------------------------|---|
| The State                  | ... Respondent  |
| Counsel for the appellants | .... Mr. Muhammad Riaz and<br>Mr. Anees Muhammad Shahzad<br>Advocates |
| Counsel for the State      | ... Mr. Arshad Ahmad,<br>Deputy Advocate General, KPK.                |

FIR No. Date and  
Police Station ... No.43 dated 22-04-2012  
P.S. Batkhela

Date of Judgment of  
trial Court ... 09-10-2013

Date of Institution  
of Cr.Appeals in FSC ... 31-10-2013 and 26-11-2013

Date of hearing ... 13-02-2014

Date of decision ... 13-02-2014

Date of Judgement ... 06.03.2014



**JUDGMENT**

**RIZWAN ALI DODANI, JUDGE:** - We intend to dispose of both the Criminal Appeal No.6/P of 2013 and Jail Criminal Appeal No.29/I of 2013 filed by the appellants Zakirullah and Fazal Aziz respectively against one and the same judgment dated 09-10-2013 passed by Sessions Judge/Zillah Qazi Malakand at Batkhela in Hadd case No.9/2012, whereby both the appellants have been convicted and sentenced as under:-

- i. Under section 395 PPC sentenced to life imprisonment each, fine of Rs.100000/- each or in default to further undergo 06 months imprisonment each.
- ii. Under section 376 PPC life imprisonment each, fine of Rs.100000/- each or in default to further undergo 06 months imprisonment each.
- iii. Under section 457 PPC 05 years imprisonment each, fine of Rs.20000/- each or in default to further undergo 02 months imprisonment.
- iv. Under section 337-A (i) one year imprisonment each and to pay of Rs.20000/-each as Daman. The amount of Daman if recovered to be distributed equally among Mst. Safia and Mst. Neelam victims.

All the sentences were ordered to run consecutively. Benefit under section 382-B Cr.P.C has been extended to both the appellants only in the first punishment i.e. under section 395 PPC.



2. Brief facts of the case as contained in the crime report are that

on 22-04-2012 complainant Mst. Safia Bibi and her Family members

were sleeping in their house when at about 3.00 a.m. some one

knocked at the door and they woke up. They saw that accused Zakir

alias Zakoory son of Abdul Mastan, Fazal Aziz son of Asmatullah

alongwith four unknown persons armed with weapons were standing

in the courtyard of her home. The accused persons tied the hands of

complainant and her brothers namely Iftikhar and Dilawar and forced

them to sit in a room and were guarded by two persons and the other

two accused had started searching the rooms of the house. After that

accused persons forcibly took her niece Mst. Neelam to another room

and committed zina with her. During search they took from her

possession jewellery i.e. two pairs of earring, one locket weighing

three tolas and from box lying in the room seven ( 7) tolas jewellery

of different kinds, cash amount of Rs.3,50000/-, snatched one mobile

set from her, her mother and brothers Iftikhar and Dilawar. During

search the accused beat them on their resistance due to which she

and her niece were injured. At 4.30 the accused persons made their

escape good with all the said articles and cash amount.

3. After registration of the case and completion of investigation,

challan under section 173 Cr.P.C. was submitted against the

appellants/accused for trial. The learned trial Court formally charge

sheeted the appellants/accused under sections 376, 457 PPC and under

section 17(3) of the Offences Against Property Ordinance, 1979 to

which the appellants/accused pleaded not guilty and claimed trial.

4. During trial, the prosecution in order to prove its case

examined Faridullah, Naib Subedar/post commander as (PW-1), who

has submitted supplementary challan. Gul Nawaz Khan Moharrir

(PW-4) registered the FIR Ex.PW-4/1.Zia-ur-Rehman, Moharrir (PW-5)

witness of recovery memo Ex.PW-5/1. Azam Khan, Moharrir (PW-6)

witness of recovery memoes Ex.PW-6/1 to Ex.PW-6/5. Mst. Safia

Bibi (PW-7) complainant of the case who inter alia narrated the story

of FIR. Mst. Neelam (PW-8) she is the victim of the occurrence of

 zina and eye witness of dacoity. She was forcibly raped by the

appellants/accused. Iftikhar (PW-9), he is another eye witness of the

occurrence and brother of complainant (PW-7). Lady Dr. Raishma

Jamal, Medical Officer (PW-10). She medically examined Mst.

Neelam on 22-04-2012. Saif-ur-Rehman, IHC appeared as (PW-11).

He is the investigating Officer of the case, and arrested the accused

Zakirullah and Fazal Aziz on 15-07-2012 and 18-07-2012

respectively. Umar Ali, Moharrir (PW-12) is the witness of recovery

memos Ex.PW-11/14 and Ex.PW-5/1. Thereafter, the prosecution

closed its side on 09-07-2013.

5. After conclusion of the trial, the appellants/accused were

examined under section 342 Cr.P.C. They denied all the charges of the

prosecution leveled against them in the evidence; however, they

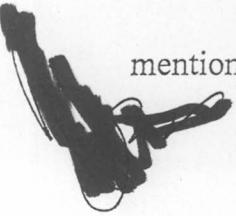
neither opted to record their statement on oath under section 340 (2)

Cr.P.C nor produced any evidence in their defence.

6. The learned trial Court after concluding the formalities of trial

returned a verdict of guilty. Conviction was recorded and awarded as

mentioned in the opening part of this judgment.



7. Heard learned counsel for the appellants and the State and

perused the impugned judgment and relevant record.

8. It has been observed that the FIR was promptly lodged within

an hour of the incident. The names of the appellants/convicts have

categorically mentioned in the FIR by the complainant out of the

alleged six culprits who stormed in the house of the complainant in

late hours of the fateful night. The statements of three star witnesses

i.e. the complainant Mst. Safia Bibi, PW-7, Iftikhar, PW-9 and Mst.

Neelam, PW-8 have also remained consistent in material particulars

with regard to the alleged offences of dacoity and rape of Mst.

Neelam, PW-8. That all the said three eye witnesses have been

subjected to cross-examination but they could not be shaken in any

manner in respect of what they have stated before the Court in their

examination-in-Chiefs. That the suggestions made by the counsel for

the appellants/convicts in their defence are not worthwhile to be

considered being general in nature and as such, could not put any dent

on the prosecution story. As regards the offence of Zina, the statement



of Mst. Neelam who is the victim of the said offence has categorically

named both of the appellants for commission of Zina with her and the

said statement remained consistent for all material aspects. The

defence side tried to allege the victim as married woman but they

failed to prove said claim as she unequivocally denied the said

suggestion and finally the defence side could not materialize the same.

The defence side also tried to put an element of enmity between the

complainant and the culprits especially the appellants but also could

not have been able to make it substantive as no any serious nature of

enmity was alleged that could have prompted the complainant side to

involve the appellants and other culprits into such heinous offences of

dacoity and especially of zina to put their honor at stake. That the

medical examination which was conducted on the same day of the

occurrence is also supportive of the fact that the virginity of victim

Mst. Neelam was not intact at the time of medical examination and

the redness was seen at the lower volva and trouser was also showing

multiple stains on it. However, it was stated by the doctor that no

fresh laceration or bruises or other signs of violence were seen. This

piece of evidence was vehemently emphasized by the defence

counsel. But on the other hand the chemical examiner report in respect

of vaginal swabs came with the positive results as being stained with

semen. The said report, which has not been made disputed anywhere

on the record, showing fresh semen, renders such statement of lady

doctor immaterial which says no fresh bruises/injuries or mark of

violence found on her person. Above all the statement of prosecutrix

alone is sufficient to prove the commission of offence of zina by the

appellants.

9. That as observed the promptly lodged FIR and medical

examination of victim which has also been carried out immediately

after the occurrence and the statement of victim Mst. Neelam in

respect of offence of zina committed with her by the appellants, which

has been corroborated by the medical and chemical examiner's

report, leave no room for any doubt and deliberation for false

implication of appellants in commission of Zina.



10. As regards the arguments advanced by the counsel for the

appellants such as, no identification parade was conducted by the

prosecution, is devoid of any force under the circumstances when the

appellants have been named in the FIR which was lodged within the

hour after the incident for inter alia commission of offences of dacoity

and zina, therefore it was not imperative for the prosecution to get

conducted identification parade as far as appellants are concerned.

The other argument that since no specific role was assigned to each of

the culprits renders the prosecution case doubtful. We are of the view

that this argument has no legs to stand as the appellants/convicts

before us alongwith other four persons have categorically been

assigned with the role of commission of dacoity and zina as well in

the house of complainant in the FIR and subsequently by the

prosecution witnesses in their respective testimonies. Another

argument which was taken by the defence counsel was that since the

three accused have been acquitted vide impugned judgment, therefore,

the appellants could not be convicted under the offence of dacoity

inasmuch as requisite number of culprits to constitute an offence of

dacoity has not been fulfilled. This argument of the defence counsel

is devoid of any force because the fact as to number of culprits alleged

to have participated in the offence has to be proved and determined

from the evidence available on record in this regard and not by the

number of persons having been convicted by the Court. The case law

PLD 1967 Dacca 528 referred to by the counsel also does not in any

way supportive of his contention, in fact it is other way around and

goes against it. The number of persons alleged to have participated in

offence have sufficiently been proved in the instant case by the

evidence brought on record therefore, the conviction for dacoity has

rightly been recorded by the trial Court. Likewise the arguments

regarding no identification of the recovered gold ornaments and no

matching of semen are not material under the circumstances of the

case as discussed above when the names of appellants have been

mentioned promptly with the specific roles for all the offences they

have been charged with, however, these arguments at the most could

be termed as inefficiency on part of the prosecution, but these

deficiencies are not of that nature which could damage the prosecution

case in the given circumstances. It was also argued that no recovery of

stolen articles was effected from appellant/convict Fazal Aziz except

from appellant/convict Zakirullah and that too only Rs.10,000/-

(Rupees ten thousand) out of alleged stolen amount of Rs.3,50,000/-

(Rupees three lac fifty thousand only). That record has been perused

which revealed that both the appellants have been arrested after the

considerable period of three (3) months, which is a sufficient time to

have disposed of the stolen articles.

11. That what has been discussed above we are of the view that

prosecution has adequately and beyond reasonable doubt proved the

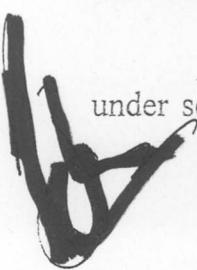
charges against the appellants. Consequently, the Criminal Appeal

No.6/P of 2013 and Jail Criminal Appeal No.29/I of 2013 are

dismissed. The convictions recorded and sentences awarded by the

trial Court are maintained except alteration in the sentence awarded

under section 457 PPC, which is hereby enhanced to ten (10) years



from five (5) years inasmuch as the house trespass has been committed by night in order to commit heinous Offences. Moreover, all the punishments as awarded to both the appellants are ordered to run concurrently. The benefit of section 382-B Cr.P.C is also extended to both the appellants in respect of all the sentences.

These are the reasons of short order dated 13-02-2014.



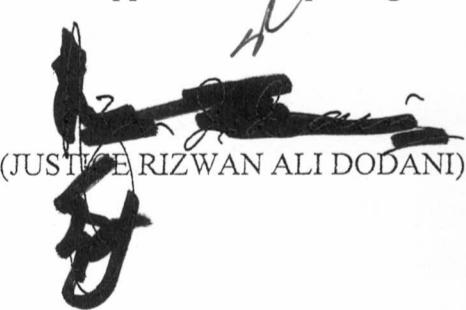
SH  
JUSTICE RIZWAN ALI DODANI



SH  
JUSTICE ASHRAF JAHAN

Islamabad, the  
06<sup>th</sup> March, 2014  
Abdul Majeed/-

Approved for reporting.



SH  
(JUSTICE RIZWAN ALI DODANI)