

**IN THE FEDERAL SHARIAT COURT**  
(Appellate Jurisdiction)

## PRESENT

**MR.JUSTICE ALLAMA DR.FIDA MUHAMMAD KHAN  
MR.JUSTICE SHEIKH AHMED FAROOQ.**

**CRIMINAL APPEAL NO.32-I-2012**

1. Amjad Ali son of Shamroz Khan, and
  2. Fakhar-Imam son of Chaman Khan,  
Both residents of Village Charorary District Bunir.

**Appellants.**

Versus

The State

## Respondent

For the appellants ..

Sahibzada Asadullah,  
Advocate.

For the State ...

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For the complainant ...

Mr.Ghulam Farooq Awan,  
Advocate

No.& date of FIR ...  
Police Station

No.211,dt.17.12.2010  
P.S Nagri,District Bunir

Date of judgment of Trial court ..

6.7.2012

Date of Institution ..  
in this Court

492012

Date of hearing  
and decision ..

25.4.2013

Date of judgment ..

30.4.2013

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**JUDGMENT**

**SH.AHMAD FAROOQ, J.** - Through the instant appeal,

Amjad Ali son of Shamroz Khan and Fakhar Imam son of Chaman Khan/

appellants have challenged the judgment dated 06.07.2012, whereby the

learned Additional Sessions Judge-I/Izafi Zilla Qazi, Buner at Daggar has

convicted and sentenced them as under:-

Amjad Ali alias <b><u>U/S 354-A PPC</u></b>	Life Imprisonment with a fine of Rs.100,000/- (One lac)
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<b><u>U/S 294 PPC</u></b>	Three months simple imprisonment with a fine of Rs.10,000/- (Ten thousand)
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<b><u>U/S 18 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979</u></b>	Seven years simple imprisonment
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Fakhar Imam	<b><u>U/S 294 PPC</u></b>	Three months simple imprisonment with a fine of Rs.10,000/- (Ten thousand)
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<b><u>U/S 18 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.</u></b>	Seven years simple imprisonment
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All the substantives sentences awarded to the appellants were ordered to

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

2. Precisely, the allegations leveled by the complainant /Kamil Khan alias Kamilay in the F.I.R(Ex.PA) lodged on 17.12.2010 at police station Nagari, district Buner are that his daughter Mst.Nagina was married to his nephew namely Johar Ali, about 7/8 years earlier but no child was born during their wedlock. Johar Ali was mentally weak and had gone to Karachi 4/5 months ago to earn his livelihood. On 10.12.2010 at about 0900 hours, complainant's brother Noor Parast shot dead Mst. Nagina by a firearm weapon. On inquiry, the complainant came to know that his daughter Mst.Nagina and his niece namely Mst.Akhtar Meena were assaulted by Amjad Ali and Fakhr Imam, who stripped off their clothes and made nude video, which was subsequently released to the public at large. The said act of the accused disgraced the whole family of the complainant and resulted in the murder of Mst.Nagina.

3. After completion of usual investigation, a report under section 173 Cr.P.C was submitted in the learned trial court for taking cognizance of the offences.

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4. The learned trial court framed the charge against the accused/

appellants under sections 354-A/34, 294/34 PPC and section 18 of the

Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The accused/

appellants did not plead guilty and claimed to be tried.

5. During the trial, the prosecution in order to substantiate its

allegations and to prove the charges produced seven witnesses including

complainant/Kamil Khan, (P.W.1), SHO/S.I/Ibrahim Khan(P.W.4),

Farhatullah Marwat/ SDM Mandanh, Buner (P.W.6) and Zahir Shah

Khan(P.W.7), who was the Investigating Officer of this case. P.W.3 Syed

Mukhtiar, H.C placed on record the recovery memo/Ex.P.W.3/1 Memory

Card/Ex.P-1, Compact Disk/Ex-P-2 and 60 photographs/Ex/P-3. He is also

a witness of recovery memo Ex.P.W.3/2 whereby the complainant handed

over the Memory Card to the I.O. P.W.5/Amirang Zeb/ASI is a marginal

witness of recovery memo Ex.P.W.5/1 whereby Computer, Monitor Model

2003 Ex.P-4, CPU, 2003 Paintium Ex.P-5, Key Board Ex.P-6 and Mouse

Ex.P-7, along with Power Cable Ex.P-8 were taken into possession by the

police on the pointation of accused Nasir Ali. However, the prosecution

gave up the witnesses namely Babir Ali, Saifullah, Sajjad, Naveed, Amir

Samad, Sher Muhammad, Nasarullah, Muhammad Taj, Aamir Ali and

Waris Khan and Sibtain Anwar as being unnecessary. The entire statements

of the witnesses of the prosecution have been mentioned in the impugned

judgment dated 06.07.2012 and there is no need to reproduce the same in

this judgment to avoid un-necessary repetition. However, the relevant

portion of the statements of the witnesses of the prosecution would be

discussed in the subsequent paragraphs.

6. After closure of the evidence of the prosecution, the accused/

appellants were examined under section 342 Cr.P.C. wherein they

categorically denied the allegation leveled by the prosecution as well as the

charges framed against them. In response to crucial questions 'as to why

they have been involved in this case and the witnesses of the prosecution

have deposed against them, the accused replied as under:

"They have been implicated in this case with mala-fide intention and no independent witness except the police officials has deposed against them".

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7. However, neither the accused/ appellants opted to make their statements under section 340(2) Cr.P.C. on oath nor produced any witness in their defence.

8. Upon conclusion of the trial, the learned trial court vide judgment dated 06.07.2012 has convicted the accused/ appellants as mentioned herein before in para-1 of this judgment.

9. Learned counsel for the appellants namely^ Sahibzada Asadulah, Advocate submitted that there was no evidence available on record of the learned trial court for recording the conviction of the appellant/Amjad Ali under section 354-A PPC as neither he assaulted or used criminal force against Mst.Nagina nor the said Mst.Nagina was exposed to public view in naked condition. He further submitted that the whole case of the prosecution is based on the Memory Card Ex.P-1 and C.D Ex.P/2 which were not recovered from the present appellants. He maintained that no witness of the prosecution has specifically stated that the convicted accused were preparing or attempting to commit zina and as such, their conviction under section 18 Offence of Zina (Enforcement of Hudood) Ordinance,

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1979 was not justified. He claimed that the place, where the appellants allegedly were doing obscene acts, was not a public place, therefore, the provision of section 294 PPC are not attracted. Before concluding his arguments, he informed the Court that the parties have patched up the matter through the intervention of local 'jirga'. However, he conceded that the offences for which the appellants have been convicted are not compoundable but he pleaded for taking a lenient view in view of the compromise between the complainant and the accused.

Learned counsel for the appellants/Amjad Ali and Fakhar Imam has relied upon the following judgments in support of his arguments:

- 1) 1989 P.Cr.L.J 1453  
(Muhammad Ashraf and 3 others Vs. The State)
- 2) 1988 P.Cr.L.J 2321  
(Muhammad Saleem and another Vs. The State)
- 3) 2006 SCMR 1846  
(Lal Khan Vs. The State)
- 4) 2010 P.Cr.L.J 221  
(Ghulam Yasin Vs. The State)
- 5) 2009 SCMR 916  
(Qadir Shah and others Vs. The State).

10. The learned counsel for the complainant did not controvert the factum of a compromise between the parties. However, he admitted that the essential ingredients of section 354-A PPC are not available in the

evidence of the prosecution. Never-the-less, he maintained that the

accused were found involved in doing in obscene acts after taking

away/enticing the women and as such, liable to be punished accordingly.

11. We have heard the learned counsel for the appellants as well as the

learned counsel for the complainant. We have also examined and evaluated

the evidence produced by the prosecution during the trial in addition to

carefully scanning the impugned judgment dated 6.7.2012.

12. First of all, we would like to clarify that despite compromise

between the parties, the present appellants cannot be acquitted as they have

been convicted for offences which are not compoundable under the

statutory law as contained in section 345 Cr.P.C. Even otherwise, no

compromise could legally be effected in a case where the accused have

been convicted for an offence under section 18 Offence of Zina

(Enforcement of Hudood) Ordinance, 1979. Hence, this Court is not

competent to give effect to a compromise in the non-compoundable

offences which have been committed by the present appellants as the same

is against the law as well as public policy. However, the compromise can

be considered as a mitigating circumstance for the purpose of awarding sentence in non-compoundable offences in appropriate cases except in heinous offences which are considered crime against society. In this regard, we would like to rely upon the judgments reported in PLD 1996-Quetta-56(Muhammad Akbar and another Vs. The State) and PLD 1997-Quetta-17(Niaz Muhammad Vs.The State). The Hon'ble Supreme Court of Pakistan in the case of Ghulam Farid alias Farida Vs. The State reported in PLD 2006 SC-53 has held that tabulation of offences as made under S.345,Cr.P.C, being unambiguous, remove all doubts and uncertainty and must be taken as complete and comprehensive guide for compounding the offences---Legislature has laid down in this section the test for determining the classes of offences which concern individuals only as distinguished from those which have reference to the interests of the State--Courts of law cannot go beyond the said test and substitute their own test for it--- To compound, non-compoundable offence is against public policy, keeping in view the state of facts existing on the date of application to compound---No offences shall be compounded except where the provisions

of S.345,Cr.P.C are satisfied as to all matters mentioned therein. Hence,

notwithstanding, the compromise between the parties we proceed to decide

the instant appeal on merits.

13. In this case, appellant No.1/Amjad Ali amongst other offences has

been convicted under section 354-A PPC and sentenced to life

imprisonment along with fine of Rs.100,000/- Before evaluating the

evidence produced by the prosecution whereupon Amjad Ali has been

convicted, it would be advantageous to reproduce hereunder section 354-A

PPC:

**Sec.354-A. Assault or use of criminal force to woman and stripping her of her clothes; Whoever assaults or uses criminal force to any woman and stripes her of her clothes and, in that condition exposes her to the public view, shall be punished with death or with imprisonment for life, and shall also be liable to fine".**

(underlining for emphasis is ours)

A plain reading of the above provision of law would reveal that the accused should either assault or use criminal force to any woman and thereafter, strip off her clothes and in that condition, exposes her to the public view.

The word "stripping" is defined in Webster New World College Dictionary as "to remove the clothing or covering from a person and making him or her naked". The word also means "the undressing of

the person. While further explaining the term, an explanation is mentioned therein in these words, "strip implies the pulling or tearing off clothing, outer cover, etc. and even connotes forcible or even violent action and total deprivation".(Reliance PLD 2005 Peshawar-128). Similarly in the judgments reported in PLD 2008-Lahore-308 and 2009 SCMR-913, it has been held that two conditions must co-exist and be fulfilled to attract the provision of section 354-A Cr.P.C, firstly, there should be stripping off the clothes of the woman and secondly, the victim in that condition be exposed to public view.

14. However, in the instant case neither Mst.Nagina was stripped off her clothes making her naked nor she was exposed to public view in that condition as no one from the general public was admittedly present at the scene of the incident. Moreover, there is no evidence at all regarding the use of any criminal force or assault by convicted accused/Amjad Ali alias Amjad against Mst.Nagina, deceased at the time of the occurrence. It is worth mentioning that Mst.Nagina was murdered prior to the registration of this case and as such, there could not be any statement or allegation from her side that Amjad Ali assaulted her or used criminal force. Further-more, there is no eye witness of the occurrence. Even the date and time of the occurrence is neither mentioned in the FIR nor specified by any witness of the prosecution during the trial. The only evidence produced by the prosecution is the photographs/Ex.P-3 which have been prepared on the basis of Memory Card/Ex.P-1 and C.D Disk/Ex.P-2 but the same also did not substantiate the allegation of the prosecution that

Mst.Nagina was stripped off her clothes and exposed to public view in that condition. Rather, from the photographs, Mst.Nagina seems to be a consenting party to all the obscene acts being done by accused/Amjad Ali. The playing of the video film or photographs shown to public at large by other persons would not bring the act of accused Amjad Ali within the mis-chief of section 354-A PPC. Hence, there was no evidence available on the record of the learned trial court to record the conviction of Amjad Ali alias Amjad under section 354-A PPC and award the sentence of life imprisonment thereof.

15. Now, we advert to the conviction of the appellants i.e Amjad Ali alias Amjad and Fakhr Imam under Section 18 Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and under section 294 PPC. The learned trial court has held in the impugned judgment that both the accused/present appellants were making preparation and attempted to commit zina with Mst.Nagina and Mst.Akhtar Meena respectively. The Federal Shariat Court in the case of Arshad Mehmood Vs. The State reported in PLD 1991 FSC-268 has mentioned the definitions of the words "attempt" and "preparation" as given in Black's Law Dictionary, which are being reproduced hereunder:

**"Attempt.—**In statutes and in cases other than criminal prosecutions an 'attempt' ordinarily means an intent combined with an act falling short of the thing intended. It may be described as an endeavour to do an act, carried beyond mere preparation, but short of execution.

An effort or endeavour to accomplish a crime, amounting to more than mere preparation or planning for it, which, if not prevented, would have resulted in the full consummation of the act attempted, but which, in fact, does not bring to pass the party's ultimate design. The requisite elements of an "attempt" to commit a crime are (1) an intent to commit it, (2) an overt act toward its commission, (3) failure of consummation, and (4) the apparent possibility of commission.

A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he (a)purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or (b) when causing a particular result is an element of the crime, does not or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or (c) purposely does or omits to do anything, which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

"Preparation.—With respect to criminal offence, consists in devising or arranging means or measures necessary for its commission, while attempt is direct movement toward commission after preparations are made".

16. Needless to mention here that attempt is an act done in part execution of criminal design amounting to more than mere preparation, but falling short of actual consummation and possessing

except for failure to consummate, all the elements of substantive crime. Attempt signifies an act which if successful would amount to commission of offence. Offence of Zina being an offence requiring actual penetration, attempt to rape, must be an attempt at penetration involving catching of female in such manner that penetration might be facilitated. If we consider the evidence produced by the prosecution in this case, particularly, the photographs in the light of the aforementioned definition of the words "attempt" and "preparation" there remains no doubt at all that there was no attempt to commit "zina" by accused/Amjad Ali with Mst.Nagina and accused. Fakhr Imam with Mst.Akhtar Meena. Neither the male and female accused had put off their clothes/naked nor any stain of semen was found on their shalwars by the I.O or the Chemical Examiner. Even from the photographs, it is not established that the convicted accused/present appellants have committed some overt act toward achieving their object of committing "zina" with Mst.Nagina and Mst.Akhtar Meena. Hence, the learned trial court was not justified in recording the conviction of the present appellants under section 18 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

17. Never-the-less, Mst.Nagina and Mst.Akhtar Meena were married women and they were admittedly taken away by the convicted accused/present appellants from their houses with criminal intent of having illicit intercourse. In view of above, we are of the considered opinion that act of the present appellants squarely fell within the mischief of section 16 of the Offence of Zina (Enforcement

of Hudood) Ordinance, 1979 which is being reproduced herein below for ease of reference:

**Sec.16 Enticing or taking away or detaining with criminal intent a woman.** Whoever takes or entices away any woman with intent that she may have illicit intercourse with any person, or conceals or detains with intent any woman, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

No doubt in order to attract the provisions of section 16 of the Ordinance ibid two conditions should co-exist, firstly, taking or enticing away any woman and secondly, intention that she may have illicit intercourse with any person. (Reliance 2007 S.D-321). However, the Shariat Appellate Bench of the Supreme Court of Pakistan in the judgments reported in 2004-S.D-284 and PLD 1991 SC-567 have distinguished between the words "taking and enticing". The word "take" as used in section 16 of the Ordinance ibid does not mean the taking by force, it implies to get into possession or to cause a female to go with an accused. The element of force cannot be inferred by incorporating the word "taking" which does not mean taking by force. The word "take" includes constructive taking such as meeting at appointed place outside. In the instant case, the accused must have exercised some influences or some kind of inducement to take the female accused to the place of occurrence. Similarly, it is established from the photographs, wherein the accused could be seen kissing , embracing and molesting the female that they had an intention to have illicit intercourse with them, which is punishable under section 16 of the Ordinance ibid. It is also pertinent to mention

here, that Mst.Akhtar Meena (one of the co-accused) was not only convicted under section 18 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and awarded a sentence of three years but also she has already undergone the said punishment and has been released from jail after the expiry of her sentence. Although we do not agree with the conviction of the present appellants under section 18 of the Ordinance ibid but we are of the considered view that they should be convicted for commission of an offence falling under section 16 of the Ordinance ibid, for the reasons mentioned above, as well as in view of the conviction of their co-accused Mst.Akhtar Meena, following the rule of consistency.

18. Lastly, from the photographs/Ex.P-3, the production of which was neither opposed vehemently nor accused in their statements under section 342 Cr.P.C have specifically claimed that those were fabricated, it is established that the accused were indulging in obscene act in a public place and as such, were rightly convicted by the learned trial court under section 294 PPC. No doubt, the place of occurrence is located in mountainous area but the same is not an abundant place and accessible to the public at large.

19. Before parting with this judgment, we would like to observe that there is no chance of false implication of the accused by the complainant in this case, as the complainant/Kamil Khan is the real father of Mst.Nagina and real uncle of Mst.Akhtar Meena. We also cannot ignore the allegations that Mst.Nagina was murdered by her father-in-law due to the humiliation caused to the family as a result of

the videos/photographs of this occurrence. As observed above Mst.Akhtar Meena/niece of the complainant was not only convicted and undergone her entire sentence but also her appeal against the said conviction was dismissed by this Court vide Order dated 25.4.2013. The record of the learned trial court revealed that the learned counsel, who appeared on behalf of the convicted accused, did not plead their innocence. Rather, they only requested for reduction in the quantum of the sentence being awarded to them.

20. The upshot of the above discussion and observations is that the conviction recorded and sentence awarded to appellant No.1/Amjad Ali alias Amjad by the learned trial court under section 354-A PPC are set aside. Similarly, the conviction of both the appellants and sentences awarded to them under section 18 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 are altered to one under section 16 of the Ordinance ibid and they are sentenced to four years R.I each with a fine of Rs.10,000/- each or in default thereof, both shall suffer six months S.I. Additionally, the conviction recorded and sentence of three months along with a fine of Rs.10,000/- awarded to both the appellants under section 294 PPC vide the impugned judgment dated 6.7.2012 are maintained. However, the sentences awarded to the present appellants on two counts shall run concurrently and benefit of section 382-B Cr.P.C extended to them by the learned trial court shall remain intact.

A handwritten signature consisting of stylized initials, possibly 'M' and 'F'.

With the above modification in the impugned judgment dated 6.7.2012 , the instant appeal is accordingly dismissed.

These are the reasons for our short order dated 25.4.2013.



JUSTICE SHEIKH AHMAD FAROOQ



JUSTICE DR.FIDA MUHAMMAD KHAN

Islamabad, 30.4.2013  
M.Akram/

**APPROVED FOR REPORTING**



JUSTICE SHEIKH AHMAD FAROOQ