

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE SYED AFZAL HAIDER

Criminal Appeal No. 140/I of 2007 **LINKED WITH**

1. Shafullah son of Muhammad Nawaz, Caste Pathan, resident of Chandni Chowk, Tehsil Kallur Kot, District Bhakkar.
2. Saeedullah son of Gul Khan, resident of Chak No.2/ML, Tehsil Piplan, District Mianwali.

... Appellants

Versus

The State

.. Respondent

Criminal Appeal No.142/I/2007 **LINKED WITH**

Ayub son of Esab, resident of Jandanwala, Tehsil Kalur Kot, District Bhakkar.

.... Appellant

Versus

The State

.... Respondent

Criminal Reference No.1/I of 2008

The State

Appellant

Versus

1. Shafullah
2. Saeedullah

.... Respondent

Counsel for appellants

Malik Rab Nawaz Noon and Nisar
Abbas Jora Advocates

Counsel for State

...

Mr. Shahid Memood Abbasi,
Deputy Prosecutor General

FIR No. Date &
Police Station

...

Complaint case

Date of judgment of
trial court

...

21.6.2007

Dates of Institution

...

26.6.2007, 28.6.2007 and
28.1.2008 respectively

Date of hearing of Appeal

...

20.10.2008

Date of decision by
Federal Shariat Court

...

21.11.2008

JUDGMENT

SYED AFZAL HAIDER, Judge.- Shafaullah and

Saeedullah, appellants vide Criminal Appeal No.140/I of 2007 and Ayub vide Criminal Appeal No.142//I of 2007 have challenged their conviction and sentences recorded by Ch. Muhammad Saleem, Additional Sessions Judge, Kalur Kot through his judgment dated 21-06-2007 passed in Hudood Complaint Case No.23 of 2006 whereby appellants Shafaullah and Saeedullah were convicted under section 10(4) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to death while appellant Ayub, being convicted under section 10(3) of the said Ordinance, was sentenced to life imprisonment. All the appellants have also been convicted under section 452 of the Pakistan Penal Code and sentenced to rigorous imprisonment for five years each with a fine of Rs.20,000/- each and in default whereof to further undergo six months simple imprisonment each. All the three appellants were convicted further under section 506 of the Code and sentenced to two years rigorous imprisonment each. All the sentences were ordered to run concurrently. The learned trial court has

also preferred Criminal ~~Muxidex~~ Reference No.1/I of 2008 for confirmation of death sentence awarded to Shafaullah and Saeedullah appellants. As both the appeals and ~~Cr. Reference~~ Reference have arisen out of the same judgment, so they are being disposed through this single Judgment.

2. Brief facts of the case as narrated in the direct complaint lodged before Additional Sessions Judge, Kalur Kot on 08.07.2006 by complainant Iqbal Bibi, P.W.1, against Najeeb and three appellants are that during night of 20.3.2006 at 11/12 p.m. accused Ayub, Shafaullah, Saeedullah and Najeeb Khan, armed with deadly weapons, forcibly entered her house situated in Chak No.38/ML and committed zina-bil-jabr turn by turn with her two unmarried daughters Mst. Shahnaz Bibi, P.W.3 and Mumtaz Bibi, P.W.2. While leaving the house the accused threatened the complainant with dire consequences if any report was made of the incident. It was further stated that the complainant on a previous occasion moved an application before Additional Sessions Judge, with powers of Justice of Peace, on which the learned court on 24.04.2006 gave a direction that a complaint be lodged in the relevant court. It was further averred that the local police did not pay

heed to her complaint and hence a private complaint was being lodged direct in the court. The complainant also added that the previous application moved by her was written by a petition writer who accidentally omitted certain facts in the application. The accused, it was stated, committed zina-bil-jabr with her daughters. In the end it was stated that previously a private complaint was also moved which was dismissed for non-prosecution.

3. After cursory evidence the complaint was admitted for regular hearing and the accused were summoned to face trial. The learned trial court framed charge against the accused on 15.2.2007. The accused did not plead guilty and claimed trial.

4. The prosecution in order to prove its case produced four witnesses in all at the trial. Mst. Iqbal Bibi complainant appeared as P.W.1. Mst. Mumtaz Bibi victim, appeared as P.W.2 and supported the version narrated by her mother P.W.1 while Mst. Shahnaz Bibi P.W.3, the second victim, also supported the prosecution story. Ghulam Jaffar, S.I. appeared as P.W.4 and stated that on 7.4.2006 at 10.40.a.m. Mst. Iqbal Bibi came to the police station and verbally stated before him that Ayub, Attaullah, Saeed and

Rasheed had committed zina with her and her daughters. He then recorded her statement which was sent to the police station through Shafaullah Constable No.107/C on the basis of which "Rupt" No.04 dated 07-04-2006 was entered in the Register. At the time of recording the statement of Mst. Iqbal Bibi her daughters, the witness stated, were not with her. The witness was however declared hostile and was allowed to be cross-examined.

5. After close of the prosecution evidence the learned trial court recorded statements of the accused on 29.05.2007 under section 342 of the Code of Criminal Procedure wherein all the three appellants took up the same plea that complainant party wanted to extort money from them because the son of the complainant was in jail on account of some criminal case and she needed money to pursue his case. None of them availed the opportunity provided under section 340(2) of the Code of Criminal Procedure nor they opted to produce any evidence in their defence. The learned trial court in the end convicted and sentenced them as noted above. Hence the present appeals.

6. We have heard the learned counsel for the appellants as well as the learned counsel for the State at some length. It has been contended on behalf of the appellants that:-

a) There was element of unexplained delay which fact has not been dealt with by the learned trial court;

b) That the incident is alleged to have taken place on 20.3.2006 whereas the "Rupt" was lodged on 07-04-2006 after the first complaint was dismissed on 03-07-2006. It is further contended that second complaint was lodged on 08-07-2006;

c) That the details of the incident were not mentioned in the complaint;

d) That there were lot of discrepancies between the statements of the mother and the two daughters;

e) That no attempt was made by the complainant to get the two victims medically examined;

f) That P.W.2 Mst. Mumtaz Bibi does not state that rape was committed upon her sister Mst. Shahnaz Bibi, P.W.3 and similarly P.W.3

does not mention in her statement that rape was committed upon her sister Mst. Mumtaz Bibi, P.W. 2 though it is mentioned by P.W.1 that she alongwith her two daughters was in the same room when four persons entered and hit her and both her daughters were also present there;

g) That Iqbal Bibi, P.W.1, does not implicate any of the accused for the offence of zina in her examination-in-chief before the trial court;

h) It was therefore contended that under these circumstances it is not at all safe to convict Shfaullah and Saeedullah and award capital punishment under section 10(4) of Offence of Zina(Enforcement of Hudood) Ordinance, 1979 or sentence Ayub appellant to 25 years rigorous imprisonment under section 10(3) of the said Ordinance;

i) Learned counsel has also challenged their conviction and sentences under sections 452 and 506 of the Pakistan Penal Code.

7. Learned counsel for the State on the other hand supported the impugned judgment and stated that the element of delay has been explained inasmuch as private complaint was lodged after the police case did not proceed and further that there was no need of any medical examination of

the victims when the offence of rape was alleged against the appellants and that the discrepancies in the statements of the witnesses were not material.

According to him the offence stood proved and consequently the conviction and sentence should be maintained.

8. We have considered the arguments of the learned counsel for the parties and carefully gone through the record of the case. The fact of the matter is that we are not convinced that it is a case of gang rape. The evidence of P.W.1 Iqbal Bibi is silent on the question of rape whereas Mumtaz Bibi P.W.2 does not mention the presence of Ayub and Najeebullah appellants in the room as culprits and P.W.3 Shahnaz Bibi does not mention that Shafaullah and Saeedullah appellants were present in the room and committed rape. We have also noticed that the learned Additional Sessions Judge, Kalur Kot on 24.4.2006 while dismissing the petition of Iqbal Bibi P.W.1 for registration of the case against the appellants, observed that there were doubts as regards the genuineness and veracity of the story of the complainant.

9. It might as well be added that the incident is said to have taken place during the night between 20/21st March 2006 whereas the first complaint was lodged with police on 07-04-2006 i.e. after about seventeen days. Thereafter application was submitted before the sessions court for direction for registration of First Information Report. This application was dismissed on 24.06.2006 after the learned Additional Sessions Judge considered the application of the complainant on merit. Of course he observed that the applicant had an alternate remedy by way of private complaint. Thereafter the complainant, on her showing, filed a complaint on 08-04-2006 which was dismissed for lack of prosecution on 03-07-2006, thereafter on 08-07-2006 a second complaint was moved by the complainant which became the basis for conviction in the present case before us. Even at this belated stage the complaint lodged by P.W.1 Mst. Iqbal Bibi was devoid of crucial information or details.

10. We have also noticed that in her complaint dated 08-04-2006 P.W.1 Mst. Iqbal Bibi alleged that she was raped by Ayub appellant who, it was further alleged, also urinated on her face. It was further alleged by her

that the clothes of the complainant and her two daughters were removed and after making them naked all the three women were raped by the accused persons. This version was however neither stated in the preliminary evidence nor was it related at the time of the trial. It may also be noticed that the name of Najeebullah was not mentioned in this complaint. He was identified as "a son of Rashid Khatgi resident of 30/ML Kalur Kot". However Najeebullah, who had appeared before the learned trial court after having been duly served, was acquitted because the complainant exonerated him. It is clear that the story as built by the complainant in due course of time does not inspire confidence particularly when capital punishment is awaiting two appellants. The prosecution story must be convincing and proved beyond any shadow of doubt before conviction and sentence for gang rape can be sustained.

11. The learned counsel at the end stated that it is a fit case for remand because the complaint was lodged directly in the court of learned Sessions Judge without following the prescribed procedure of moving a complaint in the court of the Magistrate as mandated by the Code of Criminal Procedure.

12. We have also heard learned counsel for the State on this legal objection who states that it will not be in the interest of justice to remand the case and subject the appellants to suffer another period of agonizing trial. He was further of the view that presentation of complaint before the Sessions Court was a mere irregularity which would not vitiate the trial. He also contended that it would be a mechanical process now for the Magistrate to refer the complaint to the Sessions Court for trial.

13. In view of what has been stated above at the factual and legal plane it is a case which is not free from doubts. It is not safe to award death penalty or life imprisonment unless and until the case stands proved beyond any reasonable doubt. We are not considering the legal objection and the plea for remand because after considering the facts and circumstances of the case we are not persuaded to uphold the judgment of learned trial court.

14. In this view of the matter it is not possible for us to maintain the conviction and sentence of the appellants in the facts and circumstances of the case. Consequently appeals of Shafaulah, Saeedullah and Ayub are

accepted and the judgment of learned Additional Sessions Judge, Kalur Kot dated 21-06-2007 delivered in Hudood Complaint No.23 of 2006, whereby the appellants were convicted and awarded punishments referred to in opening para of this Judgment, is hereby set aside. The appellants shall be released forthwith unless they are required in any other case.

15. Resultantly the question of confirmation of death sentence awarded to Shafaulah and Saeedullah appellants does not arise. The ~~XXXXXX~~ Reference No. 1/I of 2008 is therefore answered in the negative.



JUSTICE SYED AFZAL HAIDER



JUSTICE HAZIQUL KHAIRI
Chief Justice



JUSTICE DR. FIDA MUHAMMAD KHAN

Announced in open Court
at Islamabad on 11.11.2008
UMAR DRAZI

Fit for reporting
