

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO. 101/I OF 2009

Muhammad Usman son of Rehmat Nazar
r/o Orghoch Tehsil and District Chitral

.... Appellant

Versus

1. The State
2. Msr. Shah Gul D/o Ali Akbar resident of Orghoch Tehsil and District Chitral.

....

Respondents

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Counsel for appellant

....

Mr. Amir Gulab Khan,
Advocate

Counsel for the State

....

Mr. Muhammad Sharif Janjua,
Advocate,

FIR No. Date &
Police Station

....

363, 24.6.2008
Chitral

Date of Judgment of
trial court

....

14.7.2009

Dates of Institution

....

08.08.2009

Date of hearing

....

22.01.2010

Date of decision

....

28.01.2010

JDGMENT

SYED AFZAL HAIDER, Judge.- Muhammad Usman has, through this appeal, challenged the judgment dated 14.07.2009 delivered by Additional Sessions Judge/Azafi Zila Qazi Chitral whereby he was convicted under section 10(2) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to five years rigorous imprisonment and to a fine of Rs.10,000/- or in default thereof to further undergo one month's rigorous imprisonment. Benefit of section 382-B of the Code of Criminal Procedure was granted to the appellant.

2. Facts leading upto this appeal are that Mst. Shah Gul PW.15, lodged an information with Police Station Chitral on 24.06.2008 that 3/4 months back, while she was working in her field at about 10.00 a.m, when one person resident of Orghouch, whose name or parentage she did not know then though she could identify him, forcibly took her to his house where no other person was present. The accused committed Zina bil Jabr with her twice. However she did not narrate the incident to anybody due to shame. Later she became pregnant and reported the matter to local police.

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Consequently a report was registered on 24.06.2008 with Police Station Chitral under section 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 of serial No.363 after preliminary enquiry under section 157 of the Code of Criminal Procedure.

3. P.W.10 Muhammad Jan, Sub Inspector had partly investigated the case. He stated that Mst. Shah Gul had given birth to a dead daughter and a son. He obtained death certificate Ex.PW.5/2 of the dead child from DHQ Hospital vide application Ex.PW.10/1. He also obtained sample of the skin of dead child and blood sample of the living child. Both the samples were sent for DNA test to Lahore. He also got blood from the body of accused Muhammad Usman through laborartoy technician DHQ Hospital Chitral and sealed the same into a parcel and prepared recovery memo Ex.PW.7/1 and signed the same. He handed over the dead body to Hafeez-ur-Rehman and Shuja-ur-Rehman residents of Orghouch vide memo Ex.PW.10/3. After completion of investigation the Investigating Officer handed over the file to SHO for submitting report under section 173 of the Code of Criminal Procedure.

Ex. 1

4. Thereafter the learned trial court on 03.09.2008 framed charge against the accused Muhammad Usman under section 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

5. The prosecution in order to prove its case at the trial produced 15 witnesses. The gist of statements of witnesses is as under:-

- i. Hafeez-ur-Rehman appeared as P.W.1. to depose that Mst. Shah Gul was his phoophizad.
- ii. Lady Dr. Sultana appeared as P.W.2. She had medically examined Mst. Shah Gul on 24.06.2008 and found that the victim had 14 weeks pregnancy.
- iii. Dr. Saeed Malook appeared as P.W.3 to state that on 27.06.2008 he had medically examined accused Muhammad Usman and found him fit to perform sexual intercourse.
- iv. Jehanzeb Khan Head Constable No.190 appeared as P.W.4. He stated that he and Ikram-ul-Haq, Foot Constable, were present when on 10.11.2008 lady doctor Sultana got skin sample of dead female baby and blood samples of male baby for DNA test report. He had attested recovery memo Ex.PW.4/1.
- v. Dr. Ali Murad appeared as P.W.5. He stated that while serving as medical officer of DHQ Hospital Chitral he received an

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application Ex.PW.5/1 on 02.12.2008 from the Investigating Officer, seeking permission to obtain blood of Mst. Shah Gul for DNA test. He marked the application to the Laboratory Assistant for the needful. He identified his signatures on the application. He also issued death certificate Ex.PW.5/2.

- vi. Muhammad Liaqat Ali Khan, Laboratory Assistant DHQ Hospital, Chitral appeared as P.W.6. He stated that Investigating Officer brought accused Muhammad Usman to obtain blood sample. He obtained blood of accused and handed over the same to I.O. for DNA test. He identified his signatures on recovery memo Ex.PW.6/1. He also took blood sample of Mst. Shah Gul and handed it over to Investigating Officer for DNA test report vide memo Ex.PW.6/2.
- vii. P.W.7 Maulai Shah Head constable is an attesting witness of recovery memo Ex.PW.7/1 whereby blood sample of Muhammad Usman accused was taken for DNA test.
- viii. Ijaz-ur-Rehman P.W.8, is a relative of the victim. He stated that it came to the knowledge of the family that Mst. Shah Gul had conceived. On enquiry the latter informed that accused Muhammad Usman had committed Zina-bil-Jabr with her.
- ix. Muhammad Khalid Khan, SHO Police Station Chitral appeared at the trial as P.W.9. He stated that on 24.06.2008 Mst. Shah Gul appeared before him along with her brother Yousaf Khan and complained that she was subjected to rape and had

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consequently conceived. In order to ascertain the factum of pregnancy, the witness got the complainant medically examined. The lady doctor confirmed pregnancy vide report Ex.PW.2/2 whereafter legal opinion was solicited by this witness from the prosecution department vide application Ex.PW.9/2. He was advised to register a case and proceed accordingly. The witness also submitted interim report under section 173 of the Code of Criminal Procedure whereas the complete report against Muhammad Usman accused was submitted by Inspector Inayat Ullah, S.H.O.

- x. Muhammad Jan, Sub Inspector appeared at the trial as P.W.10. He had partly investigated the case. The details of his investigation have already been mentioned in an earlier paragraph.
- xi. Sardar Wali ASI, appeared at the trial as PW.11. He stated that the victim gave birth to twins, a male and a dead female body on 09.11.2008 in D.H.Q Hospital Chitral. Having received this information the witness moved an application Ex.Pw.11/1 before the Medical Officer for DNA test. The blood sample of the living baby and skin sample of the dead child were obtained vide memo Ex.PW4/1. The dead body of the new born baby was handed over to Ijaz-ur-Rehman for burial.
- xii. P.W.12, Inayat Ullah SHO, had submitted complete report in the court requiring the accused to face trial.

xiii. Abdul Qayyum, ASI appeared as P.W.13 and stated that he formally registered FIR Ex.PA on receipt of murasala Ex.PW.9/1 from Muhammad Khalid Khan, SHO.

ix. P.W.14 Rehman Ali Shah stated at the trial that on receipt of case file from the SHO he partially investigated the case. He arrested the accused Muhammad Usman on 26.06.2008. He prepared site plan Ex. P.W.14/2 and got accused medically examined vide application Ex.PA.3/1 and also got conducted identification parade of the accused. He recorded statements of witnesses under section 161 of the Code of Criminal Procedure.

xv. Mst. Shah Gul victim appeared as P.W.15. She endorsed the contents of the complaint recorded by police.

6. Learned trial court after close of the prosecution evidence recorded statement of accused under section 342 of the Code of Criminal Procedure. He also made a statement under section 340(2) ibid. The accused contended that the complainant party wanted to have a Hafiz-e-Quran in his place as Pesh Imam. It was further stated that litigation about property between him and complainant group was pending in the court. It was also contended that the victim was a deaf, dumb and insane woman who did not observe 'parda' and that she was instigated to file a false complaint against him. The learned trial court after completing all codal formalities recorded

conviction as noted in the opening paragraph of this Judgment. Hence the present appeal.

7. I have gone through the file. The evidence adduced by prosecution as well as the statement of accused has been perused. Learned counsel appearing on behalf of the appellant and State have been heard. Learned counsel for the appellant has raised the following points for consideration:-

- i. DNA test alone is not sufficient to form basis for conviction. Reliance is placed on Muhammad Azhar Versus The State reported as PLD 2005-Lahore 589;
- ii. That the victim was not taken to the laboratory for medical test.
- iii. The complainant could not identify the accused during identification parade;
- iv. That in case the conviction is found to be correct then the complainant was also liable to be convicted;
- v. The complainant party is inimical to the accused because of pending civil disputes; and
- vi. Lastly the learned counsel requested for reduction of sentence on the ground of old age of the appellant.

8. Learned counsel representing the State on the other hand

supported the Judgment and vehemently opposed the request for reduction of sentence on the ground that the appellant a Pesh Namaz, committing such a heinous offence, does not deserve leniency, particularly when the victim was partly deformed.

9. My observations after hearing the parties and scanning the record of the case are as follows:-

i. That the impugned judgment is well reasoned and nothing objectionable has been pointed out by the learned counsel for the appellant.

ii. The objection that DNA test alone is not sufficient to record conviction is not valid. In this case the victim categorically alleged rape at the trial and she had conceived as a consequence of the illegal sexual intercourse. She gave birth to twins. Her allegation was duly supported by DNA report which confirmed that victim and accused were the biological parents of the twins. In judicial history even the solitary statement of a victim has, in a number of cases, become the basis of conviction. In this case we have the corroborative evidence by way of DNA test as well. The

statement of victim, on the question of rape and evidence regarding delivery of twins, was not challenged by the appellant in the cross-examination.

iii. The case of Muhammad Azhar Versus The State relied upon by the learned counsel for the appellant does not advance his case. This case, decided by the learned Single Judge of the Lahore High Court on a bail application, dealt with a situation where the husband had lodged a complaint against his wife alleging that the child born out of the wedlock was the result of zina. The complainant had produced report from the laboratory in support of his contention. The accused was consequently admitted to post arrest bail.

In this case the learned single Judge of the Lahore High Court found that:

“Offence of Zina is specific to the Islamic Jurisprudence and lays down the standard of proof, the rationale behind the standard of proof, and the punishment..... so, amongst the standard of proof, there is a requirement of four witnesses because of its nexus with the rationale and not otherwise”.

The learned Judge also found that:

“The DNA test may be an important piece of evidence for a husband to establish an allegation of Zina against his wife and use this as a support justifying the taking of the oath as ordained by Sura Al-Noor, which leads to the consequences

of breaking the marriage. The DNA test may further help in establishing the legitimacy of a child for several other purposes. Therefore, its utility and evidentiary value is acceptable but not in a case falling under the penal provisions of Zina punishable under the Hudood Laws having its own standard of proof”.

It is stated with respect that the proof of Zina liable to Hadd is provided in Section 8 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 but section 10 ibid states that whoever commits Zina or Zina-bil-Jabar which is not liable to Hadd, or for which proof in either of the forms mentioned in Section 8 is not available such an offence shall liable to Tazir. It is therefore clear that in case of Tazir there is no prescribed standard of proof as stipulated in section 8 ibid either by way of a confession or proving the allegation through the statement of four Muslim adult male witnesses about whom the Court is satisfied, having regard to the requirement of Tazkiah-al-Shahood, that they are truthful persons and abstain from major sins. In this view of the matter evidence other than the proof prescribed by section 8 ibid can be brought on record and can legitimately become basis of conviction. Moreover the learned Single Judge was persuaded by the fact that the allegation in the case of Muhammad Azhar Versus The State was levelled by

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the husband against his wife and that was the reason that the learned Single Judge referred to Verse 6 through 9 of Sura Al-Noor of the Holy Quran. That is not the position in the appeal under consideration. Needless to add that under Article 164 of the Qanoon-e-Shahadat Order, 1984 the Court can always consider any evidence that may have become available because of modern devices or techniques. Learned Single Judge has very rightly stated that “ Islam was not opposed to science and its achievements. In fact it encourages pursuit of knowledge and research and the DNA test, which forms an important basis for determining genetically about a biological paternity of the child and consequently it has a place in evidence.”

iv. The objection that the victim was not taken to the laboratory for medical test has no force for the simple reason that only the paternity of the appellant qua the twins had to be established. The victim, the mother had already given birth to the twins. Her maternity was not in doubt at all nor was the birth of twins challenged. The blood samples of the victim were duly sent to the laboratory. It was only the blood/skin samples of the new born babies that had to be matched with the DNA profile of appellant.

v. The objection that victim was not able to identify the appellant is also without force because she did identify the appellant before the trial court. No question was put to the victim during cross-examination as regards her role in the identification parade of the appellant. It is in the evidence of PW.14 that the victim succeeded in identifying the appellant in the second round of the identification parade.

vi. The objection that the victim should also have been prosecuted is no reason to annul the conviction recorded against the appellant. The case originally was recorded under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and not under section 10(2) *ibid*. The victim was therefore not prosecuted as the allegation was of Zina bil Jabr and not Zina bil Raza.

vii. That the element of enmity as canvassed by learned counsel for the appellant is not available on file. Proof of alleged civil litigation between the parties has not been brought on record. The proof of pending litigation or even decided cases is not at all difficult to obtain. Attested copies can be obtained and produced at the trial in support of the contention regarding

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enmity. It was not done. The objection that there was enmity between parties is therefore baseless.

viii. The appellant in his statement on oath on the one had contended that the prosecutrix was an insane woman who would roam about in the village aimlessly but in the same breath the appellant stated that she was incited to lodge a false case against him. The prosecutrix did appear as P.W.15. Her statement was recorded and she was subjected to cross-examination as well. The learned trial court did not record any finding that the prosecutrix was insane. The appellant did not cross-examine her on the point of sanity. In fact, as stated above, the appellant had also not challenged the allegation of zina-bil-jabr or the consequent pregnancy and the birth of twin. It is by now established that facts deposed to in examination-in-chief but not questioned in cross-examination will be deemed to have been accepted by the parties against whom it was given. In other words unchallenged portion of the statement of a witness which is material to the controversy has to be given full credit particularly when it is not displaced by reliable evidence. In this connection reference may be made to the

by reliable evidence. In this connection reference may be made to the following cases:-

- a. Syed Iqbal Hussain Versus Mst. Sarwari Begum PLD 1967 page 1138(at page 1146)B
- b/ Qamaruddin through his Legal Heirs Versus Hakim Mahmood Khan 1988 SCMR 819 (at page 823)B
- c/ Mst. Nur Jehan Begum through Legal Representatives Versus Syed Mujtaba Ali Naqvi 1991 SCMR 2300 (at page 2303) B
- d/ Bashir Ahmad Versus Muhammad Luqman 2000 YLR 326 (at page 330)A
- e/ Kabool Khan Versus Shamoon through represented and others PLJ 2002 Lahore 425 (at page 432)C.
- ix. The last contention of the learned counsel for the appellant

regarding reduction of sentence does not apply in the facts and circumstances of this case. The appellant is sexually potent. He is incharge of the village mosque. Such a person does not deserve leniency at all. A

Persian complete reflects this situation:

مرد چوں پیر شود حرص جوان می گردد
قبحه چوں پیر شود پیشه کند دلا لی -

Lust grows stronger as males advance in age,

And an aging prostitute turns into a procurer.

10. The upshot of the above discussion is that this appeal fails. The conviction and sentence of the appellant as awarded by the learned trial court is maintained. Benefit of section 382-B of the Code of Criminal Procedure shall however remain intact.

JUSTICE SYED AFZAL HAIDER

Announced in open Court
on 28-01-2010 at Islamabad
*Mujeeb ur Rehman/**

Fit for reporting

JUSTICE SYED AFZAL HAIDER