

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE HAZIQUIL KHAIRI, CHIEF JUSTICE.

CRIMINAL APPEAL NO.38/K OF 2006

Mst. Roshan Bibi wife of Allah Dino Shaikh,
Presently confined in Special Prison for Women,
Karachi. Appellant.

Versus

The State. Respondent.

JAIL CRIMINAL NO.39/K OF 2006

Anwar son of Dilshad,
Presently confined in Central Prison,
Karachi. Appellant.

Versus

The State Respondent.

For appellant Miss Saleha Naeem Ghazala,
Mst. Roshan Bibi Advocate.

For appellant Mr. Abdul Rauf Kasuri,
Anwar Advocate.

For the State Mr. Agha Zafir Ali,
A.A.G

No. & date of F.I.R ... No.146/2003, 11-06-2003
Police Station P.S. Baghdadi, Karachi.

Date of order of ... 20-07-2006
trial court

Date of Institution ... 12-08-2006

Date of hearing ... 05-01-2007

Date of decision ... 08-02-2007

JUDGMENT:

HAZIQUL KHAIRI, CHIEF JUSTICE.— By this judgment I will dispose of criminal appeal No.39/K of 2006 filed by appellant Mst. Roshan Bibi and jail criminal appeal No.38/K of 2006 filed by Anwar who were aggrieved by judgment dated 20.7.2006 passed by the learned VII Additional Sessions Judge, Karachi (South) whereby both the appellants were convicted under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as “the said Ordinance”) and sentenced to undergo ten years R.I. each with thirty stripes and fine of Rs.50000/- each or in default thereof to further suffer three months S.I. each, extending the benefit under section 382-B Cr.P.C.

2. Facts as recorded in the impugned judgments are that on 11.6.2003 complainant Ali Dino Sheikh lodged an F.I.R. disclosing therein that his cousin Anwar, appellant herein, used to visit his house and had developed illicit relations between his wife the appellant Mst. Roshan Bibi. He, therefore, stopped Anwar from visiting his

house, which resulted into a quarrel between complainant and his wife. According to the complainant on 5.6.2003 at about 4.00 p.m. when he returned home, he did not find his wife in the house and on inquiry his daughter informed him that from 11.00 a.m. she went along with appellant Anwar for getting medicine. The complainant then searched for his wife but to no result and ultimately he reported the matter to police showing his suspicion over his cousin Anwar for kidnapping and enticing away his wife Mst. Roshan Bibi with intention to commit zina with her.

3. Pursuant to the registration of F.I.R., investigation was entrusted to Inspector Saifullah Khan Niazi, who visited the place of incident on the pointation of complainant and prepared memo of site inspection and also recorded the statements of the eye witnesses, namely, Abdul Khaliq son of Abdullah, Mst. Sakina wife of Abdul Khaliq and Ghulam Mustafa son of Karim Bux. He also recorded the further statement of the complainant under section 161 Cr.P.C. During investigation on 12.6.2003 the Investigating Officer arrested

12/6

appellant Anwar from Mauripur Road, near Crown Cinema on the pointation of the complainant and recovered the abductee Mst. Roshan Bibi from his possession. He got them examined medically through MLO. On 16.6.2003 the Investigating Officer produced the abductee before the Court of Judicial Magistrate-VIII, Karachi South and got her statement recorded under section 164 Cr.P.C. in the presence of appellant Anwar, wherein she disclosed that she lived with him for six days as husband and wife during which period they committed zina with mutual consent. After recording the statement of Mst. Roshan Bibi, the Investigating Officer arrested her on the same day. He also seized the clothes of both the appellants and sent the same for chemical analysis. After recording the statements of the witnesses under section 161 Cr.P.C. and completing the other legal formalities, he submitted challan in the competent Court of law, having jurisdiction for trial of the appellants.

4. Copies as required under section 265-C, Cr.P.C. were supplied to the appellants on 6.9.2003 and charge against them was

framed on 13.12.2003 to which they both pleaded not guilty and claimed to be tried.

5. The prosecution in order to prove its case examined PW.1 Ghulam Mustafa son of Karim Bux at Ex.5, who produced memo of site inspection at Ex. 5/A. PW.2. Ali Dino son of Ameer Bux (complainant) was examined at Ex.6, who produced FIR at Ex.6/A, memo of arrest of accused Anwar and recovery of abductee at Ex.6/B. PW.3 Pervez son of Bashir Ahmed was examined at Ex.7. PW.4 Abdul Khaliq son of Abdullah at Ex.8. PW.5 Dr. Zareena Bhutto wife of Mumtaz at Ex.9, who examined accused Mst. Roshan Bibi and produced M.L. Certificate No.59/2003 of accused Roshan Bibi at Ex.9/A. PW.6 ASI Farhat Abbas was examined at Ex.10, who produced Roznamcha entry No.27 dated 11.6.2003 at Ex.10/A. PW.7 Dr. Qarar Ahmed son of Deen Muhammad, MLO Civil Hospital was examined at Ex.11, who examined appellant Anwar on the point of potency as active agent and produced M.L. and certificate No.2450/2003 at Ex.11/A. PW.8 HC Muhammad Khan was

examined at Ex.12, who produced memo of seizure of clothes of appellant Anwar at Ex.12/A, memo of seizure of clothes of appellant Mst. Roshan Bibi at Ex.12/B. Vide statement Ex.13, the learned DDA gave up PWs. LPC Yasmin Tahir and PC Abdul Rasheed. PW.9 PC Naheed Anjum was examined at Ex.14 and stated that when she was staying outside the Court she heard that accused . She produced memo of arrest of appellant Mst. Roshan Bibi at Ex.14/A. Vide statement Ex.15 the learned DDA gave up PW PC Akhter Ali. PW.10 Khairunnisa daughter of Ali Dino was examined at Ex.16. PW.11 Mst Sakina wife of Abdul Khaliq at Ex.17, PW.12 Dr. Jalil Qadir, Chemical Examiner, Karachi at Ex.18, who produced chemical report at Ex.18/A. PW. 13 Anwar-ul-Hasan Siddiqui, the then Judicial Magistrate-VIII, Karachi South was examined at Ex.19, who produced request application of I.O. dated 13.06.2003 seeking permission to record the statement of abductee Mst. Roshan Bibi at Ex.19/A, notices served upon the accused under section 160, Cr.P.C. at Ex.19/B and 19/C, statement of Mst. Roshan Bibi under section

164, Cr.P.C. at Ex.19/D. PW.14 Inspector Saifullah Khan Niazi (Investigating Officer) was examined at Ex.20. Vide statement Ex.21, the learned DDA closed the prosecution side on 22.04.2003.

6. Prosecution examined as many as 14 witnesses. Statements of appellants Anwar and Mst. Roshan Bibi under Section 342, Cr.P.C. were recorded wherein they denied the commission of offence and pleaded their innocence. However, both the accused have not adduced any witness in their defence, but examined themselves on oath under section 340(2), Cr.P.C.

7. PW.1 Ghulam Mustafa in his deposition has stated that Mst. Roshan Bibi, the appellant, is his mother-in-law. He supported the version of Allah Deeno, the complainant, adding that he enquired from the brother of appellant Anwar, namely Ahsan Bhatti on telephone about the whereabouts of his brother and was told that he did not come to his house.

8. PW.2 Allah Deeno, the complainant, in his deposition reiterated what he had stated in his F.I.R., adding further that

appellant Mst. Roshan Bibi obtained loan from Abdul Khaliq and that the police had informed him that appellants Anwar and Mst. Roshan Bibi were standing near Crown Cinema where he found both of them later on.

PW.10 Khairunnisa, age 12 years deposed that appellant Roshan Bibi is her mother. On 11-6-2003, her mother told her that she will go to the house of Mst. Sakina (wife of PW.4 Abdul Khaliq) to take money and buy medicine. According to her appellant Anwar was a regular visitor to her house and came to her house to collect clothes of her mother.

9. PW.3 Parvez is the paternal cousin of complainant Allah Deeno. He came to know through the complainant that appellant Anwar had abducted his wife Mst. Roshan Bibi and both of them went to the house of Abdul Khaliq and obtained Rs.500/- from him. According to him, Bashir the nephew of appellant Anwar, came to his house and informed him that the appellants were available at Mari Pur Road whereupon he went to Police Station. He along with Bashir

escorted the police and on their pointation the appellants were arrested.

10. PW.4 Abdul Khaliq and PW.11 Mst. Sakina both stated that the complainant as well as the appellants are their relatives. On 5.6.2003, appellant Mst. Roshan Bibi came to their house along with his daughter and obtained Rs.500/- as loan. She left their house along with her daughter.

According to PW.9, she alongwith Inspector Saifullah Khan Niazi and PC Akhtar produced both the appellants in the court. While she was standing outside she heard Roshan Bibi telling the court that she and appellant Anwar were living together as husband and wife for 4-5 days.

PW.5 Dr. Zarina Bhutto who had examined appellant Mst. Roshan Bibi had stated that she had handed over the chemical analyst to the Investigating Officer. She found nothing incriminating against appellant Mst. Roshan Bibi. PW.6 Farhat Abbas, ASI was posted at Police Station, Baghdadi where he came to know that the

complainant's wife had not returned back to the house and was missing. He made entry in Roznamcha Register and recorded F.I.R. PW. 7 Dr. Qamar Ahmed examined appellant Anwar and found him potent. PW.8 Muhammad Khan arrested the appellants from Mari Pur Road. According to PW.12 Dr. Jalil Qadir, Chemical Examiner, the shalwar kamiz of both the appellants were analyzed by him and he did not detect human sperms in any of them. PW.13 Anwarul Haq Siddiqui, Judicial Magistrate recorded the statement of appellant Roshan Bibi under section 164 Cr.P.C.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100

PW Saifullah Khan, Investigating Officer stated that he received spy information on the basis of which he arrested both the appellants from Crown Plaza on 12-6-2003. The statement of PW.8 Muhammad Khan, HC is the same as regards the appellants's arrest.

What emerges from the evidence on record is that Mst. Roshan Bibi left her house along with his daughter and went to the house of PW.4 and obtained Rs.500/- as loan from him for purchase of medicine. It is also established that appellant Anwar was on

visiting terms with the complainant and is his relative. He was seen with appellant Mst. Roshan Bibi near Crown Cinema at Mari Pur Road and both were arrested there. Except the confessional statement of Mst. Roshan Bibi under section 164 Cr.P.C. before the Magistrate which was retracted by her, there is no other evidence on record that they committed Zina or that both of them lived together anywhere. Appellant Anwar was found potent vide PW.7 Dr. Qamar Ahmed and as per the report of PW.12 Dr. Jalil Qadir, Chemical Analyst, no human sperms were found in the clothes of the appellants.

13. It is a settled position that the confession of a co-accused under section 164 Cr.P.C. is no evidence, more so when it is retracted (*State Vs. Asfand Yar Wali and two others 1982 SCMR 321*). Even in every case of judicial confession u/s 164 Cr.P.C. it is to be seen if it was made by an accused person voluntarily and free from any pressure or fear and that all the requirements of law have been complied with by the Magistrate. In case of doubt or non-compliance of legal requirements or where evidence on record is found to be

contrary or not in line with the admission of guilt, far greater care has to be taken by the Courts. What is borne out from the record is that Mst. Roshan Bibi had left her house with her minor daughter on 5-6-2003 and obtained loan of Rs.500/- from PW.4 Abdul Khaliq. According to PW.4 she had come to him alone. However, when she was arrested she was in the company of appellant Anwar at Maripur Road. There is no evidence that she stayed anywhere with Anwar who was on visiting terms to her family and otherwise their relation. Only the complainant Ali Dino Sheikh suspected that they had developed illicit relation. No one had seen them committing zina. PW.12 Dr. Jalil Qadir, Chemical Examiner did not find any human sperms in their shalwar kamiz. In her statement under section 342 Cr.P.C. she stated that her husband is a greedy person and always demanded money from her and offered to examine herself on oath in which it was stated by her

“On the day of my arrest I was sitting with some ladies alongwith my children where police came and arrested me. The police has taken

Rs.4000/- from my maternal cousin PW Sakeena with the assurance that they will release me soon. The police has misbehaved with me and used filthy language. In reply I also used the same language with the police due to this reason they have booked me in this false case. I am innocent and the police has involved me in false case in connivance of my husband/complainant. I did not commit any offence. I have left the house of the complainant with my own wish and started to reside with my relatives as my husband was used to maltreat me and because of his attitude I became fed-up and left his house. I pray for justice.”

According to appellant Anwar:-

“I am innocent. I have booked in a false case. I was labour by profession. The complainant Ali Dino has engaged his daughter with me. I use to reside in his house and supported complainant’s family. Later on the complainant engaged his daughter to another person PW Pervaiz and due to this reason the complainant has booked me in the instant case. The complainant is my real maternal cousin and falsely involved me with co-accused Mst. Roshan. I am poor person and pray for justice.”

Miss Saleh Naeem Ghazala, learned counsel for the appellant argued that in the present case, appellant Roshan Bibi implicated herself as well as appellant Anwar of Zina by way of her

confession u/s 164 Cr.P.C. but she retracted from it afterwards, therefore, it is all the more necessary to prove beyond any shadow of doubt the accusation of Zina against them from other evidence on record. There is **none**. In Bhuboni Sahu-Vs-The King PLD 1949, it was held:-

“A confession of a co-accused does not indeed come within the definition of evidence contained in section 3 (Evidence Act). It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence on an approver which is not subject to any of these infirmities. Section 30, however, provides that the Court may take the confession into consideration and thereby, no doubt, makes it evidence on which the Court may act; but the section does not say that the confession is to amount to proof. Clearly, there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence. The confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction.”

In 2006 P.Cr.L.J. 762 and NLR 1999 Criminal 453, it was held that

“Evidentiary value of a retracted confession against a co-accused is

considerably less which requires full corroboration." No where the prosecution was able to establish that appellant Anwar had enticed or taken away or detained Roshan Bibi with intent to commit illicit intercourse. According to PW.10, Khairunnisa, daughter of appellant Roshan Bibi, her mother left the house alone for buying medicine not in the company of Anwar. There is nothing on record that they were living together anywhere. However, they were arrested at Maripur Road, according to complainant, on his pointation but according to PW.3 Parvez, on the pointation of Bashir who had accompanied him and again according to PW.14 Saifullah Khan Niazi, Inspector/I.O. on the basis of spy information. PW.12 Dr. Jalil Qadir in his statement had stated that he did not find any human sperms in their clothes.

Now reverting to the case of appellant Roshan Bibi, there was her confession on record before a Magistrate under section 164 Cr.P.C. which was retracted by her subsequently. No doubt an accused person may be convicted on the basis of judicial confession alone when it is voluntary and true as was held by the Supreme Court

of Pakistan in the case of State-Vs-Minhun, PLD 1964 S.C. 813.

Learned counsel for appellant Roshan Bibi brought to my notice the case of Abdul Jabbar-Vs-The State, 1995 P.Cr. L.J. 159 which speaks of formalities to be observed by the Magistrate before recording judicial confession. All these formalities in fact are legal requirements under section 164 Cr.P.C, which if not complied with by the learned Magistrate loose its credibility. Although PW.13 Anwarul Hassan Siddiqui in his cross-examination has stated that he had fulfilled all the legal requirements as per law but PW.9 Naheed Anjum PC 19721 of Police Station New Town (investigation) in her deposition had stated that she had brought Roshan Bibi and produced her in the court of the said Magistrate. What further she had stated was that she was standing outside the court and heard Roshan Bibi admitting that she had been living with appellant Anwar as husband and wife. The possibility of her watching Roshan Bibi during her confession from outside the court cannot be ruled out and it appears that the learned Magistrate did not take necessary precautionary steps before the

13

statement of Roshan Bibi could be recorded by him. There was neither any eyewitness nor any other corroborative evidence that she committed Zina with appellant Anwar. In fact the chemical report is negative.

Consequently both the appeals are accepted and the impugned judgment dated 20.7.2006 passed by the learned VII Additional Sessions Judge, Karachi (South) is set-aside with direction to jail authorities to release appellants Anwar and Mst. Roshan Bibi forthwith if not required in any other criminal case.

J. H. Khairi
(JUSTICE HAZIQUL KHAIRI)
Chief Justice.

Announced on 8.2.2007
at Karachi.

M.Khalil.

Approved for reporting

J. H. Khairi
8/2/07