

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR.JUSTICE CH. EJAZ YOUSAF CHIEF JUSTICE

MR.JUSTICE DR.FIDA MUHAMMAD KHAN

MR.JUSTICE SAEED-UR-REHMAN FARRUKH

CRIMINAL APPEAL NO.29/L OF 2004 L.W.

Bashir Ahmad son of -- Appellant
Latif Caste Arain, resident
Of 139/9-L, Dera Rahim,
Tehsil and District Sahiwal.

Versus

The State -- Respondent

CRIMINAL APPEAL NO.54/L OF 2004 AND

Mst.Tasneem Akhtar alias -- Appellant
Tasneem Kausar, wife of
Muhammad Hanif, Caste Arain,
Resident of Chak No.139/L,
Tehsil & District Sahiwal.

Versus

The State -- Respondent

CRIMINAL APPEAL NO.39/L OF 2004

Abdul Sattar son of Sajjan -- Appellant
Khan, Caste Kharal, resident of
139/9-L, Tehsil and District,
Sahiwal.

Versus

1. Bashir Ahmad, -- Respondents
2. Mst. Tasneem Akhtar
3. The State

Counsel for appellant Bashir Ahmad -- Mr. Muhammad Inamullah Khan,
Advocate.

Counsel for appellant Tasneem Akhtar -- Mr. Muhammad Arshad Khan,
Advocate

Counsel for appellant Abdul Sattar -- Mr. Shahid Qayyum,
Advocate

Counsel for the State -- Mr. Shawar Khilji,
Advocate.

No. date of FIR and Police station -- 312 dated 30.6.1998
P.S. Dera Rahim.

Date of order of trial Court -- 23.12.2003

Date of institution -- 30.1.2004

Date of hearing -- 25.11.2005

Date of decision -- 25.11.2005

JUDGMENT

CH. EJAZ YOUSAF, CHIEF JUSTICE.- This judgment will dispose of three connected appeals i.e. Criminal Appeal No.29/L of 2004 filed by Bashir Ahmad son of Latif, Criminal Appeal No.54/L of 2004, filed by Mst.Tasneem Akhtar alias Tasneen Kausar wife of Muhammad Hanif Criminal Appeal No.39/L of 2004 filed by Abdul Sattar son of Sajjan Khan as all the three arise out of the same judgment dated 23.12.2003, passed by the learned Additional Sessions Judge, Sahiwal whereby appellants, aforementioned i.e. Bashir Ahmad and Mst..Tasneem Akhtar, were convicted on different counts and sentenced as under:-

<u>Bashir Ahmad</u> under section 10(2) of "the Ordinance"	--	Ten years R.I. and a fine of Rs.50,000/- or in default to further undergo R.I. for two years.
U/s 338-A/109 PPC	--	Three years R.I.
U/s 316/109 PPC	--	Fourteen years R.I. alongwith payment of Diyat.
<u>Mst.Tasneem Akhtar</u> under section 338-A PPC	--	Three years R.I.
Under section 316 PPC	--	Fourteen years R.I. alongwith payment of Diyat.

All the substantive sentences of imprisonment were ordered to run concurrently. Benefit of section 382-B Cr.P.C. was, however, extended to the appellants. Appellant/complainant Abdul Sattar has assailed the impugned judgment, for setting aside the above acquittal of respondent No.3 i.e. Mst.Parveen alias Peeno wife of Haji Shafique from the case and acquittal of respondents/appellants No.1 and 2 i.e. Bashir Ahmad and Mst.Tasneem Akhtar from the charge under section 302 PPC.

2. Facts of the case, in brief, are that on 17.2.1998 report was lodged by one Abdul Sattar son of Sajjan Khan with Abdul Wasay, S.I. of police station Dera Rahim wherein, it was alleged that the complainant was resident of Chak No.139/9-L and was doing labour in Lahore. Four/five days ago, Muhammad Hanif son of Fatch Muhammad informed him about the death of her daughter namely, Sajida Parveen, whereupon the complainant rushed to his village where, his wife namely, Mst.Majeedan Bibi told him that Bashir Ahmad had illicit relations with the deceased. Resultantly, Sajida

Parveen became pregnant. Since she was unmarried, therefore, said

Bashir Ahmad and his sister namely, Parveen alias Peena, in order to

get rid of the pregnancy, took her to a 'dai' of the village namely,

Kausar Parveen and in the process of abortion said Sajida Parveen

died. On the stated allegation complaint, Exh. PA, was written and

sent to police station for formal registration of the case. On the basis

thereof, FIR bearing No.312/98 dated 20-6-1998 was registered under

section 10 of "the Ordinance" and section 338-C PPC at the said

police station and investigation was carried out in pursuance thereof.

On the completion of investigation the accused persons were

challaned to the Court for trial.

3. At the trial, the prosecution in order to prove the charge and

substantiate the allegation leveled against the accused persons

produced 11 witnesses, in all. P.W.1 Majeedan Bibi is mother of the

deceased. She, at the trial, deposed that on the fateful day, she was

present alongwith the deceased in her house. At about 11.00 a.m.

Mst.Parveen alias Peena, sister of Bashir Ahmad came to their house

while Bashir Ahmad remained standing outside the house. Parveen took her daughter Sajida away on some pretext. At about 2/3 p.m. her daughter came back. She was in serious condition. On the query made, she disclosed that Bashir Ahmad had been committing zina with her, as a result whereof she became pregnant, she was taken to Mst.Tasneem Kausar 'dai' by said Bashir Ahmad and Mst.Parveen alias Peeno, who administered her a "drip" and also gave her some medicine, due to which, her condition became serious. Her daughter Mst.Parveen expired at 4.00 p.m. on the same day. She was unmarried. P.W.2 Abdul Sattar is the complainant. He, at the trial, while reiterating the version contained in the FIR corroborated the statement of P.W.1 in all material particulars. P.W.3 Dr.Ejaz Qutab had on 11.3.1999 examined appellant Bashir Ahmad qua the potency test. He produced in Court the MLR as Ehx.PB. P.W.4 Zahid Iqbal was on 31.3.1998 posted on general duty at the said police station. On the same day he participated in exhumation proceedings in the graveyard of Chak No.139/9-L, in the presence of Ilaqa Magistrate as

well as the lady doctor. He deposed that after conducting postmortem on the dead body of the deceased Mst.Sajida Parveen, two sealed parcels were handed over to him which in turn were handed over to Abdul Sattar Muharrir by him on the same day for keeping in safe custody. He further stated that on 3.4.1998 Abdul Sattar Moharrar handed over to him the said parcels for delivery of one in the office of the Chemical Examiner, Lahore and the other to the Pathologist for analysis, intact. P.W.5 Akhtar Nawaz, ASI, had incorporated contents of complaint, Exh.PA, into the formal FIR i.e. Exh.PA/1. P.W.6 Noor Muhammad, S.I. had taken the appellant Bashir Ahmad for medical examination. P.W.7 Hamand Ali deposed that on production of the Chemical Examiner,s report by the complainant, he had sent the complaint, Exh.PA through note Exh.PA/1 to the police station for formal registration of the FIR. P.W.8 Abdul Sattar, Moharrir had kept in safe custody the sealed parcels before handing the same over to Zahid Iqbal P.W.4 for its onward transmission to the office of the Chemical Examiner. P.W.9 Abdul Basit, SHO had, on 17.2.1998, on

receipt of the statement of the complainant, drafted Rapat No.28. He produced in Court a copy thereof as Exh.PA. P.W.10 Abdur Rehman, ASI is the Investigating Officer of the case. P.W.11 lady doctor Shagufta Waseem had conducted postmortem examination on the dead body of the deceased. She produced the postmortem report as Exh.PC. In her opinion, death of the deceased was due to induced septic abortion leading to rupture of uterus which led to severe hemorrhage and shock and it was sufficient to cause death in ordinary course of nature.

4. After the close of the prosecution evidence Farooq Ahmad Khan and Muhammad Ilyas Inspectors were summoned as CWs. Both deposed that as a result of the investigation conducted by them Mst.Parveen alias Peena was found innocent whereas, Bashir Ahmad and Mst.Tasneem Kausar accused persons were found guilty. Thereafter the accused persons were examined under section 342 Cr.P.C. In their above statements all the accused persons denied the charge and pleaded innocence. They, however, failed to lead any

evidence in their defence or to appear themselves as their own witnesses in terms of section 340(2) Cr.P.C. In answer to the question as to why the case and the PWs have deposed against him Bashir Ahmad accused stated that it was a false case. The story was concocted by the complainant in order to humiliate him and his family members on account of previous enmity and civil litigation as he i.e. the said accused was a witness in the pronote against the complainant which afterwards was decreed against the complainant. Bashir Ahmad, however, tendered in evidence certain documents pertaining to the said case as Exhs.D.1 to D-6. Mst.Tasneem Kausar also tendered in Court a copy of the order of the District and Sessions Judge i.e. Exh.D-1.

5. After hearing arguments of the learned counsel for the parties, the learned trial Judge convicted the appellants and sentenced them to the punishments as mentioned in the opening para hereof.

6. We have heard Mr.Muhammad Inamullah Khan, Advocate, learned counsel for appellant Bashir Ahmad in Criminal Appeal

No.29/L of 2004, Mr.Muhammad Arshad Khan, Advocate, for
appellant Mst.Tasneem Akhtar in Criminal Appeal No.54/L of 2004,

Mr.Shahid Qayyum, Advocate, learned counsel for

appellant-complainant Abdul Sattar, Mr.Shawar Khilji, Advocate,

learned counsel for the State and have also perused the entire record

with their assistance, carefully.

7. Mr. Muhammad Inamullah Khan, Advocate, learned counsel for

appellant Bashir Ahmad has contended that conviction against the

appellant could not have been recorded merely on the basis of dying

declaration of the deceased. account whereof was furnished by her

mother i.e. Mst.Misjoodan Bibi P.W.1 as she was an "interested

witness"; that unexplained delay in lodging the FIR was fatal to the

prosecution case and that; since no body had seen Bashir Ahmad

appellant committing zina with the deceased, therefore, he could not

have been convicted under section 10(2) of "the Ordinance".

8. Mr.Muhammad Arshad Khan, Advocate, learned counsel for

appellant Mst.Tasneem Kausar, has, contended that since no body, at

the trial, was produced to testify that "Asqat-e-Hamal" was on account of the treatment of the deceased by Mst.Tasneem Kausar, therefore, she could not have been convicted for the offence.

9. Mr.Shahid Qayyum, Advocate, learned counsel appearing for the appellant/complainant, on the other hand, while controverting the contentions raised by the learned counsel for the appellants submitted that since sufficient evidence in the shape of dying declaration, the medical evidence and Chemical Examiner's report, was available to substantiate the charge therefore, the appellants were rightly convicted for the offence. He maintained that since it was a case of qatl-e-amd, therefore, the appellants may be convicted under section 302 PPC instead of section 316 PPC.

10. Mr.Shawar Khilji, Advocate, learned counsel for the State while adopting the arguments of the learned counsel for the appellant/complainant submitted that since guilt of the appellants was substantially and materially brought home, at the trial, through independent and reliable evidence and sufficient corroboratory

evidence, to the dying declaration, was available, therefore, the

impugned judgment was un-exceptionable. He added that delay in

lodging the FIR was not fatal because at the time of the death of the

deceased husband of the complainant was away to Lahore and

Mst.Majeedan Bibi being a illiterate and poor lady could not have

decided to lodge FIR of her own without consulting him and no

sooner he came back then report was lodged. Hence, the delay in

lodging the FIR was immaterial.

11. We have given our anxious consideration to the respective

contentions of the learned counsel for the parties. The prosecution

case rests on the dying declaration, the medical evidence; the

Chemical Examiner's report and the Pathologist's report.

It would be pertinent to mention here that a dying declaration

which is the statement of fact by the victim concerning the cause and

circumstances of the homicide is admissible as a relevant piece of

evidence under Article 46 of the Qanun-e-Shahadat Order, 1984. It is

an exception to the general rule that hearsay evidence is not

admissible and principle of this exception partially rests on the awful situation and distressing condition of the dying person, which is considered to be as powerful over his conscience as the obligation of an oath and partially on the assumption that the person on the verge of next word, when every motive to falsehood is silenced, would hardly involve an innocent person. However, in order to test reliability of the dying declaration certain factors such as, whether the witness testifying the dying declaration himself had an opportunity to come across the deceased and was capable to recapitulate correctly what was narrated to him, whether narration of the deceased was free from prompting from any quarter, whether the maker had an opportunity to himself see and correctly recognize the assailant, whether the maker had the physical capacity to make the dying declaration; whether it related to the cause of death or the circumstances culminating therein, whether it was influenced, whether it was made to the person whose presence near the deceased, at the alleged time and place, was possible and whether at all it rings true, may be taken into account.

It is also well-settled that dying declaration once proved through reliable evidence becomes substantive evidence itself and can be made sole basis for conviction and corroboration thereof is sought for as a matter of prudence only. This view receives support from the following reported judgments:-

- 1) Zafar Iqbal alias Shahid Vs. The State PLD 2004 SC 367;
- 2) Javed Khan Vs. The State 2002 P.Crl.L.J. 1798;
- 3) Farman Ullah Vs. Qadeem Khan and others 2001 SCMR 1474;
- 4) Zarif Khan Vs. The State PLD 1977 SC 612;
- 5) Ashiq Vs. The State 1970 P.Crl.L.J. 373;
- 6) Tawaib Khan and another Vs. The State PLD 1970 SC 13; and
- 7) Abdul Raziq Vs. The State PLD 1965 SC 151.

12. In the instant case, the dying declaration is alleged to have been made to P.W.1 who happens to be the mother of the deceased. The defence has neither disputed P.W.1's presence in the house wherein the deceased breathed her last nor the fact that she met the deceased prior to her death has been challenged. Hence, her presence, at the place and time of making the declaration, cannot be doubted. Likewise, it has also not been challenged by the defence that

deceased, at the relevant time, was not in a position to make any statement or her faculties were impaired nor it is the defence plea that the cause of death is not the same as alleged nor is it a case of substitution of the accused. The only objection raised by the learned counsel for the appellant is that since account of the dying declaration was given by mother of the deceased who was an "interested witness", therefore, the learned trial Judge has erred in believing the same.

We are afraid the above argument advanced by the learned counsel for the appellants cannot prevail for the simple reason that though P.W.1 being mother of the deceased was closely related to her yet, she by no stretch of imagination can be termed as an "interested witness" because interested witness is one who has, of his own, a motive to falsely implicate the accused, is partisan, biased or prejudiced and predisposed towards a party or prompted and swayed away by a cause against the accused and nothing of the sort has been brought on record against P.W.1. Rather she was trying to conceal the crime. In her statement, she has admitted that she, a month prior to

the occurrence, herself had seen the male appellant committing zina with the deceased, despite that she kept quiet and did not disclose the commission of zina by Bashir Ahmad to any one else as according to her she did not want it make known to the public.

It may be noted here that relationship, in itself, is not a yardstick or standard for discarding evidence which otherwise is trustworthy.

It would also be not out of place to mention here that related witnesses some time, particularly in murder cases, may be found more reliable because they due to their relationship with the deceased would not let go the real culprit or substitute an innocent person for him. It is quite possible that in a case, in which, a number of accused persons are involved and there is previous enmity between the parties as well, a wider net might have been thrown but in the case of a single accused, relatives of the deceased would rarely replace or spare the culprit actually responsible for the crime. Reference, in this regard, can be made to the following authorities:-

- i) Muhammad Din and others Vs. The State and others 2005 SCMR 1756;
- ii) Noor Muhammad Vs. The State and another 2005 SCMR 1958;
- iii) Sher Dil Vs. The State and another 2003 SD 35;
- iv) Farmamullah Vs. Qadeem Khan and another 2001 SCMR 1474;
- v) Sarfraz alias Sapi and two others Vs. The State NLR 2001 Criminal 5;
- vi) Abdul Ghafoor Vs. The State 2000 SCMR 919;
and
- vii) Muhammad Sarwar Vs. The State 1999 SCMR 2428.

What to speak of related witnesses, it has been, in a number of cases, held that testimony of an interested witness even, cannot be brushed aside unless it is proved that the witness had involved the accused for some ulterior motive and in case of interested witness only as a rule of prudence and not as a rule of law, the Courts have emphasized that testimony of the witness may be evaluated with more than ordinary care and corroboration may be sought from other evidence. The contention therefore, has no force.

In the instant case the dying declaration finds sufficient corroboration from the other evidence. Lady Dr. Shagufta Waseem

who, after exhumation, had conducted post mortem on the dead body, was of the firm opinion that death in the case was due to induced septic abortion leading to rupture of uterus which led to severe hemorrhage and shock and it was sufficient to cause death in ordinary course of nature. She further opined that ergot might have been given for abortion. During cross-examination, she stated that yellow colour material present around the abdomen of the dead body of Mst. Sajida was due to peritonitis, septicemia and bile and meconium of foetus. She further stated that administration of ergot alkaloids, in second and third trimester of pregnancy, is fatal hence, the medical evidence fully corroborates the prosecution case qua the pregnancy, abortion and death of the deceased due to abortion whereas, the Chemical Examiner's report lends further support to the prosecution case.

12. Adverting to the next contention of the learned counsel for the appellants that un-explained delay in lodging the FIR was fatal towards the prosecution case, it may be noted here that the contention appears to have been raised, perhaps, under some misconception

because in the FIR itself, it has been mentioned that since complainant was away to Lahore where he used to do labour and no sooner he, 4/5 days prior to lodging of the report, received information regarding the death of her daughter Muhammad Hanif then he rushed to his village, enquired about the cause of her death and having found that it was on account of zina committed by Bashir Ahmad which ultimately led to miscarriage and death of her daughter lodge the report, therefore, it cannot be said that the delay in lodging the FIR was not explained. It is, however, entirely a different matter that the explanation offered, in this regard, otherwise was satisfactory or not. Since the explanation offered by the complainant has been found quite satisfactory by the trial Court, therefore, in the absence of any enmity or motive to falsely implicate the appellant in the offence by the complainant, we are also not inclined to take a different view because in cases of zina, in which honour of the victim is always at stake, delay in lodging the FIR is not of much consequence as people are normally hesitant to make public the charge which is equally shameful for the victim and her family.

Some times it may be due to anguish or shock. The dictum contained

in the following reported judgments would hold up the above view:-

- (i) Muhammad Ashraf vs. Tahir alias Billo and another PLJ 2005 SC 724;
- (ii) Zahoor Ahmad Vs. The State 1995 SCMR 1338;
- (iii) Ajaib alias Ajba and other Vs. The State 1994 SCMR 1479;
- (iv) Said Bahadur Shah and others Vs. The State 2000 P.Cr.L.J.850;
- (v) Mulazam Hussain vs. The State 1998 SCMR 1206
- (vi) Mehboob Ahmad Vs. The State 1999 SCMR 1102;
- (vii) Zafran Bibi vs. The State 2003 SD 352;
- (viii) Zar Bahadur vs. The State – 1978 SCMR 136
- (ix) Abdul Ghaffar and another vs. The State – 1987 P.Cr.L.J 2127
- (x) Mubarak Ali and another vs. the State – PLD 1984 FSC 55; and
- (xi) Saleem Khan and others vs. The State and others – 2001 P.Cr.L.J 503.

14. As regards the next contention of the learned counsel for appellant Bashir Ahmad that since no body had seen him committing zina with the deceased, therefore, the said appellant, could not have been convicted under section 10(2) of “the Ordinance”, it may be pointed out that this contention too, on its face, appears to be devoid of force because it has come on record through the statement of

Mst.Majeedan Bibi that she herself had seen the appellant committing zina with the deceased.

15. As regards involvement of Mst.~~Tasneem~~ Kausar in the offence, though Mr.Muhammad Arshad Khan, learned counsel for the said appellant has tried to canvass that since no body, at the trial, was produced to testify that "Asqat-e-Hamal" was on account of the treatment of the deceased by Mst.Tasneem Kausar, therefore, she could not have been convicted for the offence yet, we are afraid in view of the medical evidence as well as Chemical Examiner's report, this contention too, appears to have no force in it. It has been proved on record that death of Mst. Sajida Parveen, in the instant case, was due to induced septic abortion leading to rupture of uterus which caused peritonitis and septicemia besides meconium of foetus. The lady doctor has categorically opined that rupture of uterus was either due to high doses of ergot or by mechanical abortion. Since the suggestion, that mechanical abortion in this case was a suicidal act was categorically denied by the said doctor, therefore, the only

inference possible to be drawn is that it was either due to administration of high doses of ergot or by mechanical abortion carried out by the female appellant, who, as per dying declaration, had treated the deceased prior to her death. Further, the Chemical Examiner in his report i.e. Exh.PB, too, has specifically stated that ergot was detected in the liver, spleen, kidney, stomach, small and large intestines as well as uterus of the deceased. Hence, keeping in view opinion of the lady doctor that administration of ergot alkaloids in second and third trimester of pregnancy was fatal and the deceased was treated by the appellant with a drip and was also given some medicines, the appellant's involvement in the offence could not have been ruled out.

16. Learned counsel for the appellant in Criminal Appeal No.39/L of 2004 has contended that since the deceased had lost her life due to abortion which was carried out by the female accused at the instance of Bashir Ahmad, therefore, it being a case of qatl-i-Amd instead of Shibh-i-amd convictions recorded against the appellants under section

316 PPC were bad in law. Learned counsel for appellants Bashir

Ahmad and Mst. Tasneem Kausar, on the other hand, have urged that

if the prosecution version, in toto, is believed even then the offence of

qatl-i-amd is not made out against the appellants because their

intention was not to kill her.

Before entering into the proposition it would be advantageous

to have a glance at sections 300 and 315 PPC which provide definition

of qatl-I-amd and shibh-I-amd and read as follows:-

“S.300. Qatl-I-amd: Whoever, with the intention of *causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit qatl-i-Amd.”

S.315. Qatl Shibh-I-amd: Whoever, with intent to *cause harm to the body or mind of any person, causes the death of that or of any other person by means of a weapon or an act *which in the ordinary course of nature is not likely to cause death is said to commit qatl shibh-i-Amd.”

* Underlining is ours.

A bare perusal of both the above provisions, particularly the

under-lined portions thereof, would lead to the inference that main


distinguishing factor between the two is that in case of qatl-i-amd intention of the assailant must be to cause death or such bodily injury which in the ordinary course of nature is "likely to cause death" whereas, in the case of Shibh-i-amd the intention should be to cause such harm to the body or mind of the person which in the ordinary course of nature is "not likely to cause death." Meaning thereby that in case of shibh-I-amd "intention to cause death or cause such bodily injury which in the ordinary course of nature is likely to cause death" must be non-existent.

No doubt, in the instant case, the intention of the appellants might have been to get rid of the pregnancy and in order to achieve the very end the deceased was treated yet, from the evidence it does not appear, to us, that intention of the appellants was definitely to kill the deceased. Further though there cannot be two opinions that the act to destroy the foetus too, was imminently dangerous yet, it cannot be concluded with certainty that death of Sajida Parveen in consequence thereof was certain. This is entirely a separate matter and as ill luck


of the appellants would have it the deceased could not survive. Further though as per opinion of the doctor, treatment of the deceased also led to destruction of foetus yet, on record, it is not proved that foetus in the womb of the deceased had developed sufficiently to respire, so as to be called as a "child", for "whose" "murder none of the appellants have been charged, therefore, this contention too, is without force.

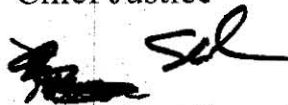
17. The upshot of the above discussion is that all the three connected appeals i.e. Criminal Appeal No.29/L of 2004, Criminal Appeal No.54/L of 2004 and Criminal Appeal No.39/L of 2004 are dismissed.

These are the reasons of our short order of the even date.


(Dr.Fida Muhammad Khan)
Judge

SCL


(Ch.Ejaz Yousaf)
Chief Justice


(Saeed-ur-Rehman Farrukh)
Judge

Lahore, dated the
25th November, 2005
A. RAHMAN/**

FIT FOR REPORTING


CHIEF JUSTICE