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IN THE FEDERAL SHARIAT COURT.
(APPELLATE JURISDICTION)

PRESENT:

Mr.Justice Agha Ali Hyder, Member.

Mr.Justice Sh.Aftab Hussain, Member.

Mr.Justice Karimullah Durrani, Member.

CRIMINAL APPEAL NO.4/R. OF 1980.

Mohammad Rafiq and another. .... Appellants.

Versus

The State. ..... Respondent.

ON APPEAL FROM THE JUDGMENT DATED 19.7.1980, OF THE ADDITIONAL SESSIONS JUDGE, ABBOTTABAD, AT HARIPUR IN CASE NO.4/2 OF 1980 (STATE VERSUS NO.1 MOHAMMAD RAFIQ AND NO.2 MST. MUBARIK JAN).

For the Appellants. .... Sh.Khalid Mahmood, Advocate.

For the State. .... Shabizada Akhtar Munir, Asstt.Advocate General, NWFP.

Dates of hearing: 1st and 10th Nov.'1980:

JUDGMENT:

Karimullah Durrani, J/Member: The appellants, namely (1) Mohammad Rafiq son of Illahi Bakhsh, resident of Talokar and (2) Mst. Mubarik Jan wife of Muhammad Saleem, resident of Ghari Afghan, Tehsil Haripur,District Abbottabad, have come up on appeal from the judgment of Mr.Mohammad Nawaz Khan, Additional Sessions Judge, Abbottabad, at Haripur, dated 19.7.1980, whereby both the accused-appellants were convicted under Section 10(1) of the Offence of Zina (Enforcement of Hadood) Ordinance, 1979 and each sentenced to 10 years R.I. and whipping by 30 stripes and a fine of Rs.1,000/-, or in default of payment of fine further R.I. for one year. In case of realization of fine from the accused appellants, it was to be paid to the sons of

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accused-appellant No.2, Mst. Mubarik Jan.

2. The prosecution alleges that accused-appellant No.2, Mst. Mubarik Jan was legally wedded wife of one Muhammad Saleem, a brother of Abdul Razzaq, PW 5, the informant. The marriage took place about 10/11 years ago. The said appellant has three children from her husband. The husband of the said appellant left Pakistan about 4 years ago. He is now residing in Bahrain, where he earns his livlihood. In the absence of her husband, Mst. Mubarik Jan, accused along-with her children was living with her brother-in-law, Abdul Razzaq, PW 5. On 11.9.1979, Mst. Mubarik Jan left the house after telling her children that she was going to bazar to purchase "chappels" for them. She took her youngest child with her. At the sun set Abdul Razzaq, PW 5 returned to the house and found accused appellant No.2, missing therefrom. He came to know, on inquiry from the children, that she has left the house on her own accord. This witness spent the following 3/4 days in visiting the mother, uncle and other relations of the said accused at different villages in searching for her. None of the relations of the absentee was aware of her whereabouts. On 15.9.1979, PW 2, Abdul Razzaq moved an application to the Assistant Commissioner, Haripur, bringing the disappearnace of his sister-in-law to his notice and seeking assistance from the authorities in her recovery. On 23.10.1979, the informant, Abdul Razzaq came to know that Mohammad Rafiq accused-appellant No.1, had enticed away Mst. Mubarik Jan to Karachi for the purpose of committing illicit sexual intercourse with her and that the two had returned to their village. He lodged a report to this effect in Police Station, Haripur at 17.15 hrs of the same day, which was recorded by Malik Aman Khan, A.S.I.

3. On the same day the said Police Officer was informed by him that the abductee and her paramour were

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on their way to the Police Station. Mohammad Rafiq, accused-appellant No.1, was arrested from the gate of the Police Station, and Mst. Mubarik Jan was also taken into custody as the abductee. On the statement of Mst.Mubarik Jan she was also made an accused of the offence of Zina and as such was also detained. The I.O., on completion of inquiry submitted challan to the Magistrate of the area, who in his turn submitted the challan to the Sessions Judge, in view of the recent amendments brought in the Ordinance VII of 1979. The accused Mohammad Rafiq was charged under Section 11, while Mst. Mubarik Jan accused was charged under Section 5 of the said Ordinance. Both of them denied the charge and were,therefore, put to trial.

4. The evidence against the accused consisted of the statements of PW 1, Ghulam Sarwar, PW 2, Mohammad Mastoor, PW 3, Khan Zada, PW 4, Moazam Shah, S.H.O.,Haripur, PW 5, Abdul Razzaq, the informant, PW 6 Ghulam Muhammad Khan, M.I.C., E.A.C., Haripur,who had recorded the confessional statement of appellant No.2, PW 7, Malik Aman Khan, A.S.I., who had conducted the inquiry and PW 8, Lady Doctor Miss. Mumtaz who had medically examined the said appellant. In addition,the confessional statement of the said accused-appellant was introduced in evidence as Ex PW 6/2. Two vaginal swabs taken from the body of the appellant, Mst. Mubarik Jan, were sent to the Chemical Examiner, who found these contained semen of human origin. This report is Ex PW 7/1.

5. On the conclusion of trial, the learned Additional Sessions Judge, found the two appellants guilty of the offence under Section 10(1) of the said Ordinance and sentenced them as stated above.

6. The conviction and the sentences passed against the appellant No.1, Mohammad Rafiq have been assailed on the ground that there was no evidence against the said accused of having at any time committed illicit sexual intercourse with

the co-accused. It was also claimed that he was below the age of 16 years and was not capable of committing sexual intercourse. As regards, the appellant No.2, Mst. Mubarik Jan her conviction was challenged on the ground that her guilt was not established from independent evidence apart from the retracted confession which according to the defence was not voluntary.

7. In the case of the co-accused, Mst. Mubarik Jan, I find that the evidence against her consists of retracted confessional statement, wherein, she has admitted going with her free will to Karachi with the co-accused and of having induldged in illicit sexual intercourse with him. Apart from this statement, there is the statement of PW 8, Lady Doctor who has found this accused having had the sexual intercourse within the past 10 days. This witness took two vaginal swabs from the body of this accused for onward transmission to the Chemical Examiner. The next piece of evidence against the appellant No.2, is the report of the Chemical Examiner wherein the vaginal swabs have been stated to contain semen of human origin. This coupled with the statement of PW 6, Ghulam Muhammad Khan, M.I.C., E.A.C., Haripur, who had recorded the confessional statement after observing all the legal formalities and having warned the accused of the consequences of the admission of the offence. The disappearance of this accused from her house during the stated period also stands proved. The question before me is whether the above stated evidence would amount to sufficient corroboration of the confession which was later on retracted by the said accused. This accused has herself admitted that she is separated from her legally wedded husband for a period of 4 years. Her Medical Examination and the Chemical Examiner's report go a long way to establish that before her apprehension by the Police, she had subjected herself to the sexual intercourse by a male. Her disappearance from her residence and her actual detention from the gate of the Police Station while

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accompained by the co-accused would also be sufficient corroboration.

8. An attempt has been made on behalf of the accused appellant No.2 to dub her confessional statement as in-voluntary and having been obtained under duress. Reliance was placed on "Naqibullah and another Versus the State" (P.L.D. 1978, S.C 21), in order to show that the confession was obtained much after her arrest under the pressure of Police who had not acted fairely in the investigation of the case. I am afraid the cited case does not came to the aid of the appellant No.2 as in that case there was sufficient delay between the arrest of the accused and their production before the Magistrate for recording confessions. In the instant case, it was only on the following day of her arrest that appellant No.2 was produced before the Magistrate, PW 6 and thus there did not lapse a significant number of days in between the arrest and the recording of confession to allow sufficient margin of time for the Police to exercise pressure. Also there is nothing on the record to show that the statement was obtained by torture or the confessor was subjected to any unfair tactics, duress or pressure on the part of the Police. The fact of the matter is that neither the Inquiry Officer nor the Magistrate who recorded the confession has been put any question on this topic during his cross-examination. The statement of Ghulam Muhammad Khan, E.A.C., is to the effect that the accused had voluntarily made the statement, Ex PW 6/2 and that the questions put by him to the accused and her answers thereto were reduced into writting before recording of the confession. I, therefore, am fortified by the same above quoted decision of the Supreme Court in holding the confession has not been obtained in the circumstances which would render it inadmissible in

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evidence and that it is not liable to be struck down. Moreover, the confession in question although afterwards retracted is fully corroborated from the above stated different pieces of evidence and is in itself sufficient to prove the commission of the offence of Zina by accused-appellant No.2.

9. An objection has been taken on behalf of the appellants to their conviction on the basis of delay of about 43 days in lodging of First Information Report from the alleged date of occurance. No doubt the First Information Report was lodged in the Police Station, Haripur on 23.10.1979, but the fact remains that the written information of the disappearance of the appellant No.2 was given by the informant to the Sub Divisional Administration on 15.9.1979 i.e. within 4/5 days of the event. From 15.9.1979 to 23.10.1979, the informant was not aware of any further development. When the accused returned to their village on 23.10.1979 and their presence become known to the informant, he did not lose any time in lodging the F.I.R. in the Police Station. Thus the delay of about 4 or 5 days only is to be accounted for which stands explained by the informant in that he had spent this period in searching the accused in the houses of her relations at a number of villages. It is also in evidence that the co-accused Mohammad Rafiq was not named as an abductor or a co-accused till 23.10.1979, by the informant. It would go a long way in establishing the correctness of the information given to the E.A.C., Haripur vide application Ex PW 5/1. I would therefore, maintain the conviction of the appellant No.2, Mst. Mubarik Jan under Section 10(1) of the Offence of Zina (Enforcement of Hadood) Ordinance, 1979.

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10. Now coming to the case of accused appellant No.1, it has been contended on his behalf that his conviction is based only upon the retracted confession of the co-accused Mst. Mubarik Jan. Although there seems to be some force in the contention of the learned counsel for the appellant Mohammad Rafiq, but in actual fact it is not so. Evidence against this accused consists of the statement of PW 7 Malik Aman Khan, ASI who had affected the arrest of the two accused from the gate of the Police Station while in accompany him each other. This contention of the Inquiry Officer finds support from the testimony of PW 3 Khanzada who had witnessed the arrest of the appellants in the Police Station. It is also on the record that when on the behest of Abdur Razzaq, informant search was conducted for the co-accused in the house of this appellant he was found absent from the house. His absence during the period in question coupelled with the fact of his arrest from the gate of the Police Station with the co-accused has furnished sufficient corroboration of the retracted confession of the co-accused. Thus the involvement of this appellant with the co-accused Mst.Mubarik Jan in the comission of offence of Zina becomes fully established. It has also been contended on behalf of Mohammad Rafiq appellant that he is below 16 years of age and not physically capable of performing sexual intercourse. A mere assertion of being non pubert by the accused in his statement under Section 342 Criminal Procedure Code, without a positive attempt on behalf of the accused to substantiate the allegation could not be sufficient. He should have demanded the examination of his person by a Medical Expert on this point in order to bring the offence under the perview of Section 7 of the Ordinance. I would therefore maintain his conviction under Section 10 of the Offence of Zina (Enforcement of Hadood), Ordinance, 1979.

11. This brings me to the question of quantum of the sentences awarded to the appellants. Although it is not

established that appellant No.1 is a non pubert but there is sufficient material on the record to indicate that he is a young person of tender age as against the co-accused Mst. Mubarik Jan who is a married woman having had three children from the wed-lock. It would, therefore, not be unreasonable to believe that the accused Mst.Mubarik Jan must have played a dominent role in the affair. As far as the latter is concerned, she is a married woman who was left alone for full 4 years and deprived of the society of her husband during this long period. She could, therefore, very easily, fall prey to the tempetation of sin. It was precisely for this reason that Hazarat Umar (May God be pleased with him) issued standing orders to his commenders in the battle fields that no married personnel of the army should be allowed to remain absent from his home for a longer period than 3 months. I am also fully conscious of the fact that Shariat does not recognize the above stated excuse as a mitigating circumstance in enforcing "Hadd" on a culprit against whom the offence of Zina is proved by the evidence of the quality of the required Sharie standard. But this is not a case wherein the evidence of that quality is forthcoming. The offence is, therefore, to be dealt with as Zina not liable to "Hadd". This kind of offence, which essentially is created by the secular law of the country on the crimes would allow the consideration of all attending circumstances in fixing the quantum of punishment. I am, therefore, of the view that ends of justice would meet if the sentences awarded to the accused appellants are reduced to 4 years R.I.

12. In view of what has been stated above both the appeals partially succeed. The sentences of whipping and fine awarded to the appellants are set aside and the sentence of imprisonment is reduced to 4 years R.I. in case of each of the appellants.

Member IV

Member I

Member II

Announced in the presence of parties.

Dated Islamabad the 13th December, 1980