IN THE FEDERAL SHARIAT COURT
(APPELLATE / REVISIONAL JURISDICTION)

PRESENT
MR. JUSTICE MUHAMMAD NOOR MESKANZAI, CHIEF JUSTICE
MR. JUSTICE DR. SYED MUHAMMAD ANWER

CRIMINAL APPEAL NO. 04-P OF 2019

MST. NASEEMA BIBI W/O ABDUL QADIR, RESIDENT OF VILLAGE KOSHT, TEHSIL MASTUJ, DISTRICT CHITRAL.

APPELLANT

VERSUS

1. MURAD SON OF KELLES, R/O SHOKOR DORI KOSHT, TEHSIL MASTUJ, DISTRICT CHITRAL.
2. THE STATE.

RESPONDENTS

COUNSEL FOR THE APPELLANT	…	MR. ABDUL WALI KHAN, ADVOCATE.
COUNSEL FOR RESPONDENT NO.1.		MR. ZAKIR TAREEN, ADVOCATE.
COUNSEL FOR THE STATE	…	MS. ABIDA SAFDAR, ASSISTANT ADVOCATE GENERAL, K.P.K.
DATE OF JUDGMENT OF TRIAL COURT	…	10.12.2018
DATE OF INSTITUTION OF APPEAL	…	01.04.2019
DATE OF HEARING	…	15.10.2020
DATE OF DECISION	…	29.10.2020

DR. SYED MUHAMMAD ANWER, J: Through a petition for Special Leave to Appeal, the petitioner (Mst. Naseema Bibi) sought permission to file appeal against the judgment dated 10.12.2018, passed by Additional District & Sessions Judge/IZO, Chitral Camp, Court Booni, whereby the accused/respondent No.1 Murad son of Kelles was acquitted from the charge of Qazf levelled against him under Section 7 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979. After hearing preliminary hearing, the Criminal Petition for Special Leave to Appeal was disposed of and converted into criminal appeal in original number.

2. The brief facts of the case are that Mst. Naseema Bibi wife of Abdul Qadtgir, filed a complaint under Section 7 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979, (Ex.P.W.1/6) against the accused Murad son of Kelles with the contention that the complainant/appellant is a *sui juris* married woman, who is a practicing Muslim and leading a life according to principles of Islam. Her husband works in Saudi Arabia so he lives there and she is living with her in-laws amicably and happily. She is a *Parda Nasheen* lady and her in-laws are acquainted with her chaste character.

3. On 12.2. 2015, Abdul Khaliq alias Layeq son of Aziz Khan (P.W.2) came to the father-in-law of the complainant, namely, Fazal Karim (P.W.4) and stated that accused/respondent (Murad) has sent him with the message that Fazal Karim's daughter-in-law (complainant) i.e. Mst. Naseema Bibi wife of Abdul Qadir is expecting with an illegitimate child, therefore, it is the duty of Fazal Karim (P.W.4) (father-in-law of appellant/complainant) that he should get Mst. Naseema Bibi examined

by a doctor in the presence of elders of locality in order to prove that Mst. Naseema Bibi is not pregnant.

4. Two days after, on 14.2.2015, another person namely Aziz Jalal son of Ahmed Jalil (P.W.3) again came to the father-in-law of the appellant/complainant with a similar message of Murad (the accused) containing imputation of zina levelled against her (the complainant/appellant). Thus, the father-in-law of the appellant/complainant left with no other option but to take her to the hospital for her examination. Consequently, the appellant/complainant went to the hospital and was medically examined in Al-Khidmat Hospital/ Laboratory, Chitral, for pregnancy test. Resultantly, she took pregnancy test and ultrasound test and as per reports, her pregnancy test came out as negative (Ex.P.W.1/1). Similarly, according to the ultrasound report (Ex.P.W.1/2), she was not pregnant.

5. After undergoing the examination and medical tests, the appellant/complainant filed a criminal complaint under the Qazf Ordinance (Ex.P.W.1/4) for commission of Qazf against the accused/respondent (Murad) for imputation of fornication (Zina) upon her.

6. After submission of complaint, proceeding under Section 203-B Cr.P.C. was initiated. Respondent was summoned and charge was duly framed under Section 7 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979, against him for allegedly publishing the imputation of 'Zina' concerning complainant who is a 'Muhsan'. The complainant/appellant produced four male witnesses namely, Abdul

Khaliq (P.W.2), Aziz Jalal (P.W.3), Fazal Karim (P.W.4) and Muhammad Qayyum, S.H.O. (P.W.5) in her favour and also recorded her own statement. Her father-in-law, Fazal Karim (P.W.4) also gave his evidence in support of the complainant. Relevant documents especially the medical reports of pregnancy test (Ex.P.W 1/1) and ultrasound report (Ex.P.W.1/2) of Al-Khidmat Hospital/Laboratory Chitral were also produced.

7. She prayed in her complaint that accused/respondent, by leveling imputation of fornication and alleging that the complainant/appellant is pregnant by illegitimate sperm, has not only defamed her but also vilified her family and the house of her in-laws. By spreading of such rumors in the vicinity, she and her family was badly disgraced and humiliated.

8. The fifth witness of the prosecution namely, Muhammad Qayyum, S.H.O. Police Station Mulkhow (P.W.5) also appeared in this case and gave a statement that on 5.3.2015, accused/respondent had come to police station with an application, wherein he levelled a similar allegation of fornication against Mst. Naseema Bibi, which also contained an additional allegation of having an abortion of illegitimate pregnancy. According to Muhammad Qayyum, S.H.O. (P.W.5), this application was not entertained by him because complainant/appellant is a married woman and no such complaint was received from her family or husband.

9. After completion of evidence of the prosecution, statement of the accused/respondent under Section 342 Cr.P.C. was duly recorded wherein he denied the charge and pleaded not guilty by claiming his innocence. Subsequently, he was asked whether he wanted to be examined under

Section 340(2) Cr.P.C. or produce any evidence in his defence. The accused/respondent did not opt to enter the witness box nor proposed to produce any defence witness. The proceedings so conducted by the learned Trial Court culminated in the acquittal of respondent, hence, this appeal.

10. The learned Counsel for the complainant/appellant contended with vehemence that the impugned judgment is legally defective and suffers for sheer misreading and non-reading of evidence. It was maintained that the Trial Court seriously erred in law by observing that the complaint is hit by limitation. The learned Counsel contended that the complainant produced overwhelming evidence, which were/are sufficient to warrant conviction but the Trial Court failed to appreciate the evidence in its true perspective by misreading and non-reading the same. According to learned Counsel, the only conclusion in the circumstance of this case that can be drawn is the guilt of the respondent, as the prosecution witnesses were honest, truthful and the statements were/are confidence inspiring. The learned Counsel for respondent vehemently opposed the submissions by submitting that the Trial Court properly appreciated the evidence, there is no misreading and non-reading of evidence. The learned Counsel urged that even another view on reappraisal of the evidence may be possible, but the appellate forum cannot undertake that exercise in view of set principles governing acquittal appeals. The learned Assistant Advocate-General supported the learned Counsel for appellant and adopted his arguments.

11. We have heard the learned Counsel for the parties and have gone through the record carefully with their assistance. We find sufficient force in the submissions of the learned Counsel for the appellant. For instance, the learned Trial Court acquitted the accused/respondent on the ground of absence of Tazkiyah al-Shuhood in the witnesses of the prosecution declaring it as a mandatory provision in any case of Hadd. But the judgment is silent about the fact that how the learned Trial Court reached at the conclusion that Tazkiyah al-Shuhood was missing from the prosecution witnesses. It is correct that assessment of Tazkiyah al-Shuhood of the prosecution witnesses is very relevant and important in cases of *Hadd*; but at the same time, the learned Trial Courts are supposed to give plausible and cogent reasons for declaring any witness which does not fulfill the standards of Tazkiyah al-Shudood. Case titled "Sanaullah Versus The State" (PLD 1991 FSC 186) elaborates the concept of Tazkiyah al-Shudood, how it should be evaluated by the courts. The relevant statement contained in this judgment is " All Muslims are Just with respect to their evidence excepting those who have been punished for *Hadd* of Qazf or for giving false evidence or those who are under the pressure of their relatives and friends in giving evidence."

12. In Para-9 of the impugned judgment, it is stated that "the alleged incident imputation of Zina has happened on 12.02.2015 while the report has been lodged to police on 12.3.2015; meaning thereby, there is a delay of about 01 month in reporting the matter" according to the trial court that this is enough time to deliberation and consultation on the part of the complainant for false implication of the accused. This approach of the

learned Trial Court, which conducting the trial of Qazf is utterly misplaced and wrong due to the nature of the alleged offence. Unlike other criminal cases, in Qazf the honour, reputation, respect, social norms and values associated with the victim and her whole family are deeply involved. Hence, delay in filing complaint not only natural but permissible in Islamic Law. According to Imam Kasani "Unlike other Hudood cases promptness in filing complaint in case of Qazf is not a requirement or condition, even if the witnesses of *Maqzoof* (upon whom the false allegation of zina is levelled) take some time in giving evidence that is also permissible." Reference is made to [Dr. Wahbah Zuhayli, al-Fiqh al-Islami wa-Adilatuhu; Dar al-Ash'at Karachi, Vol. IV, Page-165]. This difference in *Hadd* of Qazf from the rest of the *Hudood* is natural due to the nature of the crime and involvement of the whole family of the victim. The crime of Qazf is taken so seriously by the Islamic law that in case if a *Maqzoof* (victim of Qazf) dies during the proceeding in the Court, her/his legal heirs can proceed with the complaint against the alleged Qazf (one who commits Qazf). Similarly, if someone commits Qazf against a dead person then her or his legal heirs can file criminal complaint of Qazf in the Court of Law against the accused. Reference is made to [al-Bada'i al-Sana'i Fi Tartib Al-Shara'i, Al-Imam Alauddin Abi Bakar Bin Mas'ud al-Kasani Al-Hanafi' Dyal Singh Trust Library, Lahore, Page-158].

13. Similarly, the learned Trial Court ignored the negative pregnancy test (Ex.P.W.1/1), which is the most relevant medical report in this case. The content of the ultrasound report (Ex.P.W.1/2) are clearly in favour of

the claim of complainant/appellant showing her not pregnant. The learned Trial Court disregarded the ultrasound report for containing a typographical error in date written on it. The learned counsel clarified that the date on the letterhead upon which the report was written erroneously contained printed the year as --/--/2014 instead of --/--/2015, however, the hand written digits for the day and month on (Ex.P.W.1/2) are clearly mentioned as (13/2) (13th of February).

14. The learned Trial Court wrongly presumed that Fazal Karim " the (P.W.4), [who is father-in-law of the complainant/appellant is also the husband of daughter of accused]" , whereas on the contrary the contents of the statements of the witnesses and the cross-examinations revealed that the daughter of accused (Murad) is the step-mother of the complainant/appellant. Due to this mis-reading of evidence, the reaching of learned Trial Court at a wrong conclusion is obvious.

15. The learned Trial Court also completely ignored the evidence of Mohammad Qayyum (P.W 5), who was SHO of Police Station Morekaho. In his statement, he clearly states that the accused (Murad) came to him in Police Station on 05.03.2015, first he gave an application against Naseema Bibi wife of Abdul Qadir, containing allegation of Zina and doing abortion. That application was returned to him because it contained the allegation of Zina. The P.W 5 also stated in his examination-in-chief that:

"ملزم مراد نے میرے سامنے واضح الفاظ میں نسیمہ بی بی زوجہ عبدالقادر کو زانیہ، بدکردار اور ناجائزنطفہ سے حاملہ ہونے اور ناجائز بچہ کو ضائع کرنے کا جھوٹا الزام لگایا تھا لہٰذا یہ میرا بیان ہے"

This statement was discussed by the trial court but no inference was drawn from it, the learned Trial Court again committed non-reading of the material evidence of the case by just ignoring it.

16. Learned Counsel for the accused/respondent while arguing the appeal, contended that the words, which were allegedly used by the accused/respondent does not amount to Qazf. According to him, the allegation of fornication (Zina) must be in accordance to the definition of Zina as mentioned in the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. This understanding of the learned Counsel of the respondent (Murad) is completely incorrect and wrong, any word which directly or indirectly connotes to Zina uttered by a person against an adult Muslim without the support of four witnesses is enough to constitute the offence of Qazf against that person who is leveling this imputation. Section-3 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979, is reproduced hereunder for clarity:

> **"3. Qazf.--** Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes an imputation of zina concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation, or hurt the feelings, of such person, is said, except in the cases hereinafter excepted, to commit qazf.
>
> Explanation 1.-- It may amount to qazf to impute zina to a deceased person, if the imputation would harm the reputation or hurt the feelings, of that person if living, and is hurtful to the feelings of his family or other near relatives.
>
> Explanation 2.--An imputation in the form of an alternative or expressed ironically, may amount to qazf.
>
> First Exception Imputation of truth which public good requires to be made or published). -- It is not qazf to impute zina to any person if the imputation be true and made or published for the public good. Whether or not it is for the public good, is a question of fact.

> Second Exception (Accusation preferred in good faith to authorized person).-- Save in the cases hereinafter mentioned, it is not qazf to prefer in good faith an accusation of zina against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation:
>
> (a) A complainant makes an accusation of zina against another person in a Court, but fails to produce four witnesses in support thereof before the Court.
>
> (b) According to the finding of the Court, a Witness has given false evidence of the commission of zina or zina-bil-Jabr.
>
> (c) According to the finding of the Court, complainant has made a false accusation of zina-bil-Jabr.**"**

17. The learned Counsel for the appellant/complainant during the course of arguments, extended an offer to the respondent (Murad) that if the accused takes a special oath upon the Holy Qu'ran and states that he (Murad) did not level imputation of Zina amounting to Qazf against the complainant/appellant then she will withdraw the case. The learned Counsel for accused/respondent opposed this suggestion that the provision of offering a special oath to the opposing party with intention to infer their results for or against him depends on the acceptance or rejection of the offer is not at all maintainable in criminal cases, especially in the case of Qazf. The understanding of learned Counsel for accused/respondent on this point is correct in view of *Hanafi* Jurist, a person cannot be held liable to *Hadd* on the ground that he rejects the offer of taking special oath that he did not commit Qazf. The non-taking of the oath cannot amount as the equivalence of confession for commission of a crime, Reference is made to [Dr. Wahbah Zuhayli, al-Fiqh al-Islami wa-Adilatuhu; Dar al-Ash'at Karachi, Vol. IV, Page-166].

وَإِذَا ادَّعَى رَجُلٌ أَنَّهُ قَذَفَهُ، وَلَا بَيِّنَةَ لَهُ لَمْ يُسْتَحْلَفْ عَلَى ذَلِكَ، وَلَا يَمِينَ فِي شَيْءٍ مِنْ الْحُدُودِ؛ لِأَنَّ الْمَقْصُودَ مِنْ الِاسْتِحْلَافِ الْقَضَاءُ بِالنُّكُولِ وَالنُّكُولُ إنَّمَا يَكُونُ بَدَلًا وَالْبَدَلُ لَا يَعْمَلُ فِي الْحُدُودِ أَوْ يَكُونُ قَائِمًا مَقَامَ الْإِقْرَارِ وَالْحَدُّ لَا يُقَامُ بِمَا هُوَ قَائِمٌ مَقَامَ غَيْرِهِ

ترجمہ: اور اگر کسی شخص نے دعوی کیا کہ کسی نے اس پر قذف کیا ہے، تو اس میں بینہ نہیں ہوگی، اس سے اس معاملہ پر حلف لینے کا مطالبہ نہیں کیا جائے گا، اور نہ ہی یمین حدود میں کارگر ہوگی۔ کیونکہ مقصود حلف یہ ہوتا ہے کہ نکول (قسم سے انکار)کے ذریعے فیصلہ کیا جائے، اور نکول بدل ہیں اور حدود میں بدل کارگر نہیں، یا پھر نکول قائم مقام اقرار کے ہوتے ہیں اس لئے حد میں غیر کا "قائم مقام" قابل قبول نہیں۔

[Imam al-Kabir Abi Bakar Mohammad Bin Ahmed al-Sarkhasi, al-Mabsoot li-Sarkhasi, Idaratul-al-Quran wa uloom al-Islamia, Page-105]

أنه حد، فلا يستحلف فيه، كالزنا والسرقة. فإن نكل عن اليمين، لم يقم عليه الحد

یہ(معاملہ قذف) حد ہے، پس اسمیں حلف کا مطالبہ نہیں کیا جائے گا حدِ زنا اور چوری کی طرح، پس اگر اس نے حلف لینے سے انکار کرلیا تو اس پر حد جاری نہیں ہوگی۔

[Ibn Qudamah, al-Mughni, Dar al-Kitab al-Arabi Beirut, vol.10 page-235]

In Islamic jurisprudence, the principle is known as “Nukul” **(نکول)۔** This principle of Islamic law is duly incorporated in Article 163 of the Qanoon-e-Shahadat Order, 1984, which is reproduced below:

Article 163. Acceptance or denial of claim of oath.-

> “(1) Acceptance or denial of claim on oath.- (1) When the plaintiff takes oath in support of his claim, the Court shall, on the application of the plaintiff, call upon the defendant to deny the claim on oath.
> (2) The Court may pass such orders as to costs and other matters as it may deem fit.
> (3) Nothing in this Article applies to laws relating to the enforcement of Hudood or other criminal cases.”

[emphasis added]

18. Last but not the least, the impugned judgment is violative of the mandatory provisions contained in Section 367 Cr.P.C. because the Trial Court utterly failed to formulate the points for determination as required by this Section and decision thereon with reasons. By now, it is the settled principle of law that a judgment not fulfilling the mandatory requirements of Section 367 Cr.P.C. is not sustainable. The defect is incurable and by itself sufficient to vitiate the judgment. Section 367 Cr.P.C. is reproduced as under:

> **"367. Language of judgment Contents of judgment**.--(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court or from the dictation of such presiding officer in the language of the Court, or in English; and shall contain the point or points for determination, the decision thereon and the reasons for the decision; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.
>
> (Emphasis supplied)
>
> (2) It shall specify the offence (if any) of which, and the section of the Pakistan Penal Code or other law under which, the accused is convicted, and the punishment to which he is sentenced.
> (3) Judgment in alternative. When the conviction is under the Pakistan Penal Code and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.
> (4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted, and direct that he be set at liberty.
> (5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed.
> (6) For the purposes of this section, an order under section 118 or section 123, sub-section (3), shall be deemed to be a judgment."

19. We are fortified in our view by the dictum laid down by the Hon'ble Apex Court in its judgment reported in "SAHAB KHAN and 4 others vs. THE STATE and others" (1997 SCMR 871), for the safe of convenience, the same is reproduced:

> **"**Without going into the merits and demerits of the case of the parties, we hold the view that criminal appeals referred to above were not decided in the light of afore-noted statutory provisions. They shall, therefore, be deemed to be still pending adjudication. Needless to state that at the appellate stage, whole original case stands reopened for its hearing and decision in accordance with law. Such-like appeals cannot be decided summarily without analytically discussing the evidence on record. The appeals of the parties were required to have been decided in accordance with the evidence. This could not be done for no obvious legal reasons. The counsel has attempted to argue that both the appeals may be heard and decided on merits by this Court to do substantial justice between the parties. We cannot substitute our opinion/decision with the one which is still to be given by the High Court on the basis of evidence available on record."

20. In the light of above discussion, we are inclined to accept this appeal, set aside the impugned judgment and remand the case to the Trial Court for re-writing of judgment by fully adhering to mandatory provisions contained in Section 367 Cr.P.C. with the result, the case shall be treated pending before the Trial Court and the parties shall be allowed an opportunity of addressing arguments and the matter shall be concluded preferably within the span of two months after the receipt of this judgment.

(JUSTICE DR. SYED MUHAMMAD ANWER)

(JUSTICE MUHAMMAD NOOR MESKANZAI)
CHIEF JUSTICE

Announced in Open Court
on 29.10.2020 , at Islamabad.
*Mubashir**