5-6-9/80

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

(13)

PRESENT:

Mr.Justice(Rtd)Salahuddin Ahmed, Chairman.
Mr.Justice Agha Ali Hyder, Member.
Mr.Justice Aftab Hussain, Member.
Mr.Justice Karimullah Durrani, Member.

CRIMINAL APPEAL NO.5 OF 1980

Ghulam Mohammad alias Gaman .... Appellant

Versus

The State .... Respondent

CRIMINAL APPEAL NO.6 OF 1980

Mst. Sairan Bibi .... Appellant

Versus

The State .... Respondent.

ON APPEAL FROM THE JUDGMENT DATED 1.6.1980 OF THE SESSIONS JUDGE, FAISALABAD IN CASE NO.5 TRIAL NO.9 OF 1980(STATE VERSUS GHULAM MOHAMMAD ALIAS GHAMAN AND MST. SARIAN BIBI)

For the Appellant in appeal No.5/80 ... Mr. Ilahi Bukhsh Vijdani, Advocate.

For the Appellant in appeal No.6/80 ... Mr. M. S. Baqir, Advocate.

For the State ... Nemo.

Per Karimullah Durrani, J/Member: These two criminal appeals arise from a common judgment of Mr. Masud Ahmad Ansari, Sessions Judge, Faisalabad, whereby Ghulam Mohammad alias Gaman and his wife, Mst. Sairan Bibi, the appellants in the two appeals, respectively were, on 1.6.1980, convicted under Section 14 of Offence of Zina (Enforcement of Hadood) Ordinance, 1979 and each sentenced to suffer imprisonment for life and whipping with 5 stripes. They were also to pay Rs.500/-, each as fine or in default to suffer further rigorous imprisonment of 6 months. This judgment will dispose off both the above mentioned appeals.

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2. The prosecution story in brief, as gleaned from the statement of Mst.Irshad Bibi alias Shado (Ex PA) resident of Mouza Jharianwala, Police Station Sambrial, District Sialkot, the prosecutrix, which was later on incorporated in the First Information Report (Ex PA/1) and registered in the Police Station Dijkot on 14.9.1979 at 3.30 PM, is that the prosecutrix, Mst.Irshad Bibi alias Shado, of the age of 16/17 years, was married to one Asghar s/o Boota caste Sando Jat resident of Mouza Lubahki, District Sialkot about two years prior to the lodging of the report in exchange whereof her brother Allah Dita was married to the sister of her husband. The consummation of marriage took place after one year. She spent about 3/4 months with her husband in the house of her in-laws whereafter relations between the spouses became strained which resulted in her return to her parents' house. On the other hand, her sister-in-law, namely Parveen had amicable relations with her husband, the brother of the prosecutrix and is still living with him. It was alleged that her brother Allah Dita and his wife were putting pressure on her to resume marital relations with her husband. Her refusal to return to the house of her husband resulted in receiving beatings from her brother who also gave beatings on several occasions to his parents as well in order to get them compell Shado to return to her husband. About 2 or 3 days before the last Eid a quarrel on the same subject take place in the house. The prosecutrix alleges that her brother wanted to kill her on her refusal to go to her husband. She, therefore, left her house during the night taking with her Rs.15/- in cash and a ladies watch and a golden ring and boarded a Wagon from

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Baigowal Bus Stand for Wazirabad where she boarded a train and reached Faisalabad Railway Station. She spent the night with other women in the waiting room of the Railway Station. On the day break the prosecutrix went to the Bus Stand of Mai Di Jhuggi where she was met by accused Mst. Sharifan Bibi who by persuation took her to her house and therefrom to the house of Mst. Chiragh Bibi. Mst. Chiragh Bibi in her turn kept the prosecutrix in her house for the night. On the next day Mst. Chiragh Bibi and Sharifan both handed over the prosecutrix to Mehanga Mochi and Ghulam Mohammad, appellant on the pretext that they will keep her with comfort in their house. She further alleges that both the above named accused covered her with a burqa and brought her to Dijkot. On reaching Dijkot the prosecutrix came to know that the above named two ladies had sold her to these two persons. She was brought to the house of Ghulam Mohammad, appellant where from Mehanga left for some other place and from this point also went out of the story. Mst. Sairan Bibi, appellant who is the wife of Ghulam Mohammad the other appellant used to lock up the prosecutrix in a room of their house during the day and in the night compelled her to prostitution. She was on her refusal given beatings by the said appellants. The prosecutrix, before her rescue from the house of the appellants, was compelled to submit herself for forcible sexual intercourse to 5/6 persons from whom the said appellant had received monies. During the time these rapes took place both the appellants used to guard the gate of the house. On the night prior to her recovery a person came to the house of the appellants and Sairan Bibi tried, once again, to compell the prosecutrix to commit Zina with him, but the prosecutrix refused and was therefore beaten with a 'chimta' in consequence thereof. The prosecutrix

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then started crying. Some neighbourmms, namely Mohammad Aslam alias Kamma s/o Mohammad Shafi (PW 4) Akram Babar s/o Fazal Din (PW 3) and Mohammad Ramzan s/o Mohammad Tufail (not produced as a witness by the prosecution) were attracted to the spot who enquired the cause of grief from her but were told by Mst. Sairan Bibi, appellant that it was her domestic matter and they should not interfere therein. The prosecutrix wanted to say something, but she was caught hold of by the arm by the appellant and pushed into the room and was locked up.

3. Prosecution alleges that Mohammad Akram, S.I., Police Station Dijkot (PW 1) was informed by the above named neighbourmms on the following day, while on round of the market that a girl was being kept confined in the house of the appellants. The said Police Officer raided the house and recovered the prosecutrix therefrom. He recorded her statement Ex PA at the spot which was later on incorporated in the F.I.R., Ex PA/1. The prosecutrix was kept in the Police Station during the night and was on the next day sent for the medical examination to Lady Doctor Nafeesa Akhtar (PW 2) vide application Ex PB, who conducted the medical examination of the prosecutrix and found the following conditions of her person, as per report Ex PB/1:-

"1. Contusion right upper-arm 2" x 1"

2. Hymen broken. Tear old healed. Admits freely two fingers. No injury on private part or thighs".

4. To ascertain presence of semen two vaginal swabs were taken and sent to Chemical Examiner, Lahore. The report of the Chemical Examiner has not been produced in evidence. Thereafter the Enquiry Officer, Mohammad Akram was led, on 15.9.1979, by the prosecutrix to the house of

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Mst.Sharifan Bibi the acquitted co-accused where Memo Ex PC and Ex PC/1 were prepared by the said Officer. Mst. Shado also took the I.O. to the house of the other acquitted co-accused Chiragh Bibi. He also prepared Memo Ex PD and a rough sketch of this house Ex PD/1. On the completion of the investigation the two appellants along with other 3 co-accused were put to trial in the Court of the above named learned Sessions Judge, Faisalabad.

5. The prosecution evidence consisted of the statements of Mohammad Ayub M.H.C., P.S., Dijkot (PW 1) who on the receipt of complaint Ex PA from the S.I., Mohammad Akram prepared formal FIR Ex PA/1. Lady Doctor Nafeesa Akhtar appeared as PW 2 and proved her report Ex PB/1. Mohammad Akram Babar and Mohammad Aslam named above were produced as PWs 3 and 4, respectively who narrated the story of confinement of prosecutrix in the house of the appellant and her recovery therefrom. The prosecutrix herself appeared as PW 5 and narrated the above stated prosecution story with minor variations before the Court. The Enquiry Officer appeared as PW 6 and proved the statement of the prosecutrix, Ex PA along with other Memos and plans prepared by him and stated about recovery of the prosecutrix from the house of the appellants. On the completion of the prosecution evidence, statements of the accused were recorded under Section 342 Cr.P.C. Both the appellants denied recovery of Irshad Bibi from their house and attributed enmity as motive to the PWs 3 and 4 for joining hands in falsely implicating them. The appellants produced the Lambardar of the Village, Mohammad Amin and a neighbour, Bashir Ahmed (DWs 1-2) in their defence.

6. The learned Sessions Judge, Faisalabad found no case made out against Mst.Sharifan, Mst.Chiragh Bibi and Mehanga co-accused and, consequently, acquitted them

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of the charge. The learned Sessions Judge also did not believe PWs 3 and 4, the alleged informers of the confinement of the prosecutrix in the house of the appellant. The learned trial Court relying on the statement of the prosecutrix herself which was, according to him, corroborated by finding of human semen on the vaginal swabs came to the conclusion that the prosecutrix was subjected by these accused to prostitution during her stay in their houses. Brushing aside the defence evidence on the ground that both the DWs had not been at the spot at the time of the raid the Learned Sessions Judge found both the appellants guilty of the offence under Section 14 of Zina (Enforcement of Hadood) Ordinance, 1979, and sentenced them in the aforesaid manner.

7. Messers Elahi Bukhsh Vijdani and M.S. Baqir, Advocates representing Ghulam Muhammad and Sairan Bibi, appellants, respectively, have assailed the conviction of the appellants and the sentences passed against them on the following grounds:-

(a) The prosecution evidence, which was disbelieved in case of Mehanga co-accused has been relied upon against the appellants by the trial Court,

(b) the statement of the prosecutrix is contradicted by the F.I.R. in that:

While in the F.I.R., it has been stated by her that five or six persons had committed rape on her during her stay in the house of the appellants, in her statement in the Court, she has raised the figure of the rapists to 10 or 12,

(c) that the recovery of the prosecutrix from the house of the appellants has not been witnessed by independent and respectable residents of the locality,

(d) that the alleged recovery was admittedly affected in the absence of the accused-appellants,

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(e) that the evidence of PW 3 and 4 was tainted with enmical motives,

(f) that the prosecution story in regard to the sale of the prosecutrix by the acquitted co-accused, Mst.Sharifan and Mst. Chiragh Bibi to Ghulam Muhammad, appellant and Mehanga acquitted co-accused has been disbelieved,

(g) the prosecution story in regard to the prostitution of the prosecutrix by the appellants was not worth credence as it is almost impossible to run a brothal or a prostitution house in a small rural locality,

(h) the Inquiry Officer before raiding the house of the accused appellants had not recorded the report to this effect in the Police Station and as such the proceedings of raid are of no legal value,

(i) the statement of the prosecutrix(Ex PA) was recorded after preliminary investigation. It was, therefore, a statement before the Police under Section 161 of the Code of the Criminal Procedure and it was therefore inadmissible in evidence,

(j) the statement of Aslam (PW 4), the informer of the confinement of the prosecutrix in the house of the appellants had not been recorded by the Inquiry Officer before conducting the raid, and

(k) that there was no evidence before the learned trial Court on the presence of human semen in the private parts of the body of the prosecutrix, which supposed evidence has been relied upon by it in convicting the appellants, and lastly

(l) that there was sufficient element of doubt created by prosecution evidence which should have gone in favour of the accused-appellants under the tenets of

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Islam as well as under the secular Criminal law of the Country.

8. A persual of the judgement of the Learned Sessions Judge would show that he has not based the conviction of the appellants on that part of the evidence which has been disbelieved by him in regard to envolvement of Mehanga co-accused in the commission of the offence. Similarly, the Learned Judge has, very correctly, not believed the evidence of Akram Babar, PW 3 and Muhammad Aslam, PW 4 to the extent that they had met Mst.Sairan Bibi a day prior to the recovery of the girl. He has only accepted their presence at the time of recovery of Mst.Irshad Bibi from the house of the appellants which according to him was established by the statement of the Inquiry Officer, Muhammad Akram, S.I;PW 6.

9. I have gone through the statements and find that these two prosecution witnesses do not merit credence to the extent they are disbelieved by the Learned Sessions Judge. These two witnesses have contradicted each other in the details manner of their having been attracted to the house of the appellants on the cries of the prosecutrix. It has also been established on the record that there is a common wall between the house of the appellants and that of Malik Mohammad Aslam, PW 4 which has now been demolished and Ghulam Mohammad appellant had been asking the latter to reconstruct the same but this witness has refused to do so. Such circumstances would entail a querral between the parties and when this witness deposed to the contrary he cannot be believed. Also there is a criminal litigation going on between the brother of this witness who happens to be a friend of PW 3, Mohammad Akram Babar and the appellant Ghulam Mohammad. In this state of affairs these two witnesses cannot be relied upon about the

allegation of having seen prosecutrix crying on the night before the raid. It seems that PWs 3 and 4 somehow came to know of the presence or confinement of the prosecutrix in the house of the appellants due to the close proximity of their residences. When they met Mohammad Akram PW 6, who was on the round of his area, in the Mandi they informed the said witness about the confinement of a woman who immediately after receiving information rushed to the spot and recovered the prosecutrix from that house.

10. This disposes of objections mentioned at (a) and (f) of the learned counsel for the appellants. As far as objection in regard to the contradiction in the statement of the prosecutrix is concerned, no doubt, she has given the number of the rapists 5 or 6 in the report (Ex PA) as against her statement before the court, wherein she stated that 10/12 persons committed forcible sexual intercourse with her during her stay in the house of the appellants. This at the most is a minor discrepancy and not such a material contradiction as to affect the credibility of the witness. Despite the said discrepancy, the fact remains that nothing has come on the record to show a connection of any sort at any time before the recovery of the prosecutrix between her and the PWs or between her and the I.O. for the matter of that. Also there is no suggestion of any sort on the part of the defence to establish enimosity on the part of the prosecutrix with the appellants. Even any remote contact of the said witness with the appellants, in any capacity whatsoever prior to the occurance has not been established to cause doubt on the authenticity of the charges leveled by her against them. Moreover, the nature of the allegations are such as no married woman, no matter having how estranged relations

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with her spouse, in any circumstance would condescend to get attributed to her. An admission of having been subjected to prostitution would have the effect of tarnishing her reputation for the rest of her life. It becomes almost impossible for a married woman to have peace of mind or enjoy honourable life or command respect in any society or environment once it is known that she had indulged in or was subjected to prostitution. It would, therefore, require something much more and graver than a passing fancy for such a woman to charge others of earning money by prostituting her. Had she been falsely charging it would have been natural for her to name Mehanga and Ghulam Mohammad appellant as rapists before naming the others. But she does not name either of them in this respect. If looked from this angle, the statement of the prosecutrix would not allow any element of doubt in its authenticity.

11. But even after having kept the evidence of the above named two witnesses out of consideration, I find sufficient material on the record to bring home guilt to the appellants. There seems to be no justification to cast any doubt on the statement of the prosecutrix for the stated reasons. Her recovery from the house of the appellants stands proved from the statement of PW 6, Muhammad Akram, S.I. This witness came to know of the presence in confinement of a girl in the house of the appellants from PWs 3 and 4 which compelled him to rush to the spot. Under such circumstances, there was neither occasion nor reason for recording any report of acquiring this information, specially under the stated circumstances

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when the said Police Officer was on round of his area. The statement Ex PA of the prosecutrix recorded at the spot on her recovery from the house of the appellants would not have the character of a statement made under Section 161 of the Code of Criminal Procedure, as contended by the Learned Counsel for the appellants, for the simple reason that it was a verbal complaint of the incident made at the earliest opportunity by the victim to a Police Officer and was reduced to writing by the Police Officer at the spot. It was therefore, for all legal intents and purposes no more than the information received of the commission of an offence and therefore, was very rightly incorporated in the formal F.I.R., Ex PA/1. It was perfectly admissible in evidence and stands duly proved by the statements of PWs 5 and 6.

12. PWs 5 and 6 are unanimous in the assertion that PW 3 and 4 were present at the time of the recovery of the prosecutrix from the house of the appellants and so were other members of the Police force. These PWs reside in the same vicinity and the requirement of Section 103 of Criminal Procedure Code stands met with by the presence of these persons. The absence of any other neighbour or non production of any other witness would not adversely affect the case of the prosecution as the raid of the house of the appellants by PW 6 Mohammad Akram, S.I. is not even denied by Ghulam Mohammad accused appellant himself who made the following reply to the question regarding the raid of his house on 14-9-1979, in his statement under Section 342 Code of Criminal Procedure:

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"The P.W's. abductee and police came to my house. They entered into my house, gave me beating and took me to the police station. I have been falsely involved in this case."

Apart from that even the two DWs, in an attempt to show that the prosecutrix was not recovered from the house of the appellants, admitted the raid carried at by PW 6 Mohammad Akram on the house of the appellants.

13. The contention of the Learned counsel that the Police Officer should have recorded the information received from PWs 3 and 4 and have then proceeded to the search of the house of the appellants is also not of much force.

14. In "M.Bashir Saigoal and Other Versus The State and Other" (P L D 1964 Lahore, page 148), a Full Bench Judgement, it was held, that,

"In fact the recording of a first information report is not a condition precedent and the police, on the receipt of credible information that a cognizable offence has been committed may, under the Code of Criminal Procedure or other statute or law authorizing them in this behalf, start investigation without recording or drawing up a formal first information report."

Similar view was repeated in a subsequent judgement of the same High Court in "Rehman and Others Versus The State" (P L D 1968 Lahore, page 464), wherein it was laid down that,

"It would be seen that any person may set the criminal law in motion, by making a report under this section. The information so given is called the First Information. It is the basis upon which an investigation is commenced under Chapter XIV (Part V) of the

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Code of Criminal Procedure. However, receipt and recording of first information report is not a condition precedent to the setting in motion of criminal investigation".

15. An objection has also been taken on behalf of the appellants to the validity of the raid of the house of the appellants on the ground that under Section 165 of the Code of Criminal Procedure, it was incumbent upon the Police Officer to have recorded in writing the grounds of his belief that it was necessary for the purpose of investigation to make search of the house of the appellants and also to specify the person or thing for which the search was necessary. I do not see much force in this contention of the learned counsel also as it is well established law that illegality or irregularity in the investigation of an offence does not vitiate the trial. If an authority is needed on this proposition of law then "Shaman Versus the State" (1972 P Cr. L J 400), is on all fours.

16. As regards the alleged recovery of the prosecutrix from the house of the appellants in their absence, suffice it to say that I.O. (PW 6) has stated in his examination in chief that at the time of raid Mst. Sairan Bibi was present. Also Ghulam Mohammad, appellant admits his presence at that time in the above reproduced part of his statement. If later on, during the course of cross-examination, the Inquiry Officer has stated that none of the appellants was present at the time of recovery then it would not be a contradiction of the statement made earlier but a discrepancy of an ineffective nature. It has also been urged that it was not practically possible in a small rural locality to run a brothel as such a fact as that cannot remain a secret for long. It is in evidence that this is what exactly has happened in the instant case in that within a few days of the appellants bringing the prosecutrix to their house, the matter became an open secret

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and was known to the neighbours and thus reached the ears of the Station House Officer, of the Police Station of the area. Similarly, the disbelieving by the Trial Court of the story of the sale of the prosecutrix by Mst.Sharifan Bibi and Mst. Chiragh Bibi the acquitted co-accused to Ghulam Muhammad and Mehanga would not in effect go against the prosecution as according to Section 14, Offence of Zina (Enforcement of Hadood) Ordinance, 1979, obtaining the possession of any person in any manner what-so-ever with the intention that such persons shall at any time be employed are used for the purpose of prostitution or illicit intercourse with any person would be enough to complete the offence under the said section.

17. Having dealt with the above stated grounds taken on behalf of the appellants, I am left with the last contention in respect of alleged presence of human semen on the vaginal swabs taken from the body of the prosecutrix and find much force in the contention that there was no evidence before the learned Trial Court for arriving at the said conclusion. The report of the Chemical Examiner was not on record and even the Lady Doctor Nafeesa Akhtar, PW 2, had said nothing in this respect apart from that the report was in her possession. The report in question was not adduced in evidence. The Learned Sessions Judge was, therefore, labouring under misreading of evidence while holding a piece of non-existant evidence as a corroboration of the statement of the prosecutrix. But this leaves us with the question whether the statement of the prosecutrix is corroborated by any

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other evidence at all ? Her statement to my mind stands corroborated by the fact of her recovery from the house of the appellants in the raid carried out by PW 6. This statement coupled with that of PW 6, Mohammad Akram, the Station House Officer, P.S., Dijkot is quite sufficient to bring home guilt to the accused appellants. As no margin of doubt is left anywhere in any respect, the question of its benefit going to the accused also does not arise.

18. The learned counsel for the appellants have finaly urged for reduction of sentences awarded to the appellants on the ground of these being severe in nature. The quantum of punishment prescribed by the Statute for the offence under Section 14 is life imprisonment and with whipping not exceeding 30 stripes. The culprit has also been made liable to fine. The words used for the former are "shall be punished with ...." and for the latter "shall also be liable to". The phraseology used for prescribing punishment in this offence is not capable of allowing any other meanings than that while Court must award life imprisonment and whipping to the offender, it may in its discretion fix the number of the stripes not exceeding 30 and in addition he may also be fined. In this state of law there did not vest discretion in the Trial Court to award lesser sentences of imprisonment to the appellants. Even in those cases where such a discretion vests the appellate Courts would refrain from interfering with the judicious exercise of discretion by the Trial Court. In the instant cases although it was obligatory for the learned Trial Court to award sentences of life imprisonment and whipping to the appellants, it was not, under the circumstances attending the cases, desirable that this longest term of imprisonment should have been supplemented by an additional sentence of fine.

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19. In view of what has been stated above, I would maintain conviction of the accused appellants under Section 14 of the Offence of Zina (Enforcement of Hadood) Ordinance, 1979 and the sentences of life imprisonment and whipping awarded to them by the learned Trial Court, but set aside the sentence of fine passed against each of the appellants. These appeals are partially accepted to this extent.

Member. IV

Chairman.

Member, I

Member, II