IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT
MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE MEHMOOD MAQBOOL BAJWA

CRIMINAL APPEAL NO.75-L OF 2009

MUHAMMAD SAEED AKHTAR SON OF MUNSHI JAN MUHAMMAD, CASTE ARAIN, RESIDENT OF CHAK NO.322-G.B., TEHSIL KAMALIYA, DISTRICT TOBA TEK SINGH.

APPELLANT

VERSUS

1. MUHAMMAD ASHRAF SON OF SHAH MUHAMMAD, CASTE ARAIN.

2. RIAZ SON OF MOHABIT KHAN, CASTE NONARI.

3. MST. TASLEEM AKHTAR DAUGHTER OF GHULAM RASOOL, CASTE ARAIN.
ALL RESIDENT OF CHAH KANJAN-WALA, TEHSIL KAMALIA, DISTRICT TOBA TEK SINGH.

4. THE STATE.

RESPONDENTS

COUNSEL FOR THE APPELLANT	…	SHAHID MEHMOOD KHAN, ADVOCATE.
COUNSEL FOR RESPONDENTS NO.1 TO 3.		SYED MUMTAZ HUSSAIN BUKHARI, ADVOCATE.
COUNSEL FOR THE STATE		MR. GHULAM ABBAS GONDAL, DEPUTY PROSECUTOR-GENERAL, PUNJAB.
FIR NO. AND POLICE STATION		354 OF 2005 SADDAR KAMALIA, DISTRICT TOBA TEK SINGH.
DATE OF JUDGMENT OF TRIAL COURT	…	20.05.2009
DATE OF PREFERENCE OF APPEAL	…	22.07.2009
DATE OF HEARING	…	10.04.2019
DATE OF DECISION	…	30.04.2019

JUDGMENT:

Mehmood Maqbool Bajwa, J: After conclusion of trial in Crime-Report No.354 of 2005, registered under Section 7 of The Offence of Qazf (Enforcement of Hadd) Ordinance VIII of 1979 (Hereinafter called Ordinance VIII of 1979), a learned Additional Sessions Judge Kamalia, acquitted the respondents No.1 to 3 (The respondents) from the charge of "Qazf" through judgment dated 20th May, 2009, resulting in preference of present appeal, by the appellant, complainant of F.I.R., questioning the legality and validity of adverse conclusion, seeking its annulment with prayer to record conviction against the respondents, awarding them appropriate sentence.

2. The appellant, Saeed Akhtar (P.W.2), husband of Mst. Maqsoodan Akhter (P.W.3), got F.I.R (Ex.PA-1), lodged with the stance that Mst. Maqsoodan Akhter, entered into a contract of marriage with him with her freewill and consent, being sui juris, but since it was solemnized without blessing of her father, therefore, he got F.I.R No.88 of 1997, registered against him and others under Sections 10 and 11 of The Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 (Shall be called Ordinance VII of 1979) in which, the appellant, Mst. Rukhsana,

Khurshid Bibi and Muhammad Shafique, persons complained of were acquitted.

The respondent No.1, maternal uncle of his wife, while distorting facts including about the residence of his wife got F.I.R. No.486 of 1999, lodged under Section 10(2) of The Ordinance VII of 1979 not only against the appellant but also his wife in which they were put to face trial and conviction was recorded against them through judgment dated 31st July, 2002, by a learned Additional Sessions Judge, Kamalia.

3. Appeal No.249-L of 2002 was preferred by the appellant and his wife before this Court, which was allowed on 6th November, 2002.

4. Having judgment of acquittal in their favour, the appellant and his wife first approached the learned Additional Sessions Judge, Kamalia and then on his direction to the local police for registration of case against the respondents, resulting in recording of F.I.R. No.354 of 2005.

5. After completion of trial, a learned Additional Sessions Judge, Kamalia, concluded about the failure of prosecution to prove case, recording acquittal in favour of the respondents through judgment assailed.

6. Heard adversaries and re-appraised the evidence keeping in view the contentions advanced.

7. First of all, we will take up the case of prosecution against respondents No.2 and 3.

In the F.I.R. (Ex.PA-1), only allegation against the said respondents is that Muhammad Ashraf, respondent No.1, prior to registration of F.I.R. under Section 10(2) of Ordinance VII of 1979 made consultation with them.

The accusation by itself is not sufficient even to suggest actionable claim against the respondents No.2 and 3 keeping in view the definition of "Qazf" made in Section 3 of Ordinance VIII of 1979, requiring specific imputation of "Zina" as defined in Section 4 of Ordinance VII of 1979.

The appellant (P.W.2) and his wife, Mst. Maqsoodan Akhter (P.W.3) in their respective statements attributed allegation of giving false evidence against them not only in the Court of Sessions during trial but also during the course of investigation though same was not agitated in the crime-report.

Part of deposition referred above by no stretch of imagination can attract the penal provision under which case was registered.

We are not un-mindful that both the witnesses were put suggestion in cross-examination that the respondents did not level allegation of Zina against them in their evidence, which was questioned. Though, suggestion referred to was not required to be

put but that by itself is not sufficient to prove the case of prosecution in view of omission on the part of the witnesses to explain the nature and detail of accusation.

8. We have also gone through the certified copy of statement of Tasleem Akhtar, respondent No.3 (Ex.PC), made during the trial of F.I.R. No.486 of 1999, relied upon by appellant in which, she stated that Riaz (respondent No.2) and Rafique (not before us) disclosed during search of Maqsoodan Bibi that appellant had taken her on a motorbike. The respondent did not attribute any allegation attracting the penal consequences. Even otherwise, she disclosed a fact to the respondent No.1, her maternal uncle, intimated to her by others.

9. Muhammad Riaz (respondent No.2) appeared as P.W.6 during the course of trial against the appellant on 10th May, 2002, in which, he though stated that both (appellant and Maqsoodan) were going for the purpose of committing Zina but part of the testimony does not in clear terms can be treated as attribution of Zina keeping in view its definition contained in Section 4 of Ordinance VII of 1979. The words "Said to commit "Zina" and "willfully have sexual intercourse", clearly demonstrates actual commission of Zina.

Line of distinction and demarcation has to be made regarding the imputation of "Zina" and "Going for the purpose of

Zina", particularly keeping in view the number of punishments, stringent in nature, mentioned in *Sura* "*Al-Nur*", (Sura 24.A.4)

Since deterrent punishments have been provided, therefore, it requires harder proof to substantiate it. Any premium, if possibly can be given, has to be extended to the respondents.

Expression "Going for the purpose of Zina" is more or less a guess which words by no stretch of imagination can be considered substitute of expression "Zina".

10. Pursuant to above, we have no doubt in our mind that evidence led by appellant-prosecution was not sufficient to prove the charge of "Qazf" against both the respondents.

11. No other evidence was led against the said respondents.

12. Evidence led by prosecution against Muhammad Ashraf (respondent No.1) has also been scanned on the touchstone and we feel no hesitation to endorse the conclusion of learned Trial Court but for our own reasons.

The said respondent is admittedly complainant of F.I.R. No.486 of 1999, copy of which is Ex.PC. In the later part of the crime-report, one finds the words "Abduction for the purpose of Zina" mentioned. The said expression has been dealt with earlier keeping in view the parameters mentioned in Sections 3 and 4 of Ordinance VIII and VII of 1979 respectively, reaching to the

conclusion that the same are not *stricto senso* substitution of imputation of Zina.

13. Evidence of appellant (P.W.2) and Mst. Maqsoodan Akhter (P.W.3), attributing allegation of false evidence against the respondent No.1, cannot satisfy the yardstick, enumerated and dealt with in depth earlier.

14. Reliance upon the statement of respondent No.1 as P.W.4 (Ex.PB) recorded on 5th July, 2001, during the trial of case F.I.R. No.486 of 1999 cannot advance plea of appellant as in his testimony, there is no such attribution to attract the penal provision, under which charge was framed.

15. Judgment dated 6th November, 2002, delivered by this Court in Appeal No.249-L of 2002, recording acquittal in favour of appellant and Maqsoodan Bibi by itself would not be sufficient to make interference in the judgment impugned in view of discussion made in preceding paragraphs.

However, we are unable to endorse the contention of the respondents making an attempt to question the binding force of the judgment suggesting it as "Ex-parte" in view of non-issuance of notice to the respondents.

16. Though, we are also in agreement with the contention of learned Counsel for the appellant that the judgment of learned Trial Court recording acquittal is not well-reasoned but the fact by itself is not sufficient to make interference in the conclusion as after re-appraisal of evidence, an un-escapable conclusion is failure of prosecution-appellant to prove the case beyond shadow of doubt.

17. Pursuant to above, we do not find any merit in the appeal, which accordingly is dismissed.

(DR. FIDA MUHAMMAD KHAN) JUDGE

(MEHMOOD MAQBOOL BAJWA) JUDGE

Announced in Open Court
Dated, Islamabad the
30th April, 2019.
*Mubashir**

Approved for Reporting

Judge