

JUDGMENT:

ZAHOORUL HAQ, MEMBER: This is an appeal from the judgment of Additional Sessions Judge, Muzaffar Garh dated 22.7.1981 whereby the present two appellants Pak Mohammad and Mst. Sakina were convicted under Section 10/2 read with Section 18 of Ordinance 7 of 1979 and were sentenced to three years R.I. and five stripes each. The third appellant in this appeal namely Allah Banda was convicted under Section 19/1 of Ordinance 7 of 1979 read with Section 109 of P.P.C. and was sentenced to pay Rs 2,000/- fine or in default to suffer 18 months rigorous imprisonment.

2. The relevant facts of the case as related in the FIR lodged by P.W. Chiragh Din at Police Station, Alipur on 18.2.1980 at 11.00 A.M. are to the following effect:-

"I live inside Fatehpur Gate of village Alipur. Today, when I came out of my house, I saw that a woman and a man are entering in the house of Allah Banda s/o Allah Dya, in suspicious circumstances. I took Nayyar Imam and Muhammad Afzal, my neighbours alongwith me and went to the shop of Allah Banda and saw that the door of the house is closed, which was pushed and we found Mst. Sakina w/o Amir Bakhsh lying naked on a cot and Pak Muhammad standing naked. Mst. Sakina immediately put her Shalwar on and Pak Muhammad after wearing his Shalwar, fell down on my feet and begged for mercy and said that he has committed a mistake. Therefore, we have brought Pak Mohammad and Allah Banda at whose instance they were going to commit the offence. Action against them be taken."

3. The investigation of the case was conducted by P.W.5 Ghulam Sabir Head Constable of the same Police Station who had examined PW.3 Nayyar Imam and P.W.4 Mohammad Afzal had also arrested the accused-appellants on the same day. He sent Mst. Sakina for the examination to Lady Doctor but the same is of no consequences as there was no allegation of actual zina. He also got appellant Pak Muhammad examined by P.W.6,

66

Mohammad Ramzan Shah, the Medical Officer who reported that Pak Muhammad was fit for sexual intercourse.

4. The prosecution in support of its case had examined three eye witnesses. Chiragh Mohammad P.W.2 who is the complainant in the case who had reiterated the contents of the F.I.R. in his deposition and stated that he saw appellants Pak Mohammad and Mst.Sakina going into a room of the house of Allah Banda appellant in suspicious circumstances. Thereupon he called Nayyar Imam and Mohammad Afzal, his neighbours, and they had gone together and opened the door of the room of Allah Banda where they found Mst.Sakina and Pak Mohammad naked and thereafter they reported the matter to the Police at 11.00 A.M. The incident was alleged to be of 9.30 A.M. on the same day. Chiragh Mohammad was cross examined at length by the Defence but nothing of substance has come out of that cross examination. He stated that he had seen accused standing naked. He denied any knowledge about the brother of accused Pak Mohammad having been murdered some where in Tehsil Sadiqabad and further denied that he wanted to force the accused to compromise in that murder case. He also denied that he had developed some grudge against accused on account of vegetable article dealings. In cross examination by Mst.Sakina he denied that Mst. Sakina was cutting grass in his land and he checked her from cutting the grass or that Mst.Sakina had abused him. He also denied that Mst.Sakina was at the shop of Allah Banda for purchasing the vegetables and that he pushed her into the room and confined her there where appellant Pak Mohammad was already in the room. He denied that he had implicated Mst.Sakina because she had abused her.

Jami

5. Next prosecution witness P.W.3 Nayyar Imam X has supported the complainant Chiragh and stated that Chiragh had called him saying that a man and a woman have gone into the house of Allah Banda in suspicious condition. They called Mohammad Afzal, P.W. and went to Allah Banda asking him as to who were inside the room. Allah Banda answered in the negative but then admitted that the said two accused were in the room for the purpose of illicit intercourse. They then pushed the door open and went into the room where they saw accused Mst.Sakina lying naked and accused Pak Mohammad standing in naked position and on seeing them they caught them and took them to the Police Station. It is surprising to see that Nayyar Imam was not cross examined by Pak Mohammad or Allah Banda and the cross examination by Mst.Sakina was only to the extent that Nayyar Imam was landlord which he denied.

6. P.W.4 Mohammad Afzal gave almost identical evidence as that of P.W.3 Nayyar Imam had fully supported the version of Nayyar Imam. In cross examination he denied that Pak Mohammad was standing in the street when he saw him. He denied any knowledge about the murder of the brother of Pak Mohammad and denied that in order to reach a compromise in the murder case they had implicated the accused in this false case. In cross examination by Allah Banda he denied to have smoked cigarettes standing on the shop of Allah Banda. In cross examination to Mst.Sakina he denied the suggestion that Mst.Sakina was at the shop of Allah Banda for purchasing vegetables. He also denied that he and Chiragh Mohammad pushed the appellant into the room or that he gave a slap on the head of Mst.Sakina. He denied the knowledge of the fact that Mst.Sakina was cutting grass from the land of Chiragh Mohammad who checked her from doing so.

Yammi

(18)

He admitted that Mst. Sakina belongs to Baqar Shah which was three miles away from Alipur. In cross examination to court he stated that house of Chiragh was 3/4 karams from his house and they belonged to the same brotherhood and land of Chiragh Mohammad is in Mauza Baqar Shah. He also stated that hundred of peoples had gathered when they were taking accused person to the Police Station.

7. The appellants in their statement under Section 342 Cr.P.C. had denied the case of the prosecution. Pak Mohammad had stated that he was 100 yards from the shop of Allah Banda when Chiragh Mohammad took them from there to the Police Station. He also stated that his brother was murdered in Tehsil Sadiqabad and the complainant party used to force him to have compromise in that murder case and on his refusal he had been falsely implicated in the case. The appellant Allah Banda stated that he was not taken alongwith others two accused but after some time he was taken to the Police Station. He also stated that Chiragh Mohammad had asked him to make the exchange of his house property with that of Chiragh Mohammad and on his refusal this case was filed. Mst. Sakina stated that she was at the shop of Allah Banda for purchasing vegetables when alongwith other two accused she was taken from there to the Police Station. She also alleged that complainant Chiragh attempted to develop illicit relation with her but she refused and therefore, this false case is filed.

8. The defence examined three defence witnesses. P.W.1 Shaukat, stated that he used to sell fruits near the shop of Allah Banda and that accused Pak Mohammad and Allah Banda were sitting on the shop of Allah Banda when at 9.30 A.M. one woman who is accused in Court came there with her brother and that man said to her sister to sit at the shop of Allah Banda and purchase

Jam

(19)

vegetable from there as she was to go to the goldsmith. There arrived P.W. Chiragh Mohammad and he started abusing all the three accused and took them to the Police Station. The brother of Mst. Sakina on his return was informed of the incident. On the same day Police reached at the spot and witnesses had told the Police about the facts. In cross examination the witness did not remember as to in which ward the shop of accused Allah Banda was located. He stated that his house was 20 karams from the shop of Allah Banda. He denied that he and accused Pak Mohammad and their family belonged to the same town in India. He denied that he had deposed falsely.

9. D.W.2 Allah Bachaya who is the brother of Mst. Sakina stated that he and his sister had gone to Alipur where he directed her to purchase vegetable from the shop of Allah Banda and wait for his return as he was going to the goldsmith. On his return from goldsmith a Rehri Owner told him that his sister was taken to the Police Station while she was sitting on the shop of Allah Banda. He stated that thereafter he went to the Police Station and stated before the Police that his sister was innocent. In cross examination he admitted that he was convicted and sentenced in a murder case but actually he was innocent. He denied that he was not with his sister on that day. He stated that the ornaments were not ready on that day and therefore, were not purchased. He stated that the ornaments were required for his wife but admitted that his wife was not along with him for purchasing the ornaments. He stated that the order was already placed for the ornaments. He admitted that no ornaments were purchased thereafter on account of the expenses of defending the case in question.

10. D.W.3 Mahmood Khan deposed that he knew Pak Mohammad and Chiragh Mohammad. Mushtaq, the brother of Pak Mohammad was murdered. Anwar and Aslam were accused in that murder case. They both are from brotherhood of P.W.Chiragh Mohammad. Chiragh Mohammad had asked Pak Mohammad to have a compromise in that case but he refused. The relation of accused Pak Mohammad were not cordial since then and accused was threatened with dire consequences. In cross examination he stated that he was not a witness in the murder case of said Mushtaq. He admitted that he was from the brotherhood of Mushtaq in the sense that they belong to the same Mohallah. He also stated that he had only heard about the murder of Mushtaq who was murdered about three years ago. He admitted that he did not know Aslam and Anwar. He also admitted that Aslam and Anwar were acquitted but he did not know as to when they were acquitted.

11. Mr. Mushtaq Ahmad, learned counsel for the appellants has submitted that the case is not worth being believed. We do not agree with that submission as we find that the case of the prosecution has been amply proved by P.W.Chiragh Mohammad, Nayyar Imam Shah and Mohammad Afzal. We find that all the three eye witnesses are consistent in their statements that on opening the relevant door they had found Mst.Sakina and Pak Mohammad in naked condition. Two of them had stated that Mst. Sakina was lying naked and all the three of them had stated that Pak Mohammad was standing in naked condition. There is hardly any cross examination directed against Nayyar Imam and his evidence has gone completely un rebutted. Similarly there is no cross examination worth i name against Mohammad Afzal. We also find that the evidence of Chiragh Mohammad has not been shaken in the cross examination and therefore, there is no reason to disbelieve to three P.Ws. as against Pak Mohammad and Mst.Sakina. In fact we find from the

ham

statement of Pak Mohammad under Section 342 Cr.P.C. that he has not denied his presence near about the shop of Allah Banda but stated that he was 100 yards from the shop. If it had been so and he was falsely implicated then the town of Alipur could not have allowed such a false implication to go unchallenge. The appellant Mst. Sakina has stated that she was present at the shop of Allah Banda for purchasing vegetables therefore, her presence near the scene is almost admitted. From the trend of cross examination made by Mst. Sakina to Chiragh and Mohammad Afzal we find that the suggestion was that she had been pushed into the room with Pak Mohammad and this would therefore, amount to indirect admission of her presence at the spot. This trend of cross examination is therefore of some significance. In any case even if we leave aside the trend of the cross examination, we still find the case of the prosecution fully proved by the three P.Ws. as against Pak Mohammad and Mst. Sakina.

12. In respect of the defence witnesses suffice it to say that the story of Allah Buchaya that he had come to purchase ornaments to Alipur from village Baqar Shah without his wife for whom the ornaments had been ordered is not believable. Further it is inconcievable to believe that Allah Bachaya who resides in village Baqar Shah three miles away from Alipur would bring his sister Mst. Sakina for the purpose of purchasing vegetables and would not even take her to the goldsmith in order to see whether the ornaments had been properly prepared or not. Moreover no goldsmith has been examined by the defence in order to substantiate the story about the purchase of ornaments from the goldsmith. In fact Allah Bachaya had admitted that the ornaments had not been purchased eventually. The reason

Jam

which he has given that the expenses of the present case prohibited the purchase of the ornaments is feasible alright but it is doubtful whether the ornaments which had been prepared under order could be left in that condition. After all a good deal of advance payment must have been made for the ornaments at the time of the placing of the orders and the advance payment could not thus be foregone. If the defence was serious in its contention then it was incumbent upon it to produce the goldsmith which could substantiate the story which is otherwise not believable.

13. D.W. Shaukat is not worth being believed as we have found that the story of the goldsmith is not substantiated. In any case D.W. Shaukat had stated that he had told the Police on the very day about the facts on the spot but we do not find even a single suggestion to that effect having been put to the Investigating Officer, Ghulam Sabir. In fact Ghulam Sabir has clearly stated that he had examined only Nayyar Imam and Mohammad Afzal and therefore the presence of D.W. Shaukat on the spot is hardly believable.

14. Similarly the version of D.W.3 Mahmood Khan about the strained relationship of complainant party with Pak Mohammad accused is hardly of any credence particularly in view of the fact that he had merely heard of the murder and he did not even know Aslam and Anwar who were the accused in the case of murder of Mushtaq and more particularly in view of the fact that Aslam and Anwar had been acquitted of the charge of murdering Mushtaq and witness Mahmood Khan did not even have the knowledge as to when they were acquitted. In such circumstances the version of Chiragh Mohammad having a strained relationship with Pak Mohammad is not worth any credence. Even the relationship of Aslam and

Sam

Anwar with Chiragh was not stated. We do not consider mere brotherhood as enough to force a complainant to withdraw a murder case against the member of brotherhood.

15. We also find that Mst. Sakina did not allege any attempt of illegitimate intimacy by Chiragh Mohammad when she cross examined Chiragh Mohammad but in her statement under Section 342 Cr.P.C. she has made that allegation. It is needless to say that such an allegation is of no consequences as she did not allow Chiragh Mohammad to explain that position by putting away such suggestion. It is thus evidence that the factum of Pak Mohammad and Mst. Sakina having been found naked in the room of Allah Banda is proved beyond doubt and it is further proved that Mst. Sakina was lying naked on the cot and Pak Mohammad was standing naked.

16. Mr. Mushtaq had submitted that the facts proved merely amounted to the preparation for the offence of zina but they did not constitute an attempt. He had relied upon a number of rulings starting with P.L.D.1950 Lahore 147 where difference between preparation and attempt to commit an offence was elucidated by S. Mohammad Jan J. He also relied upon P.L.D.1952 Sind 28 which was a case of essential commodities and therein "preparation" and "attempt" were distinguished. The relevant portion of the same is as under:-

" Person intending to do a particular offence must have done one or more criminal acts being part of the criminal transactions towards the commission of the intended offence".

17. Reference is also made to P.L.D.1970 Lahore 230 where attempt to commit offence was defined but it was also observed in the said ruling that what amounts to an attempt is of necessity vague. In another case viz: 1973 SCMR 108(11) Justice Sajjad Ahmad Jan has elucidated

Jammi

as to what amounts to an attempt as under:-

"More specifically an attempt to commit a crime consists of the following elements:-

- i) The intent to commit the crime
- ii) Performance of some act towards the commission of the crime, and
- iii) Failure to consummate its commission on account of the circumstances beyond the control of the offender.

The test whether there has been an attempt to commit a crime, is a factual one by reference to the three ingredients set out above".

With respect agree with those observations.

The Supreme Court was a case of an intention to rob by a Police Constable when he had pointed out his knife on some persons who had gathered at the Kotha of a Prostitute and he had told them that they should surrender what they have but eventually nothing was robbed out of those persons as the culprits had fled away when the inmates raised a cry, and in those circumstances the court held that it was not their intention to rob as if the accused had really intended to rob to they would have certainly done something practical to rob them and since there was no outside intervention and accused had fled away on their own therefore it was not an attempt at robbery. The conviction was therefore altered from 393/398 P.P.C. to one under Section 506 P.P.C. It is apparent therefore that every case of attempt has to be decided on its own facts.

18. In the present case we have the evidence that the appellants Pak Mohammad and Mst.Sakina went into the room of Allah Banda and closed the door. Thereafter we have the evidence that when the door was opened by the P.Ws. they found Pak Mohammad and Mst.Sakina both naked and further they found that Mst.Sakina was lying on the cot. In these circumstances there is no other inference possible except that the appellants Mst.Sakina

Gami

and Pak Mohammad were attempting to commit zina but they were failed in their attempt to commit zina by the intervention of the P.Ws who opened the door. They had certainly gone beyond the stage of preparation and the only thing left was the commission of the offence of zina itself. It was a case of zina by consent of the parties and not a case of rape. The accused had not stopped from attempting to commit the zina on their own but they have been stopped in that act by outside intervention. We are quite clear in our mind that if a young man and young woman undressed themselves and the woman lies naked on the cot and the man is standing naked then they have gone beyond the stage of preparation and are attempting to commit zina, and but for the outside intervention they would have performed the act^{of} zina.

19. We are therefore, clearly of the view that Pak Mohammad and Mst.Sakina had attempted to commit zina and their conviction under Section 10(2) read with Section 18 is justified and therefore their appeals are dismissed. However, the case of Allah Banda appellant is different. We find that the complainant, Chiragh Mohammad in his FIR has not attributed any role to Allah Banda in respect of this matter but had only stated that it was the house of Allah Banda. It is correct that Allah Banda was sitting outside that room selling vegetables and in all probability he might have known the intentions of the other appellants when they entered in his room but Chiragh Mohammad had not burdened Allah Banda with any direct responsibility in his F.I.R. That F.I.R. had been lodged at 11.00 A.M. while the offence had taken place at 9.30 A.M. and therefore, till 11.00 A.M. the specific role played by Allah Banda was not specified by Chiragh Mohammad in his FIR because he had merely stated in the FIR that the offence was going to be committed at the instance of Allah Banda

ham

but that is a mere expression of opinion without mentioning the specific action which could be regarded as the ground of that opinion. We may note here that complainant Chiragh Mohammad and P.Ws Nayyar Imam and Mohammad Afzal were together when they had opened the room of Allah Banda and found the appellants Pak Mohammad and Mst.Sakina naked inside at 9.30 A.M. and therefore, Chiragh Mohammad should have been conversant that what happened at the time of the opening of the relevant door. But we find that P.Ws Nayyar Imam and Mohammad Afzal have in their statements stated that they asked Allah Banda about going into the room of a man and a woman and Allah Banda denied but later on admitted that a man and woman were in the room for illicit purpose. This aspect of the case appears to be an improvement and as it is not found in the FIR lodged by Chiragh Mohammad which is the earliest version of the case. Even in the deposition of P.W.2 Chiragh Mohammad we do not find any mention of a talk between the P.W. and Allah Banda and we are therefore of the view that the case against Allah Banda has not been proved beyond doubt and he is therefore, entitled to an acquittal and he is therefore, ordered to be released. These are the reasons for the oral order passed by us on 5.9.1981. The appeals of Pak Mohammad and Mst.Sakina are dismissed.

Zawar-ul-Haq

MEMBER - I

[Signature]

MEMBER - V

Jamm
1/11/81

Approved for publication

Zawar-ul-Haq
25.1.83