

IN THE FEDERAL SHARIAT COURT

(APPELLATE JURISDICTION)

PRESENT

JUSTICE IQBAL HAMEEDUR RAHMAN, CHIEF JUSTICE

JUSTICE DR. SYED MUHAMMAD ANWER

CRIMINAL APPEAL NO.02-I OF 2023

Muhammad Kashif s/o Hidayat Ali, Caste Sindhu Jatt,
R/o Basti Punjabi, Mouza Shahani, Tehsil Jampur, District Rajanpur.

...Appellant

VERSUS

1. The State.
2. Noor Muhammad s/o Muhammad Shafi, Caste Uthwal Jatt,
R/o Basti Punjabi, Mouza Shahani, Tehsil Jampur, District Rajanpur.
3. Tahira Bibi d/o Noor Muhammad, Caste Uthwal Jatt,
R/o Basti Punjabi, Mouza Shahani, Tehsil Jampur, District Rajanpur.

...Respondents

Counsel for the Appellant : Sardar Muhammad Yaqoob
Mastoi, Advocate.

Counsel for Respondents : Ch. Ghulam Miran, Advocate.

Counsel for the State : Mr. Saeed Ahmed Shaikh,
Additional P.G, Punjab.

Private Complaint filed on : 25.04.2019 before ASJ-I, Jampur

Date of Impugned Judgment : 29.10.2022.

Date of Institution of Cr.PSLA : 26.12.2022.

PSLA converted in Appeal on 16.03.2023.

Dates of Hearing : 01.02.2024.

Date of Decision : 29.02.2024.

JUDGMENT

IQBAL HAMEEDUR RAHMAN-CJ. After conclusion of trial in private complaint filed under Section 7 of The Offence of Qazf (Enforcement of Hadd) Ordinance VIII of 1979 (Hereinafter called

Ordinance VIII of 1979), learned Additional Sessions Judge Jampur-1, District Rajanpur, acquitted the respondents Nos. 2 & 3 (The respondents) from the charge of "Qazf" through judgment dated 29th October, 2022, resulting in preference of present appeal, by the appellant, complainant of private complaint, 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 accusation contained in the private complaint (EX.PA) filed on the strength of statement of the present appellant are that Complainant is an educated person belonging to respectable landlord family. The respondents in order to defame and get "Chatti" (reparation) from the appellant lodged crime report No.202/2016 under section 376 (i) of the Pakistan Penal Code, 1860 (Act XLV of 1860) (Hereinafter called The Code) at police station, Muhammadpur against Muhammad Kashif-appellant leveling false allegation of 'zina' with Mst. Tahira Bibi-respondent No.3, while his brother Rashid Ali was alleged to have stood as guard. As a result, police apprehended the appellant and his brother and got conducted DNA test of Mst. Tahira Bibi-respondent, the appellant and his brother. The DNA report resulted in 'negative'. Then, police placed Rashid Ali brother of the appellant in column No.2 of the report of the Code of Criminal Procedure, 1898 (Act V of 1898) (Hereinafter called Act V of 1898). As Mst. Tahira was pregnant, after

her delivery, DNA test of Mst. Tahira and her baby as well as appellant and his brother-Rashid Ali was again conducted in order to ascertain paternity of the baby but the result of DNA was again in 'negative'. Later on, police declared the appellant and his brother innocent and submitted report under section 173 of the Act V of 1898 in the court of learned Additional Sessions Judge-I, Jampur where respondent No.2-Noor Muhammad had already filed private complaint of '*zina*' with the apprehension of police being in connivance with the accused by not recording his statement correctly being illiterate, obtained his thumb impression on blank paper. The learned trial court framed charge, in the private complaint, against the appellant and his brother and recorded evidence of the respondents, who appeared as PW-1 and PW-2. At the end of trial, the appellant and his brother were acquitted of the charge. After acquittal, the appellant Muhammad Kashif (PW-1) alongwith his brother Rashid Ali (PW-3) and Haji Piyara (PW-2) went to the respondents, pleaded their innocence and asked the respondents not to put blame of '*zina*' upon them, but the respondents did not accept their plea and kept on leveling false allegation of '*zina*', hence, committed offence under section 7 of the Ordinance VIII of 1979.

3. The learned trial Court after recording cursory statements of the complainant-Muhammad Khashif, Haji Piyara (PW-2) and Rashid Ali (PW-3), summoned the respondents to face trial.

4. Denial on the part of the respondents to admit the accusation contained in the charge resulted in commencement of trial and production of 03 witnesses i.e. appellant-Muhammad Kashif, Haji Piyara (PW-2) and Rashid Ali (PW-3) brother of the appellant. In addition to this, Sardar Ameer Bux Khan Mastoi Advocate while appearing before the court tendered attested copy of private complaint titled "Noor Muhammad Vs. Muhammad Kashif, etc." as Ex.PB, attested copy of MLC of Tahira Bibi along with police docket as Ex.PC, attested copy of statement of Noor Muhammad before police as Ex.PD, attested copy of FIR No.202/2016 as Ex.PE, attested copy of rough site plan of the place of occurrence as Ex.PF, attested copy of Forensic DNA Analysis Report of P.F.S.A (four pages) as Ex.PG, attested copy of MLC of Tahira Bibi as Ex.PH, attested copy of application for DNA test as Ex.PI, attested copy of list of witnesses and their statements in private complaint "Noor Muhammad Vs. Kashif etc." (three pages) as Ex.PJ, attested copy of rough site plan as Ex.PK, attested copy of cursory statements of PWs (three pages) as Ex.PL, attested copy of charge sheet as Ex.PM, attested copy of statements of PWs (eight pages) as Ex.PN, attested copy of statements u/s 342 Cr.P.C. (six pages) as Ex.PO, attested copy of order sheet (eight pages) as Ex.PQ, attested copy of judgment dated 08.11.2018 (ten pages) as Ex.PR and attested copy of reports u/s 173 Cr.P.C. along with order sheet (12 pages) as Ex.PS.

5. The respondents while explaining the incriminating evidence put to them in their statements under section 342 of the Act V of 1898, denied their involvement of false accusation, attributed malice due to grudge of lodging crime report No.202/2016 by the respondent-Noor Muhammad. The respondents also attributed collusion of staff of P.F.S.A. with the appellant and his brother, who managed 'negative' report of DNA which resulted in their acquittal and filing the private complaint of 'qazf'.

6. The learned Additional Sessions Judge-I, Jampur, through judgment dated 29th October, 2022, putting question mark about the veracity of the evidence led by prosecution recorded acquittal in favour of the respondents, by holding as under:

"From the perusal of the aforesaid judgment passed by the learned ASJ, Jampur, it appears that the learned ASJ, Jampur after thorough trial arrived at the conclusion that the prosecution has failed to prove its case against the accused persons of the aforesaid private complaint beyond any shadow of reasonable doubt, therefore, they were acquitted of the charge by extending the benefit of doubt. Here the question arises as to whether acquittal of the complainant and his brother Rashid Ali was based on clear cut findings of the learned trial Court that the said case was lodged by the complainant Noor Muhammad (accused in this case) with malafide intention, deliberately with concoction of the facts or the learned trial Court in its findings has declared the complainant and victim (accused in this case) as liars. There is no clear cut finding of the learned ASJ, Jampur that the aforesaid case was based on clear cut falsification. There is distinction between allegation of Zina made by a stranger and by the victim. Where the allegation of Zina is leveled by the victim herself it is to be seen that when she herself is the victim of the case wherefrom she would bring four witnesses to support her version. Moreover, it has been held in Qazaf ordinance that making complaint to the Authorized Person falls within the exception of the Qazaf ordinance. In the present case, the accused persons alleged that they had made complaint before the Authorized Person in good faith and there was no malafide on their part. Moreover, no

malafide or ulterior motive or ill will of the accused persons Noor Muhammad and Mst. Tahira Bibi in registration of criminal case and filing the private complaint against complainant Muhammad Kashif and his brother Rashid Ali has been established on record. Mst. Tahira Bibi (accused in this case was subjected to continuous rape by Muhammad Kashif (complainant of this case) and his brother Rashid Ali (PW in this case). So, merely failure of the complainant and the victim (accused in this case) to prove their case by not producing cogent and confidence inspiring evidence does not render the complainant and the victim to punishment under the Qazaf Ordinance, 1979."

7. Contention of the learned Counsel for the appellant that respondents, in order to get 'Chatti' from the appellant and his brother, lodged crime report alleging false accusation of 'zina' committed by the appellant and his brother with Mst. Tahira Bibi-Respondent No.3 and during investigation DNA of the respondent-Tahira Bibi and appellant-Muhammad Kashif and his brother Rashid Ali was conducted, the report of which was in 'negative', resulting in cancellation of crime report. He also submitted that after giving birth to a baby by respondent-Mst. Tahira Bibi, DNA tests of the baby, Mst. Tahira Bibi, Muhammad Kashif and his brother Rashid Ali were again conducted but again its report came 'negative'.

Continuing the arguments, it was maintained that due to registration of false crime report and subsequent private complaint, the good image of the appellant and his brother has been tarnished in the locality.

Contended that appellant and his witnesses while recording their evidence have proved the offence of 'qazf' committed by the

respondents but the judgment of learned trial court is result of misreading and non-reading of evidence and as such cannot hold the field.

8. Controverting the arguments, learned Counsel for the respondents maintained that the respondent No.2 had lodged crime report and subsequent private complaint, which was not aimed at tarnishing good repute of the appellant and his brother and their case fell within the second exception of Section 3 of Ordinance VIII of 1979.

Repudiating the motive behind the false accusation to defame and get "*Chatti*" (reparation) from the appellant, the learned Counsel submitted that appellant could not prove it during the trial.

Making reference to the DNA test, it was maintained that the appellant and his brother being influential, in collusion with the staff of P.F.S.A. got managed 'negative' DNA report in and in order to take revenge they have filed the false case of '*qazf*', which was rightly dismissed by the learned trial Court.

He also argued that the appellant and his brother Rashid Ali were acquitted due to benefit of doubt. Similarly, the present respondents were acquitted on the basis of benefit of doubt. He maintained that acquittal of the appellant and his brother was not upon clear cut findings of the Court based on falsification of evidence. In support of his arguments, he placed his reliance on the case law reported as "NASRULLAH vs. THE STATE and 4 others" (2016 PCr.LJ 979),

SHAHZAD alias SHADDU and others vs. THE STATE (2002 SCMR 1009), "RANA SHAHBAZ AHMED and 2 others vs. THE STATE" (2002 SCMR 303), "ABDUL GHANI vs. THE STATE through P.G. Balochistan and another" (2022 SCMR 544) and "AZEEM KHAN and another vs. MUJAHID KHAN" (2016 SCMR 274).

9. On the other hand, the learned Law Officer while supporting judgment of learned trial Court argued that the respondent No.2 filed private complaint of '*zina*' against the appellant and his brother after having been declared innocent by the police during investigation in crime report No.202/2016. Further by adverting to charge framed by the learned trial Court, the learned Law Officer asserted that learned trial Court wrongly framed charge on the basis of crime report in the private complaint of appellant-Muhammad Kashif, whereas it completely ignored that appellant and his brother were proceeded on the basis of private complaint filed by respondent No.2. He also asserted that the appellant-Muhammad Kashif in private complaint of '*qazf*' had concealed facts of private complaint filed by respondent No.2 instead narrated facts of lodging of crime report by the respondent No.2.

It is contended that appellant neither produced nor relied upon the documents of crime report No. 202/2016. It was also contended that appellant could not produce direct evidence of the offence of '*qazf*' committed by the respondents as per requirement of Section 6 (1) (c) of the Ordinance VIII of 1979 read with Article 117 Qanun-e-Shahadat,

Order, 1984. He further contended that Bashir Ahmed, ASI who had recorded complaint of 'zina' was not produced during the trial and the appellant, PW-2 and PW-3 while recording evidence did not mention date, time and place of occurrence of commission of offence of 'qazf' nor made reference of the actual words of 'zina' which imputation was leveled by the respondents against the appellant, failure to do so is fatal to the case of 'qazf'. He maintained that the learned trial Court has rightly acquitted the respondents from the charge. In support of his arguments he relied upon the case law reported in "Maj.Gen. (Retd.) ABDUL AZIZ and 2 others vs. MST. KANWAL RABBANI and another" (1996 PCr.LJ 2030).

10. Conscious consideration has been given to the arguments advanced by the parties while examining the record.

11. Before examining the moot point, one has to dilate upon the definitions of "Qazf". The expression "Qazf" has been defined in Section 3 of Ordinance VIII of 1979 which is reproduced for analysis:-

Sec.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 harmful 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 refer 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, a complainant has made a false accusation of 'zina-bil-jabr'.

(Underlines are ours)

Malafide intention is an essential ingredient to prove offence of Qazf and in absence of such intention to harm the reputation, or hurt the feelings, of such person; the offence of 'qazf' as mentioned in section 3 of Ordinance VIII of 1979 is not clearly made out. During trial the appellant was not able to prove the motive of demanding 'Chatti' as such they defaulted in establishing motive.

To prove the offence of 'qazf' the prosecution must indicate that imputation of 'zina' was made with intention to harm the person or his reputation by imputing such accusation of 'zina'. In the present case the intention to harm the reputation of appellant and his brother as well as getting "chatti" has not been proved during trial, so in absence of such evidence indicating intention to harm reputation of the appellant and his brother prosecution has miserably failed to prove its case. Reliance is

placed on the dictum laid down in "SARFRAZ and another Vs. THE STATE" (2023 SCMR 670) and "ALI ASGHAR alias AKSAR Vs. The STATE" (2023 SCMR 596).

"It is now well established that if a specific motive has been alleged by the prosecution then it is duty of the prosecution to establish the said motive through cogent and confidence inspiring evidence. Otherwise, the said motive might be considered a mitigating circumstance in favour of an accused. However, where no motive is alleged, the capital punishment can be awarded keeping in view the evidence led by the prosecution."

Nevertheless, failure of the respondents to get their stance established before the learned trial Court would not be sufficient to prove the charge of 'qazf'. The fact has to be appreciated keeping in view the well established proposition of law that prosecution has to prove its case against the respondents beyond the shadow of doubt. Reliance is placed on the case law in "MAQSOOD ALAM and anther vs. The STATE and others" (2024 SCMR 156). Relevant portion of the case law is reproduced here in below:-

"Motive has also rightly been disbelieved by the learned High Court by holding that it is a vaguely formulated motive and no evidence in support of the same has been placed on record."

So far as the production of four witnesses in support of accusation of 'zina' according to clause (a) to second exception of Section 3 of the Ordinance VIII of 1979 is concerned, the victim being minor girl of 14/15 years could not produce four witnesses of the 'zina bil jabr' but it is well settled that solitary statement of victim is sufficient to record conviction of an accused for an offence of zina-bil-jabr. Rule of law

enunciated in "SHAHID MAQSOOD SIDDIQUI vs. THE STATE" (2002 YLR 2949), "SHAHZAD alias SHADDU and others v. THE STATE" (2002 SCMR 1009) and "RANA SHAHBAZ AHMED and 2 others vs. The STATE" (2002 SCMR 303). In the light of above dictums the acquittal of appellant/accused in case of 'zina-bil-jabr' on basis of benefit of doubt does not establish the involvement of the respondents No.2 & 3 for the offence of 'qazf'.

Clause (b) of Second Exception to Section 3 of Ordinance VIII of 1979 concerns a person held for the Offence of Qazf if a witness gives false evidence of commission of 'zina', in court or according to findings of the court false accusation of zina-bil-jabr was leveled. The learned trial Court while deciding the complaint filed by respondent No.2 in its judgment has not given any finding regarding giving false evidence by the witnesses/respondents.

Similarly, clause (c) of Second Exception to Section 3 of Ordinance VIII of 1979 also concerns the complainant who makes false accusation of 'zina-bil-jabr' but in the complaint case filed by the respondents, the learned trial court has not given any finding that complainant/Noor Muhammad-Respondent No.2 has made false accusation of 'zina-bil-jabr', rather the appellant and his brother were acquitted while extending them benefit of doubt (See: "BAKHT ALI and another v. The STATE" (1993 PCr.LJ 1872) (Federal Shariat Court). The relevant portion of case law is reproduced as under:

“The main question of concern in this case to be decided is the fact whether an accusation of Zina-bil-Jabr in a Zina case by any witness levelled before any person who has lawful authority over that person with respect to the subject-matter of accusation amounts to Qazf. It seems pertinent here to mention that the injunctions of Islam regarding punishment of Hadd for the Offence of Qazf have been given in Sura Noor verse 4 and the trend of that verse indicates that mere failure of a complainant to prove his allegations in Court does not make the witnesses of the said offence liable to Qazf punishment unless it is proved that they had mala fidely concocted a false accusation”.

(Underlines are for Emphasis)

12. The respondent-Noor Muhammad is admittedly complainant of FIR (Ex.PE), wherein he alleged that his daughter Tahira Bibi-respondent No.3, who was 14/15 years of age, used to go to the house of appellant for reciting Holy Quran, where she was subjected to ‘zina bil jabr’ by the appellant while his brother Rashid Ali performing duty as guard. This allegation of ‘zina’ was narrated by respondent-Noor Muhammad to ASI Bashir Ahmed who lodged the crime report and at the time narrating allegation of ‘zina’ to ASI Bashir Ahmed none from the side of appellant, who witnessed the imputation of ‘zina’ from the mouth of respondent-Noor Muhammad were present enabling them to give direct evidence of offence of ‘qazf’ liable to Hadd. Apart from this, the said Bashir Ahmed ASI, who was natural witness of imputation of ‘qazf’, before whom allegation of ‘zina’ was levelled, was not produced as prosecution witness in the complaint case of ‘qazf’ filed by the appellant.

Keeping in view the absence of appellant, Haji Piyara (PW-2) and Rashid Ali (PW-3) at the first time of leveling allegation of ‘zina’ by

respondent-Noor Muhammad before Bashir Ahmed ASI, their evidence will be considered as hearsay and as such cannot be relied upon.

13. Negative report of the DNA was also relied upon on behalf of appellant but that too by itself would not place the case of prosecution on better footing in order to make interference in the conclusion assailed. In the light of discussion elaborated above, DNA report does not give any support to the case of appellant, without solid corroborative evidence. Reliance is placed on the dictum laid down in case of "ATTA UL MUSTAFA vs. The STATE and another" (2023 SCMR 1698).

"Even otherwise, the DNA report cannot be treated as primary evidence and can only be relied upon for the purposes of corroboration"

Mere negative DNA report, on whose basis acquittal was recorded, cannot be made basis for punishment for the offence of 'qazf' liable to Hadd. The prosecution has to prove its own case through direct evidence as contemplated under Article 71 of the Qanun-e-Shahadat, Order, 1984 which if read in conjunction with Section 6 (1) (c) of Ordinance VIII of 1979 provide strict parameters of 'tazkiyah al-shuhood' for competency of witnesses to give direct evidence of the commission of 'qazf' which in this case is missing. The relevant section is reproduced hereinbelow:

"6. Proof of qazf liable to hadd.(1) Proof of qazf liable to hadd shall be in one of the following forms, namely:

- (a) the accused makes before a Court of competent jurisdiction a confession of the commission of the offence;
- (b) the accused commits 'qazf' in the presence of the Court; and
- (c) at least two Muslim adult male witnesses, other than the victim of the qazf, about whom the Court is satisfied, having regard to the requirements of tazkiyah al-shuhood, that they are truthful persons and abstain from major sins (kabair), give direct evidence of the commission of qazf:"

(Underlines are for emphasis)

14. We have also noted the contention of learned Law Officer that proper charge was not framed by the learned trial Court as it did not advert to the factum that the acquittal of the appellant and his brother Rashid Ali was not on the basis of the crime report No.202/2016 dated 11.07.2016, under section 376 (i) of the Code, registered at Police Station Muhammadpur, rather the acquittal of appellant and his brother was on the basis of private complaint filed by the respondent No.2. It is also to be noted that at the time of framing of charge no such objection was raised to rectify the charge.

15. Another infirmity which we have observed in the cursory statements of the appellant, Haji Piyara and Rashid Ali (C.W.1, C.W.2 and C.W.3) is the omission to mention date, time and venue of the occurrence where the offence of "qazf" was alleged to have been committed by the respondents.

The said infirmity is also reflected in their stereotype statements while appearing as PW-1, PW-2 and PW-3. Since, there is an omission on the part of the witnesses to highlight the time, date and place of

occurrence in their deposition as a witness, therefore, their evidence cannot be relied upon.

As such omission to disclose time, date and place of occurrence is significant, going to the root of the case, putting a serious dent to the case of prosecution and by itself is sufficient to brush aside the prosecution evidence.

Disclosure of time/date and place of occurrence has been stressed in section 222 of Act V of 1898 which is reproduced below:-

222. Particulars as to time, place and person: (1) The charge, shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

Bare perusal of above referred section, suggests that mentioning of time/date and place of occurrence is essential ingredient to constitute an offence which has to be proved by the prosecution but this aspect is missing in the present case, hence sufficient to discard the prosecution evidence.

16. We have gone through the statements of the appellant and his witnesses while appearing as PW-1 to PW-3 and feel no hesitation to observe that right to cross examine the witnesses was closed on 13.04.2022 and subsequently application of the respondents to recall the said order dated 13.04.2022 was also dismissed on 24.05.2022. Despite that prosecution could not make out its case for awarding punishment to the respondents as there is no mention of time, date and place of

occurrence of the offence and reference of word to word imputation of 'zina' uttered by the respondents necessary to constitute offence of 'qazf' as per Section 3 of the Ordinance VIII of 1979.

17. Undeniably, the criminal justice is casting conclusive duty upon the prosecution to prove its case beyond the shadow of reasonable doubt. Article 117 of the Order is referred to as the "legal" burden of proof, which can never be shifted to the accused, unless the legislature by express terms commands otherwise. Ratio expounded in: "Raja KHURRAM ALI KHAN and 2 others Vs. TAYYABA BIBI and another" (PLD 2020 SC 146) relevant portion of the case law is as under:-

"53. The law on the burden of proof, as provided in Article 117 of the Order, mandates the prosecution to prove, and that too, beyond any doubt, the guilt of the accused for the commission of the crime for which he is charged."

The same rule of law has also been enunciated in "Mst. ASIA BIBI Vs. The STATE and others" (PLD 2019 SC 64) relevant portion of the case law is as under:-

"In criminal cases, the burden to prove the guilt of the accused rests heavily upon the prosecution, who has to prove its case beyond any shadow of doubt. Reliance in this behalf may be made to judgments of this Court reported as Nadeem Ramzan v. the State (2018 SCMR 149), S. Mahmood Aslam Shah v. the State (PLD 1987 SC 250) and State v. Rab Nawaz and another (PLD 1974 SC 87)."

18. Scanning of the evidence clearly demonstrates failure of prosecution to prove its case beyond shadow of doubt against the respondents, warranting no interference in the judgment impugned.

Thus, the learned trial Court has rightly come to the conclusion by acquitting the respondents by extending benefit of doubt.

19. Under the circumstances, we find no illegality in the impugned judgment. Appeal is dismissed.

IQBAL HAMEEDUR RAHMAN
CHIEF JUSTICE

DR. SYED MUHAMMAD ANWER
JUDGE

Dated: 29.02.2024
Ajmal/*

Approved for reporting.

CHIEF JUSTICE