

**IN THE FEDERAL SHARIAT COURT**  
**( APPELLATE JURISDICTION)**

**PRESENT.**

**HON: MR. JUSTICE DR. FIDA MUHAMMAD KHAN.**  
**HON: MR. JUSTICE SAEED-UR-REHMAN FARRUKH.**  
**HON: MR. JUSTICE ZAFAR PAHSA CHAUDHRY.**

**CRIMINAL APPEAL NO. 115/I OF 2003.**

Nazir Ahmad son of Rahim Gul,  
R/o Bhanamari, Peshawar. --- Appellant.

**Versus**

The State --- Respondent.

Counsel for the appellant --- Mr. Muhammad Ajmal Khan,  
Advocate.

Counsel for the complainant --- Mr. Shakeel Ahmad,  
Advocate

Counsel for the State --- Mr. Muhammad Sharif Janjua,  
Advocate

Complaint No. & Date --- 1, 5.9.2002.

Date of decision of trial Court --- 4.6.2003

Date of Institution --- 10.6.2003.

Date of hearing --- 27.9.2005

Date of judgment --- 27.9.2005

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Cr. Appeal No.115/I of 2003JUDGMENT.

SAEED-UR-REHMAN FARRUKH, J:- This appeal by Nazir Ahmad son of Rahim Gul is directed against the judgment dated 4.6.2003 passed by learned Additional Sessions Judge-I/Judge Special Court, Peshawar, whereby he was convicted under section 7(1) of Offence Of Qazf (Enforcement of Hadd) Ordinance, 1979 (hereinafter called "the Ordinance") and sentenced to whipping numbering 80 stripes.

2. The background of the case is as under: Mst. Zaiba wife of Naseer Ahmad (brother of the appellant) instituted a complaint against the appellant on 5.9.2002 before the Illaqa Judicial Magistrate, Peshawar under section 500 of Pakistan Penal Code read with Section 5/10 of "the Ordinance". The learned Magistrate conducted inquiry under section 202 of Criminal Procedure Code and thereafter vide order dated 21.11.2002

Cr. Appeal No.115/I of 2003

submitted the record to the Court of learned Sessions Judge Peshawar with the report that on the basis of material / evidence available on the file he was of the view that the appellant had committed offence under section 500 of Pakistan Penal Code read with section 5/10 of "the Ordinance".

3. The appellant was charge sheeted by the trial Court for offence under section 500 of Pakistan Penal Code read with section 5/10 of "the Ordinance". He denied its correctness, pleaded not guilty and claimed to be tried.

4. At the trial, Mst. Zaiba and her husband Naseer Ahmad appeared as PW.1 and PW.2, respectively, in support of the prosecution case.

Mst. Zaiba (complainant) deposed that her marriage was solemnized with Naseer Ahmad on 18.2.2001 and she was living with him as his legally wedded wife. Earlier, Naseer Ahmad had

Cr. Appeal No.115/I of 2003

contracted Nikah with one Mst. Shahnaz Akhtar. Their relations became strained and she went back to live in her parent's house.

She, later on, filed a suit against her husband Naseer Ahmad for dissolution of marriage which was pending adjudication before Judge Family Court, Peshawar. The appellant appeared as a witness on behalf of Mst. Shahnaz Akhtar in the said suit.

During the course of cross-examination, he levelled allegation that she (complainant) was pregnant before her marriage and her character was "fictitious". She relied on the copy of the plaint and said "statement" of the appellant, already on the record of the complaint. Both the documents were exhibited as Ex.PW.1/1 and Ex.PW.1/2, subject to the objection of the defence counsel.

2  
The complainant went on to depose that the allegations levelled by the appellant in his "statement" PW.1/1-2 were false

Cr. Appeal No.115/I of 2003

and baseless and calculated to bring bad name to her in the society.

The witness was cross-examined at some length by the appellant. She conceded that she was not informed by anybody about the litigation pending between Mst. Shahnaz Akhtar and Naseer Ahmad. She deposed that Naseer Ahmad conveyed information about allegation made against her by the appellant in his "statement" in the said suit. She admitted that she could not read the said statement which had been recorded in urdu by the learned Judge Family Court, Peshawar. She also admitted that at the time of recording the "statement" of the appellant she was not present in Court. She insisted that even if the appellant took oath on the Holy Qur'an in support of his plea of innocence she would not be satisfied and would insist for decision of her complaint. She denied, for lack of knowledge, the assertion that

Cr. Appeal No.115/I of 2003

Mst. Shahnaz Akhtar had also filed a complaint against her husband which was pending in the Court of learned Judicial Magistrate. She refuted the suggestion that the present complaint had been filed simply to put pressure upon Mst. Shahnaz Akhtar (first wife of her husband) to withdraw her complaint against him.

5. PW.2 Naseer Ahmad deposed about his marriage with the complainant. He stated that he had earlier contracted marriage with Mst. Shahnaz Akhtar who was still in his wedlock but no issue was born out of the marriage. She instituted a criminal complaint against him. Besides, a family suit was also filed by her before a family Court. In the said suit the appellant who was his brother appeared as a witness and made "some false allegations" against his wife Mst. Zaiba to the effect that she was

Cr. Appeal No.115/I of 2003

pregnant before her marriage with him and that her conduct was not good.


During cross-examination, he conceded that complainant was not present in Court at the time of recording of the impugned "statement" of the appellant. It was he who informed the complainant that his brother had levelled allegations against her. He denied the suggestion that complainant had filed the instant complaint to pressurize Mst. Shahnaz Akhtar to withdraws her cases against him. He denied the suggestion that the appellant did not make any allegation against him as well as Mst. Zaiba in his "statement". He admitted that it was only on the basis of information conveyed to the complainant about the alleged statement of the appellant that the complaint was filed by her.

6. The appellant, after closure of the prosecution evidence, was examined under section 342 Criminal Procedure Code. He

Cr. Appeal No.115/I of 2003

denied having made any allegation against the complainant of her bad character and pregnancy before marriage, while appearing as a witness on behalf of Mst. Shahnaz Akhtar in her suit. He asserted that the prosecution witnesses were interested as they wanted to put pressure upon him and his wife so that Mst. Shahnaz Akhtar may withdraw her two cases pending before Courts of law.

He did not offer to lead defence evidence. He, however, expressed his intention to be examined as his witness to disprove the prosecution allegations, as postulated by section 340(2) Criminal Procedure Code.

7. The appellant, in his statement under section 340(2) Cr.P.C,  deposed that he was innocent and had been falsely implicated in the case. He denied the suggestion that while appearing as a witness in the suit for dissolution of marriage filed by Mst.



Cr. Appeal No.115/I of 2003

Shahnaz Akhtar he had levelled any allegation against the complainant, inter-alia, to the effect that prior to her Nikah with Naseer Ahmad she was pregnant.

8. We have heard the learned counsel for the parties and perused the record with their assistance.

We find merit in this appeal. As noticed above, Mst. Zaiba conceded that she was not present in the Court at the time when statement of the appellant was recorded (in the aforesaid family suit). According to her, she was informed by her husband Naseer Ahmad in this behalf. Her assertion that the appellant uttered the offending words was to be treated as mere hearsay, carrying little evidentiary value.

Though Naseer Ahmad PW-2 did assert that the appellant levelled above-noted allegations of immorality against Mst. Zaiba, his oral statement before trial court cannot be taken

**Cr. Appeal No.115/I of 2003**

into consideration for resolution of the controversy involved in this case.

Article 102 of the Qanun-Shahadat Order, 1984 reads as

under:-

**“Article 102.** Evidence of terms of contracts, grants and other disposition of property reduced to form of document.--- When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained-----.”  
(Under lining is ours)

It is well settled that a deposition, whether in a civil or criminal case is required by law to be reduced into writing. The rule with regard to recording of deposition in civil cases is contained in Order 18 of Civil Procedure Code. Since learned Judge, Family Court, seized of the suit, had recorded the

Cr. Appeal No.115/I of 2003

deposition of the witness (appellant herein) the only legal course to prove it was to produce written record of the deposition itself and not the oral statement of Naseer Ahmad with regard to its contents. His statement about the contents of the deposition under reference, per law, had to be excluded from consideration, being inadmissible in evidence.

9. We are thus left with the copy of the statement allegedly made by the appellant in the suit, brought on record of this case as Ex-PW-1/2.

We have carefully perused the document Ex-PW-1/2 and find that it is not a certified copy, as required by law, of the statement allegedly made by the appellant in the suit filed by Mst. Shahnaz Akhtar. Some of the pages bear endorsement "attested, Examiner, Sessions Court Peshawar" while others as "certified to be true copy, Examiner, Sessions Court Peshawar".

Cr. Appeal No.115/I of 2003

Significantly, prescribed seal by the Copying Agency at the end of the document is missing.

Item No. 7 (XVI) in Chapter 'C' of Lahore High Court Rules and Orders, pertaining to supply of copies, (adopted by Peshawar High Court) reads as under:-

“After entering the copies in the Cost Register, and putting the prescribed seal thereon, the Examiner, Copy Supply Section, will deliver them to the Copy clerk after obtaining the latter's signature on the Register. The Copy Clerk will in turn, pass them on to the Supervisor, Copy Section after completing the accounts.

After making the necessary checks, the Supervisor Copy Sections will have the copy delivered to the petitioner through the Copy Clerk.” (the underlining is ours).

The prescribed seal contains number of columns, to be filled by the Copying Agency, inter-alia, about date of application, date of receipt of record, date of preparation, fee to be charged, date of delivery of the copy.

Cr. Appeal No.115/I of 2003

10. It was the duty of the complainant Mst. Zaiba to place on record of the case the certified copy of the impugned statement of the appellant, as postulated by above quoted rule. She failed to do so with the result that document Ex-PW-1/2 stood hit by mandatory embargo of Article 102 of Qanun-e-Shahadat Order, 1984 rendering it inadmissible in evidence. It thus carried no evidentiary value.

11. On being confronted with this situation the learned counsel for the complainant argued that in case the appellant was serious about admissibility of this document he should have raised objection before the trial court. He failed to consider that this objection was in fact raised by the appellant at the relevant time.

It was necessary for the trial court to deal with this objection in the first instance before proceeding to decide the lis before it. This was not done. Obviously, the appellant, who was


Cr. Appeal No.115/I of 2003

arrayed as accused, could not be penalized for this lapse on the part of the trial Court. keeping in view the well known maxim that no body should suffer through fault of the Court.

12. It was the duty of the prosecution to prove its case against the appellant beyond all shadow of doubt which duty it failed to discharge. We find that there was no legal evidence on the record which could warrant conviction of the appellant and the impugned judgment is thus not sustainable in law.

Consequently, we have no option but to accept this appeal and after setting side the impugned judgment acquit the appellant. Order accordingly. The appellant was enlarged on bail during pendency of the appeal. His bail bonds are discharged.

  
(SAEED-UR-REHMAN FARRUKH)  
JUDGE

  
(DR. FIDA MUHAMMAD KHAN)  
JUDGE

 84  
(ZAFAR PASHA CHAUDHRY)  
JUDGE

Islamabad,  
the 27<sup>th</sup> September, 2005.

Approved for reporting.  
