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IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT:

HON:MR.JUSTICE DR.FIDA MUHAMMAD KHAN
HON:MR.JUSTICE ABDUL WAHEED SIDDIQUI

Criminal Appeal No.76/I of 1997.

Mohammad Haneef s/o Fazal Ellahi, Caste Gujjar, r/o Sohawa District Chakwal	.....	Appellant
	.....	
1. Mst.Reshma w/o Mohammad Sharif Caste Dhabba 2. Sh.Mohammad Rafique s/o Mohammad Din Caste Sheikh Both r/o Sohawa District Chakwal 3. Asif Saleem Nawaz s/o Mohammad Nawaz Caste Jatt, r/o Dewalian, Chakwal 4. The State	.....	Respondents
Counsel for the appellant	.....	Mr.Muhammad Ilyas Siddiqui Advocate
Counsel for the respondents	.....	Ch.Afrasiab Khan and Qazi Muhammad Amin Advocates
Counsel for the State	.....	Mr.Muhammad Aslam Uns, Advocate

Cont... P/2 ...

Criminal Appeal No.78/I of 1997.

Asif Saleem Nawaz s/o Muhammad Nawaz Caste Jatt, r/o Dewalian, Tehsil & District Chakwal	.....	Appellant
	Versus	
The State	.....	Respondent
Counsel for the appellant	.....	Ch.Afrasiab Khan Advocate
Counsel for the State	.....	Mr.Muhammad Aslam Uns Advocate
FIR No. Date and Police station	.....	37 dated 19-4-1996 P.S. Dhuman
Date of the Judgment of the trial Court	.....	25-7-1997
Date of Institution	.....	2-8-1997 / 6-8-1997
Date of hearing	.....	24-2-1998
Date of decision	.....	2-4-1998

JUDGMENT:

ABDUL WAHEED SIDDIQUI,J:- Appellant in Criminal Appeal No.78/I of 1997 has assailed a judgment delivered by the court of Additional Sessions Judge, Chakwal on 25-07-1997 whereby he has been convicted under section 10 (3) of the Offence of Zina (Enforcement of Hudood) Ordinance 1979, hereinafter referred to as the said ordinance, and has been sentenced to R.I. for 10 years and whipping numbering 30 stripes. Benefit of section 382-B Cr.P.C. has also been extended.

2. One Muhammad Hanif (PW-3) appeared at police station Dhuman District Chakwal on 19-4-1996 at 4-10 P.M. and lodged F.I.R. In the said F.I.R. the above-mentioned complainant has stated that during the preceding night he had gone to irrigate his agricultural land and his wife had gone in the brothery whereas his virgin daughter Soofia Naz (PW-4) aged 14/15 years alongwith two younger brothers was present in the house. At about 230 hours in the night, he returned to his house and found Soofia Naz missing. Then he searched her in the houses of his brothery in vain. At about 6 A.M. one Ishfaque came and informed that his missing daughter was lying near his house in an unconscious condition. The complainant then rushed towards

the spot accompanied by his brother Afrasiab and found his daughter in the fields of Riaz Hussain in such condition. Many persons of the village gathered and she was taken to civil hospital Sohawa on a cart and there she was given first aid. After gaining senses, she related while weeping that she was taken by her nighbour Mst.Reshman (acquitted accused) at 10 P.M. in the fateful night towards her house where Saleem Nawaz (appellant) armed with a churri and Shaikh Muhammad Rafique (acquitted accused) armed with pistol were present. On their threat, Soofia Naz sat down. Then she was administered with some water by Shaikh Muhammad Rafique at the instance of Reshman. After drinking that water Soofia Naz felt drowsy and then both the males present there committed zina-bil-jabr (rape) with her. When she became unconscious, she was thrown out of the house.

Three persons were arrested and challaned including the appellant and were charged for the alleged specific roles under the relevant law to which they pleaded not guilty. They were tried. Appellant in Appeal No. 78/I of 1997 was convicted as shown above. Remaining two co-accused namely Mst.Reshman and Shaikh Mohammad Rafique were acquitted.

Criminal Appeal No.76/I of 1997 has been filed by the

complainant against the two acquitted accused as a criminal acquittal appeal and against the only convicted accused for enhancement of sentence. We propose to dispose off both these appeals together.

3. We have heard the learned counsel for the appellant, complainant, respondents and state. The learned counsel for the convicted appellant in criminal appeal No.78/I of 1997 has contended that there is an unexplained delay in lodging F.I.R. which is fatal to the case of prosecution; that medical evidence is conclusive on the point that no sexual inter-course has taken place at all; that report of the chemical examiner about the shalwar is mainpulated; that complainant Muhammad Hanif (PW-3) has deposed that he produced shalwar of his victim daughter stained with blood and semen but the report of chemical examiner indicates the staining of semen and not that of blood and then in this regard there is also conflict between the complainant (PW-3) and the victim (PW-4) ; that the deposition of Mirza Tufail Hussain DSP (DW-1) and Ex.DB cannot be used against the convicted appellant under the provisions of section 162 Cr.P.C.; that there is no evidence of the administration of some intoxicant and therefore this aspect is fatal to the story of prose-

cution; that the deposition of complainant (PW-3) indicates that the victim girl was first taken to the Rural Health Centre Dhumman and admittedly there was a police post nearby yet no report was made there which conduct creates doubt in the case; that there are discrepancies in the evidence; that the impugned judgment has relied on first version of Mirza Tufail Hussain DSP (DW-1) who was in fact originaly a witness for prosecution and there is no concept of the admission of the first version of PW later on converted into DW in the existing corpus of the criminal law; that the impugned judgment has still lingered on with the infliction of stripes in a Tazir cases whereas through the promulgation of Ordinance VII of 1996 the infliction of stripes is not all mandatory in such cases; that reliance has been placed on 1997 SCMR 548, 1996 SCMR 154, 1996 SCMR 1987 and 1994 SCMR 1218. The learned counsel for the acquitted accused/respondents in criminal appeal No.76/I/1997 has contended that in the case of acquittal the principle of double presumption of innocence is to be kept in the mind by the appellate court for which reliance is placed on the principles enunciated in, inter alia, 1991 SCMR 2220 and 1993 SCMR 28; that there is absolutely no evidence against the acquitted accused Mst.Reshman as the evidence indicates that

she was involved as accused due to enmity of one of the PWs with her husband and the raison d' etre for the said enmity, inter alia, has been shown to be a dispute about the ownership and irrigration of certain agricultural lands in the vicinity; that the Investigation Officer has admitted during his deposition that Mst.Reshman the acquitted accused was having only one house in which she was residing alongwith her children at the time of occurrence. Mst.Sofia Naz (PW-4) and her father, the complainant Muhammad Hanif (PW-3), have deposed on the other hand that Mst.Reshman was having two houses in one of which the occurrence of the commission of zina-bil-jabr (rape) had taken place. The learned counsel for the acquitted accused has vehemently argued that this conflicting situation sets aside the story of the prosecution that in the case of acquitted accused Muhammad Rafiq complainant Muhammad Hanif PW-3 has denied existence of suit of premption about certain property but this is established by Ex.DC which is a certified true copy of the plaint filed in the Court of Civil Judge Chakwal by Fazal Elahi s/o Noor Muhammad Gujar. Consequently it transpires that the complainant has tried to hide a fact proved by the record only to show that he has no previous enemity with the acquitted

accused that the complainant Muhammad Hanif has admitted during deposition that both the parties belong to different political parties; that the doctor to whom the victim lady was referred to and who was the Incharge of Rural Health Centre Dhuman has not been taken up as one of the PWs nor has he been produced in the trial Court for examination and withholding of his evidence indicates that had he deposed it would have gone against the story of prosecution. The learned counsel for the complainant has vehemently argued that not only the convict appellant is involved into commisstion of zina-bil-jabr with a nubile virgin but Muhammad Rafiq is also involved and in fact it is the case of gang rape in which abettment has been carried on by acquitted accused Mst.Reshman and that the case is proved against all the accused beyond reasonable doubt. Consequently he has prayed that the conviction of the appellant may be enhanced from 10 years R.I. to the maximum of 25 years R.I. and that the acquitted accused Muhammad Rafiq may also be awarded with same conviction and acquitted Mst.Reshman may be awarded the punishment under the relevant law of abetment and maximum punishment may be awarded to the accused persons whether convicted or acquitted. The learned counsel for state has contended that he does not

press the Cr.A.No.76/I/97 as State is not a party to it. He has supported the impugned judgment in toto and has vehemantly argued that the delay in making a complaint and lodgment of FIR is that of only 10 hours and such delays in rape cases are condoned by the trial as well as appellate courts; that section 4 of the said ordinance indicates that peneteration alone constitutes zina and in the present case the medical evidence does not debar part peneteration which also constitutes zina and therefore the commission of zina-bil-jabr has taken place.

4. So far as the contention of unexplained delay in lodging FIR is concerned, it has its locus standi on the fact that it is alleged in FIR that at about 6 A.M. on 19-4-1996 the victim was found in an unconscious condition, but the report was made at police station Dhuman at 4-10- P.M. on the same date. Hence a delay of about ten hours. The explanation for this delay is first of all forthcoming from the very body of FIR itself in which the complainant is stating:

موقع پر گیا دیکھا کہ میری بیٹی صوفیہ ناز گھیت ازاں
ریاض حسین خلاص خان سکنہ دلہہ بے ہوش پڑی ہے۔
گاؤں کے کافی لوگ جمع ہو گئے ہم اسے چارپائی پر ڈال کر
سول ہسپتال سوہاوہ لے گئے۔ جہاں ڈاکٹر صاحب

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The distance between the place of incident and police station Dhuman is shown in column No.4 of FIR to be 7 miles. The explanation is plausible and this contention is rejected.

5. So far as the contention of conflict of the medical evidence with the story of prosecution is concerned, it appears to be misconcieved. Lady Dr.Afia Huda Mirza (PW-1) has deposed during examinaiton -in-chief that the hymen of the victim was ruptured and that she was not habitual to sexual intercourse. This opinion of the examining doctor does not rule out coitus of a single or few times. The reliance of the appellant on the following piece of evidence of PW-1 is of no avail to him as the victim was examined on 20-4-1996 at 9 A.M. whereas she was subjected to zina somewhere after 10 P.M. during the night falling on 18-4-1996. Hence the time having elapsed between the occurrence and examination is about 35 hours. Consequently the opinion as followrs inspires confidence: "I am of the opinion that no fresh act of rape was committed on her." Rupture of hymen coupled with coitus do prove

that the commission of the offence of zina had taken place. Consequently this contention is rejected .

6. Another contention is that Muhammad Hanif (PW-3) has deposed that he produced before the investigator shalwar Ex.P.1 stained with semen and blood. The Report of Chemical Examiner (Ex.PK), on the other hand, is giving its finding that the shalwar is stained with semen. Mst. Soofia Naz (PW-4), the victim, has deposed that she handed over the semen stained shalwar to her father which was produced by him before the same as Ex.P.1. The memo of recovery of shalwar (Ex.PG) indicates that the shalwar was stained with blood and semen. The victim is not making a reference to stains of blood on her shalwar and in this respect she is corroborated by the Report of Chemical Examiner (Ex.PK). A reference to the stains of blood on shalwar appears to be an exaggeration by PW-3 and the memo of recovery and is a falsity. But this falsity in itself is not that much substantial so as to demolish the story of prosecution. The maxim " falsus in uno, falsus in omnibus" is not applicable in this country as the grain is to be sifted from the chalf. Enough is to say that the

very staining of the shalwar of the victim with semen is an indicator towards the existence of some male who had ejaculated outside the vaginal orifice as the swabs taken from that area of the victim have been reported to be in negative.

7. Now we take up the deposition of Mirza Tufail Hussain (DW-1), DSP vis-a-vis Ex.DB which is a portion of the Zimni of the police papers as the same have been used as evidence by the impugned judgment to arrive at certain conclusions. Convicted appellants's line of argument is that this deposition read with Ex.DB could not be used as a legal document against him in view of the provisions of section 161 Cr.P.C. On the other hand the learned counsel for acquitted respondents has contended that section 161 Cr.P.C. is not to be read in solitude and the evidence of DW-1 is totally relevant when section 161 Cr.P.C. is read with section 162 Cr.P.C. and further read with article 140 of the Qanoon-e-Shahadat Order 1984. All the three quoted provisions of law are reproduced verbatim for convenience in comprehending and proper interpretation of law:

"161 Cr.P.C: Examination of witnesses by police: (1) Any Police Officer making

an investigation under this Chapter or any police officer not below such rank as the Provincial Government may, by general or special order, prescribe in this behalf, acting on the requisition of such Officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case. (2) Such person shall be bound to answer all questions relating to such case, put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfiture.(3) The police Officer may reduce into writing any statement made to him in the course of an examination under this section, and if he does so he shall make a separate record of the statement of each such person whose statement he records"

"162. Statement to police not to be signed, use of such statements in evidence: (1) No statement made by any person to police-officer in the course of an investigation under this Chapter shall if reduced into writing be signed by the person making it; nor shall any such statement or any record thereof whether in a police-diary or otherwise or any part of such statement or record, be used for any purpose (Save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid the Court shall on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination:

Provided further, that, if the Court is of opinion that any part of any such statement is not relevant to the subject-matter of the inquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor and shall exclude such part from the copy of the statement furnished to the accused. (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of Section 32, clause (1) of the Evidence Act, 1872 or to affect the provisions of Section 27 of this Act."

140 Qanun-e-Shahadat Order 1984

"Cross-examination as to previous statements

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in writing:- A witness may be cross-examined as to previous statements made by him in Writing or reduce into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

We have taken the notice of a fact that during his statement under section 342 Cr.P.C., convicted appellant Asif Saleem Nawaz has replied in affirmation to a question as to whether he will produce evidence in defence. In pursuation to this reply, he produced Mirza Tufail Hussain (DW-1), D.S.P. in his defence and then vide his statement dated 22-7-1997 he closed his right of defence evidence. Consequently the evidence of this witness was called by the trial court on the request of the accused/convicted appellant within the meaning of first proviso to sub-section (1) of section 162 Cr.P.C. Sub-section (1) of section 162 Cr.P.C. envisages that statement under section 161 Cr.P.C. or any part of such statement shall not be used for any purpose at any inquiry or trial save as provided in the

provios. As shown above, being mandatory for the Court to refer to such statement on the request of the accused, the duty was done and DW-1 has been referred to qua Ex.DB. Substantial part of the deposition of this witness reads:

> "She herself fell in love of Asif Saleem Nawaz accused and had many meetings with him before the present occurrence. It was disclosed by the victim that in the heat of passions she committed a blunder on the night of occurrence when she was with Asif Saleem Nawaz, accused. It is also correct that the victim introduced her plea Ex.DB for the first time on 12-5-1996, and that too very secretly."

This witness had deposed in the open Court, was cross-examined in details by the state counsel. The convicted appellant was present and he was not debarred by law to disown the deposition of his own witness of defence immediately or get him recalled at any stage of trial. His acquiescence in itself is affirmation of what has been deposed. At the appellate stage he cannot raise such a plea suddenly and he is estopped to do so within the meaning of article 114 of the Qanoon-e-Shahadat Order 1984. Consequently, this contention of the counsel for the convicted appellant fails.

8. It has been correctly pointed out that the Abolition of the punishment of whipping Act, 1996 (Act VII of 1996) has remitted such sentences of whipping in tazir cases which have not been executed. Section 3 of the said Act reads:

> "Abolition of punishment of whipping.--
>
> Except in cases where the punishment of whipping is provided for as hadd, the sentence of whipping provided under any law, rule or regulation for the time being in force shall stand abolished. Provided that where, on the commencement of this Act, the sentence of whipping awarded by any Court or Tribunal has not been executed such sentence of whipping shall stand remitted."

Consequently the sentence of whipping in the present case is set aside and to that extent the impugned judgment is modified.

9. The learned counsel for complainant's prayer that the sentence of convicted appellant may be enhanced to the maximum of 25 years under article 10(3) of the said Ordinance is not supported by cogent reasons. Medical evidence of Lady Dr.Aafia Huda Mirza (PW-1) proves that no signs of external violence were seen on the body of victim. No

cruelty or sadism has been alleged by the complainant party Dr. Muhammad Javaid Iqbal (PW-2) has declared the age of the convicted appellant to be 22 years. He is a young man and has not shown any signs to place him in the list of dangerous, hardened or desperate criminals. He is not a previous convict as well. Conseqently we find the sentence of ten years R.I. reasonable in the circumstances of the present case. Hence this plea of the complainant fails.

10. The complainant has also prayed for conversion of the acquitted two co-accused to conviction on the plea that the prosecution has been able to prove their guilt beyond reasonable doubt. In fact it is not so. The double presumption of innocence is to be kept in mind by the appellate Court, while dealing with the criminal acquittal appeals/revisions. In this context reliance has been placed on 1991 SCMR 2220 the relevant ruling of the said judgment is quoted verbatim.

> "S.302-- Criminal Procedure Code (V of 1898), S.417-- Appeal against acquittal--Benefit of doubt does not necessarily mean that the eye-witnesses had either not seen the occurrence or that they had deliberately and falsely implicated the acquitted accused-- In such like cases, however, care is taken that for convicting

the remaining accused, the witnesses were put to hardest test of scrutiny and their testimony was corroborated by independent circumstances.--
(Criminal trial--Benefit of doubt).

We find reasoning of the impugned judgment about the acquittal of the two co-accused feasible and coherent with the law developed by superior Courts in this context. Hence this prayer of the complainant party is rejected.

11. In view of the above mentioned discussion the impugned judgment is upheld with modification that whipping of 30 stripes is set aside in view of section 3 of the Abolition of Punishment of Whipping Act, 1996. Resultantly both the appeals are dismissed.

(Abdul Waheed Siddiqui)
Judge

(Dr.Fida Muhammad Khan)
Judge

Approved for reporting.

Judge

Announced in the open Court
today the 2nd April, 1998.
Zain/*

Judge

Zain/*