

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE DR.FIDA MUHAMMAD KHAN

CRIMINAL REVISION NO.10/I OF 2009

1. Mst. Gulzar Begum widow of Ch. Muhammad Yaqoob
2. Fazal Habib Yaqooq
3. Haseeb Yaqoob sons of Ch. Muhammad Yaqoob
All residents of H.No.V-195, Chaklala, Rawalpindi
.... Petitioners

Versus

1. Mst. Sajida Yaqoob d/o Ch. Muhammad Yaqoob and wife of Ch. Waheed residents Mohallah Nazirabad, Village Chaklala Rawalpindi.
2. Mst. Abida Yaqoob d/o Ch. Muhammad Yaqoob wife of Pervez resident Village Lodain, Tehsil Gujar Khan District, Rawalpindi.
3. Mst. Shagufta Yaqoob widow of Ghulam Habib
4. Anum Habib
5. Alisha Habib daughters of Ghulam Habib, residents of Dhoke Murid, P.O. Karali, Tehsil Saray-e-Alamgir District Gujrat.

6. The State Respondents

Counsel for petitioners Mr. Muhammad Asif Chaudhry,
Advocate

Counsel for respondents Sardar Asmatullah Khan, Ch.
Muhammad Uffan Iftikhar and Syed
Hassan Abbas,
Advocates

Counsel for State Dr. Muhammad Anwar Gondal,
Additional Prosecutor General

FIR, Date and Police Station Complaint case

Date of Order of trial court 03.11.2009

Date of Institution 21.12.2009

Date of hearing 08.05.2013

Date of decision 17.05.2013

JUDGMENT

DR. FIDA MUHAMMAD KHAN, Judge.- Petitioners

Mst. Gulzar Begum, Fazal Habib Yaqoob and Haseeb Yaqoob have challenged, through this Criminal Revision Petition, order dated 03.11.2009 passed by learned Additional Sessions Judge, Rawalpindi whereby he has dismissed, in limine, the complaint filed by said petitioners against respondents Mst. Saleem Akhtar, Sajida Yaqoob, Abida Yaqoob, Shagufta Yaqoob, Anum Habib and Alisha Habib.

2. The said private complaint had been filed under sections 5/7 of the Offence of Qazf (Enforcement of Hudood) Ordinance, 1979 with the request that necessary legal punishment be awarded to the said respondents.

3. Briefly stated, facts as revealed in the said complaint are that Mst. Gulzar Begum, petitioner, got married to Ch. Muhammad Yaqoob on 26.07.1998. Out of this wedlock two sons, who are petitioners Fazal Habib Yaqoob and Haseeb Yaqoob, were born on 21.02.2003 and 15.02.2007, respectively. Prior to her marriage, Ch. Muhammad Yaqoob had got married with one Mehboob Jan and respondent Mst. Abida was born out of that wedlock. Ch. Muhammad Yaqoob married for the second time with respondent Mst. Saleem Akhtar. Ghulam Habib (son) and



respondent Sajida Yaqoob were born out of this wedlock. Ghulam Habib died prior to the death of Ch. Muhammad Yaqoob and left respondent Mst. Shagufta (widow), Anum Habib and Alisha Habib (daughters) as his legal heirs.

4. Ch. Muhammad Yaqoob who died on 29.11.2008 left two houses which he had gifted to his son, petitioner Fazal Habib Yaqoob, vide registered deed. Ch. Muhammad Yaqoob divorced his second wife Mst. Saleem Akhtar on 19.07.1997 and had, in this respect, submitted an application to the Chairman Arbitration Council, Chaklala also. He had deprived Mst. Sajida respondent from inheritance on 17.07.1997.

5. She further asserted that said respondents had moved an application for conducting exhumation and DNA test of Ch. Muhammad Yaqoob with the allegation that petitioners Fazal Habib Yaqoob and Haseeb Yaqoob, born out of his wedlock with Mst. Gulzar Begum, were not sons of Ch. Muhammad Yaqoob, as after his marriage with her on 26.07.1997, he got paralyzed in February, 2001 and was unable to perform marital obligation. They also alleged that petitioner Mst. Gulzar Begum had usurped the property left by said Ch. Muhammad Yaqoob and had expelled the respondents/petitioner from her house.

6. Mst. Gulzar Begum, petitioner in order to prove the case at the trial appeared as PW.1 and got recorded her statement wherein she reiterated the same facts as narrated by her in the complaint. The learned trial Court after examining all incriminating material brought on record and after analyzing the statement of Mst. Gulzar Begum petitioner dismissed the complaint in limine as mentioned hereinabove. Hence the present revision petition.

7. I have heard learned counsel for the parties and perused the record with their assistance. It transpires that, allegedly, the respondents namely Mst. Saleem Akhtar (since dead), Mst. Sajida Yaqoob, Mst. Abida Yaqoob, Mst. Shagufta Yaqoob, Mst. Anum Habib and Mst. Aleesha Habib filed application for conducting the exhumation and DNA tests of deceased Ch. Muhammad Yaqoob, who had died on 29.11.2008 for matching with the petitioners Fazal Habib Yaqoob and Haseeb Yaqoob, to ascertain that they were sons of Ch. Muhammad Yaqoob from his wedlock with petitioner Mst. Gulzar Begum. The application was fixed for hearing before Special Judicial Magistrate, Rawalpindi who vide his order dated 20.04.2009 dismissed the same for non prosecution. Thereafter the petitioner/complainant filed private complaint under section 5/7 of Offence of Qazf (Enforcement of Hudood) Ordinance, 1979

against the respondents and the same was dismissed in limine on 03.11.2009 by the Additional Sessions Judge, Rawalpindi.

8. It is worth mentioning that in the earlier application allegedly moved by the said respondents for exhumation and DNA tests was dismissed by Special Judicial Magistrate on 20.04.2009, and that too for non prosecution, but it was never challenged nor pursued thereafter by the respondents. Perusal of the order sheet further reveals that no order in respect of proceedings under section 202 Cr.P.C. were conducted and so none of the respondents made any statement in support of that application. It also transpires from the said diary that despite fixation of the case for several times no one of the respondents entered appearance on any date, though a counsel on their behalf appeared on some dates. On the last date of hearing neither counsel nor any one of the respondent was present. Therefore, there is no supportive statement to corroborate the contents of the application allegedly agitated by the respondents. On record also, there is only a solitary statement of the petitioner as PW.1 but, as it appears, there is a civil litigation between the parties and the question whether the earlier application was actually moved by the respondent is still shrouded in doubtful mystery.

9. The impugned order also shows that the respondents did not produce any witness in support of the alleged accusation of zina at any

stage and neither recorded their statements any time. They never pursued the matter nor repeated the allegation at any other forum despite the continued litigation in respect of the property in question. This fact also casts doubt whether the application in question was actually submitted by the said respondents.

10. It will be appreciated that a case under *Qazf* liable to Hadd can be established by an evidence which fulfills the requirements as envisaged under section (6), reproduced herein below:-

“Proof of Qazf liable to Hadd: Proof of *qazf* liable to *had* shall be in one of the following forms namely;

- (a) the accused makes before 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-shahood*, that they are truthful persons and abstain from major sins (*Kabair*) give direct evidence of the commission of *qazf*:

Provided that, if the accused is a non Muslim, the witnesses may be non-Muslims:

Provided further that the statement of the complainant or the person authorized by him shall be recorded before the statements of the witnesses are recorded.”

It is evident that none of the above proof is available on record which may warrant awarding Hadd punishment. Since after promulgation of Women Protection Act 2006, *Qazf* liable to Ta'azir is no more existing on the

statute in the said Ordinance, the only punishment that could have been awarded is Hadd punishment. In absence of the required proof, however, as discussed above, there is a strong circumstance to extend benefit of doubt to the respondents. It will be appreciated to note that one of the basic guiding principles of Islamic law, as emphasized upon by the Holy Prophet (S.A.W.), is that an accused, in case of Hadd punishment, be granted benefit of doubt as far as possible. The Holy Prophet (S.A.W.) said on one occasion: 'Avoid enforcing *hudud* as much as you can' (Ibn Majah). There is another *hadith* of similar import: "Keep *hudud* away from Muslims as much possible". The Holy Prophet (S.A.W.) also said on another occasion, 'If there is any way to spare people from punishment, let them go, for it is much better that an *Imam* (i.e.ruler) should err in acquitting someone rather than that he should err in punishing someone'. (See Tirmidhi, K. al-Hudud, 'Bab maja' fi Dar' al-Hudud-Ed). The obvious reason is that infliction of Hadd punishment is a very severe punishment and, therefore, it is necessary that it must be established beyond any reasonable doubt either by confession of the accused before a Court of competent jurisdiction or other reliable and credible witnesses through testimony that the offence was actually committed.



11. I have anxiously perused the impugned order also and have found that it is neither arbitrary nor perverse. It does not suffer from any illegality and, therefore, calls for no interference. The present Criminal Revision Petition, being without force and misconceived is, therefore, dismissed.


JUSTICE DR. FIDA MUHAMMAD KHAN


Announced in open Court
on 17.05.2013 at Islamabad
UMAR DRAZ/*

File for reporting

