

Criminal Appeal No.41/Q of 2007 L/w
Criminal Appeal No.23/Q of 2007

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IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE ALLAMA DR. FIDA MUHAMMAD KHAN, ACTING CHIEF JUSTICE
MR. JUSTICE RIAZ AHMAD KHAN

CRIMINAL APPEAL NO.41/Q OF 2007 L/W

The State Appellant

VERSUS

Khadim Hussain son of Ewaz Ali, Respondent
caste Hazara, resident of Hazara Town,
Brewery Quetta.

CRIMINAL APPEAL NO.23/Q OF 2007

Mst. Rizwana daughter of Hussain Ali, Appellant
caste Hazra, resident of Hazara Town,
Brewery Road, Quetta

VERSUS

Khadim Hussain son of Ewaz Ali, Respondent
caste Hazara, resident of Hazara Town,
Brewery Quetta.

Advocate for the State/appellant: Mr. Tahir Iqbal Khattak,
in Cr. A.No.41/Q/2007 Additional Prosecutor General
Baluchistan for State.

Advocate for the appellant in : Nemo.
Cr. A. NO.23/Q/2007

Advocate for the respondent in : Raja Muhammad Afsar,
Cr. A. No.41/Q/2007 and Cr. Advocate
A. No.23/Q/2007.

FIR No, date & PS : 67/2005, dated 11.06.2005,
P.S. Brewery, District Quetta.

Date of impugned Judgment : 15.05.2007
of learned trial Court

Date of Institution of Cr.A. : 09.10.2007
No.41/Q/2005 in FSC

Date of Institution of Cr. : 09.06.2007
A. No.23/Q/2007

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Date of hearing : 28.01.2015
Date of judgment : 03.02.2015

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JUDGMENT

Riaz Ahmad Khan, J:- State through this Criminal Appeal No.41/Q/2007 has called in question judgment passed by learned Additional Sessions Judge-IV, Quetta dated 15.05.2007 by virtue of which the accused Khadim Hussain was acquitted in case FIR No.67/2005, dated 11.06.2005, Police Station, Brewery, District Quetta under section 10/16 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. The complainant Mst. Rizwana had also filed Criminal Appeal No.23/Q of 2007 against the respondent Khadim Hussain. Since, 2007 she did not appear on several dates, therefore, the said appeal was dismissed for non-prosecution.

2. Brief facts of the case are that on 01.06.2005 complainant Mst. Rizwana daughter of Hussain Ali student of class 9 (nine) submitted an application before the SHO, Police Station Brewery, Quetta that on Thursday i.e. 26.05.2005 at about 08.30 a.m. she was on her way to school, a young person came in front of her at joint road railway school. His name was Khadim Hussain and he got hold of her with bad intentions and as a result many people attracted to the spot. He told the people that he knew Mst.



Rizwana, however, after sometime and discussion, another person came forward and took her to her house. Again on her way at Hazara Town, the same person namely Khadim Hussain met her and forcibly took her to his house situated near Imam Bargah. He closed the door of the house and asked Mst. Rizwana to marry him or his brother. When the complainant refused, he got hold of her with bad intentions and insulted her. Thereafter, he threatened her that she should not tell anyone anything about the incident and left her to go home. According to the complainant out of fear, she did not tell her mother. On 01.06.2005 i.e. the day when the complaint was lodged, Khadim Hussain, came to the house of the complainant and threatened her mother that the complainant was of bad character and that she should take care of the complainant. As a result, the complainant narrated the whole story to her mother. This complaint Ex.P/1 was registered by the SHO who started inquiry under section 157(2) Cr.P.C. During the inquiry on 06.06.2005, the SHO took the complainant/appellant Mst. Rizwana to Dr. Abdul Sattar PW.2. He referred her to a Gynecologist. The said gynecologist examined the victim

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Mst. Rizwana through a nurse and issued medical certificate Ex.P/3. The said certificate was verified by the Police Surgeon.

3. On completion of inquiry, the SHO recommended registration of case. The said recommendation is Ex.P/4 dated 11.06.2005. On the same day FIR No.67/2005, dated 11.06.2005 was registered under section 10/16 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 against the accused Khadim Hussain. The accused/respondent was arrested on 13.06.2005.

4. Challan of the said case was submitted before the Court on 27.06.2005. Charge was framed on 02.08.2005 under section 10/16 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. The accused did not plead guilty and claimed trial.

5. The prosecution in support of its case examined ten witnesses. The complainant Mst. Rizwana appeared as PW.1, in her statement before the Court, she submitted that on 26.05.2005 at about 08.30 a.m., while she was on her way to school, near joint road a young boy namely Khadim Hussain came and got hold of her hand with bad intentions. That young

person wanted to forcibly take her to his house but during that period another unknown person came forward and started accompanying her. When they reached Faisal Town, the accused Khadim Hussain again was present there. He forcibly took her to his house near Imam Bargah, closed the door and asked her to marry him or his brother. On her refusal, he made an effort to commit zina with her. During that period another person entered the courtyard of the house. She afterwards came to know that his name was Raza, he took her to her house. For the sake of honour of her parents, she kept quiet. On 01.06.2005 accused Khadim Hussain again came to her house and threatened her mother that Mst. Rizwana (complainant) was of bad character. So, she told everything to her mother and also informed her that on 26.05.2005 Khadim Hussain had committed zina-bil-jabr with her. She confirmed her report Ex.P1 in her statement before the Court. In cross-examination, she submitted that while going to school she was accompanied by two friends namely Dur-e-Khatoon and Tahira. Thirty/thirty-five people had attracted to the spot. She did not know accused Khadim Hussain earlier. The name of the accused was not known to her. She came to know about the

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name of accused from the police officials/personnels. She stated that she had recorded her first statement on 01.06.2005. She further submitted that Nasir Ali had taken her from the place of occurrence to Faisal Town. She further submitted that the accused had locked the door of his house and she remained in that house for 5/6 hours. She also submitted that the name of Raza Muhammad was told to her afterwards when he had come to the police station after her statement. She was examined by the Doctor on 06.06.2005 and that she had told her about the occurrence. Dr. Abdul Sattar appeared as PW2 and in his statement before the Court he submitted that he had referred the complainant/prosecutrix to Gynecologist where a Lady Doctor had examined her. He confirmed the signatures of the Lady Doctor on the report. The report was produced before the Court and was taken on record as Ex.P3. According to the report, the complainant had told the Lady Doctor that sexual act was performed with the complainant superficially above the shalwar and no penetration had occurred on 26.05.2005. The complainant was internally examined by a nurse namely Sakina and according to her observation, hymen was old ruptured, lax, admitting two fingers easily.

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Vaginal swabs and shalwar cloth piece were taken for laboratory examination.

According to the opinion of the doctor sexual intercourse was committed, however the word old was written withit. Hymen ruptured old. Mother of the complainant Marzia appeared as PW.3, in her statement before the Court she stated that on 01.06.2005 accused Khadim Hussain had come to her house and told her that her daughter Mst. Rizwana was seen by him while trying to escape with a pathan boy. He got hold of her, saved her and brought her to Hazara Town. According to mother of the complainant, she then went to the school, brought her daughter back to the house where she informed her that on 26.05.2005, the same Khadim Hussain had committed zina with her. In cross-examination, she further submitted that she had recorded her statement before the police on 02.06.2005 and 13.06.2005. On 26.05.2005, her daughter Mst. Rizwana had reached the house in time i.e. at 02.00 p.m. Nasir Ali appeared as PW.4 in his statement before the Court he submitted that on 26.05.2005 while on his way to the shop, when he reached joint road girls high school he saw that many people had gathered there. Accused Khadim Hussain was holding hand of Mst. Rizwana, who was his neighbour, on



seeing him the accused left the hand of Mst. Rizwana, he took Mst. Rizwana on his bicycle and left her at Faisal Town and then went to his shop. In cross-examination he submitted that on the spot about 100/200 people were present, no other girl was present alongwith the complainant. Raja Shahzad/ASI appeared as PW.5 in his statement before the Court he submitted that on 01.06.2005, the complainant had submitted a written report and on the said report inquiry under section 157 (2) Cr.P.C. was initiated. During the inquiry, statements of the witnesses were recorded. The complainant was examined by a Lady Doctor and on completion of inquiry, report was submitted before the SHO. He produced the inquiry report Ex.P4 and admitted his signature on the said report. He also produced the statement, medical report and other documents collected during the inquiry. Rahim Bakhsh ASI appeared as PW.6 he was witness to the recovery memo by virtue of which inquiry report was taken by the I.O. Muhammad Akbar DSP appeared as PW.7 in his statement before the Court he submitted that he had conducted the identification parade of accused Khadim Hussain by Muhammad Raza witness on 17.06.2005. The performa regarding



identification parade was prepared by SHO and signed by him. The identification parade was conducted in police station and other persons were brought from outside by the SHO. Raza Muhammad appeared as PW.8. He submitted in his statement before the Court that on 26.05.2005 he was on his way to the house of his in-laws in Hazara Town. On the way he heard hue and cry from one house. He knocked the door but no one came out so he pushed the door and saw that accused Khadim Hussain was dragging the complainant Mst. Rizwana. According to him he asked Mst. Rizwana why she was crying and Mst. Rizwana complainant told him that Khaid Hussain was asking her to marry him or his brother. She asked him to take her to her house so he took her to her house. He further submitted that in police station identification parade was conducted where he recognized the accused. In cross-examination he admitted that he was not resident of Hazara Town whereas the house of complainant is situated at Hazara Town. He further admitted that he had been residing in Tehran and in those days he had come to Pakistan. Second statement of Dr. Abdul Sattar was recorded as PW.9, as

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that the accused was capable of performing sexual intercourse. Arif Shah, I.O. appeared as PW.10, confirmed the record already mentioned. He however, admitted in his statement that statement of Mst. Rizwana was recorded under section 164 Cr.P.C. before the Magistrate.

6. After the close of evidence, the accused Khadim Hussain was examined under section 342 Cr.P.C. The accused produced Saad Muhammad as DW.1, who in his statement before the court submitted that on 26.05.2005 at about 07.50 a.m. he had taken the accused to Hazara Gangi wherefrom some luggage was brought at about 11.00 a.m. in the morning. The said luggage was unloaded at Block No.2, Hazara Town. The accused however, did not appear as his own witness under section 340 (2) Cr.P.C.

7. After hearing the parties, the learned Additional Sessions Judge-IV, Quetta vide judgment dated 15.05.2007 acquitted the accused/respondent Khadim Hussain of the charges leveled against him.

8. Feeling aggrieved of the said judgment, the present appeal was filed.


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9. Learned Additional Prosecutor General Baluchistan for State submitted that the accused Khadim Hussain was properly identified, the medical report supported the version of complainant and as such it was a proved case of zina-bil-jabr.

10. On the other hand, learned counsel for the accused/respondent submitted that there was no evidence of zina-bil-jabr. The judgment was proper and legal and did not suffer from any illegality. There was no evidence regarding commission of offence of Zina. The prosecution evidence was full of contradictions and therefore the accused/respondent was rightly acquitted.

11. We have heard learned counsel for the parties and have also perused the record.

12. In the present case, the available record shows that the investigation of this case was conducted completely in violation of law, rules, and procedure. According to the record, on 01.06.2005 complainant Mst. Rizwana had made a report in writing to SHO, Police Station, Brewerry Quetta wherein allegation of zina-bil-jabr was made against the accused. The

 report itself show the commission of cognizable offence. The SHO was bound

to register the case under section 154 Cr.P.C. It is an established principle of law that whenever a cognizable offence is reported to the police, the concerned official is bound to register a case under section 154 Cr.P.C. The veracity of the contents as to whether the contents of the report are correct or not, is not the job of the police. The police has only to collect the evidence and then place the same before the competent Court of law. Even if, a false report is made by someone, the police is bound to register a case under section 154 Cr.P.C. The requirement of law is that the information supplied should be about alleged commission of a cognizable offence, irrespective of the fact, whether such information is ultimately proved to be correct or not. It is also immaterial, if at the end it is proved that the alleged offence was actually not committed. After the FIR, the police has to investigate the case under section 156 Cr.P.C.

13. In the present case, a cognizable offence was reported to the SHO, Police Station Brewerry, Quetta, but instead of registering a case under section 154 Cr.P.C., he recorded the statement of complainant and started an inquiry under section 157 (2) Cr.P.C. Section 157 Cr.P.C. is regarding a

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situation where the cognizable offence is suspected. For the sake of

convenience, section 157 Cr.P.C. is reproduced here in below:-

157. Procedure where cognizable offence suspected. (1) if, from information received or otherwise on officer incharge of a police-station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizable of such offence upon a police-report, and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the Provincial Government may, by general or special order, prescribe in this behalf to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary to take measures for the discovery and arrest of the offender: Provided as follows:-

(a) Where local investigation dispensed with. When any information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer incharge of a police-station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b) Where police officer incharge sees no sufficient ground for investigation. If it appears to the officer incharge of a police-station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1), the officer incharge of the police-station shall state in his said report his reasons for not fully complying with the requirements of that sub-section, and, in the case mentioned in clause (b), such officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the Provincial Government, the fact that he will not investigate the case or cause it to be investigated.

14. A bare reading of section 157 Cr.P.C. shows that the said

section had no application in the present case, the SHO concerned had

received information regarding cognizable offence and it could not be said



that he had reasons to suspect the commission of an offence. Even under

section 157 Cr.P.C. he was required to inform the concerned Magistrate and immediately could not initiate inquiry. Furthermore, on completion of inquiry, the report was to be sent to the Magistrate under section 158 Cr.P.C., as such, even the procedure provided under section 157 (2) Cr.P.C. was not followed. It is also to be kept in view that receiving information regarding commission of cognizable offence and suspecting the commission of cognizable offence, are two different matters. The police officials have no authority to evaluate the information received, the only job of the police is to collect the evidence regarding the commission of offence. In the present case, the police after receiving the report of the complainant, sent her to a doctor to determine as to whether zina has actually been committed or not. The police could send her to a doctor, after registration of FIR, same would have amounted to collection of evidence. Sending her prior to registration of a case under section 154 Cr.P.C., the police either under misunderstanding or intentionally under the garb of section 157 Cr.P.C., took upon itself the responsibility of Court and started determination of correctness or otherwise of allegations leveled in the report, which was totally uncalled for. The

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exercise carried out by the police was totally outside the ambit of powers available to the police. Determination of correctness or otherwise of allegations leveled in the report is completely the job of the Court. The FIR as such was not registered in accordance with law.

15. The medical certificate obtained by the police was produced before the Court as Ex.P3 through Dr. Abdul Sattar PW.2, but the said PW.2 had only verified the signature of Lady Doctor, who had allegedly examined the prosecutrix. The certificate Ex.P3 shows that the complainant/prosecutrix was actually not examined by the Lady Doctor, rather she was examined by a nurse namely Sakina. Neither the Lady Doctor nor the nurse were produced before the Court. The contents of the certificate as such could not be verified. It seems that since the contents of the certificate were totally against the version of prosecution, therefore, the Lady Doctor and nurse were not produced before the Court. The complainant in her statement before the Court submitted that she had also informed the Lady Doctor about the occurrence, when she was examined. On the other hand, the contents of the certificate show that the complainant had told the Doctor that zina had been

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committed with her superficially above the shalwar and no penetration had taken place.

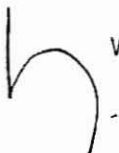
16. It is also to be kept in view that according to the medical certificate, hymen of the complainant was old ruptured and was admitting two fingers easily. Since the Lady Doctor and nurse, who had examined the complainant were not produced before the Court and as such the contents of the certificate could not be verified, therefore, the medical certificate was of no use and could not be taken into consideration. The prosecution tried to establish the case on the basis of medical certificate, but if the same is taken into consideration then according to the contents of the certificate no offence of zina-bil-jabr had taken place.

17. As far as, the oral evidence is concerned, that is full of contradictions. The complainant in her first report, on the basis of which the inquiry was initiated, had alleged that accused had insulted her, and then in her statement in the inquiry on 06.06.2005 she stated that the accused had forcibly committed zina with her. In her statement before the Court, she

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submitted that the accused had tried to commit zina with her and at that time

PW.8 Raza had entered the courtyard. In the same statement at another time she said that on 26.05.2005 the accused committed zina-bil-jabr with her. As such, the complainant was not consistent in her allegation regarding zina-bil-jabr. The occurrence was not witnessed by anyone. According to the complainant, she was accompanied by her two friends namely Dur-e-Khatoon and Tahira but this assertion was denied by other witnesses. These two girls were not produced before the Court to verify the version of the complainant. The complainant in her statement before the Court submitted that the accused was not known to her prior to the occurrence. She came to know about the name of the accused from the police official. However, she did not know about the name of the police official, who told her the name of the accused. She also submitted that accused kept her in the house for more than six hours but according to her mother, she had reached the house in time. She also recorded her statement before the Magistrate under section 164 Cr.P.C., but neither the Magistrate was examined, nor the said statement was produced before the Court.



18. It is also strange that the police had conducted identification parade of the accused by PW.8 Raza in the Police Station. The accused was arrested on 13.06.2005 and allegedly the identification parade was conducted on 17.06.2005 by the concerned DSP Police. The dummies were brought by the SHO from the general public, but there is nothing on record as to who were those people, the alleged identification parade was conducted in Police Station. Identification parade by itself is not a requirement of law and it is not mandatory that the police has to conduct identification parade, it is only corroborative piece of evidence. If substantive piece of evidence is disbelieved, then corroborative evidence has got no value. Furthermore, in the present case, the witness Raza PW.8 in his statement before the Court as well as in his statement in inquiry stated that the offence of zina had not been committed. According to his statement, at the time of occurrence, the accused had been asking the girl to marry him or his brother. As such the identification parade is of no value. It is also to be noted that under para 26.32 of Police Rules, 1934, the identification parade could be conducted by a Magistrate or

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Gazetted Police Officer, however, as a matter of prudence, the identification

should not have been conducted by DSP police, when Magistrate was available.

19. The two witnesses of the occurrence namely Nasir Ali PW.4 and Raza PW.8 did not say anything about the occurrence of zina-bil-jabr.

PW.4 Nasir Ali, in his statement before the Court submitted that on 26.05.2005, he was on his way to his shop, near joint road high school many

people were present. The accused person present in the Court was holding hands of complainant Mst. Rizwana. When he reached the spot, the accused

left her hand and ran away. He took the complainant on his bicycle to Faisal Town, this whole statement has not been corroborated by any other witness,


except the complainant Mst. Rizwana. Again, it is not known, as to why PW.4 Nasir Ali did not take the complainant to her house, rather left her on the way

at Faisal Town. According to his statement, he left her at Faisal Town and then left for his shop. He did not know as to what happened afterwards.

According to the complainant from the Faisal Town, she was taken by force by the accused to his house, but except her solitary statement, there is

nothing else on record to corroborate her statement. According to PW.8

Raza, per chance he had come to the area i.e. Hazara Town and was on his way to the house of his in-laws. He heard hue and cry from one house, he knocked the door and then pushed the door, which was open. It cannot be believed that any person committing zina-bil-jabr with a girl would leave the door open. Even PW.8 Raza did not say anything, in his statement before the Court that zina had been committed with the complainant by the accused. It also cannot be believed that a stranger would enter the house of another person simply on hearing hue and cry of a girl. The presence of PW.8 on the place of occurrence, his entry into the house of the accused is not supported by any other evidence. The only allegation, which this witness leveled against the accused was that at the time of occurrence, the accused was trying to drag the complainant to a room and when he reached, the accused left the complainant. The complainant told him that the accused was asking her to marry him or his brother, which means that no zina had been committed or attempted. Even this statement of PW.8 Raza has not been supported by any other witness. Both PW.4 Nasir Ali and PW.8 Raza, according to the prosecution are witnesses of two different occasions, but both the occasions



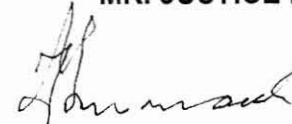
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have not been connected through any independent evidence. Both the witnesses have not alleged the commission of zina. As such, both the witnesses do not support the case of the prosecution and it cannot be said, that the alleged offence had actually taken place.

20. Keeping in view the aforementioned facts, we hold that the accused was rightly acquitted. Finding no force in this appeal, the same is hereby dismissed.


MR. JUSTICE RIAZ AHMAD KHAN


JUSTICE ALLAMA DR. FIDA MUHAMMAD KHAN
ACTING CHIEF JUSTICE

Dated Islamabad the
03.02.2015
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Approved for reporting.


MR. JUSTICE RIAZ AHMAD KHAN