

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

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PRESENT

Mr. Justice Muhammad Khiyar

Mr. Justice Ch. Ejaz Yousaf

CRIMINAL APPEAL No.58/P of 1996.

State through Advocate General, N.W.F.P.	--	Appellant
	Versus	
Mushk-e-Alam	--	Respondent
Counsel for the appellant	--	Mr. Akhtar Naveed, Advocate.
No. date of FIR & police station	--	No.233 dt:12.12.1994 P.S. Pezu
Date of the order of trial Court	--	7.9.1996
Date of institution	--	5.11.1996
Date of hearing	--	3.3.1997
Date of decision	--	<u>3.3.1997</u>

JUDGEMENT

CH.EJAZ YOUSAF, J.- This appeal calls in question judgement dated 7.9.1996 passed by the Additional Sessions Judge, Lakki, whereby the respondent/accused Mushk-e-Alam son of Khan was acquitted from the charge under section 6/10 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

2. The facts, in brief, are that on 12.12.1994 at about 1600 hours a complaint/report was lodged by one Mst.Gula Mira with the SHO P.S. Pezu, wherein it was stated that about a year back she was married to one Gul Azad who happens to be the real son of accused/respondent. It was stated in the complaint that three days prior to the day of occurrence her husband, in order to do labour left for Punjab. It was alleged in the complaint that the following night when she was sleeping in her house with other inmates, at about 2100 hours her father-in-law i.e. the present accused/respondent came to her bed and lay on her. On her raising hue and cry her mother-in-law Mst.Mulalai and other minor children were attracted but the accused threatened them to remain silent or otherwise, would face dire consequences. It was also stated in the complaint by Mst.Gula Mira that the accused thereafter took her to an adjacent room, which was being used as a kitchen and subjected her to zina-bil-jabr. It was further stated therein that on the following morning she was taken to her parents' house by the accused, whereafter, she narrated the entire story to ^{her} ~~his~~ parents and

consequently the report was lodged.

3. After completion of investigation the accused was challaned to face the trial. At trial, prosecution examined seven witnesses. P.W.1 Dr.Ghulam Nabi who had conducted medical examination of accused Mushk-e-Alam was of the opinion that the accused was capable of doing sexual intercourse. P.W.2 Muhammad Akbar Khan, affirmed on oath that he took into possession two bottles sent by the lady doctor Farhat Shafi containing vaginal swabs and a shalwar, belonging to the complainant. He also took into possession one shalwar belonging to the accused, through a separate recovery memo. Mst.Gula Mira was examined by the prosecution as P.W.3. She narrated the same story as given by her in her report. She, however, deposed that one Mst.Shamsher Gula, daughter of the present accused was married to her brother, namely, Hidayatullah. She stated that her report was initially reduced into writing by the SHO in the shape of Murasala Exh.PA/1, which was subsequently sent to P.S. Pezu, for registration of the case. She deposed that the site plan was also prepared at her instance by the I.O. However, during cross-examination she disclosed that before leaving for Punjab her husband cohabited with her. She admitted that her brother Hidayatullah and her father-in-law, the present accused, had strained relations and the report in question was lodged by her at the instance and direction of her father and brother. It would be worthwhile to mention here that during the course of cross-examination she categorically denied the commission of

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sexual intercourse with her, by the accused. On the contrary she disclosed that in fact she was slapped by the accused on her face due to which she became annoyed and this fact ultimately led her in lodging the report. She at the request of Special Public Prosecutor was, however, declared hostile and was permitted to be cross-examined, but nothing substantial was possible to be extracted. Mir Abbas Khan was examined as P.W.4. He is father of the complainant. He was also marginal witness of recoveries. He corroborated statement of the complainant. Hidayatullah SHO, P.S. Pezu was examined as P.W.5. He deposed that on 12.12.1994 at about 1600 hours he was present at Umar Adda when the complainant alongwith her father reported the matter to him which was accordingly reduced into writing and was subsequently sent to P.S. Pezu for registration of the case in the shape of Murasala. He disclosed that investigation of the case was carried out by him and he also received reports from the Chemical Examiner regarding samples duly taken by the lady doctor etc. He tendered in Court the Chemical Examiner's report Exh.PW.1/2. Jamaid Khan P.W.6 at the relevant time was posted as Muharrir at P.S. Pezu and on receipt of Murasala incorporated the same into FIR Exh.PA/1. Dr.Farhat Ashraf was examined as P.W.7. She deposed that complainant was examined by her. She stated that a small abrasion on forehead of the complainant in 1/4" area was noticed by her, however, no stain on complainant's external genitalia was found. She disclosed in her report that hymen was patulous with old

tears. She further deposed that two vaginal swabs were taken by her for the purpose of chemical examination. She disclosed that though there were some stains on the clothes, but the same may be of tea or any other kind of syrup.

4. After the prosecution evidence was closed the accused was examined under section 342 Cr.P.C. wherein he denied the accusation and pleaded innocence. He, however, stated that neither he would lead his defence nor would like to appear as his own witness in terms of section 340(2)Cr.P.C.

5. On conclusion of trial, the learned trial Court acquitted the accused from the charge primarily, on the ground that since the complainant herself has stated that she was not subjected to zina-bil-jabr, therefore, rest of the evidence which was corroboratory in nature was not sufficient to warrant conviction of the accused.

6. We have heard learned counsel for the State Mr. Akhtar Naveed, Advocate who appeared on behalf of the Advocate General, NWFP. He submitted that judgement of the learned trial Court suffers from mis-reading and non-reading of material evidence. He argued that the learned trial Court was not justified in acquitting the accused from the charge, in view of the fact that sufficient evidence was available on record to connect him with commission of the offence. He, however, while confronted with this categorical admission made by the complainant that she was not subjected to zina-bil-jabr, candidly conceded, that she in fact had made such statement in Court. Learned counsel for the State, however, pleaded

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that in case her statement was not believed or discarded by the trial Court then too, other evidence in the shape of her father's statement as well as doctor/lady doctor and Chemical Examiner's reports was also available on record which was sufficient to establish charge against the accused. He argued that the learned trial Court in the circumstances was under legal obligation to convict the accused.

7. We have given our anxious considerations to the above contentions and have also perused the relevant record with the help of learned State counsel. It is an admitted fact that Mst. Gula Mira during the course of her cross-examination has unequivocally and categorically stated that she was not subjected to zina-bil-jabr and that she lodged the report out of annoyance having been slapped by the accused. It would be advantageous to reproduce herein below relevant portion of her statement:-

"XX...It is correct that the house of my father-in-law has no electricity connection and it was complete dark. It is correct that my husband before going to Punjab for labour had also cohabited with me. It is further correct that my brother Hidayatullah and my father-in-law have strained relations. I had reported the matter as per the direction of my father and brother Hidayatullah. It is correct that the accused has not committed sexual intercourse with me. Only he slapped me on my face due to which I become a strange."

(the word "a strange" in fact appears on record but we understand that the same may be either "estranged" used in the sense of alian, stranger, distant or reserved person or the word "strained" with regard to her relations might have been used and due to typographical mistake it so appears on record).

A bare perusal of the above would lead to the following inferences that -

- 1) It was complete dark at the relevant time.
- 2) Her husband before leaving for Punjab had cohabited with her.
- 3) Accused and Hidayatullah brother of the complainant had strained relations.
- 4) No sexual intercourse was committed with her by the accused.
- 5) The complainant was "only" slapped by the accused.

It appears that by making such statement the complainant herself had tried to ensure that the prosecution is not able to prove the charge against the accused. Obviously by saying that it was complete dark at the relevant time, she has eliminated not only the possibility of any body witnessing the incident but has also made identification of the accused doubtful. Likewise, by deposing that her husband before leaving for Punjab had cohabited with her, has rendered the lady doctors' report as redundant and superfluous.

8. It may be observed here that there is no other direct evidence in this case except the statement of complainant and rest of the evidence produced by the prosecution is purely corroboratory in nature. In case the statement of the complainant is excluded from consideration then we are left with only the statement of her father and the reports of lady doctor and the Chemical Examiner which as per our estimation are not sufficient to warrant conviction of the

accused. It may also be observed here that in cases of zina where, generally there is hardly any witness, the statement of victim is elemental in nature and the same provides foundation to the prosecution for raising its structure thereon. Obviously in case of any damage to the foundation, the entire superstructure would crumble.

9. In the instant case the complainant herself has completely demolished the prosecution case. It would be pertinent to mention here that the superior Courts in the cases of zina have attached great sanctity to the statement of the victim and it has been repeatedly observed by the Hon'ble Supreme Court as well as by this Court that in such like cases sole testimony of victim is sufficient to base conviction provided the same is corroborated by other convincing evidence. Reference in this behalf may be made to the following reported judgements:-

i) Abdul Hameed vs. the State - (1988 SCMR 1772)

ii) Muhammad and another vs. the State - (NLR 1984 SD 463 SD 463 Shariat Appellate Bench of Supreme Court).

iii) Suleman vs. the State - (PLJ 1984 FSC 121).

Now by conversely applying the above quoted principal it can be safely concluded that in those cases where the victim herself is not supporting the prosecution or her statement is not confidence inspiring or lacking in bonafides, conviction of the accused would be a rare possibility.

10. It is also well settled that unless substantive or

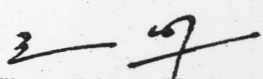
direct evidence is available conviction cannot be based upon any other type of evidence howsoever, convincing it may be. Reliance in this behalf may be placed upon 1991 SCMR 643 Muhammad Noor and another vs. Member I, Board of Revenue, Baluchistan and others wherein the Supreme Court of Pakistan has pleased to lay down as under:-


"The answer obviously is in the negative. We say because none of the pieces of evidence relied upon is a substantive piece of evidence and so long a substantive or direct evidence is not available no other type of evidence, howsoever convincing it may be, can be relied upon or can form the basis of conviction."

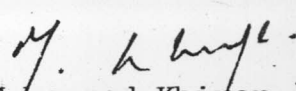
In a recent judgement delivered in the case of Qalb-e-Abbas alias Nahola vs. the State duly reported in 1997 SCMR 290, the Hon'ble Supreme Court has reconfirmed the same view.

11. Further it has also come on record through the statement of Mst. Gula Mira that her brother Hidayatullah and father-in-law i.e. the present accused had strained relations, therefore, possibility of the accused having been falsely implicated on account of personal grudge or enmity cannot be ruled out.

12. Even otherwise, it is not established from record that the view taken by the learned trial Judge was perverse, arbitrary or capricious so as to call for interference by this Court. This appeal as such is dismissed in limine.


(Ch. Ejaz Yousaf)
Judge

Fit for reporting

JUDGE


(Muhammad Khiyar)
Judge

Islamabad, dated the
3rd March, 1997
ABDUL RAHMAN /***