

IN THE FEDERAL SHARIAT COURT  
( APPELLATE JURISDICTION )

20

PRESENT

MR. JUSTICE MUHAMMAD KHIYAR

Criminal appeal No.61/P of 1996

Juma Gul son of Hazrat Noor  
R/o Teri , Tehsil Banda Daud Shah  
Distt: Karak --- Appellant

Versus

The State --- Respondent  
Counsel for the appellant: --- Mr. Assadullah Khan Chamkani  
Advocate  
Counsel for the State: --- Mr. Akhtar Naveed , Advocate

Linked with

Criminal appeal No. 62/P of 1996

Mst. Zama Jana D/o Said Noor  
Wido of Zar Mir, Resident of  
Village Teri , Tehsil Banda Daoud Shah  
District Karak. --- Appellant

Versus

The State --- Respondent  
Counsel for the appellant --- Mr. Muhammad Naseer Khan  
Advocate  
Counsel for the State --- Mr. Akhtar Naveed, Advocate  
No& Date of FIR --- 91 , Dated 18-12-1994  
and Police station: --- Teri  
Date of Judgment of --- 1-12-1996  
trial Court:  
Date of Institution: --- 21-12-1996  
Date of hearing: --- 20-03-1997  
Date of Judgment: --- 16-4-1997

(21)

JUDGMENT

MUHAMMAD KHIYAR, J. The appellants in these two appeals have challenged their conviction and sentences awarded to them by the Sessions Judge Karak vide judgment dated 1-12-1996.

2. The appellants were tried for the offences under section 10(2) of the offence of zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the Ordinance). The case was initiated on the report of Mst. Zama Jana made to Muhammad Ali Khan, S.H.O. Police station Teri on 18-12-1994 at 1215 hours. She charged Juma Gul, convict- appellant committing zina bil jabr resulting in pregnancy. After registering the case the SHO got her medically examined by lady Dr. Sumera Khattak who vide MLR Ex-PW-3/1 confirmed that Mst. Zama Jana was pregnant. The SHO then arrayed Mst. Zama Jana as an accused in the case and arrested her on 18-2-94. Juma Gul was also arrested on the same day. Dr. Muhammad Ayaz examined Juma Gul and found no clue of his impotency, and gave his report Ex- PW4/1. A Photograph of both the accused was taken into possession by the I.O. vidememo ExPC produced by Maiz Ullah Shah. After completion of investigation accused were challaned to Court.

*M. Khattak*

22

3. At the trial the accused denied the charge of committing offence punishable under section 10(2) of the Ordinance. To prove the charge against <sup>them</sup> prosecution produced five PWs.

Mohammad Kamal (PW.1) H.C Police line Karak is the marginal witness to the recovery memo Ex-PC vide which the I.O. took into possession one colour photograph of the two accused produced by Maiz ullah (P.W.2). Maizullah PW.2 is the son-in-law of Mst. Zama Jana appellant who deposed about the production of photograph to the I.O. When crossexamined he stated that photo was delivered to him by Mst. Zama Jana and while delivering the Photo she told him that she had married Juma Gul . Samera Khattak lady doctor ( PW.3) had examined Mst. Zama Jana. According to the report Ex. PW-3/1 Mst. Zama Jana was pregnant . Muhammad Ayaz (P.W-4) examined Juma Gul and found him potent. He deposed that Juma Gul was more than 55 years old and potency beyond 55 years decreases. He proved his report Ex-PW 4/1 . Muhammad Ali Khan (PW.5) conducted the investigation in the case. After the close of prosecution evidence the accused were examined under section 342 Cr. P.C. Mst. Zama Jana denied having

*M. Khattak*

(23)

committed zina and stated that she was subjected to zina bil jabr by Juma Gul. She admitted her pregnancy as a result of zina bil jabr by Juma Gul. About the photograph with Juma Gul she stated that after the death of her first husband, she developed some land dispute with her son-in-law Maiz Ullah Shah who produced the Photographs to the SHO. Juma Gul in his statement deposed that he is married person of 60 years of age having four sons and two daughters have no urge for sex. The case against him is false. Photograph produced was forged by his enemies to defame him in collusion with Maiz Ullah Shah the son-in-law of Mst. Zama Jana to save the skins of her mother-in-law. The appellants produced no evidence in defence.

4. The trial court believed the prosecution evidence as far as the commission of zina by Mst. Zama Jana with Juma Gul is concerned because of her pregnancy observing that in such like situation the burden was on her to prove that she was subjected to zina bil Jabr. The Court was of the view that in the presence of many children of Mst. Zama Jana from her previous husband, she could not be subjected to Zina bil jabr and that she was a consenting party. Her statement as co-accused

*M. Ghose*

(24)

was corroborated by the photograph depicting the two in a very happy position. The photo produced by Maiz Ullah Khan was not forged. The Court, therefore, concluded that prosecution had proved the charge of zina with consent. Accordingly the two appellants were convicted under section 10(2) of the Ordinance and sentenced to seven years R.I. and twenty stripes each. Mst. Zama Jana was given benefit of section 382-B Cr.P.C.

5. The convict-appellants have now challenged their conviction and sentences in these two appeals.

6. Asadullah Khan Advocate for Juma Gul appellant contended that except the statement of co-accused Mst. Zama Jana that she was subjected to zina-bil-jabr there is no other evidence against him and that statement of co-accused has no evidentiary value unless corroborated by convincing evidence. It is contended that photograph furnishes no corroboration, nor it is exhibited and produced in evidence. If it was produced the Court should not have returned it. In support of his contention reliance was placed on the following reported cases.

1. PLD 1983 F.S.C. 183
2. P.Cr.L.J. 1983, 496 Kar
3. P.Cr.L.J. 1983, 550 Kar

M. Khan

(2)

7. Mohammad Nasir Khan Advocate for Mst. Zama Jana appellant argued that transposition of Zama Jana as an accused by the I.O. is illegal and in any case her consent to commit zina is not established as the photograph made basis to prove consent is not placed on record. The evidence of pregnancy alone is not sufficient to convict a woman for zina especially when she claims the pregnancy to have been caused by zina-bil-jabr. Reliance was placed on the case of Mst. Rani etc Vs. the State PLD 1996, Kar 316.

8. Mr. Navid Akhtar Advocate for the State in reply argued that Mst. Zama Jana's consent is proved as she did not complain of zina-bil-jabr to anybody, though she became pregnant. The learned counsel conceded the legal position that statement of co-accused has no evidentiary value without corroboration.

9. I have heard the learned counsel for the parties and have also perused the evidence on record. The point is whether appellants have committed zina with consent or Mst. Zama Jana was subjected to zina bil jabr. For consent the trial Court has taken into consideration the photograph in which the two appellants were found in happy position, and pregnancy providing evidence of zina. The photo was produced to the Investigation officer

*Mr. Akhtar*

52

by Maizullah (PW-2) son -in-law of Mst. Zama Jana. This photograph was not placed on record and was returned by the Court. It is therefore not possible for this court to comment on the posture of the two appellants in the photograph. The pregnancy alone is not sufficient evidence for proof of zina-bil-jabr. The Division Bench of Karachi High Court in Mst. Rani's case (PLD 1996 P.316) held:

" Prosecution in order to get a woman convicted for zina has to prove on record by positive and independent evidence that she had, actually and in fact, committed Zina with her own free will and consent with another man to whom she was not lawfully married --- proof of pregnancy or some form of medical testimony /report by itself would be of no consequence as the same would at best only serve to be corroborative in nature"

10. The High Court dissented from Mst. Mina Vs. the State PLD 1983 F.S.C. 183 in which pregnancy alone was accepted as an evidence to punish the girl under section 10 of the Ordinance. Referance in the case is also made to Mst. Safia Bibi Vs. the State P.L.D 1985 F.S.C. 120 wherein dealing with the position of a female accused, the Court came to the conclusion that she could not be convicted for zina on the plea of pregnancy as a result of commission of offence of rape on her. Still another case cited is Mst. Siami Vs. the State PLD 1984 F.S.C. 121 ,

*Handwritten signature*

(27)

wherein it is held that mere pregnancy /abortion or birth of an illegitimate child by an unmarried girl/ widow or married woman whose husband had no access to her during the relevant period was not sufficient for awarding punishment under section 10 of the zina Ordinance. Respectfully following the ruling of D.B. of Karachi High Court that pregnancy by itself is not sufficient evidence to prove zina bil jabr, I am of the view that Mst. Zama Jana on the basis of evidence of pregnancy alone can not be held guilty under section 10 of the Ordinance. The statement of Mst. Zama Jana recorded under section 342 Cr. P.C. can be used as admission against its maker but it has no evidentiary value against a co-accused. The cases reported in 1983 P.Cr.L.J. Karachi, 496, 1983 P.Cr.L.J. Karachi, 550 have rightly been cited by the learned counsel for juma Gul appellant. I may also refer to a case Mohammad Sadiq Vs. The State 1995 S.C.M.R. 1403 wherein it is held that no implicit reliance can be placed on the statement of a woman of easy virtue unless some other independent evidence of commission of zina by the accused with her is available on record. No such evidence is produced in this case . Mst. Zama Jana

*W. H. H. H.*



28

is a widow having children from her previous husband.

Photograph with Juma Gul though not available on record can be taken as a proof of her loose character. The photo was produced by Maizullah Shah (P.W.2) who is the son-in-law of Mst. Zama Jana. He admitted in the cross-examination that it was delivered to him by Zama Jana disclosing that she performed nikah with Juma Gul. In the presence of this type of evidence on record it can not be said that prosecution has proved the charge under section 10(2) of the Ordinance against the convict appellants beyond reasonable doubt. I would, therefore, accept the two appeals, set-aside the judgment dated 1-12-1996 of the learned Session Judge Karak and acquit the appellants. They shall be released forthwith if not required in any other case.

*M. Khizar*  
(Muhammad Khizar)  
Judge

FIT FOR REPORTING

Islamabad, the 16<sup>th</sup> April 1997.

*Announced.*