IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO. 106/I OF 2006

Muhammad Shafi son of Muhammad Qasim
Mouza Chak Kotla Gamoon Tehsil Jatoi District Muzaffar Garh

Appellant

Versus.

1. The State
2. Lal Khan son of Nihaal Khan Caste Lashari
   R/o Mouza Shehar Sultan Tehsil Jatoi District Muzaffargarh.

Respondent

Counsel for appellant	....	Qari Abdul Rasheed, Advocate
Counsel for State	.....	Ch. Muhammad Sarwar Sidhu, Advocate
FIR, Date & Police Station	.....	133/05, 22.5.2005 Shehr Sultan
Date of Judgment of trial court	.....	05.04.2006
Date of Institution	.....	11.05.2006
Date of hearing	.....	10.01.2011
Date of decision	.....	14.01.2011

.....

JUDGMENT

SYED AFZAL HAIDER, J.- This judgment will dispose of the titled appeal which was remanded to this Court by an order dated 16.01.2008 passed by the Shariat Appellate Bench of the Supreme Court of Pakistan. The facts leading upto this stage are being mentioned succinctly as follows:-

i. Case FIR. No. 133/2005 was registered on 22.05.2006 at Police Station Shehr Sultan, District Muzaffargarh on a written application Ex. PC moved by Lal Khan complainant, P.W.2 regarding an occurrence committed during the night between 21st and 22nd May 2005 in the area of Mauza Shehr Sultan.

ii. Allegation levelled in the crime report was that during the fateful night the complainant alongwith his family members was asleep in his house when Mst. Sakina daughter of the complainant went out to ease herself during midnight. The complainant was awakened on hearing noise in the voice his daughter. He, alongwith his son Rahim Bakhsh and Haji Muhammad Shameer, rushed to the place of occurrence and in the light of torch saw that Muhammad Shafi was committing zina with his daughter Mst. Sakina. The victim was without Shalwar at that time. Co-accused Muhammad Iqbal alias Bali, armed with gun,was standing at some distance as guard. Complainant and the witnesses challenged the accused and tried to apprehend them but Muhammad Iqbal alias Bali extended

threats and warned them of dire consequences in case they coming near them. Accused persons thereafter decamped from the spot. It was also mentioned in the complaint that accused made efforts to influence the complainant to enter into a compromise but the complainant did not oblige whereafter the crime information was registered.

iii. Investigation ensued as a consequence of registration of the FIR. Investigation of the case was undertaken by Muhammad Iqbal, ASI P.W.5. On 22.05.2005 he directed Muhammad Rafique Head Constable to escort Mst. Sakina to Rural Health Centre, Shehr Sultan for medical examination and on the same day he proceeded to the place of occurrence. He prepared rough site plan Ex.PD and recorded statements of the witnesses under section 161 of the Code of Criminal Procedure and arrested accused Muhammad Shafi. After completion of investigation he sent the accused to judicial lock up. He also took into possession shalwar of the victim vide recovery memo Ex.PF. After completing legal formalities a report under section 173 of the Code of Criminal Procedure was submitted by the SHO in the trial court requiring the accused to face trial.

iv. Learned trial court, on receipt of the said report, framed charge against the appellant under section 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and under section 109 of the Pakistan Penal Code against co-accused Muhammad Iqbal on 23.11.2005. The accused did not plead guilty and claimed trial.

v. The prosecution in order to prove its case produced seven witnesses at the trial. The gist of deposition of the witnesses for prosecution is as under:-

i. Lady Dr. Saima Batool Kazmi, had medically examined Mst. Sakina victim. She appeared as P.W.1. She gave the details of the medical examination.

ii. Lal Khan complainant appeared at the trial as P.W.2 and endorsed the facts narrated by him in the complaint Ex.PC.

iii. Mst. Sakina gave evidence as P.W.3 and narrated details of the occurrence and thereby corroborated the statement made by her father Lal Khan complainant.

iv. Rahim Bakhsh son of the complainant appeared at the trial as P.W.4. He was another eye witness of the occurrence. He corroborated the statement made by his father and his sister Mst. Sakina victim.

v. Muhammad Iqbal, ASI, appeared as P.W.5. He was the investigating officer. The details of his investigation have already been mentioned in an earlier paragraph of this Judgment.

vi. P.W.6 is Muhammad Jehangir, Constable had received the sealed envelope and two sealed phials from Abdul Karim Moharrir. He deposited the same in tact in the office of Chemical Examiner Multan on 27.05.2005.

vii. Dr. Sajjad Ahmad had medically examined Muhammad Shafi accused. He appeared as P.W.7 and stated that he

examined the accused on 28.05.2005 regarding his potency and found him fit to perform sexual act.

vi. After close of the prosecution evidence the learned trial court examined the accused under section 342 of the Code of Criminal Procedure wherein he stated that the witnesses for prosecution were related interse and inimical towards them. He did not opt to make statement on oath under section 340(2) of the Code of Criminal Procedure. He produced Muhammad Yaqoob Awan, DSP in his defence who stated that Muhammad Shafi accused was not involved in this case and had been falsely implicated.

vii. The learned trial court after completing codal formalities recorded the impugned verdict of guilt in so far as the present appellant is concerned and consequently convicted him under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced him to 10 years rigorous imprisonment. The co-accused was acquitted as he had been awarded benefit of doubt.

viii. The appellant however absconded from the trial Court at the time of announcement of judgment. Warrants of arrest were issued against him. According to the record he was arrested after one month and thirteen days of his disappearance. He had not given reason for absconding from the court at the time of announcement of judgment. The convict filed an appeal in this court which appeal was dismissed on 15.11.2006. An appeal against the rejection order of this court was then preferred by the appellant before the Shariat Appellate Bench of the

Supreme Court. The appeal was accepted. The judgment of Federal Shariat Court set aside and the appeal remanded for fresh decision in accordance with the provisions of section 369 of the Code of Criminal Procedure.

2. During the course of arguments the following points were raised on behalf of the appellant before the Shariat Appellate Bench:

i. whether the material prosecution evidence, which would have a bearing on the decisions of the case, was considered;

ii. whether reliance on the evidence "of the prosecutrix Mst. Sakina (PW.3) and (PW.4) Dr. Saima Batool Kazmi" was proper to record convictions;

iii. whether the facts and circumstances of this case warrant conviction solely on the evidence of prosecutrix and medical evidence; and

iv. whether the appellant should not have been acquitted like his co-accused, who had been assigned a definite and positive significant role by the prosecutrix.

3. The case was consequently remanded with the following observation:

> "In view of the above facts and discussion, this petition is converted into appeal and is allowed. The impugned judgment is set aside and the case is remanded to the Federal Shariat Court for deciding the case afresh in accordance with the provisions of Section 369 Cr.P.C.

preferably by a Judge other than the Chief Justice, who had previously written the judgment."

4. Re-appraisal of the entire evidence recorded in this case reveals that seven witnesses in all appeared on behalf of prosecution while one D.W. appeared in defence. The evidence available on file of this case is as follows:

i. Lal Khan, PW.2, had lodged the crime report Ex.PC/1. He was an eye witness of the occurrence. He endorsed the contents of FIR No. 133/05 P.S. Shehr Sultan;

ii. Mst. Sakina Mai, aged 14 years, the victim of the crime, appeared at the trial as PW.3. She corroborated the story narrated by her father, the complainant;

iii. Rahim Bux, brother of victim, also appeared at the trial as PW.4. He was another eye witness of the occurrence. He had been named in the FIR as well. He corroborated the prosecution story;

iv. The lady doctor appeared as PW.1 to depose that the victim was a girl aged 14 years and her hymen was ruptured. The Vagina admitted one finger. PV examination indicated tenderness. Probable duration of injuries was 14/18 hours. Four vaginal swabs, two external and two internal, were taken and sent to Chemical Examiner for detection of semen;

v. The report of the Chemical Examiner Ex.PH was positive as it affirmed that the swabs were stained with semen;

vi. Muhammad Iqbal ASI, PW.5 had investigated the case. Report under section 173 of the Code of Criminal Procedure was prepared by SHO after completion of investigation. The accused were directed to face trial.

vii. Muhammad Jehangir Constable, PW.6 stated that after receiving the contaminated swabs, he deposited in tact the same in the office of Chemical Examiner Multan.

viii. PW.7 Dr. Muhammad Saeed had examined the accused Muhammad Iqbal, aged 26 years, medically and found him sexually potent.

5. The appellant in his statement under section 342 of the Code of Criminal Procedure, while responding to questions No.9 and 10 as to why the case was registered against him and why have the witnesses for prosecution have implicated him, stated as under:-

> "I have been falsely involved in this case with the complainant party who was putting pressure upon us to get compromise from us in case FIR No.50/05 under section 302/337-F(V)/337-AII read with section 148/149 PPC registered at P.S. Shehar Sultan of the murder of Nabi Bakhsh."

"All the PWs are inimical towards us and inter se related of the complainant. While, official PWs are subordinate of the I.O."

6. The appellant did not opt to make a statement on oath. However he produced Muhammad Yaqoob Awan D.S.P. as D.W.1 who stated that Shafi accused was called by the complainant and involved in this case in order to grab money. He stated further that during investigation it transpired that Shameer P.W. was involved in the murder of Nabi Bux and that Shameer was in league with complainant for the purpose of involving the accused person in this case falsely in order to put pressure upon them for securing a compromise. The DW also stated that Nabi Bux deceased of that case was close relative of Shafi etc.

7. I have gone through the file carefully. The evidence brought on record by the contending parties including the statement of accused has been perused. Relevant portions of the impugned judgment have been scanned. The questions raised on behalf of the appellant before the Shariat Appellant Bench have been considered. The arguments advanced on behalf of the appellant as well as the State have also been weighed in the light of available record.

8. Learned counsel for the appellant has now raised the following points:-

i. That the case is false and the appellant has been roped in out of malice;

ii. That according to the statement of the Investigating Officer shalwar of the victim was recovered on 07.06.2005;

iii. That D.W.1 appeared at the trial and stated that during investigation it transpired that the complainant party called Muhammad Shafi accused in order to involve him in this case falsely by using Mst. Sakina as a tool to grab money from him. It was also stated at the bar that during investigation it became known that Shameer P.W. of this case was involved in the murder of one Nabi Bakhsh which crime was registered as FIR. No. 50 of 2005 under section 302 of the Pakistan Penal Code. They have consequently involved the accused in this case falsely to put pressure upon them;

iv. Investigating Officer P.W.5 stated that "it came to my knowledge during my investigation that there was enmity between the parties over the murder of Nabi Bakhsh *but this aspect was not investigated by me*"; (emphasis added)

v. That according to the statement of P.W.2 Lal Khan the victim was married. Consequently it is not certain whether the contaminated swabs originated from the appellant or husband of the victim;

vi. That the Investigating Officer was a dis-honest person;

vii. That the benefit of doubt has illegally been denied to the appellant.

viii. That in the case of Shehzad Versus The State 2002 SCMR 1009, it was held that absence of grouping of semen makes the case doubtful. In the peculiar circumstances of this case the element of doubt created by non-production of semen grouping report should be considered by this court and lastly;

ix. That in the case of Ghulam Qamar Versus The State, reported as 2002SCMR 538, the sentence already undergone was deemed sufficient even though its facts were worst than the present case.

9. Learned Additional Prosecutor General supported the impugned judgment. He stated that the case of Shehzad, relied upon by learned counsel for the appellant, does not advance his case because the Supreme Court had in fact held that omission of scientific test of semen and grouping would mean neglect on the part of the prosecution which does not materially affect the other evidence. It is further contended that undue concessions was given by the Investigating Officers to the accused and as such one or two remarks out of context would not damage the case of prosecution. It was urged further that the element of enmity in this case, as alleged by accused, has not

been established. Lastly it was contended that the prosecution has proved its case beyond reasonable doubt.

10. Learned counsel for the appellant was asked repeatedly to show from the record the actual relationship between Nabi Bakhsh deceased of FIR No.50/205 P.S. Shehr Sultan and the appellant on the one hand and Shameer and the complainant on the other hand. The record however shows that the complainant party is Lashari Baloch whereas Shameer is Arain by caste and there is no relationship proved between them nor has it been brought on record that the complainant had some kind of special interest in the said Shameer to compel him to come to his rescue. It has also not been explained as to why should the complainant risk the reputation of his young daughter for a stranger.

11. My observations, after careful consideration of the facts and circumstances of this case and consideration of entire evidence on record, are as follows:-

i. PW.5 Muhammad Iqbal ASI had undertaken investigation of this case in May 2005 whereas DW.1 Muhammad Yaqoob Awan D.S.P. had, under the orders of Additional Inspector General of Police, Punjab undertook investigation of this case in July, 2005. Initial report under

section 173 of the Code of Criminal Procedure was sent in Court on 29.05.2005 by SI/SHO on the basis of investigation conducted by PW.5 Muhammad Iqbal. This report was incomplete as proceedings against Muhammad Shafi accused alone were concluded. Another report was submitted in the trial court on 16.08.2005 on the basis of investigation conducted by D.W.1 Muhammad Yaqoob Awan who had found one accused guilty. However Muhammad Iqbal accused alone was kept in column No.2 The two said reports however do not disclose the reasons or sources of knowledge or the material on the basis of which the inference of not guilty was drawn by the second investigating officer. The matter has therefore to be decided on the basis of evidence brought on record by the competing parties.

ii. The evidence of lady doctor P.W.1 has established the fact of penetration and the swabs taken by her have been found to be stained with semen. The basic ingredient of the offence of Zina is penetration. The medical witness was not cross-examined either on the question of age of victim or the element of penetration and rupture of hymen. The veracity of the report of the Chemical Examiner or the factum of dispatch of parcel intact in the office of Chemical Examiner was not challenged. The element of Zina has therefore been established. The only point of determination is the person who has been guilty of committing rape.

iii. The age of the victim as well as the facts and circumstances of this case rule out the possibility of consensual sex. It is therefore a clear case of Zina-bil-Jabr.

iv. Three witnesses i.e. PW.2 Lal Khan, the complainant, PW.3 Mst. Sakina Bibi the victim herself and PW.4 Rahim Bux have provided eye-witness account of the occurrence. The father and brother of the victim are natural witnesses. It was suggested to the three witnesses but denied by them that a false case had been set up to compel the accused party to enter into compromise with Shameer who is allegedly involved in the murder of one Nabi Bux. The relationship between Shameer and complainant party or between accused and deceased Nabi Bux has neither been established nor has any evidence been produced to show the role of Shameer in the said murder. It has also not been brought on record that the complainant was deeply interested in Shameer and had gone to the extent of putting the honour of his daughter at stake for his sake. In the absence of solid evidence it is not safe to believe every defence suggestion particularly when it is not only denied by witnesses for the prosecution but the inference sought to be drawn by defence side does not appeal to reason. All the three witnesses have corroborated each other and medial evidence as well as the report of Chamical Examiner further support the contention of prosecution witnesses.

The person responsible for Zina bil Jabr has therefore been identified and established by the prosecution party.

v. The appellant, in his statement without oath, stated that the complainant party falsely involved him in this case because they wanted to force a compromise upon him. The accused however did neither give details of the case in which compromise was solicited nor did he even mention the name of Shameer or the inter-se relationship of parties in his statement under section 342 of the Code of Criminal Procedure to prove the element of alleged false implication. The statement of accused merited being considered and weighed if necessary data was made available on file. The Courts have to be taken into confidence by the parties in the larger interest of securing justice and fair play. Enmity, under the circumstances, cannot be just presumed. Material must be placed before the court in order to justify an inference.

vi. The defence evidence of Muhammad Yaqoob Awan D.S.P. D.W.1 does not advance the case of defence for the reasons that:

a. the witness maintained that the accused was called by the complainant and then he was involved in this case. In other words the defence witness suggested that the accused *did go to the house of the complainant at that hour of the night.* However this is not the plea of the

appellant. No question to that effect was put to any of the three relevant witnesses during cross-examination of witnesses for prosecution nor was this plea advanced during statement without oath or even during final arguments before the trial court or even here before me. The defence in criminal cases consists of the following factor:-

i. Trend of cross-examination of relevant witnesses of prosecution with particular reference to the nature of allegation;

ii. Statement of accused without oath recorded by trial court under section 342 of the Code of Criminal Procedure. Such a statement must support the line adopted in the cross-examination of prosecution witnesses. The purpose of incorporating section 342 in the Code is to provide an opportunity to the accused to explain circumstances, facts or any in criminative evidence sought to be used against him by the prosecution. Under Article 121 of Qanun-e-Shahadat Order, 1984, the burden of proof lies upon the accused to establish that his case falls within exceptions.

iii. Statement of accused on oath if he opts to enter the witness box;

iv. Defence evidence, oral or documentary, in support of the plea adopted and maintained in the above mentioned stages; and

v. The arguments advanced before the trial court at the conclusion of the trial.

However the fact remains that:

a) The basic onus is always upon the prosecution to prove its case beyond reasonable doubt;

b) Accused is not bound to disclose his defence at the first available opportunity and his failure to disclose defence does not relieve the prosecution of the initial onus to prove its case beyond reasonable doubt;

c) The accused may opt to disclose his defence in which case he can successfully challenge the prosecution version and prove its falsity on the basis of material which can marshal his contention;

d) Disclosure of defence help the trial court in considering it in juxtaposition with the prosecution case;

e) Cogent defence can help in making a dent in the prosecution story and thereby earning benefit of doubt; and

f) The accused may adopt a defence but if he has taken up a particular plea he is legally required to prove the same on the either on the basis of evidence or attending circumstances in or order to enable the Court to evaluate the plea on the touchstone of known principles of the criminal jurisprudence.

b. The defence witness who happened to be the second investigating officer and certainly senior in rank to the former police officer, was not persuaded to recommend that the case FIR be cancelled or the accused be discharged and the complainant be prosecuted for falsely implicating the accused. The witness found Muhammad Iqbal guilty and

requested the court to exercise its own discretion in so far the present appellant was concerned. It is an established legal proposition that mere statement of the Investigating officer that the defence evidence is reasonable or that the accused is innocent is not at all sufficient particularly when direct incriminating evidence has been recorded during investigation. Relevant material to recommend discharge of the accused or for that matter the cancellation of case must be placed on file. Necessary material ought to be reflected in the *discharge report* in order to assist the Court in arriving at the recommended conclusion. The terms *discharge of an accused* and *cancellation of case* are not synonymous terms. In the event of cancellation of case the FIR ceases to exist but in case of the accused being discharged the FIR remains intact. DW.1 Muhammad Yaqoob was supposed to be an experienced officer as he held the rank of Deputy Superintendent of Police. He should have been aware that a final report contains the reasons on the basis of which the investigator comes to the conclusion that the accused is involved on the basis of evidence collected by him. The final report in this case, submitted in the Court under section 173 of the Code of Criminal Procedure, is conspicuous by absence of any evidence or useful material in support of innocence of accused. The final report in this case however contains a remark that the DSP i.e. the second Investigating Officer had found Muhammad Iqbal co-accused guilty while the case of appellant was

left to the discretion of the trial court. It is unfortunate that shoddy reports without observing the formalities stipulated by law are submitted in Courts. Let a copy of this Judgment be sent to the Inspector General of Police for perusal. He should issue directions that the Investigating Officers should not only carefully read sections 163, 169, 170(1) and 173 of the Code of Criminal Procedure but also go through rules 24.7 and 25.57 of the Police Rules, 1934 as well as the following three reports:-

i. Bahadur and another Vs. The State and another
PLD 1985 SC 62

ii. Ghulam Hussain Vs. Syed Anwar Hussain and 2 others
1991 MLD 523

iii. Ashiq Hussain Vs. Sessions Judge Lodhran and 3 others
PLD 2001 Lahore 271.

c. The Defence witness also does not divulge the reasons for his belief that one accused was involved and the other was innocent or that no incident as alleged by complainant had in fact taken place. He also does not take the Court into confidence by disclosing the nature of deep interest of the complainant in Shameer or even the role of latter in the murder of Nabi Bakhsh. This is not good investigation. The basic purpose of investigation is to collect evidence. The investigating officer must have material before him to come to a definite conclusion. The defence of accused has also to be considered undoubtedly. The accused is required to produce evidence in support of his contention particularly when the complainant party places its cards on the table during investigation. No doubt the prosecution has to

establish its case beyond all reasonable doubt but once inculpatory evidence has been brought on record the onus lies upon the accused to demolish the prosecution version in order to secure an acquittal.

vii. Learned counsel has neither advanced any argument nor referred to circumstances on the question of reduction of sentence to one already undergone. The question of reduction of sentence is a matter which relates to judicial discretion. The discretion has to be exercised judiciously and must be based on existence of extenuating circumstances. Every case including the quantum of punishment is to be decided on its facts and circumstances. The accused in this case was a grown up young man of 26 years at the time he committed rape whereas the victim was of 14 years of age. The appellant had also absconded.

12. I have gone through the impugned judgment delivered by the learned trial judge. The entire evidence brought on record was duly weighed and not a single inference, drawn by learned trial court, is contrary to the record of the case. No material evidence has been ignored from consideration. There is no indication that the codal formalities of the trial had not been fulfilled. In such circumstances the verdict of the trial court carries weight because it has observed the parties while according evidence. The impugned judgment of the learned trial court is therefore liable to be maintained.

13. The appellant had absconded from the trial court at the time of announced of judgments. This fact was not brought to the notice of the Shariat Appellate Bench. Absconsion is certainly not in itself a basis for conviction but it has been held to be a strong piece of corroboration of direct and circumstantial evidence.

14. The acquittal of co-accused Muhammad Iqbal does not advance the case of the appellant for the simple reason that there was no allegation of rape against him. It is therefore not correct to say that on the same set of evidence one accused was acquitted while the other was convicted. Muhammad Iqbal accused was charged under section 109 of Pakistan Penal Code whereas the appellant was charged for Zina bil Jabr.

15. This appeal was remanded by the Shariat Appellate Bench "for deciding the case afresh in accordance with the provisions of Section 369 Cr. P.C.....". Section reads as follows:-

> **"Court not to alter judgment.** Save as otherwise provided by this Code or by any other law for the time being in force or, in case of a High Court by Letters Patent of such High Court no Court when it has signed its judgment, shall alter or review the same, except to correct a clerical error.".

The judgment of the Federal Shariat Court dated 15-11-2006 was set aside by the Shariat Appellate Bench on 16.01.2008 and the appeal was remanded for fresh decision. The former judgment dated 15-11-2006 therefore ceased

to exist. The appeal is accordingly being decided afresh. Section 369 of the Code of Criminal Procedure stipulates that subject to the provisions of the Code, a judgment, after it has been signed, can neither be altered nor reviewed except for correction of clerical error. The present judgment is neither on alteration nor review of the previous judgment because the same having been set aside is no more operative.

16. Section 369 occurs in Chapter XXVI of the Code of Criminal Procedure. This chapter deals specifically with judgments. The basic principle enunciated in this chapter is that a judgment must be signed and announced in open court and its substance be explained to the accused or his counsel. The purposes to be achieved by enacting section 369 ibid inter alia are:

a) to lend solemnity and finality to the judgment because a judgment is the considered and a firm determination culminating into final adjudication as a result of judicial mind;

b) to prevent the Court from altering or reviewing the judgment once it has been delivered "except to correct a clerical error,"

c) to establish the principle that the Court, after signing and pronouncing a judgment becomes "functus officio" and hence not competent to revisit the decision save as otherwise provided by the Code of Criminal Procedure; and

d) to declare that henceforth the jurisdiction to examine the judgment vest in the appellate or revisional court as provided in the Code which would be legally competent to maintain or set aside a judgment once it has been signed and pronounced. The appellate and revisional jurisdiction has been elaborately spelt out by the Code of Criminal Procedure.

17. In view of what has been stated above Criminal Appeal No.106/I of 2006 filed by Muhammad Shafi is dismissed. The judgment dated 05.04.2006 delivered by learned trial court in Hudood Case No.47-2 of 2005, Hudood trial No.42 of 2005 is hereby maintained. Benefit of section 382-B of the Code of Criminal Procedure is however maintained.

JUSTICE SYED AFZAL HAIDER

Announced in Open Court
on 14-01-2011 at Islamabad
*Mujeeb ur Rehman/**

Fit for reporting

JUSTICE SYED AFZAL HAIDER