

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER
MR. JUSTICE SHAHZADO SHAIKH

CRIMINAL APPEAL NO. 188/I OF 2007 &
CRIMINAL REVISION NO.57/L OF 2006

Mst. Shahnaz Bibi daughter of Muhammad Bakhsh
R/o Kalra Tehsil Shahpur District Sargodha

Appellant

Versus.

Khushi Muhammad etc.

Respondent

Counsel for appellant	....	Rai Shafique Ahmed Khan and Abdul Sami Khawaja, Advocates
Counsel for the respondent	....	Mr. Ghulam Shabbir and Jam Khursheed, Advocates
Counsel for State	.....	Ch. Muhammad Sarwar Sidhu, Advocate
Private Complaint	.....	P/Complaint 11.01.2005 Sargodha
Date of order of trial court	.....	03.02.2005 and 29.4.2006
Date of Institutions	.....	18.5.2006 and 08.05.2007
Date of hearing	.....	19.01.2011
Date of decision	.....	19.01.2011

6:1

JUDGMENT

SYED AFZAL HAIDER, Judge.- Mst. Shahnaz Bibi through

Criminal Appeal No. 188/I of 2007 has challenged the order dated 03.02.2005 passed by learned Additional Sessions Judge, Sargodha whereby her complaint lodged against Khushi Muhammad respondent under sections 10 and 16 of Ordinance VII of 1979 was dismissed. After the dismissal of the complaint, the respondent filed a complaint under section 3 and 7 of Ordinance VIII of 1979 to initiate Qazf proceedings against the appellant. The latter, having been summoned to face charges of false allegations, moved an application under section 265K of the Code of Criminal Procedure. This application was dismissed on 29.04.2006. Mst. Shahnaz Bibi thereafter moved Criminal Revision No.57/L of 2006 to assail the said order dated 29.04.2006. Both the matters are proposed to be disposed of through this judgment.

2. Mst. Shahnaz Bibi in the meantime had moved an application before the Chief Justice Supreme Court of Pakistan praying that in the exercise of Suo Moto jurisdiction the order dated 03.02.2005 may be set

aside. Under the orders of Hon'ble Chief Justice Supreme Court the application was forwarded to the Chief Justice, Federal Shariat Court Islamabad for disposal in accordance with law. This order was issued on 07.05.2007 as Human Rights Case No.5034/2006. It was registered as Criminal Miscellaneous No.99/I of 2007 in this office on 08.05.2007. This application was later on converted into an appeal by an order of this Court dated 02.10.2007

3. The background of this dispute is that Mst. Shahnaz Bibi appellant had filed a private complaint before the learned District & Sessions Judge, Sargodha, wherein she alleged that she was married with Muhammad Azam son of Khushi Muhammad two years prior to the occurrence. Muhammad Azam her husband was not having a proper source of income and he used to go every day for labour early in the morning and would return in the evening. She alleged that her father-in-law (sussar) wanted to establish illicit relationship with her but she did not oblige. Her husband also did not pay heed to her complaint. It is further alleged that on 30.05.2004 her mother in law i.e, wife of Khushi Muhammad had gone to her parents alongwith children except her daughter Mst. Samina Bibi. Respondent

151

Khushi Muhammad on the pretext of collecting documents of his rickshaw from the box entered the room and after over-powering the appellant committed zina-bil-jabr with her. Mst. Shahnaz Bibi beseeched the respondent to desist from such a heinous offence but her entreaties fell on deaf ears. In the meanwhile Mst. Samia Bibi daughter of Khushi Muhammad came in the room and saw the occurrence. She reprimanded her father. At about 10/11.00.a.m. wife of Khushi Muhammad returned and the appellant told her the whole story upon which she advised her to keep quiet. Muhammad Azam, husband of the complainant returned home in the evening. She lodged a protest with her husband who did not respond. Consequently she sent for her parents and on the next morning her brother came and took her to his house. Criminal proceedings were initiated thereafter when Mst. Shahnaz Bibi moved the High Court in human rights jurisdiction. Her complaint was entertained and after some cursory evidence the same was dismissed as mentioned above.

4. Learned trial court, while dismissing the complaint, was influenced by the fact that it was not believable that except the daughter of respondent all the members of family except Mst. Samia Bibi would

condone the offence. It has been brought to our notice that Mst. Shahnaz

Bibi the appellant sought divorce from her husband and has married again.

The parties are related to each other because the said Mst. Samia Bibi is

married to the brother of complainant. The learned trial court did not

condescend to believe the statement of a daughter against her own father. No

valid reason was advanced by the learned trial court to disbelieve a daughter

against her father in a heinous offence.

5. We had the occasion to go through the preliminary evidence produced by complainant before the trial Court. In addition to the statement of complainant, Mst. Samia Bibi the daughter of accused corroborated the incriminating contents of the complainant against her father. Haji Muhammad also appeared at the trial on 11.01.2005 as PW 2 to affirm that the complainant disclosed the fact of Zina to him on the day of occurrence.

6. On 02.10.2007 the proceedings in the Qazf case lodged by respondent Khushi Muhammad against the appellant were stayed by this Court. It is therefore appropriate at this stage to mention that the fate of Criminal Revision No.57/L of 2006 is linked with decision of Criminal Appeal No.188/I of 2007.

18
11

7. In order therefore to consider the appeal we asked the contending parties to address the court on the question whether the impugned order dated 03.02.2005 should be maintained or set aside.

8. Learned counsel for the appellant urged that sufficient material had been brought on record that warrants issuance of process.

9. Learned counsel for the respondent on the other hand supported the impugned order and in support thereof urged as follows:-

- i. That there is no evidence by the appellant against the respondent;
- ii. That is no medical evidence in support of the contention of the appellant; and
- iii. That Mst. Shahnaz appellant did not want to stay as wife of Muhammad Azam son of the respondent in his house.

10. The question for decision before us, is whether in the facts and circumstances of this case, the process should have been issued against the respondent in this case.

11. In this case a complaint was lodged by a daughter-in-law against her father-in-law regarding incestuous adultery. It was a very serious charge. Of course it is not a common offence but it is not an unknown offence either. The allegation of rape had been supported by the real

6:1

daughter of accused who was not only present in the house but had witnessed the unfortunate incident and also reprimanded her father. The trial Court took cognizance of the matter under section 200 of the Code of Criminal Procedure. The stages in the progress of the complaint under consideration are as follows:-

i. After recording preliminary evidence learned trial Court passed the following order on 25.01.2005 when the case was adjourned to 03.02.2005:

Present Petitioner/complainant in person. Counsel for complainant.

Previously present complainant moved certain applications before Justice of Peace whereafter police conducted certain proceedings. It is just to go through that proceedings file of police therefore police file be summoned from P.S. for 3/2/2005.”

ii. On 03.02.2005 the learned court dismissed the complaint after itself considering the complaint and the evidence produced by complainant. Inquiry into veracity of the complaint was not ordered by the trial Court.

iii. The learned trial Court dismissed the complaint mainly on the grounds mentioned in paragraph 7 of the impugned order. The same is reproduced as under:-

“From the facts narrated above, it emerges that a young daughter of an old man was present in the house even then he committed the offence of rape with his daughter-in-law. Obviously, he could do so if the complainant was a consenting party but it is not believable that in presence of young daughter, a father commits such a heinous offence, that too in a broad day. Again it does not appeal to mind that wife of the accused and husband of the

complainant both remained mum and did not join the complainant during the proceedings conducted by the police on different applications and even before this court in this private complaint.”

iv. The court at the stage of inquiry, while examining the preliminary evidence, has to keep in mind the basic point that enquiry is different from a trial. The scope of appreciation of evidence in an enquiry is limited because the court has to see whether a prime facie has been made out. The evidence is purely one sided. The accused is not before the Court. The law does not require the attendance of accused before a process is issued. The core point on which the court needs satisfaction is whether the evidence adduced by the complainant in itself, without further support or corroboration, if not challenged, is sufficient to disclose a case against the accused. If the answer is in the negative, the complaint merits dismissal otherwise the process ought to issue against the accused. In other words the satisfaction of Court is the determining factor. Satisfaction, of course, is something subjective but judicial satisfaction is not based upon surmises or conjectures. It is not fair to start deducing principles of universal application on the basis of one or two cases. The order of dismissal of a complaint is a judicial order and must be based upon reasons. Reasons have a clear cut nexus with facts of the case. An order of dismissal is tentative. It does neither bar to the entertainment of a second complaint nor is it beyond the revisional jurisdiction of the superior court.

v. The learned trial court had, while considering the evidence, failed to appreciate that the crime information did merit further probe because the real daughter was an eye-witness of the crime committed by her father against his daughter-in-law. The incriminating evidence had been brought on record. Such an offence, if it has happened, had to be dealt with

6.1

in accordance with law. In such a situation the "person complained against" be asked to appear to meet the charges. The nature of the offence alleged shocks the conscience of society because the relationship of trust in family life is shattered.

12. In view of what has been stated above the impugned order merits interference because the learned trial court has travelled beyond the scope of section 203 read with section 202 of the Code of Criminal Procedure. The standard of testing prosecution evidence produced at the trial cannot be adopted at the stage complainant produces preliminary evidence before the court. It may be noticed that a complainant, while lodging a crime report with police in a cognizable offence is neither required to state the facts on oath nor is he supposed to produce evidence. What is essential is that in both cases i.e, lodging of crime information before police under section 154 of the Code of Criminal Procedure or initiating a private complaint before a court under section 190 *ibid*, the facts alleged must disclose commission of an offence. In a private complaint, the complainant makes the statement on oath and brings evidence in court in support of his allegations which is not done at the time of recording F.I.R. The information in a private complaint is laid before competent authority with the object of initiating criminal action. The purpose of complaint is to bring on record the facts and circumstances of the case so that "*attendance of the person complained against*" can be secured by a court of competent jurisdiction

which has the authority to take cognizance and administer law. The second purpose is to set the criminal law into mention. The essence of a complaint is the statement of facts which are available on record. It is only thereafter that complete evidence is collected and brought on record to enable the court to finally decide the matter.

13. We are clear in our mind that sufficient incriminating evidence had been brought on record by the appellant against the respondent to warrant issuance of process.

14. The upshot of the discussion is that the order dated 03.02.2005 of the learned trial court whereby the complaint of appellant filed under sections 10 and 16 of Ordinance VII of 1979 was dismissed is set aside. Process shall issue against the respondent Khushi Muhammad. The respondent present in person, is directed to appear before the trial court on 28.01.2011. The trial court will issue notice to the appellant to appear whereafter the learned trial court will proceed in accordance with law.

15. Criminal Revision No.57/L of 2006 is consequently accepted because the complaint under section 3 and 7 of Ordinance VIII of 1979 was filed by the respondent only after the dismissal of complaint of the appellant. The restoration of the said complaint would make the subsequent complaint of respondent infructuous. The resultant effect is that the order dated 29.04.2006 impugned in Criminal Revision No.57/L of 2006 ceases to be

operative. The trial court would have been competent to proceed in the Qazf complaint only if it had be shown by the complainant that the accused had been found by a court of competent jurisdiction, to be a liar under clause (b) of Second Exception to Section 3 of Ordinance VIII of 1979. There was no such material on record to enable the court to proceed against the accused. In this view of the matter the complaint filed by respondent against Mst. Shahnaz Bibi could not proceed and is hereby quashed. The following reports may be perused on this point:

- i. Muhammad Masood vs. Abdullah etc. 1992 SCMR 638 at pages 645, 646.
- ii. Zulfiqar Ali vs. The State 1998 SCMR 1016 at pages 1025, 1026.

“The underlined words are clear to establish that a case will fall under the mischief of sub-clause (b) of second exception only if a Court holds a witness of Zina a liar. In the instant case no proceedings could have ever started to decide whether or not these affidavits were false.”

16. As stated above the Criminal Appeal No.188/I of 2007 as well as Criminal Revision No.57/L of 2006 are accepted.



JUSTICE SYED AFZAL HAIDER



JUSTICE SHAHZADO SHAIKH

Islamabad the 19th January, 2011.
Mujeeb-ur-Rehman/*

Fit for reporting



JUSTICE SYED AFZAL HAIDER