IN THE FEDERAL SHARIAT COURT
(Appellate / Jurisdiction)

PRESENT

MR. JUSTICE ALLAMA DR. FIDA MUHAMMAD KHAN
MR. JUSTICE SHEIKH AHMAD FAROOQ

CRIMINAL APPEAL NO.05/I OF 2011

Mst. Sobia Shaheen W/o Mukhtar Hussain, Caste Awan, R/o Village Koont, P.S. Jatli, Tehsil Gujar Khan, District, Rawalpindi.

Appellant

Versus

1. Abdul Shakoor S/o Abdul Ghanni, Caste Awan, R/o Village Koont P.S Jatli, Tehsil Gujar Khan, District, Rawalpindi

2. The State

Respondents

Counsel for the appellant	Mrs. Muhammad Sharif Janjua and Quasain Faisal Mufti, Advocates
Counsel for respondent No.I.	Mr.Aftab Ahmed Khan, Advocate
Counsel for the State	Ch. Muhammad Sarwar Sidhu, Addl. Prosecutor General, Punjab.
Date of Private Complaint	02-01-2004
Date of judgment of the trial court	25-11-2009
Date of institution	09-02.2010
Date of hearing and decision	12-12-.2012

JUDGMENT

SH.AHMAD FAROOQ, J. - Through the instant appeal, appellant/complainant Mst.Sobia Shaheen wife of Mukhtar Hussain has challenged the judgment dated 25.11.2009, whereby the learned Additional Sessions Judge, Gujar Khan has acquitted respondent/ Abdul Shakoor of the charges under sections 11 and 10(3) Offence of Zina(Enforcement of Hudood) Ordinance, 1979.

2. Succinctly, the allegations levelled by the complainant/Mst.Sobia Shaheen in the private complaint are that on 21.7.2003 at 10.00 p.m., the accused/present respondent abducted her on pistol point when she had gone to answer the call of nature in the fields of Mst.Qudrat Bi at Moza Khabba Barrar P.S. Chauntra and subjected her to zina-bil-jabr. Thereafter, the accused threatened the complainant to kill her if she disclosed the occurrence to any one. The complainant after reaching home narrated the incident to her mother, who advised her to wait for the return of her husband, who had gone to Rawalpindi on 20.7.2003 in search of some employment.

The next day i.e 22.7.2003, the husband of the complainant came back to his residence, and the complainant along with her husband approached the police and lodged FIR No.181 dated 22.7.2003 in police station Jatli District Rawalpindi but the investigating officer submitted a report to the, Magistrate for discharge of the accused. However, the learned Magistrate did not accept the said report. In this back drop, the complainant/Mst.Sobia Shaheen filed a complaint against Abdul Shakoor/accused under sections 10 and 11 of Offenceof Zina (Enforcement of Hudood) Ordinance,1979 in the court of the learned Sessions Judge Rawalpindi.

3. The learned trial court directed an inquiry to be conducted by a learned Magistrate as provided under section 202 Cr.P.C. After receipt of the inquiry report, the learned trial court summoned the accused and framed the charges against him on 15.2.2005 under sections 10(3) and 11 Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The accused/present respondent did not plead guilty and claimed to be tried.

4. The complainant produced three witnesses in addition to recording her own statement as P.W.1 in order to prove her version. The complainant

also got five witnesses summoned by the court, whose statements were recorded as C.W.1 to C.W.5.

5. After closure of the evidence of the complainant, the accused was examined for the purpose of enabling him to explain the circumstances appeared in the evidence against him as envisaged under section 342 Cr.P.C. In response to the pivotal questions regarding the deposition of the prosecution witnesses and the reasons for the registration of the case against him, the accused/present respondent replied as under:

"Q.4. Why the PWs deposed against you?
Ans: All the private witnesses are interested witnesses and inimical to me".

Q.5. Why this case is registered against you?
Ans. This is a false case registered against me to make my father Abdul Ghani under pressure for compromise in case FIR No.166/1999 u/s 302PPCagainst accused Sharafat Hussain,Muhammad Jehangir,Pervaiz and Arshad Mehmood in which my father was eye witness of the said case and in the said case a quarrel took place between my father and accused Sharafat Hussain. In the said case, accused Sharafat etc were convicted and appeal is pending in the Hon'ble Lahore High Court. Sharafat Hussain etc are close relatives of the complainant and her husband. Due to this relationship malafidely to force my father for compromise,this false case was registered against me."

Accused also produced documentary evidence in his defence. He placed on record the attested copy of the FIR No.166/1999 (Ex.DH) and copy of the inquiry report conducted by an Army Officer (Mark-A). However, the accused did not opt to make a statement on oath in disproof of the charges or allegations made against him as provided under section 340(2) Cr.P.C.

6. Upon conclusion of the trial, the learned trial court vide judgment dated 25.11.2009 has acquitted the accused/ present respondent from all the charges, as mentioned herein before in para-1 of this judgment.

7. Being aggrieved by the impugned judgment dated 25.11.2009, the complainant/Mst.Sobia Shaheen has filed the instant appeal before this Court.

8. Learned counsel for the appellant (complainant), Mr.Qausain Faisal Mufti submitted that the impugned judgment is against the facts, material available on record and law, hence, liable to be set-aside. He further submitted that the complainant had no mala fide against the accused/respondent for his false implication in such like heinous case. He argued that the impugned judgment is the result of mis-reading and non-reading of evidence available on record. He maintained that there is substantial evidence on the record both oral as well as medical, which cannot be brushed aside in a flimsy manner. He contended that the learned trial court did not consider the evidentiary value of the P.Ws as well as the C.Ws and passed the impugned judgment which is against law. He explained that

no relationship of Sharafat Hussain and Arshad Mehmood with the complainant party was proved from the evidence available on record. He contended that the respondent , who is a soldier in the Pakistan Army, was not on duty on the day and time of occurrence. He claimed that the learned trial court has discarded the evidence regarding detection of semen on the swabs taken from the vagina of the victim. He clarified that the victim remained silent and did not raise any hue and cry due to fear of life as her husband was not available in the village. Lastly, he argued that the appellant/complainant had proved her case beyond reasonable shadow of doubt but the learned trial court did not evaluate the incriminating evidence in its true perspective.

9. On the contrary, the learned counsel for the respondent submitted that not only the FIR was lodged after a delay of 24 hours but also the medical examination of the victim was conducted after two days of the occurrence. He further submitted that the private complaint was also filed on 2.1.2004 i.e after a considerable delay of more than four months with mala fide intention. He also submitted that the victim/complainant was not got medically

examined at a nearby hospital, rather, she was examined in Holy Family Hospital Rawalpindi, which is at a distance of about 65 k.ms and that too, after 2 days of the occurrence i.e 23.7.2003. He contended that there are material and serious discrepancies in the statements of the witnesses of the complainant. He maintained that the complainant/P.W.1 in her cross-examination admitted that during the occurrence, there was 'Danga Mushati'/fighting between her and the accused but according to the statement of Lady Dr.Fariha (C.W.4), no sign of abrasion, injuries, bruises was found on the body of the victim. Even no stain on the person or clothes of the victim/complainant was observed by lady doctor. Moreover, according to medical report, only the high vaginal swabs and endocervical swabs were stained with semen . He pointed out that the perineal vaginal swabs were not stained with semen and the high vaginal swabs cannot be found to be stained with semen during the commission of zina-bil-jabr. He argued that the accused/present respondent was not connected with the commission of the offence beyond reasonable shadow of doubt and he has been rightly acquitted by the learned trial court.

10. The learned counsel for the State adopted the arguments advanced by the learned counsel for the appellant/complainant . He also did not support the impugned judgment of the learned trial court.

11. We have heard the learned counsel for the appellant as well as learned counsel for the respondent and the State. We have also examined the impugned judgment dated 25.11.2009 and carefully evaluated the evidence available on the record of the learned trial court with the able assistance of the learned counsel for the parties.

12. At the outset we would like to point out that there is no eye witness of the occurrence. Except for the complainant/Mst.Sobia Shaheen (P.W.1) no other witness was present at the scene of the crime. The statements of the P.W.2 and P.W.3 namely Mst.Jamila Begum and Mukhtar Hussain are admittedly hearsay evidence which cannot be relied upon. Similarly, the statement of P.W.4/Muhammad Akhtar regarding the alleged extra judicial confession of the parents of Abdul Shakoor/ accused, is insignificant as the same cannot be used against the accused. Even otherwise, the statement of P.W.4/Muhammad Akhtar is neither corroborated by any other witness nor a

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specific question was put to the accused, in this regard while recording his examination under section 342 Cr.P.C. No doubt, the Superior Courts in a large number of cases have considered the solitary testimony of the victim enough for recording conviction in a case of zina-bil-jabr if it inspire confidence. In this regard, we would like to refer to the case of Mst.Nasreen Vs.Fayyaz Khan and another reported in PLD 1991-SC-412 but in the present case the solitary statement of the victim of the occurrence i.e Mst.Sobia Shaheen(P.W.1) is not trust worthy and confidence inspiring. Particularly, when she has mentioned two different time of occurrence i.e 10.00 p.m and 10.30 a.m in her cursory statement dated 14.1.2004 and the statement dated 25.2.2008 recorded by the learned trial court respectively. It is also not believable that the victim/Mst.Sobia Shaheen could not have raised any hue and cry when she was being forcibly taken away from the field/land possessed by Mst.Qudrat Bibi by the accused to his house for commission of zina-bil-jabr. It is worth consideration that not only the occurrence took place in the month of July, when ordinarily, the people living in the villages sleep outside their bed rooms but also the house of the

mother of the complainant as well as residence of the accused/Abdul Shakoor are situated at a equal distance i.e 5 ½ karams from the land of Mst.Qudrat Bibi etc according to the site plan (CB). It also does not appeal to the mind of a prudent person that the complainant and her mother remained silent after the alleged occurrence of 'zina' till the return of the husband of Mst.Sobia Shaheen namely Mukhtar Hussain(P.W.3) on the next day. Further-more, the complainant/P.W.1 admitted in her cross-examination that her "Shalwar" was already put off when she was abducted while attending to the call of nature but the said "Shalwar" was not recovered by the investigating officer. She also admitted that she was wearing the shirt during the occurrence which was not torn by the accused, despite the fact that she strongly resisted the attempt of the accused, prior to the actual commission of zina-bil-jabr. In fact, the complainant explained that during the occurrence, there was "danga mushti"/fighting between her and the accused but according to the statement of C.W.4 (lady doctor)there was no sign of abrasion, injuries or bruises on the body of the victim at the time of her medical examination. Moreover, the complainant stated that her medical

examination took place on 22.7.2003 in the Holy Family Hospital Rawalpindi, whereas according to the statement of Lady Dr.Fariha,C.W.4, the medical examination of the victim/ Mst.Sobia Shaheen was conducted on 23.7.2003. There are many other discrepancies in the statements of the complainant/P.W.1 and her mother i.e Mst.Jamila Begum, P.W.2, as well as her husband/Mukhtar Hussain/P.W.3. In this back drop, the sole testimony of the victim is neither confidence inspiring nor could be relied upon for recording conviction of the accused/present respondent.

13. Even otherwise, the commission of "zina-bil-jabr" by the accused/ present respondent with Mst.Sobia Shaheen/complainant is not conclusively proved from the medical evidence available on the record. C.W.4 Lady Dr.Fariha admitted that on the day of examination i.e 23.7.2003, Mst.Sobia Shaheen/female was menstruating. It is highly doubtful whether a reliable sample could be taken from the vagina of a female for detection of semen while she is menstruating. Additionally, the victim ,who is a married woman, was examined two days after the occurrence. Above all, the semen of the male accused was not sent to the Serologist for grouping, hence,

evidentiary value of the swabs which were taken from the vagina of the victim and were found to be stained with semen by the Chemical Examiner loses its value. In this connection , we would like to refer to the judgment of the Federal Shariat Court delivered in the case of Waqar-ul-Islam and another Vs. The State reported in 1997 P.Cr.L.J-1107 wherein it has been held that the semen found on the vaginal swabs loses its evidentiary value if the semen of the accused was not obtained and got examined and matched with semen found on vaginal swabs by the Serologist. This fact has also been admitted in this case by C.W.4/Lady Dr.Fariha during her cross-examination wherein she conceded that in order to determine rape with married woman, tissue time test(i.e grouping of semen) is required which was not conducted in this case. Hence, the solitary statement of the victim/complainant(P.W.1) regarding the commission of zina-bil-jabr by the accused with her is also not corroborated by the medical evidence.

14. There is another aspect of this case which requires serious consideration by this court. Admittedly, the father of the accused namely Abdul Ghani is an eye witness of the FIR No.166/1999 registered under

section 302 PPC against accused namely Sharafat Husain, Jehangir, Pervez and Arshad Mehmood. P.W.2 (mother of the victim) admitted in her cross-examination that Sharafat and Arshad Mehmood (accused) have been convicted by the learned trial court in the aforementioned F.I.R. The mother of the complainant namely Mst.Jamila Begum/P.W.2 as well as the husband of the victim/Mukhtar Hussain also admitted their relationship one of the accused namely Sharafat Hussain. Even Arshad Mehmood who is also a convicted accused of FIR No.166/1999 is closely related to Ghulam Murtaza, who is a cousin of Mst.Sobia Shaheen. The relative of the accused of the said case remained in touch with the complainant after the occurrence. The accused/Abdul Shakoor in his statement under section 342 Cr.P.C has also pleaded that he has been falsely implicated in this case in order to put pressure on his father /Abdul Ghani for effecting a compromise between complainant and the convicted accused of the case arising out of the FIR No.166/1999 registered under section 302 PPC. This version of the accused is also supported by the report of Lt.Col.C.O Muhammad Saqlain Khan dated 9.9.2003 which was produced by the

accused in his evidence in defence and available on record as MARK-A. In these circumstances, the possibility of false implication of the accused/present respondent in the instant case by the complainant party cannot be ruled out.

15. Needless to mention here that for recording conviction of an accused his guilt has to be proved beyond reasonable shadow of doubt. It is the onerous duty of the court to sift the grain from the chaff and find out the truth from the pack false hood in order to arrive at a just conclusion in any case for safe administration of justice.

16. The nutshell of the above discussion is that the complainant's case is not free from doubt. It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by the Hon'ble Supreme Court of Pakistan in the case of Tariq Pervez Vs.The State (1995 SCMR 1345) that for giving the benefit of doubt to an accused, it is not necessary that there should be many circumstances creating doubts. If a simple circumstance creates reasonable doubt in a prudent mind about the guilt of the accused, then he

will be entitled to such benefit not as a matter of grace and concession but as a matter of right.

17. In addition to the above conclusions, we cannot ignore the fact that this is an appeal against acquittal and standard for assessing evidence in appeal against acquittal are quite different from those laid down for appeals against conviction. In an appeal against conviction, appraisal of evidence is done strictly, whereas in an appeal against acquittal, such rigid method of appraisement is not to be applied. Similarly, the appellate court would not exercise jurisdiction under section 417 Cr.P.C unless the acquittal judgment of the trial court is perverse or there is complete mis-reading or non-reading of evidence resulting in miscarriage of justice. In this regard, we would like to refer to the judgment reported in 2005 P.Cr.L.J-536(The State through Advocate General NWFP Peshawar Vs.Faqir Muhammad Ahmad Khan). Even otherwise, when an accused is acquitted from the charge by a court of competent jurisdiction, then double presumption of innocence is acquired by him and the appellate court would not interfere

unless the impugned judgment is arbitrary, capricious, fanciful and against the record.

18. For the foregoing reasons, we are of the considered view that the complainant could not establish the guilt of the accused beyond reasonable shadow of doubt and as such, the charges against the accused could not be proved. Hence, the learned trial court was justified in acquitting the accused from the charges and we do not find any illegality, mis-reading or non-reading of the evidence in the impugned judgment. The impugned judgment is unexceptionable and the same is upheld.

19. Resultantly, the instant appeal, being devoid of any merit, is accordingly dismissed.

JUSTICE SHEIKH AHMAD FAROOQ

JUSTICE DR.FIDA MUHAMMAD KHAN

APPROVED FOR REPORTING.

JUSTICE SHEIKH AHMAD FAROOQ

Islamabad, 12.12.2012
M.Akram/