

**IN THE FEDERAL SHARIAT COURT**  
(Appellate Jurisdiction)

**PRESENT:**

**MR. JUSTICE MUHAMMAD JEHANGIR ARSHAD**

**CRIMINAL APPEAL NO.55/L/2010**

Muhamamd Shafi @ Sakhi Muhammad Appellant  
son of Fatch Muhammad, caste Babra,  
resident of Nai Abadi Jiwan Shah,  
Police Station Saddar Arifwala,  
District Pakpattan.

Versus

1. The State Respondents
2. Mst. Shamim Bibi d/o Ghulam Murtaza,  
wife of Allah Rakha son of Faiz Muhammad,  
resident of Nai Abadi Jiwan Shah,  
Police Station Saddar Arifwala,  
District Pakpattan.

Counsel for the appellant : M/s. Qayyum Javed Khan and Farrukh  
Ahmad Khan, Advocate

Counsel for the State : Mian Muhammad Awais Mazhar,  
Deputy Prosecutor General  
Punjab for State

FIR No. and date : 646/2006, dated 19.11.2006,  
P.S. Saddar Arifwala,  
District, Pakpattan.

Date of impugned judgment : 05.03.2010

Date of Institution : 03.05.2010

Date of hearing : 04.07.2012

Date of Judgment : 04.07.2012

**JUDGMENT:**

**Justice Muhammad Jehangir Arshad, J:** This appeal is directed against the judgment, dated 05.03.2010 handed down by the learned Additional District & Sessions Judge, Arifwala by which the learned trial Court after convicting the appellant under section 10 (3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 punished him to undergo 10 (ten) years' R.I. as Tazir with fine of Rs.50,000/- (Rupees fifty thousand only) and in case of default of payment of fine to further undergo S.I. for 6 (six) months. The appellant was also extended benefit of section 382 (b) Cr.P.C.

2. The prosecution against appellant commenced with the registration of case FIR No.646/2006 under section 10 (3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 with Police Station Saddar Arifwala, District Pakpattan though at the instance of Mst. Shamim Bibi complainant (PW.1) yet under the order of learned Additional District & Sessions Judge, Arifwala dated 05.03.2010 most probably as justice of peace. According to the FIR



appellant alongwith his brother namely Muhammad Akram while armed with deadly weapons entered into the house of complainant at the faithful time, day caught hold her after giving threats got her naked committed Zina-bil-Jabr with her.

3. After completion of investigation, the police submitted challan against the appellant as well as his co-accused namely Muhammad Akram and the learned trial Court on receipt of challan framed the following charge against both the accused:-

*“I Muhammad Yar Wallana, Additional Sessions*

*Judge, Pakpattan, Camp at Arifwala, hereby charge you:-*

*That on 13.11.2006 at 9:00 a.m. at the house of Shamim Bibi in the area of Jewan Shah within the jurisdiction of Police Station Saddar, Arifwala, you the above named accused while armed with pistols, you the accused Muhammad Shafi alias Sakhi committed Zina-bil-Jabr with Shamim Bibi daughter of Muhammad Murtaza. Thus you have committed an offence*

*punishable under section 10 (3) of the Offence of Zina  
(Enforcement of Hudood) Ordinance VII of 1979 which  
is within the cognizance of this Court.*

*And, I hereby direct that you the accused to be  
tried by this Court under the above said charge. “*

4. As both the accused/appellants denied the charge, therefore, prosecution was directed to produce evidence. The prosecution produced following evidence:-

- (i) Mst. Shamim Bibi , complainant as PW.1
- (ii) Ashraf (eye witness) as PW.2.
- (iii) Mumtaz Ahmed (eye witness) as PW.3.
- (iv) Lady Doctor Rakhsana Asim Sokhera as PW.4  
alongwith Medico Legal Repot Ex.P.B. and  
Ex.P.B/1.
- (v) Zafar Iqbal, Head Constable as PW.5 who was  
handed over one envelope and two plastic sealed  
box for safe custody in the Malkhana.



(vi) Muhammad Hussain, Constable as PW.6 who transmitted the one sealed envelope and two plastic box to the office of Chemical Examiner, Multan.

(vii) Muhammad Arshad S.I. as PW.7 who recorded FIR Ex.PC.

(viii) Muhammad Rustam, S.I. as PW.8 who investigated the case recorded statements of PWs under section 161 Cr.P.C. inspected the spot and prepared site plan Ex.DD.

5. On the completion of evidence the ADPP closed the prosecution evidence after tendering the report of Chemical Examiner Ex.P.E.

6. Thereafter, statements of both the accused were recorded under section 342 Cr.P.C., the present appellant in his defence produced the copy of Nikah Nama Ex.D.B.



7. After completion of above noted evidence, the learned trial Court through the impugned judgment though acquitted co-accused namely Muhammad Akram yet convicted the appellant and imposed sentence on him as mentioned above, hence this appeal.

8. When this appeal came up for hearing, today learned counsel for the appellant at the very outset pointed out that the appellant had moved an application before the learned trial Court on 11.02.2010 being under section 540 Cr.P.C. praying for the re-examination/recalling the Mst. Shamim Bibi, complainant (PW.1) but his said application despite arguments was not disposed off by the learned trial Court, therefore, the appellant had to file Cr. Misc. A. No.92/L of 2010 alongwith his appeal with the same prayer and this Court while admitting the present appeal on 23.07.2010 directed as follow:-

*"In this view of the matter let this aspect be also considered at the time the appeal is heard and if necessary PW.1 Mst. Shamim Bibi be called in this*

*Court for cross-examination on the question whether she was married to Allah Rakha on 21.03.2005, the date before the registration of this case and if so why did she not disclose this fact in her complaint”*

9. However, the contention of the learned counsel for the appellant that the application made by the appellant before the learned trial Court for recalling/re-examination of the complaint was not finally decided is not based on correct appreciation of facts because the said application was finally decided through a speaking order passed by the learned trial Court on 24.02.2010 and the same is available on the file of the learned trial Court. When confronted learned counsel for the appellant submitted that the reasons given by the learned trial Court for dismissing the said application were neither within the parameter of section 540 Cr.P.C. nor based on proper appreciation of legal and factual aspect. According to the learned counsel the fact that Mst. Shamim Bibi complainant PW.1 was already a married women whose marriage took place on 21.03.2005



much before the registration of case and in the meanwhile she had already given birth to two children was not in their knowledge at the time when she appeared and got her statement recorded and the above noted facts came to the knowledge of the appellant, after her statement was recorded wherein she had claimed herself as an un-married lady at the time of occurrence therefore, in order to confront her; with her Nikah Nama and also put question about her marriage with one Allah Rakha her recalling and re-examination was essential, but the learned trial Court dismissed the application on a flimsy ground, therefore, the said application be allowed and in order to meet the end of justice, the learned trial Court be directed to recall Mst. Shamim Bibi PW.1 and allow the appellant to cross-examine her for the above noted facts.

10. On the other hand, learned Deputy Prosecutor General Punjab for State has strongly opposed this application and supported the order of the learned trial Court dated 24.02.2010 rejecting the application of the appellant.





11. Prima-facie, the contention of the learned counsel for the appellant is based on very strong and reasonable ground. In view of the allegation of the appellant the fact that Mst. Shamim Bibi,

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reduction of sentence to one already undergone. So far as the imposition of fine is concerned, according to learned counsel the same was absolutely without jurisdiction having not been provided under section 10 (3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. However, under section 544-A Cr.P.C. compensation to the complainant could be awarded but the learned trial Court did not allow compensation to the complainant but imposed fine of Rs.50,000/- which punishment was not provided under section 10 (3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, hence the same was liable to be remitted.

12. On the other hand, this appeal has been opposed tooth and nail by the learned Deputy Prosecutor General Punjab for State whereas complainant despite Notice through her father namely

appellant was reduced to one already undergone till date with the further request that a heavy amount of Rs.50,000/- be remitted as same was not provided under section 10 (3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. Learned counsel further argued that original FIR was got lodged against the appellant as well as his brother namely Muhammad Akram which fact was found by the learned trial Court as not appealing to person of ordinary prudence that two real brothers either cooperated or indulged in such type of sexual offence which shows that at the very prosecution was commenced with a false story, learned counsel further argued that there was a delay of about six days in the registration of FIR with no explanation and further that the complainant lady was medically examined, after the four days of occurrence which was a sufficient indication about the false involvement of the appellant in the matter, according to the learned counsel, the appellant has already undergone a major portion of sentence and only minor one remains un-expired and this facts also be considered as mitigating circumstances for the



reduction of sentence to one already undergone. So far as the imposition of fine is concerned, according to learned counsel the same was absolutely without jurisdiction having not been provided under section 10 (3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. However, under section 544-A Cr.P.C. compensation to the complainant could be awarded but the learned trial Court did not allow compensation to the complainant but imposed fine of Rs.50,000/- which punishment was not provided under section 10 (3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, hence the same was liable to be remitted.

12. On the other hand, this appeal has been opposed tooth and nail by the learned Deputy Prosecutor General Punjab for State whereas complainant despite Notice through her father namely Murtaza did not appear to oppose this appeal.

13. According to the learned Deputy Prosecutor General Punjab for State as the prosecution has established the charge against the appellant without any shadow of doubt, therefore, the judgment of



the learned trial Court was un-exceptionable and this appeal was liable to be dismissed.

14. Arguments considered, record perused.

15. There is no denying of the fact that on 11.02.2010 appellant did move an application under section 540 Cr.P.C. before the learned trial Court for further cross-examination of Mst. Shamim Bibi complainant which was after hearing rejected by the learned trial Court through order dated 24.02.2010. However, the perusal of the order of the learned trial Court indicates that same was dismissed on an erroneous assumption of law and facts.

16. It is an established principle of law that provision of section 540 Cr.P.C. in examining, recalling, or summoning any witness were incorporated to confer jurisdiction on the Court to arrive at the truth in accordance with law and technicalities should not be allowed to interfere with that function. A learned Division Bench of the Peshawar High Court in the case of Maqbool V/s The State 2006 P. Cr. L. J 110 held "Provisions contained in section 540,



Cr. P.C. in examining, recalling or summoning any witness are wide enough to give free hand to a Court of law to see that the justice does not slip out of hand or is defeated on the technicalities of law only”

17. This Court, therefore, feels that the learned trial Court not only acted with illegality and with material irregularity but also failed to assume jurisdiction while dismissing the application.. The said order suffers from jurisdictional as well as legal defects. Hence, the same is set aside.

18. In the back drop of above noted facts, the question requiring determination at this stage is as to whether the matter be sent back to the learned trial Court for re-examination of Mst. Shamim Bibi, complainant (PW.1), in the light of the above application moved by the appellant under section 540 Cr.P.C. or this appeal be disposed off by this Court in the light of the submission made by the learned counsel for the appellant for reduction of sentence after reducing the sentence to one already undergone. After considering all the above



noted facts and circumstances this Court feels that sending back the matter to the learned trial Court for deciding the matter a fresh after re-examining the Mst. Shamim Bibi, complainant PW.1, after lapse of more than six years of occurrence would neither be reasonable nor apt one. Rather the same would amount to add the agonies of the appellant who is behind bar since 18.12.2006 and sending the matter back to the learned trial Court would mean restoring the position it was on the day of occurrence, therefore, despite holding the order of the learned trial Court dated 24.02.2010 as illegal and without jurisdiction and further holding that the application of the appellant should have been allowed and Mst. Shamim Bibi complainant should have been re-examined in the light of the contents of the application moved by the appellant in the learned trial Court on 11.02.2010 referred to above, this Court is not inclined to adopt this course of action and instead feels that most appropriate course is to accept the alternate prayer of the appellant through his counsel for reduction of his sentence to one already undergone specially when the appellant



had already served out major portion of his sentence of 10 years R.I. and per instructions of the learned counsel for the appellant the appellant was likely to be released in the month of November, 2012 this year and further the end of justice would be sufficiently met if the said sentence of the appellant is reduced to one already undergone and the same is so reduced. So far as the fine of Rs.50,000/- as imposed by the learned trial Court is concerned the same being not provided under section 10 (3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, therefore, the learned trial Court could not justifiably impose the same and thus the same is set aside being without jurisdiction.

19. The upshot of the above discussed is that while the conviction of the appellant under section 10 (3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 is maintained, the sentence of 10 years' R.I. as awarded by the learned trial Court on the appellant through the impugned judgment dated 05.03.2010 is reduced to one already undergone. The appellant is directed to be released



from jail, if he is not required in any other case. Similarly, the sentence of fine of Rs.50,000/- is set aside being without jurisdiction.


Order accordingly.

 Scd -

**Justice Muhammad Jehangir Arshad**

Dated Lahore the  
4<sup>th</sup> July, 2012  
*Hummayun*\*-

*Approved for reporting.*

 Scd -

**Justice Muhammad Jehangir Arshad**