

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE MUHAMMAD JEHANGIR ARSHAD

CRIMINAL APPEAL NO.89/I/2008 L/W

Jamshid son of Khurshid, Appellant
resident of Rustam,
District Mardan.

Versus

1. Fazali Wahid, S.I., Respondents
Police Station, City Mardan.
2. Faizur Rehman, S.I.,
Police Station, City Mardan.

CRIMINAL APPEAL NO.90/I/2008

Mst. Fatima d/o Shagufta, Appellant
resident of Bicket Gang Mardan.

Versus

1. Fazali Wahid, S.I., Respondents
Police Station, City Mardan.
2. Faizur Rehman, S.I.,
Police Station, City Mardan.
3. The State

Counsel for the appellants : Mr. Aziz-ur-Rehman, Advocate in
both these appeals.

Counsel for the respondents: Mr. Abdul Rasheed Pirzada, Advocate

Counsel for the State : Mr. Aziz-ur-Rehman,
Advocate

Cr. A. No.89/I of 2008 L/W

Cr. A. No.90/I of 2008

-2-

FIR No. and date & P.S. : 1118/2005, dated 28.05.2005
P.S. City, District Mardan.

Date of impugned judgment : 20.05.2008

Date of Institution of Cr.A.No.09/Q/2011 : 12.06.2008

Date of Institution of Cr.A.No.15/Q/2011 : 12.06.2008

Date of hearing : 21.06.2012

Date of Judgment : 21.06.2012



JUDGMENT:

Muhammad Jehangir Arshad, J: As a common question of law and facts are involved in both these appeals and further both these appeals arise out of a consolidated judgment/order dated 20.05.2008 passed by the learned Sessions Judge, Mardan, therefore, both these appeals are being taken up and disposed of through this single order.

2. The facts in both these appeals are briefly stated that Fazali Wahid Khan, respondent No.1 while performing his duties as S.I., Police Station City, Mardan registered FIR No.1118, dated 28.07.2005 under section 5/10 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 read with section 201 PPC against both the appellants. The matter was investigated by Faizur Rehman, S.I. of the said Police Station (respondent No.2) and finally challan was prepared and sent by him.

3. The learned trial Court on receipt of the said challan and after taking cognizance charged both the appellants under section 10 (3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979



and on completion of the trial vide judgment dated 27.09.2006 acquitted both the appellants from the said case. The concluding part of the said judgment being material is reproduced below:-

“In the light of the above discussion I hold that this is a case of no evidence. The prosecution has miserably failed to prove its allegations on the basis of which charge against the accused has been framed. I, therefore, acquit both the accused from the charge. They are on bail and released from the liability of their bail bonds. Case property, if any, be disposed off in accordance with law but subject to the period provided for appeal/revision.

Copy of this judgment be sent to District Police Officer, Mardan and S.P. investigation for imparting instructions to all concerned to apply mind before submitting challan for trial.”



Criminal Appeal No.89/I of 2008 L/w
Criminal Appeal No.90/I of 2008

5

4. Admittedly, no appeal was filed against the above noted judgment of the learned Sessions Judge, Mardan and thus the same attained finality.

5. After acquittal both the appellants filed separate complaints on 10.03.2007 under section 203-B Cr.P.C. for initiating of proceedings against both the respondents under Offence of Qazf (Enforcement of Hudd) Ordinance, 1979 and the learned trial Court after recording statement of the appellants summoned both the respondents to face proceedings under section 3/7 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 vide order dated 15.03.2007. The respondents after their appearance submitted written reply to the complaint before the learned trial Court and the matter was thereafter adjourned from date to date for different reasons and finally entered into the crucial stage on 24.10.2007 when, learned trial Court passed the following order:-

“Complainant alongwith her counsel present.

Respondents Fazali Wahid Khan, S.I. and Faizur

Rehman Khan S.I. are present. Statements of the complainant and PWs have been recorded under section 200 Cr.P.C. Learned counsel for the complainant moved an application for directing inquiry into the matter through a judicial magistrate and thereafter further proceedings in the complaint.

Respondents raised objection.

Put up for arguments on application on 08.11.2007.”

6. Original record shows that from 24.10.2007 to onwards matter was being adjourned to different dates for hearing arguments on the application referred to in the order dated 24.10.2007 reproduced above.

7. Ultimately, according to the original record arguments were heard on 14.05.2008 and the learned trial Court fixed 20.05.2008 as the date for order on the said application, however, on 20.05.2008



the learned trial Court dismissed both the complaints holding same as meritless. The relevant portion of the judgment is reproduced below:-

“After hearing the arguments and perusing the record, I tend not to agree with the arguments advanced on behalf of the petrs. Admittedly, the petr has earned acquittal in the case registered under the Zina Ordinance against him vide order dated 27.09.2006 mainly on the ground that there was no evidence against him. The incident has caused embarrassment to both the petrs but admittedly there are no bruises or scratches on the body of Mst. Fatma and only her hymen was ruptured while falling down from the rooftop of the Kotha, which does not substantiate the plea of the petrs. Both the petitions, in the circumstances, being meritless are dismissed. File be consigned to record room after completion and compilation.”

8. The above noted orders are now being assailed through the present two appeals.

9. In view of the proposed judgment the various arguments advanced by the learned counsel for the parties need not be mentioned in detail being not relevant. The only moot point requiring determination for the decision of these appeals is as to whether the learned trial Court was justified to or could validly dismiss both the complaints instead of deciding the application referred in to the order dated 20.05.2007 reproduced above. In order to arrive at a right just and correct decision, the original record has been examined in the presence of learned counsel for both the parties as well as learned Additional Prosecutor General Punjab for State. The record indicates that on 24.10.2007 both the appellants in the above noted both complaints moved application on 24.10.2007 praying therein that inquiry in the complaint may kindly be got conducted by a Magistrate and it was on the said application the learned trial Court got on adjourning the matter from date to date for hearing arguments

Criminal Appeal No.89/I of 2008 L/w
Criminal Appeal No.90/I of 2008

9

and finally the arguments were also heard on the said application on 14.05.2008 and the matter was adjourned for order in said application to 20.05.2008, but surprisingly, the learned trial Court proceeded to dismiss the main complaints on 20.05.2008, when asked as to how without recording the evidence or affording the opportunity of producing evidence to the appellants and merely on the basis of arguments addressed and heard on some miscellaneous application, the learned trial Court could proceed to dismiss the main complaints holding the same as meritless, the learned counsel for the respondents by placing reliance on section 203 Cr.P.C. tried to argue that the learned trial Court could lawfully dismiss the complaints at any stage.

However, when the learned counsel was asked to read said section and satisfy the Court that the learned trial Court could validly dismiss the said complaints under the said section either without considering the statement on oath of the complainant and the result of the investigation or inquiry under section 202 Cr.P.C., the learned counsel had no legs to stand except by submitting that the respondents would

Criminal Appeal No.89/I of 2008 L/w
Criminal Appeal No.90/I of 2008

10

have no objection, if the matter is sent back to the learned trial Court for first deciding the said application and then proceed with complaints in the light of the decision on the said application. We do feel, after examining the record that the learned trial Court while passing the impugned order not only acted illegally but also in unnecessary haste and by taking into consideration irrelevant and alien material. Even the learned trial Court did not bother to go through section 203 Cr.P.C. authorizing the Court to "dismiss the compliant, if, after considering the statement on oath of the complainant and the result of the investigation or inquiry if any." It is also provided in section 203 Cr.P.C. that the Court shall also record reason for dismissal. We further hold that reasons mean those reasons only having nexus with the matter and not irrelevant or extraneous reasons. Reference to the provisions of section 24-A of the General Clauses Act in this respect may not be inapt. After the inclusion of said section in General Clauses Act, it has become mandatory for the public functionaries to decide all matters whether judicial or executive



by passing a speaking order after affording opportunity of hearing as well as through conscious application of judicial mind. 1968 SCMR 2268 and 2007 SCMR 1965 are the authorities to this effect. On this score also, we are satisfied that impugned order suffer from serious jurisdictional defect and cannot be maintained too.

10. In this view of the matter and with the consent so given by the learned counsel for the respondents, this Court does not feel hesitant in setting aside the impugned order in both the appeals which are accordingly set aside. The learned Additional Prosecutor General Punjab for State has also agreed that the impugned order was not sustainable.

11. Resultantly, both these appeals are allowed and disposed of with the direction to the learned trial Court to decide the application of the appellants dated 24.10.2007 firstly and then proceed with the decision of both the complaints against respondent No.1 only, in accordance with law. However, both the appeals to the extent of

Criminal Appeal No.89/I of 2008 L/w
Criminal Appeal No.90/I of 2008

12

respondent No.2 i.e. Faizur Rehman, S.I. are dismissed being not pressed.

12. As the matter has been hanging fire since 2007, therefore, learned trial Court shall ensure that both the complaints are decided within three months of the receipt of this order by submitting compliance report to the Registrar of this Court.



Justice Muhammad Jehangir Arshad



Justice Dr. Fida Muhammad Khan

Dated Islamabad the
22nd June, 2012
Hummayun-*



Approved for reporting.

Justice Muhammad Jehangir Arshad