

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO. 106/I OF 2002

Attar Khan son of Feroze Khan,
R/o of Daroot Tehsil Talagang,
District Chakwal.

.... Appellant
Versus

The State Respondent

Counsel for appellant Mr.Zahoor Ahmed Bokhari,
Advocate

Counsel for the State Miss. Shabnum Rasheed Abbasi,
Deputy Prosecutor General

Complaint case Complaint case dated 9.2.2000

Date of judgment of trial court 13.03.2002

Dates of Institution 17.05.2002

Date of hearing 22.01.2009

Date of decision 22.01.2009

JUDGMENT

SYED AFZAL HAIDER, Judge.- Attar Khan has challenged the judgment dated 13.03.2002 passed by learned Additional Sessions Judge, Talagang District Chakwal, whereby he has been convicted under section 11 of Offence of Qazaf (Enforcement of Hudood) Ordinance, 1979 and sentenced to six months simple imprisonment with a fine of Rs. 10,000/- and in default of payment of fine to further undergo two months simple imprisonment. The amount of fine, if recovered, was directed to be paid to the complainant Hidayat Khan. Riaz, Mahboob Ali and Mumtaz accused, tried alongwith the present appellant, were acquitted through the same judgment.

2. Brief facts of this case, as narrated by complainant Hidayat Khan in a private complaint Ex.PA filed before learned Additional Sessions Judge Talagang, are that one Attar Khan accused moved an application at Police Station Tamman leveling false allegation against him to the effect that he had committed zina-bil-jabr with Mst. Gulnar Begum, the grand-daughter of the accused. After registration of the case the local

police arrested Hidayat Khan, the complainant, and during interrogation Riaz, Mahboob Ellahi and Mumtaz appeared as witnesses against him. The complainant was also medically examined from Rural Health Centre Tamman where the Medical Officer opined that the complainant was not fit to perform sexual intercourse. The accused was found innocent during investigation. His discharge from the case was effected by the order of the learned Judicial Magistrate on 8.12.1999. This false allegation humiliated him in the eyes of his relatives and residents of the locality and thereby he suffered mental torture and economic loss as well. It was in this background that he filed the present complaint.

3. The complaint was moved on 09.02.2000 and after recording statement of the complainant on 3.4.2000, the file was sent to the learned Judicial Magistrate for inquiry under section 202(2) of the Code of Criminal Procedure who recorded the cursory statement of witnesses for the complainant and submitted his report dated 21.04.2004 with the finding that there were sufficient grounds for summoning the accused persons. Consequently the accused were summoned by a court order. Charge was

framed on 23.12.2000 against the accused under section 7 of Offence of Qazaf (Enforcement of Hudood) Ordinance, 1979 requiring them to face trial.

4. The prosecution produced six witnesses to prove its case at the trial. P.W.1, Hidayat Khan reiterated the facts narrated by him in the complaint Ex.PA. P.W.2 Ali Khan, Mst. Gulzar Begum P.W.3 and Niaz Gul, P.W.4 corroborated the statement of P.W.1 Hidayat Khan. Dr. Abdus Samad, Medical Officer Tehsil Headquarter Hospital, Talagang appeared as P.W.5 and stated that complainant was brought before him for his potency and he found him impotent to perform sexual act. P.W.6 Alam Khan, Head Constable No.477 produced the register of FIRs and verified that accused Athar Khan had filed FIR. No. 79 dated 5.7.1998 against the complainant which was discharged after investigation. P.Ws Sattar Gul and Ahmed Gul had been given up being un-necessary.

5. The statement of the four accused was recorded on 26.02.2002 under section 342 of the Code of Criminal Procedure wherein the accused Attar Khan stated as under:-

“The case was registered on facts without any malafide intention. Victim Gulnar Begum is the daughter of my real daughter. Complainant Hadayat Khan committed zina with Gulnar Begum. During investigation about 100 persons of the locality including woman appeared before I.O. against Hadayat Khan complainant. Gulnar victim was married to Muhammad Irfan before the lodging of FIR who is deaf and dumb, just to conceal the act of zina-bil-jabr committed by Hadayat Khan with Gulnar. The medical of Gulnar victim was not conducted due to her refusal. Complainant Hadayat Khan was not medically examined by the Medical Officer and the medico legal report produced by the prosecution in evidence is false and fictitious. The learned Judicial Magistrate falsely and unlawfully discharged Hadayat Khan from the said case on the basis of false report of Medical Officer”.

He did not opt to make statement on oath under section 340(2) of the Code of Criminal Procedure. The trial court after completion of all legal formalities and examining the incriminating material, found the accused guilty. He was convicted and sentenced under section 11 of Offence of Qazaf (Enforcement of Hudood) Ordinance, 1979 as mentioned in the opening paragraph of this Judgment. The learned trial court after convicting the appellant held that due to the advanced age of the accused

was released on bail subject to filing of appeal against his conviction and in case of failure to file the appeal he will be taken into custody to serve out his sentence.

6. I have gone through the record of the case and also perused the evidence available on the file. The impugned judgment has also been scanned with the assistance of learned counsel for the appellant. The appellant is four years less than 100 years and is naturally frail and not enjoying good health but he has made it a point to appear in person in this unkind weather in Islamabad and has come all the way from Talagang District Chakwal. He could have sent an application or even medical certificate. He is present on bail and repents for what he had done. Ali Khan son of Hadayat Khan complainant is present in person in Court. It was the daughter of Ali Khan about whom the accused had alleged that Hadayat Khan had committed zina-bil-jabr with her. I asked Ali Khan to give his re-action as regards his repentance and unconditional apology tendered by this old man in open Court to which he replied that he has certainly repented for the wrong done by him but he has not said sorry to

him, whereupon the accused tendered his apology to Ali Khan before everybody present in the Court and also patted him. I am told that the complainant and the accused are closely related to each other. The accused has further stated that he will tender apology to Hadayat Khan and Ali Khan as well when he returns to his village.

7. One of the significant attributes of God, repeatedly mentioned in Holy Quran, is that Allah is Tawwab-ur-Raheem i.e. the Compassionate, Merciful and Off returning to Mercy. Since the accused as expressed apology in the presence of his lawyer and in the open Court, I have no option but to accept the sincere repentance made by him in the presence of his counsel and the persons present in the Court. I do not think any useful purpose will be served by sending him to Jail. Even otherwise out of the four Hudood Laws the Offence of Qazaf (Enforcement of Hudood) Ordinance, 1979 is the only law which falls in the category of Haqooq-ul-Ibad which means that the complainant i.e. aggrieved person can forgive the accused at any stage of the criminal proceedings in which case the issue gets clinched. The accused has voluntarily imposed a penalty of Rs. 2500/-

upon himself and wants to give the amount to the complainant in token of the sincere repentance made by him. He says that he is a poor man and cannot compensate the complainant adequately as he is old, infirm and without independent source of income, but the amount being offered by him is just a token compensation being paid by him voluntarily. The complainant's son has received the money.

8. I am impressed by the fact that notwithstanding his age and poor physical condition the accused has been appearing in this Court since May 2002. A new trend has developed whereby some accused after seeking bail avoid appearance and delay determination of their appeal or revision. The conduct of this old timer must be appreciated for he holds the Courts in esteem and has patiently awaited final decision for a protracted period of nine years.

9. Viewed from another angle I find that a complainant is free to forego his right at any stage of the trial provided the case falls within the category of Haqooq-ul-Ibad. Right to reputation is an original personal right. This is no doubt a case in which the public rights and private rights

are mixed up but it is that category of dispute where the private right preponderates. The essential feature of such right is that the offence complained of causes sorrow or harm to an individual and the person injured can pardon the offender or even accept money in satisfaction of the injury caused to him. It is the right of the complainant to enforce or waive punishment. In this case the gesture of the complainant in accepting the apology and not insisting upon the execution of the sentence amounts to settling the issue once for all. It is another form of alternate dispute resolution in the larger interest of peace in the village where the parties have to live.

10. A tradition is reported by al-BAYHAQIY on the authority of Abu Hurayrah (R.A) which is to the following effect:-

Moses said, "O my Lord! who is the most honoured of Thy servants in Thy sight? "He who pardons when he has the power (to avenge himself)".

11. In this view of the matter the conviction and sentence recorded under section 11 of Offence of Qazaf (Enforcement of Hudood) Ordinance, 1979 vide judgment dated 13.02.2002 passed by learned Additional

Sessions Judge, Talagang in Complaint Hadood Case No.24 of 2002 and Hadood Trial No. 14 of 2002 is hereby set aside. He is already on bail and his bail bonds are discharged.

Syaidat

JUSTICE SYED AFZAL HAIDER

Islamabad the 22nd January, 2009
UMAR DRAZ SIAL/*

Syaidat

Fit for reporting.