IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE SALAHUDDIN MIRZA

CRIMINAL APPEAL NO.116/L OF 2001

1. Muhammad and 2. Ahmed both sons of Ghulam Rasool, residents of Mohallah Keetan-Wala, Tehsil Piplan, District Mianwali.	---	Appellants
	Versus	
The State and another	...	Respondents
For the appellants	...	Qureshi Muhammad Saeed Asadi, Advocate
For the Complainant/ Respondent	...	Mr. Amir Abdullah and Rana Zaheer-ul-Hassan, Advocates
For the State	...	Mr. Asjad Javaid, D.P.G.
Date of Complaint	...	13.09.1997
Date of Order of Trial Court		10.05.2001
Date of Institution	...	17.05.2001
Date of Hearing	...	07.03.2007
Date of Decision	...	10.05.2007

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JUDGMENT:

JUSTICE HAZIQUL KHAIRI, C.J: Appellants Muhammad and Ahmad, two brothers, have impugned the Judgment dated 10.05.2001 passed by the Additional Sessions Judge, Mianwali, whereby he convicted and sentenced the appellants to 80 stripes each under Section 7 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (hereinafter called the Qazf Ordinance) and to remain in judicial lock-up till the confirmation by the Court of appeal.

2. Brief facts as borne out from the impugned Judgment are that Mst. Ameeran Khatoon, respondent No.2, and the appellants are closely related. On 16.12.1991 she got married to her Phuphizad brother Khizar Hayat. Her Rukhsati took place on 26.06.1992, since when they have been living as husband and wife and three children were born out of the wedlock. Respondent No.2 is a 1st Class Graduate and a qualified teacher (EST) at Government Girls High Secondary School Kundian.

3. On 19.07.1992, appellant Muhammad filed a complaint before Sessions Judge, Mianwali, stating that about 30/32 years back Mst.Amireean Khatoon got married to him during their minority in a Watta Satta

arrangements made by elders, his sister Ghulam Fatima got married to one Muhammad Hayat, uncle of Mst. Ameeran Khatoon whereas she got married to him. Rukhsati of Mst. Ameeran Khatoon did not take place after her attaining majority despite repeated demands by him to her father. However, when he came to know about the said second marriage, he filed a complaint under sections 10/11/15/16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as "the Zina Ordinance") read with section 109 PPC in the Court of Sessions Judge, Mianwali accusing her and her husband of committing zina. The Sessions Judge forwarded complaint to Senior Civil Judge and Magistrate for holding inquiry under section 202 Cr.P.C. Since appellant Muhammad had failed to produce preliminary evidence, he withdrew the complaint. In the meantime on 22.8.1992 he also filed an application with SSP, Mianwali, for registration of case against her and her husband under sections 10/11/15/16 of "the said Ordinance" read with section 109 P.P.C. wherein he concealed the filing of private complaint earlier. On 18.11.1992 police registered a case against her and her husband for zina in which the police made investigation and recommended that the case against them be cancelled and

proceedings under section 182 PPC be taken against appellant Muhammad. Resultantly, the case was cancelled by Additional District Judge, Mianwali. On 19.6.1993 appellant Muhammad once again filed a private complaint under the said sections of Zina Ordinance read with section 109 PPC against Khizar Hayat and others in the Court of Sessions Judge, Mianwali but on the application under Section 265-K Cr.P.C. dated 18.07.1994 all of them including Mst. Ameeran Khatoon were acquitted vide order dated 17.9.1996 against which appellant Muhammad filed an appeal before this Court, which was dismissed in limine.

4. It may be stated here that while the appellants were imputing zina to Mst. Ameeran Khatoon and getting published defamatory statements in Newspapers and circulating the same through pamphlets, she was constrained to file a private complaint against the appellants on which inquiry was held by a Magistrate who submitted a report to the Additional District Judge stating that a prima facie case under section 7 of "the Qazf Ordinance" was made out by her against appellants on the basis of which the appellants were charge sheeted by the learned Sessions Judge, Mianwali. They denied the charge and claimed trial.

5. Mst. Ameeran Khatoon PW.1 and Ghaus Muhammad PW.2 adduced evidence against the appellants. Reiterating in her deposition what was stated by her in her complaint she gave detailed account of defamatory accusation made by the appellants against her and her husband and produced Newspapers cutting and other documentary evidence, on account of which she was lowered down in the eyes of others, greatly humiliated and her reputation was greatly impaired.

6. In their statements under section 342 Cr.P.C. appellant Muhammad admitted to have filed private complaint/FIR twice against Mst. Ameeran Khatoon and Khizar Hayat, which were either withdrawn and/or dismissed. Appellant Ahmad also admitted to have filed affidavit stating that she got married to his brother during minority and when she reached the age of puberty he also requested her father to arrange for her Rukhsati but he came out with excuses on one pretext or the other. However, on 16.12.1991 when she was 36 years old, she entered into second Nikah with Khizar Hayat, where after they have been committing zina with one another. DW.3 Tayyab Arshad had produced copies of Tehkeemnama and statements of Mst. Ameeran Khatoon, Sher Khan, M. Ramzan, Abdul Rahim, Muhammad and

M. Ali, recorded by him. According to him he had no personal knowledge of the marriage of appellant Muhammad with Mst. Ameeran Khatoon. The Tehkeemnama (Appointment of Arbitrator) was neither signed by her nor she ever appeared before him. He studied English up to Middle Class and he did not issue any Fatwa because one of the parties had no faith in him. It is pertinent to note that none of these persons whose statements were recorded by DW.3 were produced by the appellants. According to the learned trial Court:-

> "The accused have placed on the file Photostat copies of certain nikah namas, which were performed about 30 years ago during the minority of girls and were duly registered. Complainant, who was otherwise closely related to the respondents, did not ask Muhammad Ali accused for the Rukhsati of his daughter as soon as she became sui juris and continued awaiting for 30 long years which clearly shows that no such nikah of Mst. Ameeran Khatoon with the complainant existed as was being claimed."

7. Under section 3 of Qazf Ordinance whosoever "by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes an imputation of zina concerning any person intending to harm, or knowing or having reason to believe that such imputation will

harm, the reputation, or hurt the feelings, of such person, is said, except in the case hereinafter excepted, to commit qazf".

8. For our purposes we are concerned with the first exception to section 3 which stipulates that there shall not be any offence for qazf if the imputation be true and secondly made or published for the public good. Admittedly the imputation of zina is a matter of very grave nature which was repeatedly made by the appellants and got it published through newspapers and by distribution of pamphlets. This has not been denied by them. The contention of the learned counsel for the appellants is that the appellants had obtained a Fatwa from DW.3 Moulvi Tayyab Arshad. Firstly as per his own statement DW.3 gave no Fatwa about Mst. Ameeran Khatoon committing zina, secondly certain persons who made statements before him were not produced by the appellants. Lastly we may state here that no Fatwa of any religious scholar, Mufti, a juris-consultant is binding on a Court of law or any party and is of no legal effect, not enforceable under law, as he does not stand on the pedestal of a Judge.

9. However, the question before us is whether the appellants were rightly [illegible] learned trial Court or not. It is not the case of the

appellants that the alleged childhood marriage was consummated which took away the option of puberty of Mst. Ameeran Khatoon rather what is alleged is that the option of puberty was not exercised by her till she got married to Khizar Hayat at the age of 36 years. It was incumbent upon the appellants to establish the very existence of childhood marriage for which there is not the least any satisfactory evidence.

10. Learned counsel for the parties admit that the families of the parties are closely related and there were instances of declared enmity between them. It is also the case of the appellants that they repeatedly approached the father of Mst. Ameeran Khatoon for her Rukhsati after she attained puberty but during 30 long years they bothered not to serve her or her father with any notice nor did appellant Muhammad approach a Family Court for enforcement of his conjugal rights. After going through the record minutely, what we find is that there were a number of published defamatory statements made by the appellants which were not denied by them. The burden of proof is upon its maker and unless it falls under first exception to section 3 of Qazf Ordinance, the maker is liable to be punished under the provisions thereof. Mst. Ameeran Khatoon is a First Class Graduate and a qualified teacher at

Government Girls High Secondary School, Kundian and by virtue of her position she must be commanding respect in the eyes of her colleagues, students and society. Such wild, unfounded and malicious allegation of zina against her by the appellants cannot be overlooked. All the three complaints/FIR lodged as aforesaid filed by them were either withdrawn by them or dismissed by the Court. In fact the second case of appellant Muhammad against her with police was cancelled with recommendation that proceedings under section 182 PPC be taken against him. Learned counsel for the appellants placed reliance on the case of Bakht Ali and another Vs. The State 1993 P.Cr.L.J. 1872 in which a Full Bench of this Court found "the statement of accused as "not confidence inspiring", but there was no finding of the Court that the evidence given by them was false" and hence they were acquitted. It is not so in the present case in which the appellants stood by their defamatory statements and the trial Court had held that the statements of the appellants were defamatory and false.

11. We may add here that there is no prescribed manner, form or procedure under which the option of puberty may be exercised by a female Muslim. This may be oral or in writing, direct or indirect, express or

implied or may be inferred by a course of event or circumstances of each case. Here the appellants have miserably failed to establish the childhood marriage, hence the allegation of zina fails and the appellants are liable to be sentenced to 80 stripes. We accordingly uphold and confirm the conviction and sentence awarded by the learned Additional Sessions Judge, Mianwali, to the appellants Muhamamd and Ahmad. They are on bail, their bail bonds are cancelled and they shall be taken into custody for infliction of sentence, i.e.80 stripes.

JUSTICE HAZIQUL KHAIRI
Chief Justice

JUSTICE DR. FIDA MUHAMMAD KHAN

JUSTICE SALAHUDDIN MIRZA

Announced at Islamabad
the 10th May 2007
Bashir/*

Approved for reporting
2/6/07