

IN THE FEDERAL SHARIAT COURT
(Appellate / Revisional Jurisdiction)

PRESENT

MR.JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO.142/L/2005

1. Mst.Shehnaz alias Asma alias Rani wife of Ubaidullah Farooq, caste Rajput, resident of Police Station Shahpur, District Sargodha.
2. Mst.Naila alias Shamim daughter of Muhammad Rafique, caste Rajput, resident of Katchi Basti, near Hadi Hospital, Faisalabad Road, Okara

... Appellants

Versus

The State

... Respondent

Counsel for the appellants	...	Mr.Abdul Hameed Khan Baloch, Advocate.
Counsel for the State	...	Raja Shahid Mahmood Abbasi, DPG
F.I.R No. Date & Police Station	...	33/01, dated 25.1.2001, Kot Chutta (D.G.Khan)
Date of order of trial Court	...	28.04.2005
Date of institution	...	04.05.2005
Last date of hearing	...	14.11.2008
Date of decision	...	14.11.2008

JUDGMENT**SYED AFZAL HAIDER, Judge. -****INTRODUCTION**

Mst.Shahnaz alias Asma alias Rani and Mst.Naila alias Shamim have through this appeal challenged the Judgment dated 28.04.2005 delivered by learned Additional Sessions Judge, Dera Ghazi Khan whereby both the appellants were convicted under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and sentenced to five years rigorous imprisonment each with a fine of Rs.10,000/- each and in default thereof to further suffer three months simple imprisonment each. Benefit of section 382-B of the Code of Criminal Procedure was granted to the appellants.

2. Both the appellants were admitted to bail by this Court on 06.05.2005. On 24.10.2008 the husband of appellant Mst.Naila informed the Court that his wife had expired on 30.09.2006. Death Certificate of Mst.Naila, as directed, was placed on record and it was ordered that the appeal in so far as appellant Mst.Naila was

concerned, had abated on account of her death. This Judgment will, therefore, decide the appeal of Mst.Shahnaz alias Asma alias Rani.

3. Facts leading upto the trial of the appellant have been stated in the crime report (F.I.R No.33/2001, Ex.P-G/1) registered on 25.01.2001 with Police Station Kot Chutta on the basis of a "Murasala" (written intimation) of PW-7 Ijaz Hussain Bukhari Inspector, who is the complainant in this case. He is also the Investigating Officer and the person who conducted a raid in the house.

PROSECUTION STORY

4. According to the complainant Ijaz Hussain Bukhari Inspector PW-7, he was present at Chowk Saleemabad alongwith other police officers when he received "spy information" to the effect that one Fida Hussain was running a prostitution den at his Dera at his well Muraley Wala in village Ghousabad and further that at that time many men and women were involved in committing Zina. It was also

conveyed that Fida Hussain, in exchange for money, was indulging in the prohibited activity and if a raid was conducted the culprits could be arrested red handed. On receipt of the said information, the police party raided the said house after the complainant submitted an application before the Illaqa Magistrate to seek permission for issuance of search warrant. It is further stated that having secured ingress in the premises, the police party found accused Zulfiqar (since proclaimed offender) and Mst.Naila (the dead appellant) in room No.1 and Muhammad Akram and Mst.Shahnaz (appellant) in room No.2, committing Zina whereas accused Fida Hussain, Ubaid Ullah Farooq, Sohanra, Mst.Nasim and Mst.Lubna, present in the courtyard of the house, were wrangling over payment of money. An amount of Rs.500/- was recovered from accused Fida Hussain, whereas Rs.250/- were recovered from accused Mst.Nasim and a sum of Rs.200/- was recovered from accused Mst.Lubna, yet another amount of Rs.200/- was recovered from accused Mst.Naila while Rs.150/- were recovered

from accused Mst.Shahnaz. The recovered currency notes were taken into possession through different memos by the police. The accused were arrested on the spot and the Inspector then sent the "Murasla" for registration of crime report.

5. After completion of investigation the Station House Officer submitted report under section 173 of the Code of Criminal Procedure requiring the accused to face trial. The learned trial Court framed charges under sections 13, 14 and 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 against nine accused on 09.02.2004. They did not plead guilty and claimed trial.

PROSECUTION EVIDENCE

6. The prosecution in order to prove its case produced seven witnesses at the trial. Summary of the evidence is as follows:-

i) Lady Dr.Fatima Sherin appeared as PW-1 and stated that she examined Mst.Naila alias Shamim, Mst.Lubna Kanwal, Mst.Nasim wife of Rafique, and Mst.Asma alias Rani and gave detailed medical

reports of the four female accused. She further stated that vaginal swabs were taken and handed over to police for onward transmission to the Chemical Examiner. According to the report of the Chemical Examiner, the vaginal swabs of Mst.Lubna, Mst.Aasma and Mst.Naila alias Shamim (since dead) were stained with semen.

ii) PW-2 Dr.Abdul Rehman, medically examined Muhammad Akram and Fida Hussain to ascertain their potency and found them fit to perform sexual act.

iii) PW-3 Fayyaz Ahmad, Head Moharrar drafted F.I.R. Ex.P-G/1 on receipt of "Murasala", Ex.P-G, written and sent by Ijaz Hussain Bukhari, Station House Officer PW-7.

iv) Muhammad Ajmal appeared as PW-4 and deposed that at the time when spy information was conveyed to the Inspector and other police officials, he was present at Chowk Saleemabad. He also witnessed recoveries made by the police from the place of occurrence.

v) Sana Ullah Khan, Inspector PW-5 was member of the raiding party. He supported the version of the complainant PW-7. He admitted that no respectable person of the locality was associated at the time of raid at the place of occurrence.

vi) PW-6 Lady Constable Shazia Tabassum, conducted personal search of the female accused after she had joined the investigation at Ghousabad. The cash recovered from the female accused was handed to Investigating Officer PW-7. She testified four recovery memos.

vii) PW-7 Inspector Ijaz Hussain Bukhari, the Investigating Officer, is also the complainant. His statement has already been mentioned above.

THE TRIAL

7. The learned trial Court, after the prosecution had closed its evidence, recorded statements of the accused under section 342 of the Code of Criminal Procedure. The accused neither made statements

on oath under section 340(2) of the Code of Criminal Procedure nor produced any evidence in their defence. The relevant portions of the statements of the accused are as follows:-

a) Fida Hussain accused stated that "PW Muhammad Ajmal is a so-called journalist and black mailer. A dispute of land is going on between me and said PW. On the day of occurrence when I along with other relatives were going to Jampur to participate in a marriage ceremony and when we reached at Kot Chutta, the said PW along with the local police came on a Dala and said the police to apprehend me. On hue and cry of my other relatives, the police also apprehended all my relatives and me and confined us at Police Station and they demanded illegal gratification from us. On our refusal, the police involved me and my other relatives in this false case. All the PWs are police officials, therefore, they deposed against me to strengthen the prosecution case."

b) Ubaid Ullah Frooq accused stated that "I am a lessee (mutadar) of accused Fida Hussain. PW Muhammad Ajmal has a some dispute with Fida Hussain accused about the land, who got involved said Fida Hussain in this case due to that grudge when he was going to Jampur for participating in a marriage ceremony and the police implicated me in this case due to lessor of said Fida Hussain accused malafide and falsely. All the PWs are police officials, therefore, they deposed against me to strengthen the prosecution case."

c) Sohanra accused stated that "I am a personal servant of accused Fida Hussain. The police involved me in this case falsely due to servant of accused Fida Hussain, who was falsely implicated in this case when he alongwith other co-accused were going to Jampur for participating in a marriage ceremony. All the PWs are police officials, therefore, they deposed against me."

d. Shahnaz alias Asma alias Rani accused stated that "I am wife of accused Ubaid Ullah Farooq who was falsely involved in this case due

to lessee of accused Fida Hussain. Being wife of accused Ubaid Ullah Farooq I was also implicated in this case with malafide by the local police. All the PWs are police officials, therefore, they deposed against me to strengthen the prosecution case.”

e. Naila alias Shamim accused stated that “Mst.Nasim Mai accused is my real mother. I am married and I have two suckling daughters. Mst.Lubna and Fida Hussain are my maternal cousins. Sonhara accused is servant of Fida Hussain and Muhammad Akram is neighbourer of accused Fida Hussain. PW Muhammad Ajmal is a so-called journalist and black mailer, whose dispute of a land was going on with accused Fida Hussain. One day prior to the alleged occurrence, when I alongwith other accused except Zulfiqar reached at Kot Chutta for participating in a marriage ceremony at Jampur, suddenly PW Muhammad Ajmal came there on a Dala alongwith local police. On alighting from a Dala, he said to apprehend Fida Hussain. We raised hue and cry, upon which Muhammad Ajmal said

to arrest all of us. Police illegally confined me alongwith other accused and meanwhile, they had been demanding illegal gratification. On our refusal, they registered a false and fabricated case. All the PWs are police officials, therefore, they deposed against me to strengthen the prosecution case”.

f) Relevant portion of even the acquitted accused have been mentioned above to show unanimity of approach. Each one of them has explained the reason why a false crime report had been registered.

8. The learned trial Court in the end came to the conclusion that the prosecution failed to prove its case against the other five co-accused namely Fida Hussain, Sonhara, Ubaid Ullah Farooq, Mst.Lubna and Mst.Nasim and they were consequently acquitted of the charges under sections 13/14 of Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 while the appellants Mst.Shahnaz and Mst.Naila were convicted and sentenced under section 10(2) of the said Ordinance as mentioned in the opening para of this Judgment.

Two accused namely Muhammad Akram and Zulfiqar had absconded and were declared proclaimed offenders. Hence the present appeal.

9. I have heard arguments advanced by learned counsel for the appellant as well as learned DPG for the State.

i) Learned counsel for the appellant submits that a false case was registered against the accused persons and a paltry sum amounting to Rs.1150/- was allegedly recovered from five accused which in no way established the commission of offence charged.

ii) He also contended that five accused were acquitted but the appellant was convicted on the same set of evidence.

iii) It was further contended that PW-4 stated that "he did not witness the said accused committing Zina." This statement on the part of a member of raiding party demolishes the case of prosecution.

iv) PW-5 Sana Ullah Khan Inspector Police has also admitted that at the time of raid the outer door of the house was open and "the doors

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of the room were not bolted from inside but they were shut.” He also admitted that “no respectable person from the locality joined us at the time of raid at the place of occurrence.” The Inspector police also stated that rupees five hundred were recovered from Fida Hussain, acquitted accused and no money was recovered from any other accused. This portion of the statement demolishes the very story of recovery of cash from accused other than Fida Hussain.

v) That Ex.P-C is the report of the Chemical Examiner which states that one Ghulam Haider 266/C delivered on 14.02.2001 the packet sent by W.M.O but Ghulam Haider Constable did not appear in the witness box to depose that on a given date he received the parcel from the Incharge of Malkhana and then delivered the packet intact to the Chemical Examiner.

10. learned counsel, on behalf of the State, supports the conviction and sentence recorded by learned trial Court for the reasons that the appellant was caught red handed as a consequence of

a successful raid. He also contended that the evidence of prosecution witnesses was corroborated by medical evidence.

THE MAIN ISSUE

11. The basic question in this case is whether human dignity and the privacy of home, declared by the Constitution of Islamic Republic of Pakistan as inviolable, can be infringed by a police officer in utter violation of the provisions contained in the Code of Criminal Procedure.

12. It is on record that PW-7 on 25.01.2001 was present at Chowk Saleemabad when he received spy information that one Fida Hussain was running a brothel house at Ghousabad and that "many men and women were present there for the purpose of committing Zina and accused Fida Hussain allows them to commit Zina after receiving money from them". On receipt of the said information he proceeded for procuring search warrant and moved an application Ex.P-N, addressed to the Illaqa Magistrate, praying for the issuance of

search warrant. In this application, the house to be searched was not identified. This application was made on 25.01.2001 and the learned Illaqa Magistrate passed the following order on the same day:-

“Allowed to enter and search the said premises subject to authenticity of informer.”

This order does not bear the seal of the Court. No search warrant as a consequence of the search having been allowed, was issued in the prescribed form fulfilling the necessary conditions.

13. Thereafter the Inspector conducted a raid at the house of Fida Hussain (the acquitted accused). He found that Fida Hussain, Mst.Nasim, Sohanra and Ubaidullah were present in the courtyard whereas in room No.1 Zulfiqar accused and Mst.Naila and in room No.2 Muhammad Akram and Mst.Shahnaz, appellant were committing Zina. Recoveries were effected and accused formally arrested.

14. That it was only then that PW-7 after taking so many steps drafted complaint Ex.P-G and sent the same to Police Station,

through Muhammad Baqir Constable, for registration of the crime report. The witness had the audacity to state that it was after sending the complaint to the Police Station for registration of case that he started investigation of the case. He also prepared rough site plan of the place of occurrence and sent the female accused for medical examination.

15. It is evident from the application Ex.F-N that neither the house required to be searched was identified in this application nor was the informer produced before the learned Magistrate to help him form opinion on the basis of some material. The short order of the Magistrate does not show that there was material of any sort before him to make him believe that he must issue warrant because the person will not produce *the document or thing*. The police Inspector neither made a request for the production of a document nor of a thing. The application was for search of an unidentified house where some persons were engaged in illicit sex. Production and arrest of

human beings cannot be equated with production of a document or a thing. Had a crime report of a cognizable case been registered he could have investigated the case and effected arrest of any person concerned in any cognizable offence or against whom reasonable suspicion existed of his involvement in the offence. He could then be satisfied that there were reasons to issue search warrants. He allowed the application subject to the authenticity of the informer which meant that he left it to the discretion of the police officer. He abjured his duty in favour of discretion of a police officer which was certainly contrary to law.

16. I have gone through the evidence. The file has been scanned. The entire case starts with the spy information whereafter the Inspector presented an application Ex.P-N, before the learned Magistrate praying for the issuance of a search warrant which request was allowed "subject to authenticity of informer". A raid was consequently conducted in the house of Fida Hussain, the acquitted

accused, and nine persons were arrested. The points worth noting are

a) the competency of learned Magistrate to issue a search warrant when there is no provision in the Code of Criminal Procedure to pass such an order merely on the information of an anonymous person conveyed through a police officer that Zina was being committed at a particular place; and b) the conduct of police officer in clear defiance of the procedure and conduct prescribed by law.

17. I find the following defects in the entire process.

- a) Information conveyed to the Inspector police by an informer, whose identity no one knows;
- b) Submission by Inspector Police of an application to the learned Magistrate for issuance of a search warrant on anonymous oral information without placing material before the issuing authority.

c) Due to the lack of identity of the informer, in case the information is found to be wrong or motivated, he is saved from the legal consequences of setting the law into motion on a false report.

d) Allowing application without applying mind. No material was placed before the learned Magistrate to apply his mind. He allowed the application subject to authenticity of the informer meaning thereby that he delegated his judicial discretion to the complainant police officer. There was even no crime report registered by then. Learned Magistrate did not realize that the issuance of a search warrant is a judicial act and the word "reason to believe" occurring in section 96 of the Code of Criminal Procedure signify that there must be in existence justifiable grounds for the Court to form that opinion which may be covered by the term "reason to believe". The time-honoured principle still holds the field that when law requires a thing to be done in a particular way then it must be done in that way or not at all. All the other methods are automatically excluded.

e) As a consequence of the issuance of a search warrant the Inspector raided the house without seeking permission and invaded the privacy of the house, guaranteed by the constitution, without associating any respectable from the locality and started investigation without formally recording a crime report.

18. Since the issue under consideration is relatable to the fundamental rights, as guaranteed by the Constitution, so it would be useful to refer to various authorities to ascertain whether uncontrolled powers are available with police officers to violate privacy of home notwithstanding constitutional guarantee proclaimed in article 14 of the Constitution. The matter involves human freedoms and we have also to see to what extent God Almighty assures human freedom and provides protection to good as well as sinning human beings.

a) In the case of Niamat Chacha Kata versus Summary Military Court No.2, Lahore reported as PLD 1979 Lahore 279, it was held that where the provisions of section 103 of the Code of Criminal

Procedure are deliberately violated and no respectable person of the locality attended the search, the recoveries could not be used against the petitioner.

b) Ghulam Muhammad alias Gama versus the State reported as PLD 1981 FSC 120 (FB) is a case which interprets section 156 of the Code of Criminal Procedure differently. The facts were that one I.B. aged 16/17 years had undergone Shighar marriage i.e. the wata or exchange marriage as her brother A.D. was married to the sister of her husband A.B. After 3/4 months her relations with her husband got strained. She returned to her parents house. Her brother A.D. put pressure on her to return to her husband A.B because A.D wanted to save his own marriage as he had won his wife in exchange for his sister. I.B left her parents house and boarded a train bound for Faisalabad where she met two women who in turn handed her over to the G.M. and one M.M. G.M. kept her in detention and she was compelled to lead immoral life. One night her cries attracted the

neighbours who reported the matter to local police that she was being illegally detained. Police officer raided the house and recovered the girl and a crime report was registered subsequently on her statement and then further investigation ensued. It was under these circumstances when the girl was under illegal detention, beaten and compelled to submit herself to forcible sexual intercourse with several persons that the Hon'ble Judges held in that case that recording of the first information report was not a condition precedent for holding investigation by police.

c) The facts in the case of Ghulam Muhammad alias Gama were quite different from the facts which have culminated in the present criminal appeal. In the instant appeal Fida Hussain, who allegedly runs a brothel house, has been acquitted alongwith four others of the charge under section 14 of Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. Moreover, in the case of Ghulam Muhammad the prosecutrix had been abducted, detained and forced to become a

sex worker. It was under these circumstances that the raid undertaken by police officer was protected by the Court because the life and house of a person had to be saved. It was also held that police investigation can precede registration of crime report and further that failure on part of police officer to record grounds of his belief that it was necessary to make search, which being an irregularity or illegality in the investigation, would not vitiate the trial. It is understandable that where the life and honour of a human being is in jeopardy the procedural formalities can be ignored. Laws are made for the benefit of human beings and not vice versa.

d) In the case of Arshad Zubair Versus the State reported as 1993 SCMR 2059 it was held that the officer making the search should call upon two or more respectable inhabitants of the locality in which the place to be searched is situate, to attend and witness the search and the officer may issue an order to them or any of them to do so.

e) The Federal Shariat Court in the case of Ashiq Hussain Versus the State reiterated the age old principle that if a particular procedure for doing anything or for taking any action is prescribed by law then it has to be strictly followed and adhered to and the thing done or action taken has to be in accordance with the said prescribed procedure otherwise the same would be a nullity in the eyes of law being violative of the legal provision.

f) In the case of Riaz versus Station House Officer reported as PLD 1998 Lahore 35, it was held that lack of mention of reasons by Magistrate before issuance of warrants would vitiate the order.

g) In the case of Abdul Majeed Versus Superintendent of Police reported as PLJ 1998 Lahore 1158 it was held that even under sections 47, 48 of the Code of Criminal Procedure, which relates to the search by police to effect arrest of accused person, the police officer has to seek permission to enter the house even though he is carrying a search warrant.

h) In the case of Nasreen Versus Station House Officer reported as 2001 PCr.L.J 685 some guidelines were given for the Magistrates which have not been followed in the case under consideration.

19. The present case is different because there is neither any allegation of abduction nor of rape or detention of a young woman nor did any neighbour come forward to lodge a complaint before the police officer for release of an unfortunate girl under improper or illegal detention. The point in the present case is whether the constitutional guarantee stipulated in Article 14 could be violated without recourse of law. It is worth noticing that Article 4 of the Constitution confers a right upon the individuals to be dealt in accordance with law which *is an inalienable right wherever he may be*. The concept of human dignity and privacy of home was initially made a sacrosanct right only through Islamic Injunctions. These points, which will be discussed shortly were not raised before the Full Bench in the case of Ghulam Muhammad Vs. State and the two other

Full Bench cases on which the Hon'ble Judges of the Federal Shariat Court relied. The case of Ghulam Muhammad Vs. State is, therefore, distinguishable as the facts were different.

20. Having stated the legal position in so far as the interpretation of various provisions of the Code of Criminal Procedure are concerned I would advert to the principle of sanctity of the privacy of home or what we in our society call the sanctity of "Chaddar and Chardevari," as enunciated by the Injunctions of Islam.

i) Chapter 24, verse 27, Sura Nur of the Holy Quran mandates;-

O you believe! Do
not enter houses other
than your own houses
until you *have asked
permission* and saluted
their inmates; this is
better for you, that you
may be mindful.

The savage practice of entering the dwelling places of others has been strictly prohibited. This verse brings into prominence the importance of domestic peace, tranquility and security.

ii) Chapter 49, verse 12, Sura Al-Hujurat of Holy Quran ordains as

follows:-

O you who believe!
 avoid most of suspicion,
 for surely suspicion in
 some cases is a sin,
 and do not spy nor let
 some of you backbite
 others. Does one of
 you like to eat the
 flesh of his dead
 brother? But you
 abhor it; and be
 careful of (your duty
 to) Allah, surely Allah
 is Oft returning (to
 mercy), Merciful.

Soliciting information secretly or forcing ingress into the abodes of

others to discover whether immoral act are being committed is strictly

prohibited by Quranic Injunctions. The Offence of Zina (Enforcement

of Hudood) Ordinance VII of 1979, which deals with sexual offences,

does not contemplate apprehending sinners in the residential quarters.

The philosophy behind the presence of four Muslim, adult male

witnesses to give evidence as eye witnesses of the act of penetration,

was to discourage bringing to light unwitnessed acts of sexual

intercourse.

iii) The well known tradition of the Holy Prophet (P.B.U.H) on this issue is reported on the authority of Abu Huraira (R.A) that if some one is peeping in your dwelling without permission, and you throw a stone at him and hurt his eye there is no blame on you. Another tradition to the same effect is the right of a dweller to cause injury with impunity with a pointed weapon aimed at the intruder.

iv) The third source of inspiration is the conduct of the companions of the Holy Prophet (P.B.U.H) and in this respect the incident of Caliph Hazrat Umar (R.A) is often quoted when he during the routine nocturnal patrolling, heard a woman singing in her house. The Caliph, the head of the government, scaled the wall and saw her enjoying liquor. As the story goes, the inmate of the house on the contrary charged the Caliph of violating three injunctions: a) spying, b) entry in the house by scaling instead of coming from the front door and c) forcing entry in the house (of course without permission). The Caliph did not take cognizance of the offence because the privacy of the

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house was inviolable and the law protected it. The Caliph did not prosecute the culprit either even though he was an eye witness because he was not a natural witness and had witnessed the incident taking place in the house only after scaling the wall which was not permissible. It is worth noting that the inmate of the house was not disturbing public peace.

21. Considering the phraseology used in section 154 of the Code of Criminal Procedure, I am of the view that a statutory duty is case upon the officer incharge of a Police Station to enter every information regarding the commission of a cognizable offence in a book maintained by such officer in the form prescribed by the Provincial Government. This step is, in ordinary parlance, called the registration of first information report. The police officer, it appears, cannot delay the recording of an F.I.R once information regarding the commission of a cognizable offence has been given. It may also be pointed out that violation of this mandatory and pre-emptory duty was

always considered an aberration in police discipline. Such a deviation in police vocabulary was called Burking which was punishable under the Police Act read with Police Rules. The use of the word "shall" in section 154 *ibid* indicates that it does not give discretionary powers to the police officer to delay or refuse registration. He has no other option but to proceed with registration of the crime report without any delay. It is the right of an aggrieved person that his complaint about the commission of a cognizable offence shall be registered in the Police Station as a preliminary step before investigation is undertaken.

22. In so far as section 156 of the Code of Criminal Procedure is concerned it authorizes an officer incharge of a Police Station to investigate any cognizable case within the jurisdiction of the Police Station without the order of a Magistrate and such proceedings shall not be called in question on the ground that the case was one which such officer was not empowered to investigate. The main difference between sections 154 and 156 of the Code of

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Criminal Procedure is that former section grants i) right to the aggrieved person to set the law in motion and ii) empowers the police officer incharge of the Police Station to formally reduce into writing the crime report on the complaint of the aggrieved person. This step having been taken the police officer is authorized to initiate investigation by visiting the spot, collecting evidence and effecting arrest of suspect offenders without the intervention of a judicial order from the Magistrate. This is what section 156 of the Code of Criminal Procedure visualizes.

23. It is, therefore, clear that registration of crime report precedes initiation of investigation. In other words registration of first information report is a condition precedent to the launching of the investigation. Such a measure would rule out the possibility of deliberation, consultation and enquiry before furnishing the information. The element of delay in lodging the crime report is treated with caution because there is a tendency to involve innocent

people during the interval. The longer the intermission the greater are the chances of false implication. Investigation that follows the registration of a crime report has more value than the investigation which precedes registration of F.I.R. It, therefore, means that ordinarily there can be no investigation in a cognizable case without first registering the crime report. Having registered the case the police officer can proceed with the investigation without a formal permission from the Court which has the territorial jurisdiction to try that case.

24. However, in the case of Ghulam Muhammad Versus The State, mentioned above, the Full Bench of the Federal Shariat Court relying upon the case of M. Bashir Sehgal and others Versus the State and others reported as PLD 1964 Lahore 148 and also the case of Rehman and others Versus The State reported as PLD 1968 Lahore 464, held that recording of the first information report was not a condition precedent for holding of investigation by the police. The Courts in the above mentioned cases held that the fact that no F.I.R.

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was made or was not proved at the trial would not vitiate the conviction. It was also held that illegality or irregularity in the investigation of an offence does not vitiate the trial. This dictum also finds mention in the case of *Shaman Versus The State* reported as 1972 P Cr.L.J 400, a case decided by a Division Bench of the Lahore High Court where the objection was that the investigation in that case had not been conducted by a competent police officer in terms of section 156 of the Code of Criminal Procedure as the Assistant Sub Inspector was not the Station House Officer.

25. In the case of *Hazoor Bakhsh Versus Senior Superintendent of Police* reported as PLD 1999 Lahore 417, a Division Bench of the Lahore High Court held that the provisions of section 154 of the Code of Criminal Procedure are pre-emptory as well as obligatory and the Station House Officer has no option but to record the statement of the complainant in the relevant register when the same discloses the commission of a cognizable offence.

26. Similar view was expressed in the case of Saeed Ahmad Versus Naseer Ahmad reported as PLD 2000 Lahore 208, by a Division Bench of the Lahore High Court. It has been held that reducing the information in writing by police officer at the instance of the informant regarding the commission of a cognizable offence is imperative in law. The police officer is under statutory obligation to enter it in the prescribed register. The report to be registered should fulfill two conditions (a) it should be an information and (b) it should disclose the commission of a cognizable offence.

27. In the case of Mumtaz Hussain Versus Deputy Inspector General, reported as PLD 2002 Lahore 78, it was held that registration of a criminal case is an independent right of the aggrieved person because the officer incharge of the Police Station is bound under section 154 of the Code of Criminal Procedure to record the report and then proceed with investigation in accordance with law.

28. These are some of the cases in which the interpretation put on section 154 of Code of Criminal Procedure is to the effect firstly that it is the right of an aggrieved person to report the matter to the officer in charge of a Police Station in order to set the process of law in motion and secondly, it is the bounden duty of the police officer to reduce in writing the said report. After having done this the police officer is empowered to initiate investigation in the correctness or otherwise of the complaint.

29. The views expressed in the last three cases mentioned above is, however, different from the three Full Bench cases of the Federal Shariat Court and the Lahore High Court. An analysis of the above mentioned precedents shows that irregularity or illegality in the investigation by the police would not vitiate the trial. However, there is no bar for the Court to refuse to acknowledge the result of conduct of police officer in utter violation of mandatory provisions of section 154 of the Code of Criminal Procedure. The unnecessary haste on the

part of the police officer to initiate investigation by visiting the place of occurrence on a secret information and opting to become an eye witnesses and then after initiating investigation himself becoming a complainant as well and getting a crime report registered is certainly an action contrary to law and good conduct and, therefore, liable to be ignored to say the least. Such a course of action right a note of caution that the Court should, under the circumstances, be careful in assessing the evidence because the police officer has not only acted in violation of law but has also become a complainant and created evidence at the spot by supplying eye witnesses from among his subordinates to substantiate his own complaint.

30. It is worth mentioning that under Article 22 of the Prohibition (Enforcement of Hadd) Order, 1979 provides that: "If any Collector, Prohibition Officer or a Magistrate upon information obtained and after such enquiry as he thinks necessary, has reasons to believe that an offence under Articles 3, Article 4, Article 8 or Article

11 has been committed he may issue warrant for the search for an intoxicant, material, still, utensil, implement or apparatus in respect of which the alleged offence has been committed." But there is no corresponding provision in the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 which authorizes a Magistrate to issue search warrant or authorize a police officer to enter the house upon information that illicit sex is being committed. Ordinance does not contemplate creating evidence to convert a sex sin, being committed in the four walls of a house, into an offence punishable under the Ordinance. The law does not authorize the police officer to chase the sinners.

31. The spirit of enacting section 8 of the Ordinance was to punish such offences which have been witnessed by at least four Muslim, adult and male eye witnesses. Even in Tazir where the requirement of four witnesses is not essential the direct evidence must be of a person who is a natural witness and not one who hunts the

sinner and then takes pride in becoming a witness for the prosecution. Such a conduct is violative of the Injunctions of Islam which encourage covering the sins of others.

32. The provisions of the Code of Criminal Procedure apply mutatis-mutandis in respect of cases under this Ordinance. Section 157, however, authorizes an officer incharge of a Police Station to investigate the facts and circumstances of the case and if necessary take measures for the discovery and arrest of the offender if from information received the officer incharge of a Police Station has reason to suspect the commission of an offence which he is empowered under section 156 of the Code of Criminal Procedure to investigate. But even this section does not permit a police officer to enter the house and violate the privacy of the citizens. At this stage reference be made to the case of Muhammad Aqil Versus The State, reported as 1996 P Cr.L.J 345, where it has been held that "the informer might have a few privileges to be enjoyed before the police

but when it comes to the infringement of the legal or vested right of a citizen, the law has to take its own course. There is not a word on judicial record wherefrom one could infer that Jehanzeb Assistant Sub Inspector had collected such evidence giving strong presumption of the commission of offence that he could take cognizance there and then. On mere information of an informer which is never recorded any where and which informer cannot be subsequently proceeded against for giving false information, no Police Officer has the authority to take cognizance of an offence even if cognizable and to violate the privacy of a citizen by entering into his house and by not giving any notice to the female inmates of the house.”

CONCLUSION

33. In view of what has been stated above I am inclined to ignore from consideration the initial three steps taken by PW-7, Inspector Ijaz Hussain, which consist of a) initiating investigation without performing his statutory obligation to register the oral

information in the prescribed manner, b) submission of application to the learned Magistrate to secure search warrant which application was allowed without applying his mind knowing fully well that the order that he passed was judicial in nature and then c) the action of the Police Officer to embark upon investigation of the case.

34. The fact of the matter is that Fida Hussain and his associates according to the complaining Inspector were controlling a brothel house but all of them have been acquitted as there was no evidence to support conviction under sections 13 and 14 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. The alleged crime spot is reported to be in a village but it is not possible to believe that the business of prostitution, as recorded in the F.I.R by the complainant Inspector of Police, was rampant and the neighbourhood was in great agony but none from the neighbourhood appeared either to witness a raid or to authenticate the element of recovery or to confirm the secret report of the informer.

35. PW-7 admitted in the cross-examination that Muhammad Ajmal PW-4 "was a journalist and on some occasions he used to accompany us." It clearly means that PW-4 was a stock police witness. This admission explains the accusation of accused person that PW-4 was a black mailer and had a personal grudge against the principal accused.

36. No search warrant, in the form set forth in the fifth schedule as mandated by section 555 of the Code of Criminal Procedure, bearing the seal of the Court as visualized by section 75 of the Code of Criminal Procedure, is available on the record of this appeal. Warrant is a public document and could have been proved by production of a certified copy as visualized by Article 88 of the Qanoon-e-Shahadat Order, 1984. The only document on record is an application Ex.P-N moved by the complainant requesting for issuance of a search warrants which application was allowed by the Magistrate. It is not established on record that as a consequence of the order

allowing the application conditionally, any search warrant, in accordance with the form prescribed in Schedule V of the Code of Criminal Procedure, was issued directing the Inspector PW-7 to perform a particular duty. There is no seal affixed on the application Ex.P-N. An inference, however, can be drawn, after perusing the application that the police officer wanted permission to effect arrest of a number of persons in a house where the offence was allegedly being committed. A general warrant to apprehend more than one person is, however, neither authorized by the Code of Criminal Procedure nor by Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and consequently all the proceedings as a subsequent to submission of application Ex.P-N are void. Under clause (d) of sub-article (i) of article 112 of the Qanoon-e-Shahadat Order, 1984, the Court is authorised to take judicial notice of “ the seal of all the Courts...” in Pakistan. Application Ex.P-N does not contain the seal of the Court either and hence it is not possible to take judicial notice of the portion

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of the order which permitted conditionally the issuance of a search warrant. PW-7 in his examination-in-chief does not say that he obtained a search warrant. He say, "after procuring permission for search I came back to Saleemabad...".

37. It is rather unfortunate to notice that the investigation and prosecution in certain cases is not upto the mark. Can the Station House Officer be unaware of the existence of brothel dens? Why cannot a raid be planned properly and legally when they have all the time at their disposal?. The dens must be destroyed but the action must be transparent, bonafide and should not violate constitutional guarantees. Laws are subservient to Constitution and wherever the Constitution declares a right to be subject to law it does to mean that the guarantee of the right has been taken away. In such an event the law must be followed strictly so that the guaranteed rights are duly honoured.

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38. In view of what has been stated above, the conviction and sentence recorded by learned Additional Sessions Judge, Dera Ghazi Khan on 28.04.2005 under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979, in Hudood case No.6 of 2004, cannot be maintained. The appeal is hereby accepted. Appellant is present on bail. Her surety is relieved of the obligation to produce her. The surety is discharged.

S. Haider

JUSTICE SYED AFZAL HAIDER

Islamabad the 14th November, 2008

Amjad

Fit for reporting.

S. Haider