

IN THE FEDERAL SHARIAT COURT
(Appellate/ Revisional Jurisdiction)

PRESENT

MR.JUSTICE HAZIQUK KHAIRI, CHIEF JUSTICE
MR.JUSTICE SALAHUDDIN MIRZA

CRIMINAL APPEAL NO.192/I/2005
CRIMINAL APPEAL NO.196/L/2005
CRIMINAL APPEAL NO.199/I/2005

1. Kamal Din alias Bagga son of Reham Din
R/o Khanna Lubana, Tehsil Ferozewala
District Sheikhpura1.
2. Mst. Asima Bibi D/o Muhammad Nazir
R/o Khanna Lubana
District Sheikhpura
3. Shahbaz Ahmed son of Muhammad Hussain
R/o. Chak No.27/UCC Tehsil Ferozewal
District Sheikhpura

Appellants

Versus

The state

Respondent

For the appellants

Ch. Riaz Ahmed Kataria,
Advocate
Mr. Kawar Ikram Bhatti
Advocate
Syed Ali Imran,
DPG Punjab
No.442/2002
dated:18.9.2002
P.S Saddar Muredke
18.5.2005

For the State

No. Date of FIR& P.S.

Date of order of
trial court

Date of institution

Date of hearing

Date of decision

9.6.2005,
19.4.2007

CRIMINAL REVISION NO.69/L/2005

Muhammad Nazir son of Faqeer Muhammad
R/o Khanna Miana, District Sheikhpura

Petitioner

Versus

1. Shahbaz Ahmed
2. The State

For the petitioner

Date of Institution

Date of hearing

Date of decision

Respondents

Nemo

20.6.2005

19.4.2007

JUDGMENT

HAZIQUL KHAIRI, CHIEF JUSTICE:- By this common judgment we will dispose of three Criminal appeals No.192/L/2005 filed by Kamal Din alias Bagga, Cr.A.No.199/L/2005 filed by Shahbaz Ahmed and Cr.A.No.196/L/2005 filed by Mst. Asima Bibi where-under appellants Kamal Din and Shahbaz Ahmed were convicted and sentenced under section 10(2) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, (hereinafter referred to as the 'Ordinance') to six years R.I. with fine of Rs.20,000/- and appellant Asima Bibi was convicted and sentenced to 4 years' S.I. and fine of Rs.20,000/- in case of default all of them will be liable to 6 months' S.I. The benefit of section 382-B, Cr.P.C. will extend to all of them. By this judgment we will also dispose of Criminal Revision No.69/L/2005 filed by Muhammad Nazir complainant praying for maximum punishment to the appellants. The impugned judgment is dated 18.5.2005 passed by Additional Sessions Judge, Ferozewala.

2. Brief facts as emerged from the impugned judgment are that on 17.9.2002 complainant Muhammad Nazir (PW-5) reported to the Police that

in the last harvesting season his wife and daughter Mst. Asima, aged 13 years, appellant herein, used to go to cut the wheat crop of one Shahbaz at Chak No.27/H.C. One day his wife came back home to take lunch while the appellant Asima went to Dera of accused Shahbaz to fetch drinking water. Appellant Shahbaz who was alone there forcibly committed Zina-bil-Jabr with her. He threatened to kill her in case she would disclose the incident to any body, therefore, she kept quite. A few days back, she fell ill and disclosed the whole incident to her mother when it also transpired that she was pregnant for 5 months. She ultimately gave birth to a male child who died after 16/17 days. Later on, the complainant made a supplementary statement and took up the position that about 8/9 months back the appellant committed Zina bil Jabr with her and continued to do so, the last one during the reaping season of wheat and thus he corrected his previous statement in F.I.R. The appellants were charged on 23.4.2004, which they denied. Since Mst. Asima Bibi was a child within the meaning of Section 2(b) of the Juvenile Justice System Ordinance, 2000 her trial was separated from the trial of the other two appellants namely Kamal Din and Shahbaz Ahmed.

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There were however common prosecution witnesses and other documentary evidence etc.

3. Prosecution produced complainant Muhammad Nazir (PW-5) who deposed that appellant Shahbaz was on visiting terms with him and his wife, a T.B. patient. Three years back Shahbaz sent her younger daughters to a shop with Rs.20/- for purchasing something while he was away and committed zina with his daughter Asima Bibi. He threatened her that in case she would disclose the act of zina he had committed with her, he would kill her and her father. He also kidnapped her and kept her for three days. He also took her to a midwife for abortion. She gave birth to a male baby who died after 16/17 days. His wife PW.6 Nasim Bibi also deposed that the appellant Shahbaz used to commit zina with Asima Bibi in her absence after turning out other kids from the house. She further stated that in the harvesting season, she along with Asima Bibi went in the field of Shahbaz where he committed Zina bil Jabr with Asima Bibi and she became pregnant. Later on he kidnapped her and detained her for three days. PW.7 Muhammad Yonis deposed that he saw Asima Bibi and Kamal alias Bagga

committing zina in the field. P.W.8 Muhammad Siddique who recorded the FIR on the receipt of complaint and investigated into the matter stated that he went to the place of occurrence and prepared the rough site plan and recorded the statements of PWs and also arrested appellant Shahbaz on 16.10.2002. According to him, Asima Bibi and Kamal Din were found involved in Zina. PW.9 Mirza Maqbool Baig SP who took over the investigation of the case from P.W.8 also found appellant Asima Bibi and Kamal Din involved in the crime. PW.1 Dr.Parvez Zareef medically examined appellant Shahbaz on 17.10.2002 and found him potent. PW.2 Dr. Umm-e-Kalsoom, WMO medically examined Asima Bibi on 18.9.2002 and as per the report of Gynecologist and her observation, Asima Bibi examinee was pregnant for 36 + one week. Other witnesses were formal and need not be referred to. The statement of Mst. Asima Bibi was recorded under section 340(2) Cr.P.C. by the Juvenile Court whereby she exonerated appellant Kamal Din but implicated appellant Shahbaz as the only culprit who had committed Zina bil Jabr with her she adduced no evidence in her defence.

4. Learned trial Court was of the view that either her statement under Section 340(2) Cr.P.C. was to be accepted in its entirety otherwise be rejected outright. This may not be a correct approach in every case and if accepted as a principle will not serve the ends of justice but would lead to gross injustice in many cases. We are aware of made up cases resting on falsehood and concocted stories which are invented so as to exonerate the accused from the crime. Then there are cases, which contain half truth. The Judge should sift the grain from chaff. However, such is not the case presently.

5. According to learned trial Court "the accused Asima Bibi remained mum about the commission of Zina bil Jabr for 8/9 months and it is reasonable to believe that the accused Asima Bibi was a consenting party, as she did not disclose the pregnancy. PW.6 (mother) categorically stated that Asima Bibi became pregnant then accused Shahbaz took away Asima Bibi for 3 days but no such complaint was made to police either by the accused herself or by her parents and that PW.6 did not utter a single word about Zina bil Jabr with appellant Asima Bibi in her absence". What learned trial

Judge further stated was that "if Asima Bibi was not consenting then she would raise any alarm or hue and cry; and that "PW.7 Muhammad Yonis had deposed that he saw appellants Kamal Din and Asima Bibi committing Zina. The report of investigating officer namely Muhammad Siddique PW.8 and Mirza Maqbool Baig PW.9 was also to the effect that they were involved in the commission of Zina bil Jabr".

6. What the learned trial Court failed to see that in her statement made under section 342 she had said that the appellant Shahbaz committed Zina bil Jabr with her twice and threatened that if she disclosed it he would murder her father. Again learned trial Judge completely lost sight of her deposition under section 340(2) Cr.P.C. which is as under:-

"About three years and four months ago accused Shahbaz sent my sister out side with twenty rupees for a shop. Accused Shahbaz pretended as brother of my father and used to come in our house. My mother was in the hospital for getting her medicine. Shahbaz accused committed zina with me in my house forcibly. He also extended threats to me if I disclose to any other person it will cause my and my parent's death. After four months of this occurrence I went in the fields of the accused. We were reaping the wheat crops and at about 12.00 Noon my mother came in to the house to bring back the meal. Again Shahbaz accused committed Zina with me and also again extended the threats to cause my death if I disclose this fact to any person".

7. It is pertinent to note that when the appellant Mst. Asima Bibi made the statement under section 342 Cr. P.C. she was 14 years old and this incident first took place three years back when there was no body in the house except appellant Shahbaz, a friend of her father who had intimidated her, a child of 11 years old that if she told any one about the Zina bil Jabr with her she and her parents will be killed by him. Is not the threat given to her strong enough to refrain her from disclosing the occurrence to her parents and others and could it be said to be free consent for Zina by a child merely because she had attained puberty. No where any reference was made by the learned trial Judge of private complaint filed by her against Shahbaz and petition filed by her against SP/I.O Mirza Maqbool Baig for illegal gratification in the High Court. We accordingly do not find Mst. Asima Bibi guilty of the offence, accept her appeal No.196/L/2005 and set aside her conviction and sentence by Additional Sessions Judge, Ferozewala.

8. With regard to appellant Kamal the only evidence available on record is the deposition of P.W.7 which is not only vague but contradictory. According to him he saw appellant Asima going towards village whereas he

saw Kamal going towards north. They both emerged from jungle. Kamal asked him not to narrate whatever he saw (committing zina). In cross-examination he admitted that he was a relative of appellant Shahbaz but denied that he wanted to save him. He lived 2 ½ furlongs from the village Khana Lubana and stated nowhere as to why he had gone there. Neither the parents of Asima nor she herself came out with any allegation of zina against him. In fact Asima had categorically exonerated him in her statement under section 342 Cr.P.C. and denied in her cross-examination under section 340(2) Cr.P.C. that he committed zina with her. There is not only in-sufficient but also unreliable evidence against him. As per his 342 Cr.P.C. statement Asima was like his daughter. His name also does not appear in FIR. Again we regretfully state that the learned Additional Sessions Judge did not apply his mind and in ignorance or haste convicted him. Accordingly we accept criminal appeal No.192/L/2005 filed by appellant Kamal and set aside his conviction and sentence awarded by the said trial Judge at Ferozewala.

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9. While dealing with criminal appeal No.199/L/2005 filed by appellant Shahbaz Ahmad, his counsel impugned the judgment of the trial court on two counts, firstly there was delay of seven or eight months in filing F.I.R. and secondly there were material contradictions and improvements in the deposition of P.W.5 Nazir and P.W.6 Nasim Bibi, the parents of the victim. Keeping in view the background both the contentions raised by him are explainable. Appellant Shahbaz was a friend of Asima Bibi's father and a regular visitor to the house. He betrayed the trust of friendship reposed in him by her father and other family members. Prosecution story vide PW5 and PW.6 supported by the victim is that one day he committed Zina bil Jabr with Asima Bibi after he managed to send out other children of the family to buy some thing from market, while PW.5 (father) had gone to his job and PW.6 (mother) was admitted in hospital. Against this back drop this heinous crime was committed by him on the 11 years daughter of his friend P.W.5 threatening her that if she told any body about it he would kill her and her parents. He continued to do so afterwards as well and Asima Bibi succumbed to his blackmailing and threat till she became pregnant and told

what had happened to her mother. It is true that improvements were made over and above the facts as narrated in F.I.R as by and by new facts came into light, therefore, the complainant P.W.5 made a supplementary statement which relates to similar offence committed by appellant Shahbaz on a different occasion (s) with Asima Bibi. P.W.2 Dr.Umme Kulsoom who had examined Asima Bibi the next day of lodging of F.I.R viz.18.9.2000 had also recorded her statement in the report that she was raped about five months back in June,2000. P.W.1 Dr.Parvez Zareef also found appellant Shahbaz potent.

10. Without casting aspersion on the legal acumen of the learned Additional Sessions Judge Ferozwala, we are of the view that the case of appellant Shahbaz Ahmad is a case of zina-bil-jabr and clearly falls under section 10(3) of the Ordinance.

11. Now reverting to criminal revision No.69/L/ of 2005 filed by complainant Muhammad Nazir P.W.5 praying for maximum punishment to appellant Shahbaz Ahmad, learned counsel for the complainant Mian Nazir Ahmad urged before us that the appellant had committed a heinous offence

and destroyed the life of his 13 years old daughter and due to the offence also gave birth to a child. It was further contended that there were no mitigating circumstances to justify a much lesser punishment for six years R.I and fine of Rs.20,000/-. We fully agree with him and allow his revision petition for enhancement of sentence of Shahbaz Ahmad for reasons recorded above.

12. Resultantly while allowing criminal appeal No.192/L/2005 filed by Kamal Din alias Bagga and criminal appeal No.196/L/2005 filed by Mst.Asima Bibi and also criminal revision No.69/L/2005 filed by Muhammad Nazir, we dismiss the criminal appeal No.199/L/2005 filed by Shahbaz Ahmad. Accordingly we direct the jail authorities to release appellants Kamal Din alias Bagga and Mst. Asima Bibi forthwith if not required in any other criminal case. Further we modify the impugned judgment dated 18-5-2005 whereby the appellant Shahbaz Ahmed was convicted and sentenced under section 10(2) of the Ordinance for 6 years R.I. and fine of Rs.20000/- by the learned Additional Sessions Judge,

Cr.A.No.192/L/2005
Cr.A.No.196/L/2005
Cr.A.No.199/L/2005

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Ferozewala to 15 years R.I. and fine of Rs.40000/- failing which he will
undergo 6 months S.I, with benefit of section 382-B, Cr.P.C.

Announced in

Court today

12/5/07

Justice Haziqul Khairi
JUSTICE HAZIQUL KHAIRI
Chief Justice

Justice Salahuddin Mirza
JUSTICE SALAHUDDIN MIRZA

Announced on 11-5-2007

Announced in reporting

12/5/07

11/5/07