

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO. 249/L OF 2006

Muhammad Iqbal son of Qutab, caste Jat, aged 25 years, resident of Chak No.5/11.L, Police Station Harappa Katchi Abadi (Railways), Tehsil & District Sahiwal.

.... Appellant

VERSUS

The State

..... Respondent

Counsel for appellant	---	Mr. Muhammad Shoaib Khokhar, Advocate
Counsel for the State	---	Mr. Arif Karim Chaudhry, DPG
F.I.R No. Police Station & District:	---	490/2003, dated 11.12.2003 Harappa (Sahiwal)
Date of Judgment of the Trial Court	---	03-08-2006
Date of Institution	---	25.09.2006
Last date of hearing	---	23-07-2009
Date of Decision	---	23-07-2009

JUDGMENT:

SYED AFZAL HAIDER, JUDGE:- Through this criminal appeal

Muhammad Iqbal appellant has assailed the judgment dated 03.08.2006

delivered by learned Sessions Judge, Sahiwal in Hudood Case

No.281/SJ of 2004, Hudood Trial No.46/SJ of 2004, whereby he was

convicted under section 10(3) of the Offence of Zina (Enforcement of

Hudood) Ordinance VII of 1979 and sentenced to 4 years simple

imprisonment with compensation of Rs.10,000/- to be paid to the victim

Mst.Kaneez Bibi, in default whereof to further undergo 04 months'

simple imprisonment with benefit of section 382-B of the Code of

Criminal Procedure.

2. This case arose out of a crime report Ex.PD dated

07.11.2003 moved by Mst.Kaneez Bibi, who instead of becoming a

complainant was arrayed as an accused. Her information was registered

as F.I.R.No.490/2003 Ex.PD/1, under section 10 of the Offence of Zina

(Enforcement of Hudood) Ordinance VII of 1979, Police Station

Harappa, District Sahiwal on 11.12.2003 in which Mst.Kaneez Bibi, alleged that 1½ months ago she, her sister Mst.Hafeezan and her younger brother Mujahid PW-4 were present in their house. At about 6/7.00 p.m, she went into the nearby cotton crop to answer the call of nature when suddenly Muhammad Iqbal, accused armed with a Pistol appeared at the spot. He put the Pistol, overpowered her on pistol point and threatened her of dire consequences if she resisted. She got scared and kept silent while the accused subjected her to Zina. He extended a threat that he would kill her and her family members if she disclosed about this incident. The complainant further stated that she did not disclose the matter for fear of her life and honour. The accused got emboldened. 7/8 days before the present incident the accused reportedly threatened her as she was passing by. Then again during the night between 21st and 22nd November, 2003, when she got up at about 11.00 p.m, the accused who was hiding somewhere in the house caught her. He gagged her mouth and asked her to go out of the house. She resisted and raised hue and cry. Her brother Mujahid was awakened

and Muhammad Sher came from the adjoining house. On seeing the witnesses the accused left her brandishing his pistol and extending threats of dire consequences.

3. Police investigation ensued as a consequence of registration of the crime report. Local Police at the conclusion of investigation submitted a report under section 173 of the Code of Criminal Procedure against the accused Muhammad Iqbal. Complainant Mst.Kaneez Bibi was also grouped as an accused alongwith the former and both were directed to appear in Court and face trial. The accused were charged on 24.11.2004 under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. He pleaded not guilty and claimed trial.

4. The prosecution produced eight witnesses as well as documentary evidence in order to prove its case at the trial. The gist of oral evidence is as follows:-

- i. Ghulam Abbas appeared on 13.07.2005 as PW-1 and stated that one year back Iqbal accused and Younas PW were

working with him in his agricultural farm. The female accused Mst.Kaneez Bibi visited Iqbal accused a number of times. This witness as well as Younas forbade her but she did not desist. He had seen Iqbal and the female accused in a compromising position in the cotton crop.

- ii. Muhammad Younas appeared as PW-2 to support the version of Ghulam Abbas PW-1 to the extent of Mst.Kaneez Bibi visiting Iqbal accused.
- iii. Sher appeared as PW-3 to state that at about 11.00 p.m he rushed to the spot having heard hue and cry of Mst.Kaneez Bibi who said that a wrong had been done to her. The father of the victim and Mujahid the brother of the victim according to this witness, were also present there. The accused had run towards his house.
- iv. Muhammad Mujahid appeared on 16.11.2005 as PW-4 and stated that about two years ago at about 10/11.00 p.m his sister Mst.Kaneez Bibi came out of the room to ease herself.

She started raising hue and cry and he rushed to the place of occurrence. Iqbal the accused armed with pistol tried to catch hold of Mst.Kaneez Bibi and on seeing him he went away.

v. On 19.02.2004, Dr.Tahir Mehmood, Medical Officer PW-5, examined the accused Muhammad Iqbal and found him fit to perform sexual intercourse.

vi. Lady doctor Shabana Rasool PW-6 examined Mst.Kaneez Bibi and observed as under:-

“There was no mark of physical assault on her body. Her last menstruation period was 26.10.2003. Her secondary sexual characters were fully developed. Vagina & vulva were healthy. Pubic hair were present. There was no fresh tear or bleeding on P/V examination. Hymen was absent. Introitus admits two fingers loosely.”

vii. Manzoor Hussain Head Constable appeared as PW-7 and stated that on the basis of complaint Ex.PD he formally recorded F.I.R Ex.PD/1 without any addition or omission.

viii. Ali Nosha Ex-Assistant Sub Inspector appeared as PW-8 and stated that on 11.12.2003, investigation of the case was

entrusted to him and on the same day he inspected the place of occurrence and prepared its rough site plan Ex.PE. He further stated that all the drawings and notes on the site plan were in his hand and bear his signatures. He also recorded statements of two prosecution witnesses under section 161 of the Code of Criminal Procedure. He further submitted that accused joined investigation on 12.02.2004 during interim pre-arrest bail and after cancellation of his pre-arrest bail on 13.02.2004 the accused Muhammad Iqbal was arrested by him. This witness also stated that on 19.02.2004 he got the accused Muhammad Iqbal medically examined from the doctor. He added that on 18.02.2004 he had recorded the statements of two witnesses and added the offence under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. At the end he stated that on 20.02.2004 he declared the accused Muhammad Iqbal and Mst.Kaneez Bibi guilty and recommended their trial.

5. Statement of the accused under section 342 of the Code of Criminal Procedure were recorded on 16.06.2006 after the prosecution evidence had been closed. Iqbal accused denied the allegations levelled against him. Since Mst.Kaneez Bibi has already been acquitted by the learned trial Court so her statement is not being reproduced. However, she implicated Muhammad Iqbal co-accused in her statement. She almost endorsed the contents of her original complaint. Appellant Muhammad Iqbal in reply to the question as to "Why this case against you and why the PWs had deposed against you", stated:-

"It is a false case. The PWs are inimical towards him and have made false statements against me."

6. After completing the codal formalities of the trial the learned trial Court returned a verdict of guilt against the accused who was convicted and sentenced as indicated in the opening paragraph of this judgment. Hence this appeal.

7. The reasons that prevailed upon the learned trial Court to record conviction may be detailed as follows:-

i) That the complainant Mst.Kaneez Bibi had lodged the complaint and the Police wrongly changed her status from a complainant to an accused;

ii) PW-2 Muhammad Younis had stated that Iqbal accused had committed Zina bil Jabr with Mst.Kaneez Bibi. Rape was fully proved "inasmuch as a female child was born to the virgin complainant" and

iii) Iqbal accused, in fact admitted the charge because in cross- examination the Investigating Officer, PW-8 admitted that he had written the statement of witnesses correctly.

8. I have gone through this file. I have perused the evidence of the witnesses of the prosecution as well as statement

of the accused. The relevant portions of the impugned judgment have also been scanned.

i) There is a delay of one and a half months in making the report to the Police.

ii) PW-4 is the real brother of the victim. He states that he saw the accused holding her sister while PW-1 states that he had seen the victim and the appellant in a compromising position.

iii) PW-2 Muhammad Younis does not allege Zina either. In fact he, in response to a pointed question put to him during his cross-examination, stated plainly that he had not seen Mst.Kaneez Bibi and Iqbal committing Zina with each other. The learned trial Court has certainly misread the deposition of PW-2.

iv) PW-3 says that he heard hue and cry of Mst.Kaneez Bibi and reached the site when the victim was crying that a wrong had

been done to her. He is not an eye witness of the occurrence.

Zina has not been attributed by this witness.

- v) Solitary assertion of the victim, who was arrayed as an accused, is available on the file in the form of a statement recorded under section 342 of the Code of Criminal Procedure on 16.06.2006. She did not avail the opportunity provided under section 340(2) of the Code of Criminal Procedure to make an incriminating statement on oath, against the accused. She alone has alleged Zina to her co-accused the present appellant. Except this statement of the co-accused there is no evidence whatsoever on record to connect the appellant with the offence charged.
- vi) I have carefully perused the statement and in particular the cross-examination of Investigating Officer PW-8. The observation of the learned trial judge about the charge having been admitted by the accused is nowhere even hinted in the statement of PW-9. The learned trial Court has erred in

arriving at conclusions which have no nexus with the material on record.

9. Learned Deputy Prosecutor General, however, supports the judgment and states that the accused was seen lastly by PW-3 and PW-4 after the commission of the offence. It is further argued that PW-3 and PW-4 also stated that the accused had fled away from the scene by extending threats and a pistol was in his hand.

10. On a Court question whether any pistol was recovered the learned Deputy Prosecutor General replied in the negative and stated that non recovery of pistol was not substantial. On another Court question whether a person can be convicted on the ground that the witness saw him fleeing, the learned Deputy Prosecutor General stated that the conviction would be possible though he has no precedent to support his contention.

11. The learned trial Court in paragraph 25 of the impugned judgment adverted to the statement of co-accused Mst.Kaneez Bibi, wherein she alleged Zina to Iqbal accused. As stated above, the co-accused

did not make a statement on oath. She was not subjected to cross-examination by Iqbal accused. It is an established principle of law that statement of an accused recorded under section 342 of the Code of Criminal Procedure cannot be treated as legal evidence against the co-accused. Such an incriminating statement is not put to the affected accused. He is not afforded an opportunity to explain the allegation or to say whether he admits or denies the allegation levelled against him.

12. The learned trial Court, in paragraph 25 of the impugned judgment observed that "rape was fully proved inasmuch as a female child was born to the virgin complainant." I have gone through the contents of F.I.R Ex.PD/1. I have also scanned the pages of report sent by Police under section 173 of the Code of Criminal Procedure. The statement of Mst.Kaneez Bibi recorded without oath has also been perused. I have gone through the statement of two alleged eye witnesses PW-3 Sher and PW-4 Mujahid, real brother of the victim. I have also considered the statement of Lady Doctor Shabana

PW-6. No one has stated that there was a pregnancy or a child-birth as a result of rape committed on or around 01.10.2003 upon unmarried Mst.Kaneez Bibi. In fact the lady doctor affirmed that her last menstruation period was 26.10.2003. This factor alone rules out the element of pregnancy before 26th October, 2003. Moreover, the victim, at the time of her medical examination, never alleged pregnancy as a result of Zina by accused. There is no evidence of pregnancy or child birth on the record. The observation of learned trial Court is certainly misconceived and merits reversal. Since there is no allegation of rape after 01.10.2003 so if there was pregnancy later on the learned trial Court should have instead taken it a point that negated her allegation qua the appellant. It may also be mentioned that father of the victim did not appear at the trial. He could have testified to the fact of pregnancy and child birth. In reply to a question PW-2 had stated that Mst.Kaneez lodged F.I.R after she had become pregnant. The witness categorically stated that he had not seen both the accused committing Zina with each other,

13. I am afraid the prosecution has to stand on its own legs. There is no incriminating material on the file against the accused to support his conviction. Learned Deputy Prosecutor General also could not offer any plausible explanation to the various points including the inferences that could be drawn from the deposition of Lady Doctor PW-6 particularly about the last menses and the date of alleged Zina bil Jabr. Appraisal of evidence means weighing evidence that has been legally brought on record of the case. There is no evidence at all in this case. There is nothing that could be weighed except going through the impugned judgment based upon conjectures. The victim did not appear as a witness. Though an accused yet she could opt to make a statement on oath under section 340(2) of the Code of Criminal Procedure. No eye witness has come forward. Her allegation is not supported by medical evidence. The presumption of innocence of accused, under the circumstances, persisted throughout the trial.

14. In this view of the matter, it is not possible to maintain the conviction and the sentence of the appellant. Under the circumstances I

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set aside the impugned judgment. dated 03.08.2006. Criminal Appeal No.249/L of 2006 is accepted. Appellant is acquitted. He is present in the Court on bail. His surety is relieved of the liability of the bonds.

Syaid

Justice Syed Afzal Haider

Announced at Lahore on 23.07.2009

Fit for reporting.

Syaid

Justice Syed Afzal Haider

Amjad*