

(14)

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE DR.FIDA MUHAMMAD KHAN
MR.JUSTICE ABDUL WAHEED SIDDIQUI
MR.JUSTICE MUHAMMAD KHIYAR

CRIMINAL APPEAL NO.10/I of 1996
JAIL CRIMINAL APPEAL NO.16/I of 1996

1. Qayyum Khan son of Aman Khan r/o Sangri, P.S Aloach, District Shangla;
2. Mst.Farakh Naza daughter of Gul Amber r/o Sangri, P.S Aloach, District Shangla;

... Appellants

Versus

THE STATE

... RESPONDENT

Counsel for the appellants

... Mr.Fiaz Ahmad Khawaja, &
Dr.M.Aslam Khaki, Advocates

Counsel for the State

... Mr.Khalid Khan, Advocate

FIR No., Date & Police Station

... 38, 5-6-1993, Aloach, Shangla

Date of order of trial court

... 3-1-1996

Dates of institution

... 17-1-1996, 24-1-1996

Date of hearing

... 7-5-1997

Date of decision

... 12-7-1997

JUDGMENT:

DR.FIDA MUHAMMAD KHAN,J.- Both these appeals, one filed by Qayyum Khan son of Aman and the other jail criminal appeal filed by Mst.Farakh Naza daughter of Gul Amber, both residents of Sangri, Police Station Aloach, District Shangla, are directed against the judgment dated 3-1-1996 passed by the learned Additional Sessions Judge Swat whereby, finding them guilty for committing zina with consent, he has convicted them respectively under sections 10(2) and sec.5 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, hereinafter called as the said Ordinance, and sentenced them accordingly. He has sentenced the appellant Qayyum Khan to seven years R.I., whipping numbering 30 stripes and a fine of Rs.5000/- or in default of payment of fine to further undergo one year R.I. Mst.Farakh Naza appellant has been awarded hadd punishment of whipping numbering hundred stripes subject to confirmation by this Court, where for a Reference has been duly made.

2. Briefly stated the case of prosecution in FIR Ex. PA recorded on the statement of Mst.Farakh Naza at P.S Aloach on 5-6-1993 is to the effect that, nine months prior to the lodging of report, she was subjected to zina by Qayyum Khan appellant/accused who kept on committing zina with her

thereafter also. Resultantly she got pregnant. The

contents of said FIR read as mentioned hereinunder:-

" مستعینہ بالا بہ ہمراہ والد اش ، برادر اش لال بر بوقت صدر

بجے تھانہ آکریہ قائمی درست ہوش و حواس رپورٹ کرتی ہے ،

کہ عرصہ ۸/۹ ماہ قبل تاریخ و وقت نامعلوم میں اپنے عوجل میں

مال مویشیوں کو چارہ ڈالنے کے لئے گئی تھی کہ میرے پیچھے

مسمی قیوم خان ولد آمان خان سکنا دیہہ ام آکر مجھے پکڑ کر

اسی عوجل میں میرے ساتھ زنا کیا - میں غیر شادی شدہ ہوں -

جبکہ قیوم خان بھی غیر شادی شدہ ہے - اس کے بعد قیوم خان

مذکورہ مسلسل میرے ساتھ زنا کرتا رہا - میں نے اس سے کہا

تھا کہ اگر میں حاملہ ہوئی تو کیا بنے گا - تو اس نے کہا کہ

میں تمہارے ساتھ شادی کروں گا - اس کی مسلسل زنا کی وجہ سے

میں حاملہ ہو چکی ہوں - چونکہ میرا والد قیوم خان اور تمام

قوم کا حجام ہے - بہ وجہ ڈر کے ماریے بھی کچھ انتشار نہیں کر

سکتی ہوں - میرے ساتھ زنا کرنے اور حاملہ ہونے کا برخلاف

قیوم خان والد آمان خان سکنا دیہہ ام دعویدار ہوں -

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At the time of lodging the said report Ex.PA, she was accompanied by her father and brother who fully corroborated the contents of her report. The contents were read over to her in Pashtu language. In token of its correctness she thumb marked the same. The said statement Ex.PA was recorded by Ajab Din IHC. Thereafter he started search for Qayyum Khan accused but could not trace him out. He got Mst.Farakh Naza medically examined through P.W.3, lady Dr.Farhat Saadullah. In the light of medical report Ex.PW3/1, Ajab Din IHC (P.W.8) found her an accused and sent her to judicial lock up. Lady Dr.Farhat Saadullah (P.W.3) medically examined Mst.Farakh Naza on 6-6-1993 at 12.30 noon and made the following observations:-

"Mark of identification:- Black mole near outer end left eyebrow. She is pregnant - about 9 months. FHT - 36 F, FHs - Positive. Head-free. For confirmation of dates - advised USG. Last Menses Period - 3-9-1992"

Necessary proceedings for the arrest of accused Qayyum Khan were carried out under the provisions of section 204 Cr.P.C. and thereafter under section 87 Cr.P.C. by P.W.5 Abdul Wahab constable and P.W.4 Amir Afsar SI/SHO. Subsequently he was arrested on 25-12-1993 by P.W.7 Sherzada ASI. Later on complete supplementary challan was submitted by P.W.7-A Fazale Subhan SI/SHO, on 29-12-1993, against the appellant Qayyum Khan to face the trial.

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3. At the trial the prosecution examined nine witnesses in all. P.W.1 is Gul Amber who is father of Mst.Farakh Naza accused. He deposed that her daughter told him that she was pregnant due to illicit relations with Qayyum Khan. Thereafter he took her to the Police Station where she lodged the report in his presence. The same report was also thumb- impressed by her. He added that he was hajjam by caste and the accused Qayyum Khan was his 'Naikan'. P.W.2 is Molvi Bahawal Haq, Pesh Imam of Sangri. About 10/11 years back he performed nikah, in the baithak of Ghulam Sarwar, of Mst.Farakh Naza daughter of Gul Amber with Gul Zamin Shah in lieu of dower amount of Rs.7000/-. Out of the same amount Rs.1000/- were paid on the spot to Gul Amber. He added that many persons were present including Mehtab Khan and Mahirun Khan and that the nikah was performed on behalf of Mst. Farakh Naza by her father as, at that time, she was minor. P.W.3 is lady Dr.Farhat Saadullah, Medical Officer, who conducted medical examination of Mst.Farakh Naza on 6-6-1993. Her report Ex.PW3/1 has been referred to hereinabove. P.W.4 Amir Afsar SI/SHO and P.W.5 Abdul Wahab constable are formal witnesses who completed the proceedings under the provisions of section 204 and 87 Cr.P.C. against the accused Qayyum Khan who was not traceable

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inspite of search. P.W.6 is Lalber. He is brother of Mst.Farakh Naza accused. He stated that her sister used to go to the cattle shed. He came to know through his brother Lalzada that his sister has conceived. On his enquiry Mst.Farakh Naza told him that she had conceived as a result of cohabitation by Qayyum Khan accused. He informed his father. As Qayyum Khan accused had committed forcible zina with Mst.Farakh Naza on promise of contracting marriage with her, he collected elders of the village and sent them to Aman Khan father of Qayyum Khan appellant/accused four times. However, Aman Khan refused. He stated that Qayyum Khan accused was prepared to marry his sister but, giving threats to kill him, his father abstained him to do so. Thereafter Aman Khan asked his father to report the matter. In this connection a quarrel took place. They were beaten and they ran away from the village during the night. He added that Aman Khan abstained his son from marrying Mst.Farakh Naza on the ground that they belonged to respectable strata of society whereas Mst.Farakh Naza belonged to barber's profession. Thereafter his father and his sister made a report in the Police Station. He requested the Court to ask Qayyum Khan to marry his sister or to convict both of them accordingly.

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P.W.7 is Sherzada ASI. On 25-12-1993 he got Qayyum Khan accused medically examined and also recorded his statement under section 161 Cr.P.C. on 27-12-1993. P.W.7-A is Fazale Subhan SI/SHO. He submitted challan on 12-8-1993, Then after the arrest of Qayyum Khan accused he submitted supplementary challan on 29-12-1994. P.W.8 is Ajab Din IHC. He recorded the FIR Ex.PA on the statement of Mst.Farakh Naza who was also accompanied by her father Gul Amber and brother Lalzada who thumb marked the same. He searched Qayyum Khan accused in his house but did not find him. He found Mst.Farakh Naza accused involved in this case, He got her medically examined. In the light of medical report he sent her to judicial lock up. He entrusted the case for investigation to SHO. P.W.9 is Gul Zamin Shah. He deposed that his nikah was performed with Mst.Farakh Naza but the rukhsati had not taken place and she had been living with her father Gul Amber in village Sangri, P.S Aloach, District Swat. He further stated that Aman Khan r/o Sangri, father of Qayyum Khan accused, had approached him in his village Lahore, District Swabi, and had offered him to accept money and give a statement that Mst.Farakh Naza had been subjected to sexual intercourse by him, so that his son may escape and the case is settled. However he declined

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to do so.

4. The appellant/accused Qayyum Khan made a statement under section 342 Cr.P.C. wherein he denied the allegation of commission of zina with Mst.Farakh Naza and stated that he did not know her. He attributed the pregnancy of Mst. Farakh Naza to her husband Gul Zamin Shah. Regarding his abscondence, he explained that during the days of occurrence he was in Karachi and did not know about the case against him. On his return, he came to know about the case against him and he surrendered himself to the police. In reply to a question "Why the PWs have deposed against you"? he stated that he had been implicated in the case at the instance of one Malik Aman alias Malkay r/o his village who was their political opponent and belonged to pakhtoon tribe. He also added that Mst.Farakh Naza alongwith her father and brother lived in his kotha, were barbers by profession and served him accordingly. In reply to another question he added that he was innocent and was falsely implicated in the case on account of political differences with and connivance of Malik Aman. He declined to make a statement on oath in disproof of the allegation levelled against him. He also produced no evidence in defence.

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5. The appellant/accused Mst.Farakh Naza also made a statement under section 342 Cr.P.C. wherein she stated that she was unmarried and during the days she was living with her father Gul Amber in village Sangri. Replying to various questions put to her regarding her sexual intercourse with Qayyum Khan accused, she admitted that first of all she was subjected by Qayyum Khan accused to forcible zina in the cattle shed as at that time her uncle had expired and there was none else in the house. However on account of the promise of Qayyum Khan accused to marry her subsequently, she kept on committing zina with him wilfully. She stated that she had conceived on account of commission of zina by Qayyum Khan accused. Then she informed her mother who disclosed the matter to her father and brother and they sent jirga to the father of accused. Thereafter maternal uncle of Qayyum Khan namely Qimat Khan and others attacked them and gave beating to her father and brother whereupon she reported the matter to the police. She admitted that she had given birth to a son in jail who expired after five months inside the jail. She stated that the father of Qayyum Khan belonged to pakhtoon tribe and was a rich man whereas she was daughter of poor barber. While responding to question No.11 she reiterated her aforementioned stand with further

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details. Three other statements under section 342 Cr.P.C. made by her to the same effect were also recorded which were followed by her statement under section 340(2) Cr.P.C. which is reproduced as under :-

” بیان مسماة فرح ناز دختر گل عنبر بعمر ۱۸ سال ساکن سانگڑے تھانہ الوج ، ضلع شانگلہ - برحلف زیر دفعہ (۲) ۳۳۰ ضف میں اللہ تعالیٰ کی قسم کھا کر کہدیتی ہوں کہ میں سچا بیان دونگی - میرے چچا جسکھام حضرت اکبر تھا کا انتقال ہوا تھا - میرے ماں باپ اور دیگر اہل خانہ اسکے ہاں گئے تھے - اور میں گھر میں اکیلی تھی - میں اپنے مویشیوں کو گھاس ڈالنے کی غرض سے اپنی محوجل (مویشی خانہ) چلی گئی - ملزم قیوم اس دوران وہاں آیا - اور اسنے زبردستی میرے ساتھ بدفعلی کی - بعد میں بھی ملزم قیوم مجھے نہیں چھوڑتا تھا - اور چونکہ میرے برادران غریب مزدوکار ہیں - اس لئے جب بھی وہ مزدوری کے سلسلے میں گھر سے باہر ہوا کرتے تھے اور میں گھر میں اکیلی ہوا کرتی تھی - تو ملزم قیوم ہمارے گھر آتا اور مجھے یہ کہہ کر میرے ساتھ زنا کرتا تھا کہ وہ مجھ سے شادی کریگا - اور یہ کہ میں اسکی بیوی ہونگی - بعد میں جب مجھے حیض آنا بند ہوا تو میں نے قیوم کو مطلع کیا جس نے کہا کہ میں بے فکر رہوں - اور یہ کہ وہ مجھے نکاح میں لے گا - اس نے ساتھ مجھے دھمکی دی کہ اگر میں نے گھر میں کسی کو اس بارے میں کچھ بتایا تو وہ مجھے بھی قتل کرے گا اور میرے بھائیوں کو بھی نہیں چھوڑے

گا۔ ۸/۹ ماہ بعد ملزم قیوم کراچی چلا گیا۔ تو میں نے اپنی ماں کو واقعات سے آگاہ کیا۔ چونکہ میرا والد دل کا مریض تھا۔ لہذا میری والدہ نے اسے اس واقعہ کے بارے میں فوری طور بتانا مناسب نہیں سمجھا۔ بلکہ میرے بھائی کو بتایا، جس نے بعد میں میرے والد کو آگاہ کیا۔ میرے والد نے بتایا کہ اگر وہ غریب نہ ہوتا تو وہ مجھے اور قیوم دونوں کو زندہ نہ چھوڑتا۔ تاہم اس نے کہا کہ چونکہ میں بھی غیر شادی شدہ ہوں اور لڑکا بھی غیر شادی شدہ ہے۔ لہذا اس نے ملزم قیوم خان کے والد آمان خان کے پاس جرگہ بھیجا۔ جب جرگہ واپس ہوا تو ملزم قیوم کے ساموں نے میرے والد اور بھائیوں کو قومی مجریے میں بلایا اور قیمت خان اور ملزم کے دیگر تمام رشتہ داروں نے میرے والد اور بھائیوں کو خوب زن کوب کیا۔ اور ان کو پتھر اور اینٹیں ماریں۔ گاؤں کے لوگوں نے میرے والد اور بھائیوں کو اپنے گھر لا کر بند کیا تو قیمت خان وغیرہ نے ہمارے گھر پر پتھر برسائے شروع کئے۔ جس پر گاؤں کے ایک خان فیض اللہ خان نے ان کو کہا کہ یہ کوئی علاقہ غیر تونہ ہے۔ چنانچہ وہ لوگ منع ہو گئے۔ تاہم وہ کہہ رہے تھے کہ ہمارا ان سے پوچھنے والا کون ہے۔ میرے بھائی رات کے وقت گھر سے باہر چلے گئے اور انہوں نے رات باہر کہیں گزاری۔ میں اور والد بھی گھر سے باہر چلے گئے، جب کہ میری والدہ اور بھابھیاں گھر میں رہ گئیں۔ میں اور میرا والد رات کو سفر کرنے کے بعد صبح تھانہ آلوچ پہنچے۔ ہم پہاڑی راستوں سے ٹر کے مارے تھانے پہنچے تھے۔ میں نے تھانہ میں رپورٹ کی۔ میری رپورٹ کے بعد ایس ایچ او نے ملزم کے والد آمان خان

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کو تعانتے بلایا۔ اس کے ساتھ صاحب داد خان اور اجمیر خان عرف ڈھیری ملک بھی تھے۔ آمان خان وغیرہ نے میرے والد کو بتایا کہ ہم ریتوری تحصیل چلیں گے۔ انہوں نے ہمیں اپنے ساتھ جیب میں بٹھایا۔ اور جب ہم بیخ تنگی پہنچے تو وہاں میرے والد کا دل غراب ہونے لگا۔ جس پر آمان خان نے اسے بہانے سے نشے کی گولیاں کھلائیں۔ چنانچہ وہ نشے میں پڑ گیا۔ آمان خان وغیرہ ہمیں بونیرے لیے گئے۔ اور وہاں ہم نے ملزم قیوم کے رشتہ دار کے ہاں رات گزاری۔ میرے والد نے ان سے پوچھا کہ ہمیں وہاں کیوں لیے جایا گیا تو آمان خان نے میرے والد کو یہ کہہ کر ورغلیا کہ چونکہ عید نزدیک ہے۔ لہذا میں وہاں عید گزاروں گی۔ اور عید کے بعد وہ سب دوبارہ بونیر آ کر حالات ٹھیک کریں گے۔ دراصل آمان خان کا ارادہ تھا کہ وہ مجھے بونیر میں قتل کرنے کے بعد میرے والد اور بھائیوں سے کہے گا کہ میں کسی دوسری جگہ بھاگ گئی ہوں گی۔ آمان خان وغیرہ اور میرا والد بونیر سے گاؤں کی طرف روانہ ہوئے۔ میرے بھائیوں کو اس بات کا علم نہ تھا کہ مجھے اور والد ام کو تعازالو بلج سے بونیر لیے جایا گیا ہے۔ تاہم جب ان کو ہماری عدم موجودگی کا علم ہوا تو وہ ہماری تلاش میں گاؤں سے نکلے۔ منگورہ میں آمان خان وغیرہ ان سے ملے تو میرے بھائیوں نے آمان خان وغیرہ سے میرے بارے میں پوچھا۔ آمان خان نے لاعلمی ظاہر کی۔ چنانچہ میرے بھائی نے منگورہ تعانہ میں رپورٹ کی۔ جہاں آمان خان نے بتایا کہ وہ مجھے بونیر چھوڑ آئے ہیں۔ اس پر صاحب زادہ اور ملک بہادر کو میرے بھائی کے ساتھ ہمراہ کر کے بونیر میرے

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پاس بھیجا یا گیا۔ اور وہ وہاں سے مجھے منگورہ لے آئے۔ وہاں
 ایس ایچ او نے ہدایت کی کہ ہمیں عید کے لئے گھر جانے دیا جائے۔
 اور عید کے بعد اتوار کے دن ہمیں دوبارہ تعانہ کو آنے کو کہا۔
 چنانچہ ہم گاؤں چلے گئے۔ چونکہ میرے بھائی فریب تھے اور مجھے
 ڈر تھا کہ وہ میری حفاظت نہیں کر سکیں گے۔ لہذا میں نفرا گل
 خان کے ہاں چلی گئی۔ جہاں عید گزارنے کے بعد اتوار کے دن میں
 تعانہ آج آئی۔ اور وہاں دوبارہ میں نے اپنی سابقہ رپورٹ
 دہرائی۔ میں نے تعانہ میں بتایا کہ میرے بھائی فریب لوگ ہیں۔
 اور میری جان کو خطرہ ہے۔ لہذا مجھے جیل بھیجا یا جائے۔ لہذا
 مجھے سیدو شریف لایا گیا۔ جہاں میرا ڈاکٹری ملاحظہ ہوا۔ اور
 وہاں سے مجھے جیل بھیجا یا گیا۔ جیل میں میرا بچہ پیدا ہوا۔
 اور وہ پانچ ماہ تک زندہ رہنے کے بعد فوت ہوا۔ فیوم خان
 سات ماہ تک مفرور رہا اور سات ماہ بعد اسے جیل لایا گیا۔
 جیل سے وہ پندرہ دن کے بعد رہا ہو گیا چیکہ میں تین سال سے
 اس کی وجہ سے جیل میں ہوں۔ اگر مجھے علم ہوتا کہ فیوم مجھے
 اس طرح دھوکہ دے کر کراچی بھاگے گا تو میں اس کا پیچھا نہ
 چھوڑتی۔ فیوم نے میری زندگی برباد کی ہے۔ اور اسے چاہئے
 کہ وہ میرے ساتھ نکاح کرے۔ اس کے بعد اس کی مرضی ہے چاہے
 مجھے طلاق دیتا ہے یا پھر مجھے اپنے ہی نکاح میں میرے
 بھائیوں کے گھر میں بٹھاتا ہے۔ اگر وہ مجھے قتل بھی کرے
 تو مجھے اعتراف نہ ہے لیکن ایک بار وہ مجھے اپنی بیوی بنا
 لے۔ تاکہ میری عزت بحال ہو سکے۔

6. We have heard the learned counsel for the parties and have perused the record with their assistance. Learned counsel for the appellant/accused Qayyum Khan contended that the learned trial Judge misread the evidence led in the case and hence serious prejudice has caused to the appellant. He submitted that the learned trial Judge fell into a grave error as the required number of witnesses which is a pre-requisite for holding a person to be guilty for zina bil jabr or zina bil raza awarding punishment for hadd or tazir were not available, that according to Islamic Injunctions nobody can be convicted on mere suspicion unless the guilt is proved beyond any reasonable doubt, that it was a case of no evidence and there were inherent doubts visible on record and the appellant may be acquitted to get the benefit thereof, that on filing appeal, Mst. Farakh Naza has virtually retracted her confession and that the impugned judgment is illegal and not sustainable in toto.

7. Dr. Muhammad Aslam Khaki, Advocate, learned counsel for the appellant Mst. Farakh Naza submitted that the case against Mst. Farakh Naza is not maintainable as she had been subjected to zina bil jabr, that all the times she was under the influence of accused Qayyum Khan as he was enjoying a higher status in the village and was

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exercising undue influence upon her. Learned counsel for the State supported the impugned judgment to the extent of award of tazir punishment to both the appellants/accused.

8. We have minutely gone through the evidence on record in the light of submissions made by learned counsel for the parties and have also perused the impugned judgment. It transpires from the record that there is no direct ocular evidence of the commission of zina by Qayyum Khan appellant with Mst.Farakh Naza. However there are abundant circumstances and pieces of evidence that connect both of them with the commission of zina with each other. Mst.Farakh Naza appellant was found by P.W.3 lady Dr.Farhat Saadullah to be having nine months pregnancy. Subsequently, according to her own statement Mst.Farakh Naza gave birth to a male child in the jail who, after surviving for five months, died in the Jail. According to the evidence brought on record by her father Gul Amber (P.W.1), her brother Lalber (P.W.6) and Molvi Bahawal Haq (P.W.2), Mst.Farakh Naza was given in nikah to Gul Zamin Shah (P.W.9), but no rukhsati had taken place and she was living with her father in his house. It is on record that said Gul Zamin Shah(P.W.9), with whom her nikah had been performed, had no approach to her to make cohabitation. He has appeared as a witness and made a statement on oath

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that although Mst.Farakh Naza was in his nikah but consummation had not taken place. In cross-examination he stated that he had not visited village Sangri prior or after the said nikah. He rejected the suggestion that he had gone to village Sangri and had spent a night in the house of his father-in-law and had cohabited with Mst.Farakh Naza. He clarified that about two years before the occurrence he had shifted to Lahor, District Swabi. According to the statements made by Mst. Farakh Naza appellant/accused, four times under section 342 Cr.P.C. and once under section 340(2) Cr.P.C., as referred to above, she had conceived and delivered a child as a result of cohabitation with Qayyum Khan accused. It is her own case that for the first time Qayyum Khan had subjected her to zina bil jabr in the cattle shed but thereafter he had been performing sexual intercourse with her, with her consent. This aspect of her statement is very clear from its contents. In her jail criminal appeal however she has submitted that she was not consenting party to the offence of zina, that she had been forcibly subjected to zina bil jabr and that her alleged confession was not voluntary but she was compelled to make confession. This portion of the appeal is in conflict with her aforementioned inculpatory statements. This retraction on her part can be taken into consideration for removal of hadd



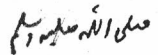
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sentence awarded to her, but can be made basis for tazir, as is being discussed subsequently.

9. Here it seems pertinent to mention that the statements under section 342 Cr.P.C. were made by Mst.Farakh Naza on 25-10-1995. Although the aforementioned statements made four times by her were recorded by the learned Additional Sessions Judge (trial court) in four sittings, it is not clear how those four sittings were constituted by him. Since neither any time has been mentioned on the said statements nor any reference to the same is available in the judgment, it is also not clear, how much time was given to Mst.Farakh Naza for consideration before she was called upon for recording her statements for the second, third and fourth time. Here we may refer to the opinion of an eminent jurist Imam Abu Hanifa who consider it necessary, in the case of zina, to have four separate confessions as four witnesses are necessary for its proof by testimony. (عقوبات : كتاب الحدود ص ٢٨٤ - ٢٨٨ (مكتبة دار الفقه)

الفقه الاسلامي وادلتة : ج ٤ ص ٥٢-٥٤ فتح القدير ج ٥ ص ٨ - ٩)

Both of them based their opinion on a tradition of the Holy

Prophet () related on the authority of father of

Abdullah Ibn Buraida which is reproduced hereinunder:-

" حدثنا عبد الله بن بريدة عن ابيه ان ماعز ابن مالك الاسلمي اتى رسول الله صلى الله عليه وسلم فقا يا رسول الله انى قد ظمت نفسي وزنيت وانى اريد ان تطهرنى فردة فلما كان من الخداتاه فقال يا رسول الله انى قد زنيت فردة الثانية فارسل رسول الله صلى الله عليه وسلم الى قومه فقال اتعلمون بعقله باسا تنكرون منه شيئا فقالوا مانعلمه ، إلا و فى العقل من صالحينا فيما ترى فاتاه الثالثة فارسل اليهم ايضا فسأل عنه فاجبروه انه لابس به ولا بعقله فلما كان الرابعة حفر له حفرة ثم أمر به فرجم "

(شرح صحيح مسلم از علامه ملام رسول سعیدی

حدیث نمبر ۳۳۱۸ ، کتاب الحدود ، باب

حد الزانی ، صفحہ : ۷۷۳-۷۷۵)

"Abdullah b.Buraida reported on the authority of his father that Ma'iz b. Malik al-Aslami came to Allah's Messenger (may peace be upon him) and said: Allah's Messenger, I have wronged myself; I have committed adultery and I earnestly desire that you should purify me. He turned him away. On the following day, he (Ma'iz) again came to him and said: Allah's Messenger, I have committed adultery. Allah's Messenger (may peace be upon him) turned him away for the second time, and sent him to his people saving: Do you know if there is anything wrong with his mind. They denied of any such thing in him and said: We do not know him but as a wise good man among us, so far as we can judge. He (Ma'iz) came for the third time, and he (the Holy Prophet) sent him as he had done before. He asked about him and they informed him that there was nothing wrong with him or with his mind. When it was the fourth time, a ditch was dug for him and he (the Holy Prophet) pronounced judgment about him and he was stoned."

(Sahih Muslim Hadith No.4206 translated by Abdul Hamid Siddiqi, Vol.III)

10. Another significant point worth-mentioning in this

connection is the contents of statements made by Mst.Farakh

Naza under sections 342 and 340(2) Cr.P.C. In all her statements

she has been alleging that for the first time she was subjected

to zina bil jabr by Qayyum Khan appellant/accused but subsequently she surrendered herself willingly for sexual intercourse as he was all the times promising to marry her. Moreover she has also alleged that when her menses stopped she informed Qayyum Khan and he told her not to worry as he will take her in his nikah. However he also extended threats to her that if she disclosed the event to anyone in the house he will kill her and will not spare her brother also. She also alleged that her brothers are poor labourers. The evidence brought on record shows that Qayyum Khan belongs to the upper strata of society and enjoys a higher social status in the village whereas Mst.Farakh Naza belongs to barber's professions and was on very weak footings in their village. Thus the difference in the status of both the appellants must have effected Mst Farakh Naza in surrendering herself to Qayyum Khan under a sort of duress and compulsion. The very fact that subsequently her family members were beaten and expelled from the village by the family members of Qayyum Khan leave no doubt to conclude that they were considered menials and were under the compelling influence of the family of Qayyum Khan. While considering the facts of the instant case these aspects also merit consideration while awarding hadd sentence. These circumstances also provide mitigating basis for taazir.

11. Moreover, it is also noteworthy that by filing an appeal she has retracted her confession and as such this retraction, besides the aforementioned position, by itself also entitles her acquittal from hadd punishment. The Holy Prophet (ﷺ) is reported to have stated as under:-

" اذفعوا الحدود ما وجدتم لها مدفعا "
(سنن ابن ماجه و سنن ترمذى / كتاب الحدود)

"Ward off hadd punishment as far as you can"

In this view of the matter the sentence of hadd punishment awarded to her for commission of zina is not warranted. However, keeping in view the fact that she made four times confessions and that confessions were corroborated in material particulars by her pregnancy as well as delivery to a child, inspite of being unmarried, her conviction under tazir can be recorded. Although in her appeal she has taken the plea that she was subjected to zina-bil-jabr by appellant/accused Qayyum Khan, this does not seem believable in circumstances. Besides her own statement that after commission of zina-bil-jabr for the first time she was subsequently a consenting party to zina, her long silence about the same is strong piece of evidence about her involvement in the commission of zina with the appellant Qayyum Khan with her consent. Her confession does not indicate in any way that the same was made under duress or coercion.

It also does not reveal that the confession was not true. Therefore,

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her voluntary true confession, even if retracted, can be taken into consideration for her conviction under section 10(2) of the said Ordinance. Here it may be pertinent to point out that as per record she has been behind the bars for more than four years.

12. So far as appellant/Qayyum Khan is concerned, there is no direct evidence of commission of zina against him except the statements made by the co-accused Mst.Farakh Naza. The said statements of Mst.Farakh Naza are inculpatory in nature. She has remained very firm on the same during the trial, as observed by the learned trial Court. There is nothing on record to show that this poor unfortunate family was inimical in any way to the 'Khan' family of their village. It is pertinent to mention that although the confession of a co-accused alone cannot make a basis for conviction of another accused, it can be taken into consideration, as contemplated under the provisions of Article 43(B) of Qanoon-e-Shahadat Order, as circumstantial piece of evidence against her/him, as the case may be, and can be made a foundation for award of tazir sentence, provided it is corroborated by other independent evidence. Besides the aforementioned inculpatory statements of Mst.Farakh Naza, duly corroborated by the factum of her pregnancy and delivery to a child, there is the evidence of her brother P.W.6 Lalbar

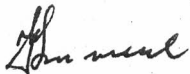
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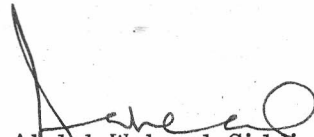
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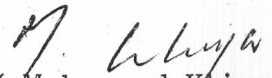
which fully supports her statement. The same position is further confirmed by the abscondance of Qayyum Khan appellant/accused as well as by the evidence of P.W.1 Gul Amber and P.W.9 Gul Zamin Shah, which, inter alia, reveal that the father of Qayyum Khan was keenly interested to murder Mst.Farakh Naza or, failing that, to distort the evidence of involvement of his son in the commission of the offence of zina. However, keeping in view the fact that Qayyum Khan appellant/accused has neither made any confession of commission of zina with Mst.Farakh Naza nor, except the statement of his co-accused, there is any other ocular evidence, he can only be convicted under section 10(2) of the said Ordinance.


13. It may be mentioned that Qayyum Khan appellant/accused is a young man. According to the evidence of prosecution he might have married Mst.Farakh Naza but on account of threats of his father, maternal uncle and other relatives he could not do so. Keeping in view these circumstances, we are taking a lenient view. Consequently, we maintain his conviction under section 10(2) of the said Ordinance but reduce the sentence of his imprisonment to four year R.I. The sentence of fine of Rs.5000/- or in default thereof one year R.I. is also maintained. The sentence of whipping is set aside as no more legally required after the promulgation of Act No.VII of 1996. With this modification in the sentence we dismiss his appeal.

14. We also dismiss the appeal of appellant Mst. Farakh Naza daughter of Gul Amber but alter her conviction to section 10(2), set aside her hadd sentence and instead, keeping in view the clean breast confession as well as the observations made by the learned trial Court about her conduct, we sentence her to imprisonment as already undergone by her. She shall be released forthwith if not wanted in any other case.


(Dr.Fida Muhammad Khan)
Judge



(Abdul Waheed Siddiqi)
Judge


(Muhammad Khiyar)
Judge

Amended

Islamabad, the 12th July, 1997.

Iqbal

Fit for reporting.


(Dr.Fida Muhammad Khan)
Judge