

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR.JUSTICE ABDUL WAHEED SIDDIQUI

Criminal Appeal No.108/I of 1998

Mst.Noshi d/o Appellant
Hameed Butt r/o
H.No.E/74, St.
No.4, Madina Colony,
Walton, Lahore

Versus

The State Respondent

LINKEDWITH

Criminal Appeal No.111/I of 1998

Shamraiz Khan s/o Appellant
Muhammad Afsar, r/o
Hern Gali, Teh & Distt:
Abbottabad

Versus

The State Respondent

Counsel for the Mr.N.A Butt and Sardar
appellants Muhammad Irshad, Advocates

Counsel for the Mr.Rana Fazal-ur-Rehman
State Advocate

FIR No. Date and 152 dated 7-6-1996
Police station P.S Margalla, Islamabad

Date of Judgment of 24-7-1998
the trial Court

Date of Institution
Cr.A.No.108/I/98 5-8-1998
Cr.A.No.111/I/98 8-8-1998

Date of hearing 16-9-1998

Date of Decision 16-9-1998

Ashraf

JUDGMENT:

ABDUL WAHEED SIDDIQUI, J:- Appellants have assailed a judgment delivered by the Court of Additional Sessions Judge, Islamabad on 24-7-1998 whereby they have been convicted under Article 10(2) Offences of Zina (Enforcement of Hudood) Ordinance 1979, hereafter to be referred to as the said Ordinance, and both of them have been sentenced to undergo R.I for 3 years each and to pay a fine of Rs:5000/- each and in default thereof to undergo imprisonment for 2 months S.I each. Both the appellants are given benefit of Section 382-B Cr.P.C. Both appeals arise from the said judgment and are disposed of through this one single judgment.

2. The story of the prosecution in brief is that one Muhammad Azam S.I.P (PW-8) of P.S Margalla, Islamabad was on patrol duty on 7-6-1996 alongwith other personnel of police and came to know _____ through some reliable sources that Zina was being committed at Zeshan Plaza G-8 Markaz, Islamabad. On the basis of permission of Ilaqa Magistrate he entered the house at about 1-30 in the night. None was ready from the public to join as a witness. Due to scorching heat, the window of the house was open. There was a parda on the window. In the light of torch he saw one male and another female totally naked and in the position of the

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commission of zina. One another person was having a bottle of liquor and from that bottle he was drinking the liquor in the glass. The complainant knocked the door and the person who was drinking liquor opened the door who was shown the warrant of search and then the police party entered flat No.4 and asked the male and female to wear their cloths. On enquiry the person who had opened the door gave his name to be Javed s/o Saddique. The male and female who were indulging into zina and were found naked came to be known as the present appellants. After completing memo and necessary investigation all the three persons were arrested and a murasila was prepared which was sent to P.S Margalla district Islamabad, where an FIR was lodged at 1-55 A.M. on 7-6-1996. After having completed the necessary investigation, police challaned all the three persons. Both the present appellants were charged under Article 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 hereafter to be referred to ^{as} the said ordinance to which they did not plead guilty. The third person Javid was also charged under the said Article of the said Ordinance r/w section 34 P.P.C to which he also did not plead guilty.

3. To prove its case prosecution examined 8 witnesses. Dr.Muhammad Naseer (PW-1), has proved the medical examination

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of appellant Shamraiz Khan on 7-6-1996 at 3-00 a.m and his report about this appellant is positive so far as potency is concerned. Azhar Iqbal (PW-2), police constable has proved that on 7-6-1996 he was handed over complaint Ex.PC by Muhammad Azam S.I which was taken by him to P.S Margalla with registration of the case. After registration of the case he obtained a copy of the FIR and returned to the spot and handed over the same to the concerned S.I. On the same day, in his presence the I.O of this case sealed a bottle of liquor into a parcel after obtaining 6/6 ounces from the said bottle for chemical examination. One sample of liquor was obtained from a glass tumbler and made into a sealed parcel which was taken into possession by the S.I. He and Siraj constable signed the recovery memo which is Ex.PD on 18-7-1996. He again joined the investigation of the case when Abdus Sattar Moharrar/ASI of P.S Margalla handed over to him 4 sealed parcels for onward transmission to the office of chemical examiner at Rawalpindi. On the same day, he delivered the said parcel in the office of chemical examiner Rawalpindi but due to some objection raised by the said office, he brought back sample and took the same to PIMS, Hospital, Islamabad. Dr.Naseer of the PIMS, made necessary corrections, and thereafter, he took the same parcels

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to the office of chemical examiner Rawalpindi and deposited the same intact. Abdul Sattar Baig (PW-3), ASI, moharrir, has deposed that on 7-6-1996 Muhammad Azam, SI/IO handed over to him four sealed parcels out of which one was of liquor. He kept the same in custody in malkhana. On 18-6-1996 he handed over the same to Azhar Iqbal, constable, for onward transmission to the office of chemical examiner Rawalpindi intact. Siraj (PW-4) constable has proved recovery memo of liquor Ex.PD which was attested by him. Asadullah Khan (PW-5) constable, has proved being a member of the raiding party led by Muhammad Azam, S.I. He has corroborated the complaint. Dr.Arfa Tabassam (PW-6) medical officer has proved that on 7-6-1996 at 3 A.M she examined appellant Noshi aged about 16/17 years. Salient features of her statement are as under:-

"There was no laceration or abrasion on face or head. Per abdominal examination, no abnormality was detected. Per vaginal examination, valuva and vagina were healthy, No marks of violence, No laceration & tears. Her uterus was in mid position. Hymen was absent. Fprrices were clear. No bleeding or any discharge was noticed. Two swabs were taken (1) High vaginal swab and (2) rectal swab. The swabs were sent to the office of chemical examiner Rawalpindi for detection, of semen. It was an alleged case of rape and the opinion was reserved, awaiting the report of the Chemical Examiner. The medico-legal report Ex.PE is in my hand and bearing my signature. Subsequently, report of chemical examiner

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was received which was handedover to Muhammad Azam S.I on 10.10.1996. The report is Ex.P.F. According to the report of the chemical examiner, the swabs sent to his office were not stained with semen. There was no fresh sign of sexual intercourse. In view of the report of the chemical examiner I am definite that no sexual intercourse was done."

Allah Bakhsh (PW-7), S.I, has proved formal registration of F.I.R Ex. P.C/1 by him on the basis of complaint sent by Muhammad Azam, S.I. Muhammad Azam (PW-8), S.I/complainant and I.O. — has deposed that during the period of his posting as S.I at P.S Margalla, he had received reports that zina is repeatedly being committed in Flat No.4 of Zeeshan Plaza, G-8 Markaz. On 7-6-1996 he got search warrant issued from Ilaqa Magistrate which is Ex.PG. After wards while he was on patrolling duties alongwith his subordinates and reached Zeeshan Plaza, window of the said flat was open. He has further deposed in confirmity with his complaint. After arrest, he took the accused for medical examination. He recorded statements of PWs under section 161 Cr.P.C, and prepared site plan. Two bottles of liquor were recovered from the spot and were sealed. There was some liquor in the glass. He secured the bottles as well as the glass vide recovery memo

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Ex.PD attested by PWs. He handed over the sealed parcels to moharrir for onward transmission to the office of chemical examiner.

In his statement under section 342 Cr.P.C, appellant Shamrez has denied all the specific questions. To question No.5 as to why this case against him and why PWs have deposed against him, he has replied as under:-

"The police arrested us from different places at different time and concocted the story with an ulterior motive."

To question No.6 as to what else he has to say, he has replied as under:-

"I am innocent, I never visited the alleged place of occurrence nor do I know my co-accused. Firstly, the police tried to plan to bottels of liquor against me and subsequently the present case was engineered."

He has declined to be examined on oath, and has not produced any witness in defence.

Appellant Mst.Noshi has also replied on the same lines in her statement under section 342 Cr.P.C.

4. I have heard the learned counsel for appellants and State. The counsel for appellants have contended that inspite of repeated earlier spy information about the commission of zina in flat No.4 of Zeeshan Plaza as admitted by Muhammad Azam (PW-8), complainant-cum-Investigation Officer, he had

not arranged for two or more respectable ~~persons~~ inhabitants of the locality in which the place to be searched was situated to attend and witness the search and this is a clear violation of the mandatory provisions of section 103 Cr.P.C. The statement in the complaint that it was night time and none was ready in the neighbourhood to join as a witness do not exonerate the raiding officer of the police or any other law enforcing agency from mandates created by section 103 Cr.P.C. In this context reliance has been placed on NLR 1998 Cr.241. The principles annunciated therein are clear which are reproduced as under:-

(a) Criminal Procedure Code (V of 1898)---

S. 103. Police should associated some person from public to witness recovery of unlicensed arm. In case of negligence of police to get assistance and presence of some person from public, no weight can be granted to statements of police officers who appear as P.Ws, in such matters of recovery.

(b) Ibid--

S. 103. Association of members of public to witness is required under letter of Supreme Court No.J.P.32/R(S)/88-SCJ, dated 20.8.1990 and letter of Lahore High Court No.17712-Genl/1-G, dated 20.12.1990 addressed to I.G, Police and others.

(c) Ibid---

S. 103. Failure by Police to associate witnesses of public in the case wherein secret information was received by Police before recovery of illicit arms, would warrant conclusion that alleged raid/recovery was planned well in advance due to

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secret information received by Police.

- (d) S. 103. Recovery would be viewed with caution in absence of any explanation as to why witnesses of public had not been associated in recovery proceedings.
- (c) Arms Ordinance (XX of 1965)--
S. 13. Contradictions pointed out and projected in evidence of recovery witnesses who were Police Officials would go to root of prosecution and would be sufficient to set aside conviction/sentence recorded by Special Judge, Suppression of Terrorist Activities."

During cross PW-8, the I.O-cum-complainant has made the

following admissions:

"I did not mention in the complaint Ex.P.C that I had received information about commission of zina in Zeshan Plaza. For the first time, I had received the information of commission of zina in Zeshan Plaza on 1 or 2 June 1996. Likewise, second information was received by me on 3.6.1996. On receipt of second information, I moved an application for issuance of search warrant. I had made the application for issue of search warrant on 6.6.1996. The court of the Ilaqa Magistrate is about 2/300 yards from P.S Margalla. I had obtained the search warrant during the court hours on 6.6.1996. The warrant Ex.P.G is dated 7.6.1996. Due to inadvertence, I has mentioned the issuance date of warrant dated 7.6.1996 but I am definite that the search warrant was obtained during court hours. The application Ex.P.G/1 is dated 7.6.1996 and the same was forwarded by the SHO on the same day. It is correct that the warrant Ex.P.G is addressed to the City Magistrate."

There remains no doubt in the fact that admittedly

an advance information was available with the Investigation Officer one week before the raid. Consequently, I cannot reach at any other conclusion but the one argued by the learned counsel for appellant and do hereby declare that a clear violation of the mandatory provisions of section 103 Cr.P.C. has taken place which is not curable. In this context the following ruling of the apex Court per justice Ajmal Mian, Judge (as he then was) fortifies my conclusion.

Heading (b) of PLD 1997 SC 408 reads as under:

"Criminal Procedure Code (V of 1898)--

S. 103-- Recovery-- Requirement of S.103, Cr.P.C namely that two members of the public of the locality should be Mashirs to the recovery, is mandatory unless it is shown by the prosecution that in the circumstances of a particular case it was not possible to have two Mashirs from the public-- If, however, the statement of the Police Officer indicated that no efforts were made by him to secure two Mashirs from public, the recoveries would be doubtful."

5. Another contention for the appellants which needs consideration is that Ex.PG/1 is an application moved by Muhammad Azam, I.O & complainant, to the City Magistrate, Islamabad praying for the issuance of warrant of search of the alleged place of occurrence. This application appears to have been moved after the raid had already been conducted.

Adrees

The application shows the date as 7-6-1996. When asked about this phenomenon, PW-8 i.e I.O-cum- complainant has replied that due to inadvertance he had mentioned a subsequent date in his application Ex.PG/1 otherwise he was sure that the search warrant Ex.PG was obtained on 6-6-1996 during the Court hours. This piece of deposition of I.O is falsified by the ~~search~~ search warrant Ex.PG itself which bears the seal and signature of the Magistrate Ist class Islamabad and mentions in the end:

"Given under my hand and the seal of the Court this 7th day of June, 1996."

This indicates that the raid and search was conducted first, and only to hoodwink the trial court warrant of search Ex.PG was obtained. later and this was done inspite of prior spy information one week earlier than the raid. It stands proved then that the prosecution is not coming up with the clean hands. It is a rule of prudence that when any person does not come with clean hands to the Court, the court has to deal with such person with caution as there is every possibility of malice and where there is a dint of malicious actions all proceedings become void.

Subee

6. It has also been contended that the warrant of search Ex.PG is mechanical as it is on a cyclostyled proforma and

as such the Magistrate Ist class has not applied his mind nor has he enquired from the applicant as to whether his authority was being used as a tool to hoodwink the trial and appellate Courts with a purpose to mislead the course of justice.

7. So far as the contention regarding non-application of provisions about the issuance of search warrants laid in Cr.P.C on Zina cases is concerned, it is misconceived in the presence of the word "mutatis mutandis " in article 20 (1) of the said Ordinance. Article 20 (1), para 1, of the said Ordinance reads as under:

Kabeer

"The Provisions of the Code of Criminal Procedure, 1989, hereafter in this section referred to as the Code, shall apply, mutatis mutandis in respect of cases under this Ordinance:"

In case the word Zina cases has not been used in/VII-B of Cr.P.C, ^{chapter} due to the introduction of the word mutatis mutandis i.e with necessary changes in article 20 of the said Ordinance, it shall be deemed that search warrants can be issued by the competent authority in the appropriate cases of zina.

7. It has been correctly pointed out that there is a conflict between the following piece of the deposition of Asadullah (PW-5) and the complaint in which it has been claimed that it was 1 A.M

and none from public was ready to join as a witness:

" At the time of raiding two/three public persons also associated us. The said two public witnesses also entered in the room and saw the bed sheets stained."

8. It has also been contended that there is a conflict between the medical evidence and the complaint. Dr.Arfa Tabassam (PW-6) has deposed in clear terms that no sexual intercourse was done. Mohammad Azam (PW-8) on the other hand has deposed:

"I peeped into the room and found that couple was busy in committing zina. They were Shamraiz and Noshi accused now present in court."

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In the presence of negative medical opinion, I hold that the complainant (PW-8) has suffered from some sort of illusion specially when it was a mid-night time.

9. In view of the above discussion, in this case prosecution has not been able to prove the guilt of the appellants beyond reasonable doubts. The benefit of doubt is extended to them and resultantly impugned judgment is set aside. The appeal is accepted. Appellants Shamraiz Khan s/o Muhammad Afsar and Noshi d/o Hameed Butt shall be released if not wanted in any other case.

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(Abdul Waheed Siddiqui)
Judge

Approved for reporting

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Islamabad, the
16th November, 1998.
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