

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SHAHZADO SHAIKH
MR. JUSTICE RIZWAN ALI DODANI

CRIMINAL REVISION NO.15/I of 2004

Mst. Nasreen Akhtar d/o Muhammad Iqbal ... Appellant
Caste Mair Minhas, r/o Dhok Harrar, near
Mona, Tehsil & District Chakwal

Versus

1. Hasnain Mehdi s/o Mehdi Hassan, Respondents
caste Sheikh, Proprietor of Anayat
Shoes, Chappar Bazar, Chakwal
2. Khalid Awan s/o Abdul Ghafoor r/o
Mohallah Dhok Feroz, Chakwal
3. Ishaq Hasrat s/o Unknown, Colum
Nigar, Other side Baldia Plaza,
District Chakwal
4. Mukhtar Ahmed, ASI (CIA) Staff District Chakwal
5. Ghulam Ahmed s/o Ghulam Rasool,
Ex-H C Police, r/o Dhok Momin, Chakwal
6. Aziz Ullah @ Till Wala, CIA Staff, Chakwal
7. Khalid Mehmood , constable, CIA Staff, Chakwal

Counsel for the petitioner ... Mr. Ansar Nawaz Mirza,
Advocate

Counsel for the respondent ... Mr. Sakhi Muhammad Kahot,
Advocate

Counsel for the State Mr. Ahmad Raza Gailani
Addl. Prosecutor General ✓

CRIMINAL REVISION NO.15/I of 2004

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Hudood Private ... 06 of 1996
complaint No.

Date of Trial Court Order/ 09-06-2004
Judgment

Date of Institution ... 08-07-2004
of Revision

Date of hearing 09.02.2012

Date of decision 09.02.2012 ✓

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JUDGMENT:

Justice Shahzado Shaikh, J: - This revision has been moved by petitioner Mst. Nasreen Akhtar against the impugned order dated 09.06.2004 delivered by learned Additional Sessions Judge, Chakwal whereby the Court declined to issue process against the respondents namely 1. Hasnain Mehdi 2. Khalid Awan 3. Ishaq Hasrat 4. Mukhtar Ahmed 5. Ghulam Ahmed 6. Aziz Ullah and 7. Khalid Mehmood for Zina Bil Jabbar and as a result the Hudood private complaint No. 06 of 1996 filed by the petitioner was dismissed.

2. Brief facts of the case are that on 28.3.1996 a private complaint under sections 10(3) and 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 read with sections 166/167/, 165/163, 342/348 and 109 Pakistan Penal Code was filed by Mst. Nasreen Akhtar in the Court of Sessions Judge, Chakwal wherein, it was alleged that 5/6 days prior to 30.5.1995 the complainant alongwith her daughter namely, Mst. Rozina Shaheen, aged about 15/16 years had gone to Chappar Bazar, Chakwal for shopping. When they passed in front of the shop of Hasnain Mehdi, the respondent No.1, Hasnain Mehdi, which was run by him in the name and style of "Inayat shoes", they were called and persuaded to enter the shop by the said respondent on the pretext that they may purchase shoes from him. On entering the shop they found that Ishaq Hasrat and Khalid Awan respondents were also present in the shop. The afore-named accused ✓

persons started teasing the complainant as well as her daughter and in the process caught hold of Mst. Rozina from her breasts. On the resistance offered by the complainant the accused persons insulted both the ladies and pushed them out of the shop. The complainant on returning to her house narrated the entire incident to her uncle namely, Ashraf with whom she, at the relevant time, was living but her uncle showed his inability to take any action against the culprits because of their influence. It was further alleged in the complaint that on 30.5.1995, in the evening, Mukhtar A.S.I. of CIA police Chakwal alongwith Azizullah Tilwala and Khalid Mahmood reached at Dhoke Harrar where, the complainant, was residing. They had already hauled up Khalid Mahmood preliminary witness, who happened to be the nephew of her uncle Ashraf. They arrested the complainant/Petitioner and also her daughter Mst. Rozina and took them to Dhoke Momin District Chakwal. The petitioner and her daughter were confined in the Chobara of the house of Constable Ghulam Ahmad. Khalid Mehmood was taken away by them whereas, Ghulam Ahmad besides, keeping a watch on them, also tried to get their thumb impression on a blank paper and ultimately succeeded in doing so. On 31.5.1995, in the evening, they took the appelland and her daughter to CIA police station where Hasnain Mehdi respondent No.1, Muzaffar Abbas, Khalid Awan respondent No.2 and Ishaq Hasrat respondent No.3 were already present. It was further alleged that on 31.5.1995 Mukhtar Ahmad, ASI Hasnain Mehdi, Ishaq Hasrat and Khalid Awan respondents took away

Mst. Rozina to the house of said Ghulam Ahmad on the pretext that she would be kept at a safe place. On 01.06.1995 there arose a dispute between CIA and the police regarding registration of the case and, as a result, the complainant and Khalid Mahmood were set at liberty. After her release the appellant searched for her daughter but in vain. She also made applications to the police as well as Executive Officers but all remained unfruitful. It was alleged that after some days petitioner's daughter reached her house and disclosed that she on 31.5.1995 and 1.6.1995 was subjected to Zina-bil Jabr by Hasnain Mehdi, Ishaq Hasrat, Khalid Awan and Mukhtar, ASI etc. It was further alleged in the complaint that despite applications, sent to high officers the case was not registered. However, taking notice of the news items Deputy Commissioner, Chakwal ordered for an inquiry which was conducted by Mr. Mobeen Aslam, Magistrate First Class, Chakwal. Inquiry report dated 18.6.1995 was later on forwarded to Superintendent Police for necessary action. Since no action, in pursuance of the inquiry report was taken, the petitioner was left with no option but to file the complaint. After holding the preliminary inquiry and recording statements of some of the witnesses the Additional Sessions Judge, Chakwal, to whom the case was made over for trial by the Sessions Judge, dismissed the complaint vide order dated 24.4.1996.

3. Being aggrieved, the petitioner filed a Criminal Appeal No.206/I of 1996 (Mst. Nasreen Akhtar Vs. Hasnain Mehdi etc) before the Federal Shariat Court on 19.6.1996 wherein Hon'ble Mr. Justice Ch.

Ejaz Yousaf, the then Acting Chief Justice passed following directions:-

“We deem it appropriate to remand the case to the learned trial Court with the direction that first, statements of the rest of the witnesses, whose name have been mentioned in the scheduled of witnesses annexed with the complaint , be recorded and thereafter the complaint be proceeded with, in accordance with law.”

4. In compliance with the above mentioned directions the learned trial court recorded the statements of Khawaja Babar Saleem, Muhammad Ashraf and Dr. Munira Jalil and after recording the statements passed following observations:

“According to the contents of FIR and the preliminary evidence of victim, as well as complainant zina-bil Jabbar was committed with her by the respondents on the nights of 31.5.1995 and 1.6.1995 and according to them she menstruated after that; thereafter, no allegation of sexual abuse regarding zina-bil-jabbar has been leveled and according to the evidence on file, after that they fondle and molest her till 10.6.1995; whereas, admittedly the victim is a deserted woman having no access to her husband; whereas, according to her medical examination report Ex.PB read with the statement of Lady Doctor Munira Jalil, semen stained swabs were sent to Chemical Examiner and according to his report No.846/S dated 21.6.1995 they were found stained with semen; whereas, as stated above she menstruated on 2.6.1995 and her medical examination was conducted on 14.6.1995; ✓

therefore, the positive report after more than 13 days and especially after menses suggest something else. This report further states that no marks of violence were found on the body of the victim; whereas, according to her, she was gang raped by seven persons and in such like situation non-observance of marks of violence do not support the complainant's allegations, regarding gang rape, by as many as seven persons."

5. We have heard Mr. Ansar Nawaz Mirza, Advocate learned counsel for the petitioner Mst. Nasreen Akhtar, Mr. Sakhi Muhammad Kahut, Advocate learned counsel for respondents and Mr. Ahmad Raza Gilani as well as Ch. Muhammad Sarwar Sidhu, Additional Prosecutors General, Punjab and have also gone through the relevant record with their assistance.

6. Mr. Ansar Nawaz Mirza, Advocate learned counsel for the petitioner contended that findings of trial Court regarding no offence under section 10 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, are not proper in law as the trial Court has not properly appreciated the evidence and has decided the case, which suffers badly from non reading and mis-reading of the evidence, being based on conjectures and surmises; the medical evidence as well as report of the chemical examiner are in line; the trial court went into deeper and minute examination of the case at the stage of preliminary hearing which is not permissible under the law; there was no option with the trial Court for non issuance of process against the respondents,

and the learned trial Court ignored clear directions of this Court to proceed according to law. Learned counsel for the petitioner relied upon following case law:-

“The Court is not expected to examine the material minutely whereas at the stage of trial it appraise the evidence thoroughly and record its findings on the basis of such appraisal and that any benefit of doubt arising out of such inquiry should be given to the accused. *It is not the stage where a material available on the record is assessed in depth but a prima facie case has to be made out to proceed further with the matter for issuance of the process. The burden of proof in a preliminary inquiry for the issuance of process is quite lighter* on the complainant as compared to the burden of proof on prosecution at the trial an offence as the prosecution is to prove the case beyond reasonable doubt and *at the preliminary stage the complainant is not required to discharge above heavy burden of proof.* The Court cannot overstretch the proceedings as to convert the preliminary inquiry or the averments made in the complaint to a stage of full-fledged trial of the case. (PLD 2007 SC 9).

” The proceeding under section 204 or 203 depends upon the existence or non-existence of sufficient ground which have been taken by the Courts as the existence of prima facie case, the two expressions i.e., the existence of *sufficient ground* and *prima-facie case* have been construed by the Courts interchangeably.” and

“If a complaint is made before the Court, it is *only to see the existence of a prima facie case* either on the basis of averments made in the complainant and the statement of the complainant on ✓

oath or on the basis of an inquiry if the Court thinks fit to hold an inquiry in order to ascertain the truth or falsehood of the complain. The order of the trial Court in the instant case has fully met the requirements of law by holding the existence of a prima facie case after which the process were issued.”

(Sher Sing Vs. Jetendranath Sen AIR 1931 Cal. 607 rel.)

7. Mr. Sakhi Muhammad Kahut, learned counsel for respondents contended that learned trial Court has properly appreciated the entire evidence available on the record; there is no mis-reading or non-reading in this case; the learned trial Court recorded the evidence even of those witnesses who were called under the directions of this Court; hence order dated 9.6.2004 passed by learned trial Court is proper, with justification, and meets the ends of justice. The impugned order of the learned trial Court should be upheld as the petitioner has come before this Court to save herself from the proceedings of Qazaf.

8. Mr. Ahmad Raza Gilani, Additional Prosecutor General, Punjab argued that trial Court had not adopted proper procedure under the law and recorded the statements in mechanical manner at that stage, in great depth and ignored the clear directions of this Court as passed in judgment of Cr. Appeal No.206/I of 1996 at the time of remanding the case. Learned trial Court has also violated the actual spirit of section 200 of Code of Criminal Procedure; the learned trial Court should have seen prima facie to dispose of the complaint on the bases of sufficient ground brought before it on the record. ✓

9. Ch. Muhammad Sarwar Sidhu, Additional Prosecutor General, Punjab, also assisted the Court, supported the impugned order and stated that learned trial Court adopted exact procedure of law and complied with the directions of this Court and proceeded the case according to law; no illegality has been committed by learned trial Court at the time of passing of impugned order.

10. In the above noted circumstances, discussions, and the law/case law, the following, inter alia, need to be considered:

Section 200 of Cr.PC. on Examination of Complainant, **provides** as follows:

“Section 200. Examination of complainant. A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate:

Provided as follows:

(a) when the complaint is made in writing nothing herein contained shall be deemed to require a Magistrate to examine the complaint before transferring the case under section 192 1{or sending it to the Court of Session}

{(aa) when the complaint is made in writing nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complainant has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties:}2

(b)

(c) when the case has been transferred under section 192 and the Magistrate so transferring it has already examined the complainant, Magistrate to whom it is so transferred shall not be bound to re-examine the complainant.”

Evidence in its broader sense includes all that is used to determine the truth with certitude. Evidence is currency by which burden of proof is discharged..Evidence in law comes through formal process for assertions:

- (i) presumed to be true,
- (ii) to be proven to demonstrate truth.

There are some important *burden-of-proof* considerations:

1. on whom the burden rests: burden of sufficiency of ground on complainant, and burden of proof of evidence on prosecution;.,
2. extent of the burden,
3. stage, as to whether it is received as a complaint or registered as a case,
4. degree of certitude of proof:
 - (i) most probable,
 - (ii) reasonable doubt, or
 - (iii) beyond shadow of doubt.
5. nature of assertion or point under contention.

Important distinction in evidence needs to be made:

- (a) what suggests truth, as opposed to
- (b) evidence that directly proves the truth.

11. This line may appear to be less clear. Therefore, what suggests truth, *prima facie*, on *apparent sufficiency of ground*, may be accepted as starting point to strive through formal course to find the truth.

For more clarity, following may be noted that:


- (i) as a starting point, it is not the *sufficient proof of evidence* but *sufficiency of ground* to issue the process,
 - (ii) prosecution has to *prove its case beyond reasonable doubt, at the trial,*
- but**
- (iii) *sufficient proof beyond any shadow of doubt* is required for awarding *punishment.. , .*

Complaint does not provide sufficient evidence, itself. At the complaint stage:

- (i) burden of complainant is to provide *sufficient ground* of its grievance,
- (ii) at the trial, burden of proof is the burden of providing sufficient evidence.

12. *Burden of proof at the stage of complaint and in preliminary inquiry for the issuance of process is quite lighter on the complainant as compared to the burden of proof on prosecution at the trial, i.e., to prove the case beyond reasonable doubt. At preliminary stage, complainant is not required to discharge burden of proof, in this heavy manner.*

13 Whoever does not carry heavy burden of proof carries benefit of assumption. Whoever bears burden of proof must present sufficient evidence to prove his assertion. At the trial, burden of proof must be fulfilled both by establishing positive evidence and negating defending assertions.

In this connection, following may also be considered: 

“Proceedings under S. 204 or 203, Cr.P.C, depend upon existence or non existence of sufficient ground which had been taking by the Court as the existence of prima facie case. Prosecution is to prove case beyond reasonable doubt and at preliminary stage complainant is not require to discharge heavy burden of proof. [PLD 2007 S.C. 9] Non registration of FIR does not bar filing of private complaint. [2008 P.Cr.L.J. 11]”

“Examination of complainant—Not sine qua non of valid proceeding. [PLD 1966 S.C. 178]”

“Reliance may be placed by Court even upon sole testimony of complainant but same would depend upon circumstances of each case. [NLR 1998 Cr. (S.C.) 454]”

“Preliminary proceedings—Purpose behind the exercise of preliminary proceedings is to find out truth or falsehood of the accusations made in the complaint to be examined on the basis of evidence to be adduced by the complainant. Person accused have no right of participation, until cognizance of the matter is taken and accused is summoned. [PLD 2002 S.C. 687]”

14. In Criminal Appeal No.206/I of 1996 (Mst. Nasreen Akhtar Vs. Hasnain Mehdi etc) before the Federal Shariat Court on 19.6.1996, Hon'ble Acting Chief Justice had directed that “**first**, *statements of the rest of the witnesses*, whose name have been mentioned in the scheduled of witnesses annexed with the complaint, *be recorded and*”

thereafter the complaint be proceeded with, in accordance with law.”

15. In view of the above position of law and above directions of this Court, in this regard, the learned trial Court was required to look into veracity (believability, truthfulness), and ‘sufficiency (capability) of evidence”, “prima facie”, which could lead towards attaining accuracy in the account (proof of facts and circumstances). “Appreciation of evidence” was the subsequent step, which could be ensured only through process, proceedings and trial by the trial Court itself under the law and procedure in that respect.

16. In this case, as is evident from the impugned order, the subsequent part of “appreciation of evidence” has also been undertaken on the basis of whatever became available on record before the learned trial Court, which was prima facie considered sufficient, without examination and strict procedure of proof to arrive at the final conclusion.

17. For what has been discussed above the order of the learned Trial Court dated 09.06.2004 is set aside. Resultantly case of the petitioner shall be deemed to be pending before trial Court for decision, in remanding position. Learned trial Court is directed to proceed further under the procedure of law after appreciation of evidence and proper trial as the fate of the other pending case regarding Qazaf also depends ✓

upon this case. We are sanguine that the trial Court would decide this case within a period of six months after adopting the required procedure under the law.

18. The learned trial Court is further directed to call for the death certificate of father of respondent Aziz Ullah who did not appear today i.e. 9.2.2012 before this Court, on the plea that his (Azizullah's father) had died immediately before that date 9.2.2012 as reported in writing by respondent Mukhtar Ahmed. The office will send a copy of this application to the learned trial Court.

19. Respondent Aziz Ullah remained absent on the following dates of hearing, in spite of Notice:

24.8.2010

11.3.2011


12.1.2012

On the last date of hearing respondents were not present before this Court and bailable warrants were issued against them. It has been observed that said bailable warrants were not promptly/properly executed on the respondents as report in this regard was not returned. However, respondents, except Azizullah, who were present before Court, today, stated that bailable warrants have not been executed and


bonds were also not taken from them. They appeared before this Court on receipt of notice only.

20. The office should write to District & Sessions Judge concerned to enquire about the factual position about compliance of this Court order dated 12.1.2012.


Justice Shahzado Shaikh


Justice Rizwan Ali Dodani -

FIT FOR REPORTING.


Justice Shahzado Shaikh

Date Islamabad, the
9th February, 2012
Zain/*