IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

Criminal Revision No. 52/L of 2007

Mst. Tahmina Asif daughter of Asif Bhatti
R/o Jan Colony, University Road,
Sargodha .... Petitioner

Versus

The State .... Respondent

Counsel for Petitioner	....	Mr. Muhammad Yousaf Zia, Advocate
Counsel for respondent	...	Mr. Muhammad Bilal Kamboh, Advocate
Counsel for State	....	Mr. Shahid Mehmood Abbasi, Deputy Prosecutor General
FIR. No. Date & Police Station	....	430, 1.12.2005 Cantt: Sargodha
Date of judgment of trial court	....	21.09.2007
Dates of Institution	....	27.09.2007
Date of hearing	....	16.5.2008
Date of decision	....	23.5.2008

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JUDGMENT

SYED AFZAL HADIER, JUDGE:- Through this Criminal Revision No.52/L of 2007 the petitioner Mst. Tahmina Asif has challenged the order dated 21.09.2007 passed by learned Additional Sessions Judge, Sargodha. The case arose out of the crime report FIR No.430 dated 01.12.2005 registered with Police Station Cantt: Sargodha at 2.30 p.m. under section 11 of Ordinance VII of 1979 on the written complaint of Zubeda Begum, mother of petitioner regarding an occurrence alleged to have taken place on 26.11.2005 wherein it was stated by the complainant that her daughter, the petitioner, had been abducted by Augustan and Aneel for the purpose of zina. It was in this background that the petitioner, the alleged victim of abduction, moved an application before the learned Additional Sessions Judge, Sargodha requesting that she may be declared as an approver and not an accused.

2. The brief facts as given in the crime report are that the complainant's daughter Tehmina Asif, student of MBA went to her college in the morning in a private carrier Suzuki Carry Dabba bearing registered No. LZM-7740, white colour, on 26.11.2005 but did not return in the

evening. She also discovered that the accused as well as the said carrier were not traceable. Sarfraz Ghauri and Saleem Ghauri residents of Jan Colony Sargodha met her and said that they had seen the accused Augustan and Aneel with abductee Tehmina in the said vehicle on the Qainchi Morr Lahore Road. She made a contact with the family members of the accused who promised to restore Mst. Tehmina. The petitioner kept quiet for this period on account of her honour and since the family members of the accused finally refused to return Mst. Tehmina, therefore, she lodged a complaint with the police.

3. The petitioner then on 10.09.2007 moved an application before the trial Court under section 337/338 of the Code of the Criminal Procedure for being made an approver. This application was rejected on 21.09.2007 and hence this Revision. The facts narrated in a rather longish application are that the petitioner then student of MBA, was residing in Jan Colony College Road, Sargodha when she used to go to her Institute on the Suzuki Carry Dabba bearing registration No.LZM-7740 belonging to Augustan Feroz and Aneel alias Aneelo. During this period the accused enticed her to the belief that Augustan wants to marry her as he had already divorced

his first wife Mst. Sarfeen. The accused took the petitioner to Kalyar Town, Sargodha where Qayyum Feroz, brother of Augustan, former member of Cantonment Board, also verified the fact that the accused Augustan Feroz had divorced his wife. The said Feroze stated that he had to go to Rawalpindi on 26.11.2005. Augustan and Aneel will escort her to Rawalpindi where her Nikah will be performed. Augustan Feroz with the help of Aneel alias Aneelo then took the petitioner to Rawalpindi on 26.11.2005 from her house on the said Suzuki carrier. She stayed in a house in Tariq Abad and it was there that the accused Augustan Feroz got signatures of petitioner on blank papers and stated that Nikah has been performed. Thereafter Augustan started living with the petitioner as her husband and had carnal access to her. The petitioner and accused Augustan Feroz were arrested after cancellation of her pre-arrest bail application. The petitioner was released on bail later on. Augustan Feroz was still in jail. On her release on bail she was taken by Aneel and Qayyum Faroz to house No.46, Isa Nagar, Factory Area Sargodha, instead of taking her to the house of Augustan Feroze. She lived there for one and a half year. There she was made dependent upon liquor and heroine. The petitioner time and again

requested them to take her to the house of Augustan Feroz but they would not oblige till she gave birth to a daughter in the house of Emanual Masih. They were reluctant to take her to the house of Augustan Feroz. After the birth of child when she insisted upon going to the house of Augustan Feroz both Emanual and Aneel threatened to get her mother killed. Out of fear the petitioner suffered the agony. It was during this period that she came to know that accused Augustan Feroz had not divorced his wife who was living in his house. According to Christian religion second marriage during the subsistence of first marriage is not legal and such a marriage amounts to Zina. In the meantime mother of the petitioner had died and she went there for condolence and taking advantage of presence of number of persons, she went to the house of accused Augustan Feroz where she found the first wife Mst. Sarfeen was living with her children. After satisfying herself (about the existence of first wife of Augustan), the petitioner then filed application under section 337/338 with the prayer that she be declared an approver as her life had been ruined.

4. After going through the contents of the application and the impugned order dated 21.09.2007, I asked learned counsel for the petitioner

to satisfy me firstly on the point that the impugned order suffered from a manifest illegality which might as well attract the exercise of discretion through revisional powers of this Court with the object of removing the illegality.

5. During the course of arguments section 337 as well as section 338 of the Code of Criminal Procedure, article 16 of Qanun-e-Shahadat Order, 1984 and sections 5 and 8 of Ordinance VII of 1979 were read and considered. The reason for perusing these provision arose because whenever in a case the offence is punishable with Hadd or Qisas, the evidence of an accomplice would be inadmissible; b) the evidence of an accomplice would be admissible only in cases relating to Tazir; c) tendering pardon to an accomplice, as contemplated in proviso to sub-section (1) of section 337 of the Code of Criminal Procedure, is permissible except when a person is involved in an offence relating to hurt or qatl and the permission of the victim or the heirs of the victim as the case may be, has not been obtained and d) revisional jurisdiction would be exercised where the purpose of law, as envisaged in section 337 or 338 of the Code of Criminal Procedure, has been defeated.

6. It might as well be stated at the outset that the learned trial Court formally charged the accused, respondent in this case on 24.07.2006 under section 10(2) of Ordinance VII of 1979 which reads as follows:-

> "(2) whoever commits Zina liable to Tazir shall be punished with rigorous imprisonment for a term which may extend to ten years and with whipping numbering thirty stripes, and shall also be liable to fine".

It therefore clearly means that the maximum punishment that could be awarded to the accused respondent in this case, if the prosecution succeeds in procuring best possible evidence to secure a verdict of guilt from the trial Court, is ten years which punishment is awarded as Tazir and not Hadd. The punishment provided under section 5 of Ordinance, VII of 1979 in case of Zina liable to Hadd is stoning to death at a public place if the accused is a Mohsin and one hundred stripes otherwise.

7. It therefore appears that punishment under section 10(2) is Tazir and not Hadd. Learned trial Court while rejecting the application came to the conclusion that a) the petitioner and accused party are involved in civil and criminal litigation and it would cause hardship and legal complications if petitioner was made approver and b) the application has not

been moved as "envisaged and contemplated in Section 338 Cr.P.C.". A perusal of section 338 shows that discretion is vested in the Court to tender pardon at any time before judgment is passed, with a view to obtaining during the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence. The restraint, as already stated is, where the offence relates to Qatl or hurt without the permission of the victim or heirs of the victim as the case may be.

8. It is evident from the facts and circumstances of this case that petitioner is directly involved in the offence of Zina and she can provide best possible evidence particularly when on her showing she has given birth to a child out of her temporary union with accused Augustan Feroz. The question of pending litigation is in no way a bar to the exercise of jurisdiction by the trial Court. The question simply is whether by granting pardon worthwhile evidence could be procured? The answer is in the affirmative. On the question raised during arguments whether pardon can be granted in a case triable under Hadood Laws it would be instructive to undertake a review of certain precedents in order to appreciate the points in the controversy. In the case of Asif Ali Zardari Versus The State reported as KLR 1992, Cr. Cases

540, a Division Bench of the Sindh High Court held that the provisions of section 337 and 339 of the Code of Criminal Procedure have not been declared repugnant to the Injunctions of Islam in entirety. These provisions were found in the case of Federation of Pakistan Versus Gul Hassan Khan, reported as PLD-1989 SC 633, to be against the Injunctions of Islam only to the extent that they permitted grant of pardon to an offender without permission of the victim in case of hurt or murder. Therefore, in cases other than hurt and murder the right of State to grant pardon was not affected.

9. Reliance can also be placed on the case of Haider Hussain & others Versus Government of Pakistan & others reported as PLD-1991 FSC 139, in which it was held that tendering pardon to a person in case of Tazir is permissible. The reason advanced was that Tazir can be waived by the Ruler, legislature or a Judge if he deems it necessary but no such laxity is permissible in Hadd. It was further found that delay might as well drop a Hadd but delay would not affect a Tazir. In so far as the pardon of an accomplice in a matter of Tazir is concerned it is permissible when Tazir relates to rights of Allah, but if Tazir relates to the rights of individual like murder or hurt then arbitrary grant of pardon would not be permissible. It

therefore follows that in a case tried under section 10(2) of Ordinance VII of 1979 rights of Allah preponderate and the rights of individuals are relegated to the secondary position.

10. In the case of Federation of Pakistan Versus Muhammad Shafi Muhammadi reported as 1994 SCMR 932 at page 941 it was held that the evidence of an accomplice is not admissible at all in case of an offence punishable with Hadd and Qisas. However in case of offence which entails punishment of Tazir his testimony is admissible and can furnish basis for conviction if there was corroboration on material particulars.

11. Article 16 of the Qanun-e-Shahadat Order, 1984 states:

> "An accomplice shall be competent witness against an accused person, except in the case of an offence punishable with Hadd and a conviction is not illegal because it proceeds upon the uncorroborated testimony of an accomplice."

12. Even here the bar is an offence punishable with Hadd but in the case of an offence punishable with Tazir the court is competent to exercise its discretion. The condition of "any offence punishable with imprisonment which may extend to ten years" as contemplated by section 227(1) of the Code of Criminal Procedure does not violate the punishment prescribed

under section 10(2) of Ordinance VII of 1979. The exception of Hadd has been prescribed because the quantity, quality and made of proof of Hadd from a Tazir.

13. The question of prejudice may also arise at this stage in the sense that if petitioner is granted relief she becomes a potential witness against the accused and the accused might suffer. Prejudice however should not be presumed for the reason that, as discussed above, the purpose of granting pardon is to secure evidence in the larger interest of justice and justice is not how the accused would view it but justice is to be administered keeping in view and the offence complained of and secondly article 16 of Qanun-e-Shahadat, 1984 merely declares that the evidence of an accomplice is admissible and any conviction based upon such evidence shall, on that score, not be called illegal. The third point to be kept in mind is that illustration b) of article 129 of Qanun-e-Shahadat is also part of this very law and under this article it has been stated that the court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. It is by now well settled principle of law that the Court will not accept the uncorroborated testimony of an accomplice. In this view of the

matter the accused should not worry because the Court is not going to convict him if the testimony of an accomplice remains uncorroborated. The mere fact that evidence of an accomplice is admissible does not mean that it shall be acceptable to the judicial mind. However the possibility, that even an uncorroborated statement of an accomplice may become basis of conviction, should be available in law because the facts and circumstance of a particular case may warrant such a situation.

14. Learned counsel for the State took up the position that the petitioner has taken almost two years to move application under section 337/338 of the Code of Criminal Procedure. The objection would have been valid had it been a case of Hadd because according to principles of Islamic jurisprudence delay can cause the Hadd to be dropped but that is not the case with Tazir. Morever it is not evident from record that the entire evidence has been recorded. In fact jurisdiction under section 338 can be exercised at any stage of the trial. The jurisdiction must be exercised before judgment is passed. It means that the element of delay stand covered by the words "At any time before the judgment is passed." Further the trial Court has observed that the parties were entangled in civil and criminal litigation and on this

score also the element of delay is not a substantial objection. The purpose behind grant of pardon is to secure evidence. It came to the knowledge of the petitioner only at the time of death of her mother that the first marriage of accused Augustan was still subsisting and therefore the objection regarding delay in filing of application by petitioner is not at all consequential.

15. It was also contended by learned counsel for the State that the application moved by petitioner is not tenable in law because it has not been moved by the officer in charge of the prosecution in the district as visualized by sub section (1) of section 337 of the Code of Criminal Procedure. The argument is not valid because section 337 and section 338 cover two different situations altogether. Section 337 facilitates the officer incharge of the prosecution in the district to petition to the trial Court for securing pardon to an accused because the investigation and prosecution branch has been able to get direct evidence in a given case. But all the trials are not based upon crime report registered as F.I.Rs. Trials can be initiated on a private complaint being moved in a court of competent jurisdiction. There is a third mode of taking cognizance under section 190 of the Code when " upon information received from any person other than a police officer, or

upon his own knowledge or suspicion, that such offence has been committed the Court can initiate proceedings. Section 338 therefore would cover cases when "evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence" has to be secured. The present petition is under the circumstances fully covered by the language of section 338 when the evidence of any person may be required without reference to the officer-in-charge of the prosecution of the district. It may be a case initiated on police report or otherwise.

16. I am therefore, of the view that the application of the petitioner has not been considered on the touchstone of section 328 of the Code of Criminal Procedure. The trial Court did not exercise jurisdiction vesting under law properly and for the purpose identified in the section. It also failed to infer the logical conclusion from the facts of case as available on the record. Considerations beyond the facts narrated in the petition were considered in order to reject the request of the petitioner for grant of pardon. The purpose behind incorporating section 338 is to secure the ends of justice. This jurisdiction has been conferred with the object of exercising it as and when occasion arises. Of course the discretion has to be used

judiciously but it should not be withheld to close the door of evidence flowing in the trial.

17. In view of what has been discussed above I would set aside the order dated 21.09.2007 passed by learned Additional Sessions Judge, Sargodha and grant the prayer sought by the petitioner in her application dated 10.09.2007 for grant of pardon under section 338 of the Code of Criminal Procedure. The trial Court should proceed with the trial and try to complete it written a period of four months under intimation to the Registrar of this Court.

JUSTICE SYED AFZAL HAIDER

Announced in Open Court
on 23.5.2008 at Islamabad
Mujeeb ur Rehman

Fit for Reporting

JUSTICE SYED AFZAL HAIDER