IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT
MR.JUSTICE CH. EJAZ YOUSAF CHIEF JUSTICE
MR.JUSTICE DR.FIDA MUHAMMAD KHAN
MR.JUSTICE S.A.RABBANI

CRIMINAL APPEAL NO.32-K OF 2002 L.W.
MURDER REFERENCE NO.2-K OF 2002

1. Pir Imtiaz son of Pir Muhammad Inayat, Resident of village Malikdino Deh 258, Taluka Kot Ghulam Muhammad.	--	Appellants
2. Jan Muhammad alias Jano son of Kaloo, Resident of Deh 167 Taluka Digri.		
	Versus	
The State	--	Respondent
Counsel for the Appellants	--	Mr.Shaukat Hussain Zubedi, Advocate.
Counsel for the State	--	Mr.Arshad Lodhi, Asstt:Advocate General
No.date of FIR and Police station	--	No.28 dt:23.4.1999 P.S.Kot Ghulam Muhammad
Date of the order of Trial Court	--	11.6.2002
Date of institution	--	18.6.2002
Date of hearing	--	13.1.2005
Date of decision	--	13.1.2005

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JUDGMENT

CH. EJAZ YOUSAF, CHIEF JUSTICE.- This appeal is directed against the judgment dated 11.6.2002 passed by II-Additional Sessions Judge, Mirpurkhas whereby he has convicted the appellants under section 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as "the Ordinance") and sentenced both of them to death as tazir. Murder reference No.2/K of 2002 has been sent for confirmation of the above sentences.

2. The facts are in a very short compass. On 23.4.1999 at 2300 hours report was lodged by one Ghulam Muhammad son of Mashkool with P.S. Kot Ghulam Muhammad District Mirpurkhas wherein, it was alleged that on the said date the complainant was grazing sheep near the sugarcane crop of his landlord whereas, her daughter Mst.Waziran, aged about 12/13 years was cutting grass for cattle in the sugarcane crop. On hearing shrieks of Mst.Waziran he alongwith Muhammad Sharif Kandero Kapri and his son Haji rushed to the place of occurrence and saw that appellants were trying to flee. They also

noticed that shalwar of Mst.Waziran was lying removed and blood was oozing out of her private parts. On inquiry, Mst.Waziran disclosed that she was subjected to zina-bil-jabr by the accused persons, turn by turn. On the stated allegation formal FIR bearing No.28 dated 23.4.1999 was registered at the said police station under section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and investigation was carried out in pursuance thereof. On the completion of investigation the appellants were challaned to the Court for trial. Charge was accordingly framed against the accused persons to which they pleaded not guilty and claimed trial.

3. At the trial, the prosecution in order to prove the charge and substantiate the allegation leveled against the accused persons produced nine witnesses, in all, whereafter, the appellants were examined under section 342 Cr.P.C. In their above statements both the appellants denied the charge and pleaded innocence. They did not opt to appear as their own witnesses in terms of section 340(2) Cr.P.C,

however, appellant Jan Muhammad alias Jani got examined one witness namely, Muhammad Rafique son of Hussain Bakhsh in his defence as D.W.1.

4. After hearing arguments of the learned counsel for the parties the trial Judge convicted both the appellants and sentenced them to the punishments as mentioned in the opening para hereof.

5. We have heard Mr.Shaukhat Hussain Zubedi, Advocate, learned counsel for the appellants, Mr.Arshad Lodhi, Assistant Advocate General, for the State and have also perused the entire record with their assistance.

6. Mr.Shaukat Hussain Zubedi, Advocate, learned counsel for the appellants has, at the very outset, submitted that he would not challenge conviction of the appellants on merits, but would pray for remand of the case only, primarily for the reason that the appellants having been charged under section 10(3) of "the Ordinance" for committing zina-bil-jabr liable to tazir could not have been convicted under section 10(4) of "the Ordinance" without alteration of the

charge because the latter being major and graver offence, carrying more sentence, conviction could not have been recorded against the appellants on the charge already framed.

7. Mr. Arshad Lodhi, Assistant Advocate General, appearing for the State while candidly conceding to the proposition submitted that since maximum sentence provided for the offence under section 10(3) of "the Ordinance" is twenty-five years imprisonment as against the death sentence provided for the offence under section 10(4) of "the Ordinance" therefore, the appellants could not have been convicted for the offence under section 10(4) of "the Ordinance" without having been specifically charged for the same.

8. Notwithstanding the fact that the learned Assistant Advocate General, has not controverted the contention raised by the learned counsel for the appellants, we have given our anxious consideration to the proposition. Record reveals that the appellants, on 20th October 1999, were charged under section 10(3) of "the Ordinance" for allegedly committing zina-bil-jabr with Mst.Waziran. At the trial,

neither the charge was altered nor was it substituted so as to enable the appellants to understand that they were answerable under section 10(4) of "the Ordinance". The omission so made, therefore, in our view, was fatal because apparently though both these sections i.e. 10(3) of "the Ordinance" appear to be one and the same with the difference of number of culprits but a minute study thereof indicates that in pith and substance there is a marked difference between the two provisions. Here, it would be advantageous to have a glance at the relevant provisions which read as follows:-

> "S. 10(3) Subject to sub-section (4) whoever, commits zina-bil-jabr liable to tazir shall be punished with imprisonment for a term which shall not be less than four years nor more than twenty-five years and shall also be awarded the punishment of whipping numbering thirty stripes.
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> "S.10(4) When zina-bil-jabr liable to tazir is committed by two or more persons in furtherance of common intention of all each of such persons shall be punished with death."

A plain reading of the above provisions would lead to the inference that both these sections i.e. 10(3) as well as 10(4) of "the Ordinance" have not only considerable elements of difference between them but deal with altogether two different situations. Where section 10(3)

covers all those cases, in which, offenders guilty of zina-bil-jabr liable to tazir are liable individually, section 10(4) takes care of the situation, in which, the offence of zina-bil-jabr is committed by two or more persons in furtherance of their common intention. Meaning thereby that application of section 10(4) of "the Ordinance" is limited to those cases only, in which, the rule of constructive liability is required to be applied. Besides, section 10(4) of "the Ordinance" is a major offence in comparison with section 10(3) of "the Ordinance" because it carries sentence of death as against the sentence of twenty-five years rigorous imprisonment provided for the offence under section 10(3) of "the Ordinance".

9. It may be noted here that though an accused person charged with one offence may, under section 237 or 238 Cr.P.C, be convicted of another yet, since both these provisions are exceptions to the general rule contained in section 233 Cr.P.C. that; for every distinct offence there shall be a separate charge, therefore, a person charged with one offence, cannot be convicted of another unless it is doubtful

as to what offence is made out against the accused and the offence is cognate to, or a part of or attempt to commit the principal offence, with which the accused was originally charged as provided by sections 236 and 238 Cr.P.C. Here it would be advantageous to have a glance at sections 236, 237 and 238 Cr.P.C which read as follows:-

> **"S.236. When it is doubtful what offence has been committed:** If a single act or series of acts is of such a nature that it is doubtful which of several offences, the facts which can be proved will constitute the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed someone of the said offences.
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> **S.237. When a person is charged with one offence, he can be convicted of another:** (1) If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.
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> **S.238. When offence proved included in offence charged:** (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.
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> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.
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> (2-A) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.
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> (3) Nothing in this section shall be deemed to authorize a conviction of any offence referred to in section 198 or section

199 when no complaint has been made as required by that section."

No doubt, an accused person charged with a graver offence may, subject to the conditions contained in the above provisions, be convicted for a minor offence but he, in no circumstances can be convicted for a major offence on the charge of a minor offence. This view receives support from the following reported judgments:-

(i) Sultan Ahmed and others vs. The State – PLD 1960 SC (Pak) 173;

(ii) Sangaraboina Sreenu v. State of Andhra Pradesh – AIR 1997 SC 3233;

(iii) Shanmugham and another v. State – 1989 Crl.L.J.203;

(iv) Asad Khan vs. The State – 2004 P.Cr.L.J.245;

(v) Mazullah vs. The State – 2000 P.Cr.L.J. 534;

(vi) Said Bahadur Shah and another vs. The State – 2000 P.Cr.L.J. 850;

(vii) Mangloo vs. Emperor – A.I.R. 1930 Lahore 544;

(viii) Saubaraub Lal vs. Emperor – A.I.R. 1935 Patna 431;

(ix) Balmukan and others vs. State – A.I.R.1952 Rajasthan 123;

(x) Ghulam vs. The State – PLD 1955 Baghdad-ul-Jadid 9;

(xi) Ahmed Din vs. The State – PLD 1959 (WP) Lahore 760;

(xii) Fateh Muhammad vs. The State – PLD 1961 (WP) Lahore 212;

(xiii) Ahmad Yar and another vs. The State – PLJ 1991 Cr.C.(Lahore) 131; and

(xiv) Habib-ul-Wahab-ul-Khairi vs. Prof.Dr.Saad Rana – 2002 YLR 234.

And since, in the instant case, the accused persons were not charged under section 10(4) of "the Ordinance" which was a graver offence in relation to section 10(3) of "the Ordinance" and thereunder entirely different facts were required to be given prominence therefore, convictions and sentences recorded against appellants under section 10(4) of "the Ordinance" in our view, on the charge framed, cannot sustain. The impugned judgment dated 11.6.2002 passed by II-Additional Sessions Judge, Mirpurkhas, therefore, is set aside and case, with consent of the parties, is remanded to the trial Court for its trial and decision afresh, in accordance with law with the direction that the accused persons may be charged again properly and be proceeded against thereafter.

Since the impugned judgment has been set aside, therefore, Murder Reference bearing No.2-K of 2002 is decided in negative.

(Ch. Ejaz Yousaf)
Chief Justice

(Dr.Fida Muhammad Khan)
Judge

(S. A. Rabbani)
Judge

Karachi, the 13th January, 2005

ABDUL RAHMAN/**

FIT FOR REPORTING

CHIEF JUSTICE