

IN THE FEDERAL SHARIAT COURT  
( Appellate Jurisdiction )

PRESENT

MR.JUSTICE CH. EJAZ YOUSAF, CHIEF JUSTICE  
MR.JUSTICE DR.FIDA MUHAMMAD KHAN  
MR.JUSTICE SAEED-UR-REHMAN FARRUKH

CRIMINAL APPEAL NO.71/I OF ~~1998~~ 1998

Muhammad Arshad Naseem -- Appellant  
son of Rauldo Khan, resident  
of Building Mian Sahib,G.T.  
Road,Mohallah Nizampura,  
Lala Musa,District Gujrat.

Versus

The State	--	Respondent
Counsel for the appellant	--	Mr.Mehdi Khan Chohan, Advocate.
Counsel for the complainant	--	Chaudhary Abdul Aziz, Advocate
Counsel for the State	--	Mr.Muhammad Sharif Janjua, Advocate.
No.date of complaint	--	No.113/93, dated 21.10.1993 Before Ilaqa Magistrate, Kharian
Date of the order of Trial Court	--	25.5.1998
Date of institution	--	8.6.1998
Date of hearing	--	28.10.2003
Date of decision	--	28.10.2003

JUDGMENT

CH. EJAZ YOUSAF, CHIEF JUSTICE,- This appeal is directed against the judgment dated 25.5.1998, passed by the learned Additional Sessions Judge, Kharian whereby appellant Muhammad Arshad Naseem son of Rauldo Khan was convicted under section 7 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (hereinafter referred to as "the Ordinance") and sentenced to eighty stripes.

2. Facts lies in a small compass. Complaint was filed by one Munawar Hussain son of Nawab Hussain in the Court of Sessions Judge, Gujrat wherein, it was alleged that the present appellant had moved an application for contempt in the Court of District and Sessions Judge, Gujrat which was though dismissed vide order dated 22.5.1993 for non-prosecution yet, since certain allegations were levelled therein, inter-alia, that the complainant had committed adultery/zina with the lady, namely, Mst.Arshad, therefore, his guilt be brought home by initiating proceeding under the law. After getting

the matter inquired through Senior Civil Judge/Magistrate Section 30, Gujrat, within the purview of section 202 Cr.P.C. the learned Sessions Judge summoned and charged the appellant under section 3 of "the Ordinance" to which he pleaded not guilty and claimed trial.

3. At the trial, the complainant in order to prove the charge and substantiate the allegation leveled against the appellant produced only two witnesses namely, Riaz Ahmad and Tosawar Hussain besides examining himself as P.W.2. Thereafter, statement of the appellant under section 342 Cr.P.C. was recorded. In his above statement the appellant denied the charge and pleaded innocence. He, however, got examined four witnesses in his defence and also appeared himself as his own witness in terms of section 340(2) Cr.P.C.

4. After hearing arguments of the learned counsel for the parties the learned trial Judge convicted the appellant and sentenced him to the punishment as mentioned in the opening para hereof.

5. We have heard Mr.Mehdi Khan Chohan, Advocate, learned counsel for the appellant, Ch. Abdul Aziz, Advocate, learned counsel

for the complainant, Mr.Muhammad Sharif Janjua, Advocate, learned counsel for the State and have also perused the entire record with their assistance.

6. Mr.Mehdi Khan Chohan, Advocate, learned counsel for the appellant has, at the very outset, submitted that since application dated 13.5.1993 wherein, allegation regarding zina was allegedly leveled against the complainant, was neither exhibited, at the trial, nor was it proved in accordance with law and only a photostat copy thereof was produced before the Magistrate at inquiry stage which by no stretch of imagination can be termed as evidence, therefore, the appellant could not have been convicted for the offence, for want of proof. It is further his grievance that since the appellant was charged under section 3 of "the Ordinance", which merely lays down definition of "Qazf" and does not provide for penal consequences, therefore, he could not have been convicted and sentenced to undergo punishment of Hadd under section 7 of "the Ordinance". He has maintained that since the omissions/defects, referred to hereinabove, had greatly prejudiced the

appellant in his defence, therefore, the impugned judgment may be set aside and the case be remanded to the learned trial Judge for its decision afresh.

7. Ch. Abdul Aziz, Advocate, learned counsel for the complainant though initially tried to canvass that since a copy of the application formed part of inquiry report, therefore, it was rightly taken into account by the learned trial Judge and that though the appellant was not formally charged under section 7 of "the Ordinance" yet, he, being aware of the nature of the accusation, could have been convicted for the offence, but then candidly conceded and submitted that since the application, in question, was not produced or proved on record and the charge as framed, was also not proper, therefore, he would have no objection to remand of the case. However, submitted that this being an old matter the learned trial Judge be directed to dispose the same of, expeditiously.

8 We have given our anxious consideration to the respective contentions of the learned counsel for the parties and have also

perused the available record with their assistance. Admittedly, the application wherein, the allegation regarding zina was leveled against the complainant was not exhibited, at the trial whereas, legally, the person relying on a document is under obligation to prove the same.

Article 72 of the Qanun-e-Shahadat Order, 1984 (hereinafter referred to as "the Order") lays down that contents of documents may be proved either by primary or by secondary evidence whereas, Article 73 of "the Order" provides that 'primary evidence' means the document itself produced for inspection of the Court and it is the requirement of Article 75 of "the Order" that the document must be proved except in the cases in which secondary evidence may be given.

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Having regard to the above provisions, it may be noted here that though documents not formally admitted in evidence and available on Courts' record or elsewhere even, may, for the purpose of elucidation of certain facts, be looked into yet, the same, by no stretch of imagination, can be termed or regarded as "evidence" unless proved and exhibited, at the trial, in accordance with law. Further,

since documents do not prove themselves and truth of the contents of the documents cannot be proved by merely producing the same for inspection of the Court within the purview of Article 2 (c)(ii) of the Qanun-e-Shahadat Order, 1984, therefore, the document upon which a party places its reliance must, at first, be placed before the Court and then be got proved by calling a witness/witnesses. In this view, we are fortified by the following reported judgments:-

- (i) Abdul Qayyum vs. Muhammad Rafique – 2002 SCJ 300;
- (ii) Muhammad Azam vs. Muhammd Iqbal and another – PLD 1984 SC 192;
- (iii) Fazal Muhammad vs. Mst.Chohara and others – 1992 SCMR 2182;
- (iv) Bishwanath vs. Sachhidanand – AIR 1971 SC 1949;
- (v) Om Prakash vs. Unit Trust of India and others - AIR 1983 Bom 1; and
- (vi) Rajwati Devi vs. Joint Director Consolidation, Government of Bihar, Patna and others– AIR 1989 Patna 66.

Thus, the application in question, a photostat copy whereof only, as per record, was produced before the Magistrate at inquiry stage could not have formed basis for conviction of the appellant.

9. Adverting to the next contention of the learned counsel for the appellant that since the appellant was charged under section 3 of “the Ordinance”, therefore, he could not have been convicted and punished

under section 7 thereof, it may be pointed out here that legally every charge must contain the specific name of offence and the law and section of the law against which the offence is said to have been committed or if no specific name is given to the offence by the law which has created it, then so much of the definition of the offence which may give notice to the accused of the matter with which he is charged and shall also contain such particulars as to the manner, time and place of the alleged offence and also the person against whom or the thing (if any) in respect whereof it was committed which may be necessary for the purpose aforesaid. Sections 221 to 223 of the Criminal Procedure Code are explicit, in this regard. It may further be noted here that every person accused of an offence or offences is required to be charged distinctly and separately for each and every offence and though as per section 237 Cr.P.C a person charged with one offence can be convicted for another yet, application thereof is limited to the cases covered by section 236 Cr.P.C only. It would also be worthwhile to mention here that section 237 Cr.P.C. is an



exception to the general rule that, no person can be convicted for an offence for which, he is not charged, therefore, it must be construed strictly and be applied in those cases only where, either the offences allegedly committed are cognate or it is doubtful as to what offence is made out of the act or acts allegedly committed by the accused.

Since section 3 of "the Ordinance" merely contains definition of "qazf" and does not provide for penal consequences whereas, the offence of Qazf is punishable under section 7 thereof therefore, the learned trial Judge, notwithstanding the fact that the complaint itself was filed under section 3 of "the Ordinance", ought to have charged the appellant under section 7 of "the Ordinance" if he had decided to proceed against him.

10. Since both the learned counsel for the parties, have agreed to remand of the case and we are also convinced that trial, in the instant case, has not been conducted in the proper manner, therefore, the impugned judgment dated 25.5.1998, passed by the learned Additional Sessions Judge, Kharian is set aside and the case is

remanded to the learned trial Judge for its decision afresh, in accordance with law, within a period of six months from the receipt hereof.

The appellant is on bail, the same shall remain intact till he is summoned by the trial Judge whereafter it shall be the discretion of the trial Court to grant him the concession or otherwise.



(Dr.Fida Muhammad Khan) ( Saeed-ur-Rehman Farrukh )  
Judge



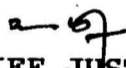
( Ch. Ejaz Yousaf )  
Chief Justice



Judge

Islamabad, dated the  
28<sup>th</sup> October, 2003  
ABDUL RAHMAN/\*\*\*

FIT FOR REPORTING



CHIEF JUSTICE