(26)

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE CH.EJAZ YOUSAF.
MR.JUSTICE ALI MUHAMMAD BALOCH.

CRIMINAL APPEAL NO.2/I OF 2000.

1. Hidayatullah son of Gul Muhammad, Caste Umrani and
2. Sabir son of Allah Ditta,(Dina) caste Umrani, both residents of Teshil Tamboo,presently confined in Central Jail,Mach.

.... Appellants

Versus

The State	...	Respondent
For the appellants	...	Mr.Muhammad Aslam Chishti, Advocate
For the State	...	Qari Abdul Rashid, Advocate
No.& date of F.I.R Police Station	...	No.44/98,dt.5.5.1998 P.S Tamboo
Date of judgment of trial court	...	13.12.1999
Date of Institution	...	3.1.2000
Date of hearing and decision	...	16.2.2000.

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JUDGMENT

CH.EJAZ YOUSAF,J.- This appeal is directed against the judgment dated 13.12.1999 passed by learned Additional Sessions Judge Nasirabad at Dera Murad Jamali whereby the appellants have been convicted and sentenced as follows:-

i) Under Section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance,1979 (hereinafter referred to as the said Ordinance) to undergo R.I for four years each and to suffer thirty stripes each.

ii) Under section 11 of the said Ordinance to life imprisonment each,to pay a fine of Rs.5000/- each or in default thereof to further undergo S.I for thirty days each plus fifteen stripes each.

iii) Under section 458 PPC to undergo R.I for three years each and to pay a fine of Rs.3000/- each or in default thereof to further undergo S.I for five months each.

Benefit of section 382-B Cr.P.C has,however, been extended to the appellants. All the sentences of imprisonment were ordered to run concurrently.

2. The case of the prosecution,breifly is that on 5.5.1998 complainant Shakar Khan lodged report Ex.P/2-A with Levies Station Tamboo,wherein, it was alleged that four days ago five persons including the present appellants and one Imdad alias Dago,armed with fire arms, forced their entry in his house and on gun point,abducted his wife Mst.Tajo. It was further alleged that the

culprits had left behind a brown coloured bag containing a loaded magazine of klashan-kov and a pair of chappals (shoes). In the end, it was further alleged in the complaint that since, as per knowledge of the complainant, ~~her~~ his abducted wife was taken to the house of one Haji Khuda Bakhsh Umrani, therefore, she be recovered therefrom.

3. On the stated allegations a formal F.I.R bearing No.44/98, was registered under section 10(3)/11 of the said Ordinance on 5.5.1998 at Levies Police Station Tamboo District Nasirabad and investigation was carried out in pursuance thereof. Record reveals that in the course of investigation, on 3.6.1998, the present appellants were arrested by Tehsildar Tamboo, the investigating officer but they were later on released under section 169 Cr.P.C, for want of evidence. However, in the incomplete challan Ex.P/7-A/1 both were placed in coloumn No.2 whereas, Imdad and other two culprits, whose particulars were not possible to be ascertained, where shown as absconders.

4. That on cognizance, case was registered in court and was proceeded against the absconder accused. On 12.2.1999, statement of prosecutrix was recorded and on the same day, in the light of her statement, bailable warrants against the appellants were issued.

5. Record reveals that on 21.4.1999 both the appellants appeared before the court and they were released on bail. On 12.8.1999 charge was framed to which the accused/appellants pleaded not guilty and claimed trial.

6. At the trial, the prosecution in order to prove the charge and substantiate the allegations levelled against the accused/appellants, produced nine witnesses, in all, whereafter the appellants were examined under section 342 Cr.P.C. In their statements they 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,produced two witnesses, namely Ghulam Muhammad son of Haji Faiz and Allah Dina son of Raees Dhani Bakhsh, in their defence.

7. After hearing arguments of the learned counsel for the parties the learned trial court convicted the acused/appellants and sentenced them to the punishment as mentioned in the opening para hereof.

8. We have heard M/s Muhammad Aslam Chishti,Advocate, learned counsel for the appellants, Qari Abdul Rashid,Advocate for the State and have also perused the entire record with their help.

9. Mr.Muhammad Aslam Chishti,Advocate,learned counsel for the appellants, at the very outset, has contended that

two of the material witnesses namely P.W.1 Mst.Tajal,i.e the complainant and P.W.2 Shakar Khan were examined under section 512 Cr.P.C in absence of the appellants when proceedings against absconded accused Imdad alias Dagu were being carried out. Subsequently when the appellants were summoned and they appeared in court, both the aforenamed witnesses were not examined afresh and were simply tendered for cross-examination, thus the statements of both P.Ws 1 and 2,having been recorded in disregard of the settled principles of law, could not have been read in evidence. Learned counsel for the appellants maintained that since statements recorded under section 512 Cr.P.C can be used against absconders only,therefore, it were inadmissible against the present appellants. He submitted that the case in hand even otherwise was not covered by the provision of Article 46 of the Qanun-e-Shahadat,Ordinance,1984 because thereunder too, the statements of those witnesses who have became incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense etc,were relevant. It is further grievance of the learned counsel for the appellants that since the above said witnesses, when tendered for cross-examination, were not administered fresh oath therefore, the omission had vitiated the whole trial. In order to supplement his contentions he has placed

reliance on the following reported judgments:-

1) Sher Muhammad alias Sher Vs.The State (1997 P.Cr.L.J 259)wherein a Division Bench of Quetta High Court was pleased to hold that though, Court is empowered to believe evidence of a witness recorded in the absence of accused provided, on the arrest of accused, such witness is dead or incapable of giving evidence or his attendance could not have been procured without an amount of delay or expense which in the circumstances of the case would be unreasonable yet,when after arrest of the accused,attendance of prosecution witnesses was procured and accused was allowed to cross-examine them on the basis of their examination-in-chief,which they had already recorded in first sound of the trial, it was held that procedure adopted by trial court was not recognized by law and it had caused serious prejudice to the accused. Conviction and sentences recorded against the accused in the circumstances, were set aside and the case was remanded.

2) Muhammad Younis Vs.The Crown (PLD 1953 Lahore-321) wherein it was held that as certain witnesses were common to all the three cases and when one of those witnesses appeared in the box,and his statement was recorded in one case and then a verbatim copy of his statement was placed on the records of the other two cases, with the addition of such matter brought out in cross-examination for the special purpose of that particular case and the witnesses were not examined in full in each case, it was held that the procedure adopted was illegal, it vitiated the trial.

3) State of Hyderabad Vs.Bhimaraya (A.I.R 1953 Hyderabad-63) wherein it was held that the evidence recorded in the case of the trial of co-accused of the absconder or other persons cannot by "ex-post facto operation" be treated as evidence recorded under section 512 for the purpose of utilising it at the trial of the absconder when he is apprehended and tried subsequently.

4) State of Mysore Vs.Sanjeeva (AIR 1956 Mysore-I)wherein it was held that section 512 Cr.P.C represents an exception to the provisions of section 33, of the Evidence Act,which itself is an exception to the general rule that only evidence recorded in the proceedings in question and in the presence of the parties can be made use of. Hence, the conditions which are required to be fulfilled under section 512 Cr.P.C have to be strictly construed.

5) Kesar Singh and another Vs.The State (AIR 1954 Punjab-286)wherein it was held that witnesses cannot be tendered for cross-examination without their being examined in chief.

6) Chhota Singh Hira Singh Vs.The State (AIR 1964 Punjab 120) wherein it was held that there is no meaning in tendering a witness for cross-examination by Public Prosecutor in a criminal trial for the simple reason that when a witness has not given statement in examination-in-chief, there is nothing in relation to which he is to be cross-examined and thus tendering a witness for cross-examination almost tantamounts to giving up a witness.

7) Sadeppa Gireppa Mutgi and others Vs.Emperor (A.I.R 1942 Bombay-37) wherein it was held that the practice of tendering for cross-examination should only be adopted in cases of witnesses of secondary importance.

8) Manzurul Haque and others Vs.State of Bihar (A.I.R 1958 PATNA-422) wherein it was held that a material witness should not be merely tendered but should be sworn and asked to give evidence by the prosecution and tendering,if at all, should be confined to witnesses of secondary importance.

9) Zafar Ali and another Vs.The State and another (P.L.D 1996 Lahore-391)wherein it was held that after amendment in section 6 of the Oaths Act,1873 by Federal Laws Revision and Declaration Ordinance, 1981, it was compulsory for Muslim witness to depose on oath.

10. Qari Abdul Rashid,Advocate,learned counsel for the State having been confronted with the above proposition candidly conceded and submitted that since earlier, statements of P.Ws 1 and 2 were recorded by the trial court, in the absence of appellants when they were neither decalred as absconders nor were present,therefore ,on summoning the appellants it was obligatory for the trial court to record examination-in-chief of the aforementioned witnesses and thereafter had asked the appellants to cross-examine them.He however,submitted that non-administering of oath has not vitiated the trial.

11. Notwithstanding the fact that learned counsel for the State has not controverted the above contentions, we have given our anxious consideration to the contentions raised by the learned counsel for the appellants. In order to ascertain as to whether or not the statements of P.Ws 2 and 3 recorded under section 512 Cr.P.C could have been, in the instant case, taken on record, it would be advantangeous to have a glance at section 512 Cr.P.C which reads as follows:-

> Sec.512. **Record of evidence in absence of accused.**-- (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him the Court competent to try or send for trial to the Court of Session or High Court such person for the offence complained of may,in

his absence,examined the witness (if any) produced on behalf of the prosecution,and record their depositions. Any such deposition may, on the arrest of such person,be given in evidence against him on the inquiry into or trial for,the offence with which he is charged,if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay,expense or inconvenience which,under the circumstances of the case,would be unreasonable.

(2) Record of evidence when offender unknown.- If it appears that an offence punishable with death of imprisonment for life,has been committed by some person or persons unknown,the High Court may direct that any Magistrate of the First Class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence. Any depositions so taken may be given in evidence against any person who is subsequently accused of the offence,if the deponent is dead or incapable of giving evidence or beyond the limits of Pakistan."

A bare perusal of above provision would show that depositions recorded under section 512 Cr.P.C can only be used against the absconders on their arrest or as per sub-clause(2) thereof, against the person or persons who may subsequently be accused of the offence,provided the deponent is dead or is in capable of giving evidence or his attendance cannot be procured without any amount of delay,expense or inconvenience which, in the circumstances of the case, would be unreasonable. Needless to point out that the procedure provided for under section 512 (2) Cr.P.C apply only to cases of great gravity and can be put inforce only under an order of High Court and that mere delay,expense or inconvenience

in obtaining the ~~pressure~~ presence of the deponant is not a sufficient grounds for ~~making~~ accepting the deposition, evidence against the person subsequently accused. It thus proceeds that the statements recorded under section 512 Cr.P.C cannot be used against those persons who before recording of the same had neither absconded nor were the persons un-known.

12. Notwithstanding the above it may be pointed out here that in criminal cases, the evidence of witnesses, has to be recorded in the presence of the accused as provided under section 353 Cr.P.C and the accused has a right of cross-examination under section 133 of the Qanun-e-Shahadat Order,1984. Both section 353 Cr.P.C as well as Article 133 of the Qanun-e-Shahadat Order,1984 are reproduced below for ready reference and convenience:-

> **Sec.353. Evidence to be taken in presence of accused.** Except as otherwise expressly provided, all evidence taken under Chapters XX,XXI,XXII and XXII-A shall be taken in the presence of the accused,or, when his personal attendance is dispensed with, in presence of his pleader.
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> **Art.133.Order of examination.**- (1) Witnesses shall be first examined-in-chief,then (if the adverse party so desires)cross-examined then(if the party calling him so desires)re-examined.
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> (2) The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

> (3) The re-examination shall be directed to the explanation of matters referred to in cross-examinations and, if new matter is, by permission of the court, introduced in re-examination,the adverse party may further cross-examine that matter."

It is a requirement of law that conviction or acquittal can only be passed when all mandatory provisions of law are complied with.

13. Record reveals that in the incomplete challan Imdad Hussain alias Dago alongwith two unknown persons were shown as absconders, whereas, the present appellants were placed in column No.2. Since said Imdad Hussain did not appear before the trial court therefore, he was declared a proclaimed offender and was proceeded against. Accordingly, witnesses were summoned for 28.12.1998 vide order dated 12.12.1998. Since none of the witnesses was present on the said date,therefore, process was repeated for 12.1.1999 and on the said date it was also ordered that notice to the present appellants as well as their sureties be also issued. The case was then adjourned to 3.2.1999, however, the statements of the witnesses could not be recorded on that date, as well. On 12.2.1999,however, witnesses including the complainant,were examined and it was ordered that since the prosecutrix has implicated the present appellants, therefore,bailable warrants in the sum of Rs.50,000/-

against each of them be issued. On summoning the appellants, attendance of the witnesses was procured and appellants were asked to cross-examine them on the basis of their statements which they had already got recorded. It is not explicit on record as to why the learned trial Judge,instead of following the procedure prescribed by Article 133 of the Qanun-e-Shahadat Order,1984 took on record the statements of P.Ws 2 and 3 recorded by him under section 512 Cr.P.C and directed the appellants to cross-examine them and that too,without formally re-administering oath to the said P.Ws. The fact cannot be lost sight of that basically object of section 512 Cr.P.C is to procure and preserve evidence in connection with an offence so that when accused is subsequently apprehended or found and put on trial he may not be able to take advantage of his abscontion or the evidence by lapse of time is not lost or disappear. It neither facilitates the court to by-pass or ignore the mandatory provision of law contained in section 353 CR.P.C not it empowers the court to device its own procedure qua examination of witnesses in dis-regard of the provision of Article 133 of the Qanun-e-Shahadat Order,1984. It may be mentioned here that since, the provisions of the Qanun-e-Shahadat Order,1984(hereinafter referred to as the Order) as per section 1(2) thereof apply

to all judicial proceedings in or before any court, including a court martial,a tribunal or other authority exercising judicial or quasi-judicial powers or jurisdiction except an arbitrator,therefore,the court was not at liberty to substitute for the procedure of the "Order". Needless to point out that under section 537 Cr.P.C too,the defects of mere formal character arising from inadvertance can be cured and it is never intended to allow a court to contravene or disobey express provisions of law. What to speak of taking on record the earlier depositions, in order to satisfy the requirement of law, in our view, it was not enough for the court to read over the statements of the witneses in the presence of the accused,treating it as examination-in-chief. Such examination must had actually taken place in the presence of the appellants. The procedure, adopted by the trial court therefore, being materially different from that prescribed by law, cannot be approved.

14. As regards the next contention of the learned counsel for the appellants that non-administration of oath to the aforenamed witnesses, before their cross-examination, has vitiated the trial, it may be mentioned here, that though there is no need to attend the contention because we have already observed that the statements of P.Ws 1 and 2 were not

recorded in accordance with law by the learned trial court yet, it may be pointed out here, that after amendment brought in section 6 of the Oaths Act,1873,by the Federal Laws (Revision and Declaration) Ordinance XXVII of 1981,though all courts are now bound to administer oath to the witnesses, in the form of oath prescribed by the High Courts yet,having regard to the express provision of section 13 of the Oaths Act it may be mentioned here that mere none administration of oath to the witnesses can neither invalidate any proceedings nor can it render inadmissible any evidence and would thus not vitiate the trial. In this view we are fortified by the following reported judgments:-

1) Sajjad Ahmad and another Vs.State (1992 SCmR-408)

2) Zaibul Haram Vs.The State (PLD 1991 FSC-1)

3) Shahnawaz Vs.State (PLD 1986 FSC-242)

4) Haji Hamal and others Vs.State (1986 P.Cr.L.J Quetta-1121)

Since in the instant case the trial Judge has not adopted the correct procedure in recording the statements of the witnesses,therefore, the impugned judgment to our mind,is not sustainable. Consequently the impugned judgment dated 13.12.1999 passed by the learned Additional Sessions Judge Dera Murad

Jamali is set aside and the case with consent of the parties is remanded to the trial court for its decision afresh in accordance with law within a period of six months from the receipt of this order/judgment,with the direction that P.Ws.1 and 2 namely Mst.Tajal and Shakar Khan be recalled and re-examined. Thereafter, appellants may also be re-examined under section 342 Cr.P.C and they be confronted with all the incriminating circumstances/evidence which may come on record through the statements of aforenamed witnesses. The appellants shall also be permitted to lead evidence in their defence,with regard thereto or to get recorded their statements within the purview of section 340(2) Cr.P.C, if they choose to do so.

These are the reasons for our short order of the even date.

(CH.EJAZ YOUSAF)
JUDGE

(ALI MUHAMMAD BALOCH)
JUDGE

(APPROVED FOR REPORTING)

Islamabad, 16.2.2000.
M.Akram/

JUDGE