

IN THE FEDERAL SHARIAT COURT

(Appellate / Revisional Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO.125/L/2005

1. Bashir Ahmad

2. Munir Ahmad

Sons of Fazal Muhammad alias Fazal
Din, caste Arain, Resident of Chak
No.156/Murad, Tehsil Hasilpur, District
Bahawalpur.

... APPELLANTS

VERSUS

1. Maqsood Ahmad son of Fazal Muhammad alias Fazal Din, caste Arain,
Resident of Jinnah Colony, Chak No.64/F, Tehsil Hasilpur, District
Bahawalpur.

2. The State

...
RESPONDENTS

Counsel for the appellants

...

Syed Fiaz Ahmad Sheerazi
Advocate.

Counsel for the complainant

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Sardar Nazar Hussain Dogar
Advocate

Counsel for the State

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Qazir Zafar Iqbal,
Additional Prosecutor General.

Private Complaint No.
Date & Police Station

...

70/2003, dated 22.05.2004
District Bahawalpur

Date of judgment of trial Court

...

11.04.2005

Date of institution

...

20.04.2005

Last date of hearing

...

19.03.2009

Date of Judgment

...

21.03.2009

(0)

JUDGMENT:

Justice Syed Afzal Haider, Judge: This appeal is directed against the judgment dated 11.04.2005 delivered by learned Additional Sessions Judge, Bahawalpur, whereby the appellants namely Bashir Ahmad and Munir Ahmad have been convicted under Section 11 of the Offence of Qazf (Enforcement of Hadd) Ordinance VIII of 1979 and sentenced to three months rigorous imprisonment each with 10 stripes each and fine of Rs.10,000/- each or in default whereof to further undergo rigorous imprisonment for one month each.

2. The prosecution story as mentioned in the private complaint filed by complainant Maqsood Ahmad, PW.1, is as under:-

That the complainant and both accused are consanguine brothers. After the death of their father, a dispute arose regarding the land whereafter a suit was filed by the complainant/plaintiff in which both the accused were cited as defendants. On

27.03.2003, the respondents submitted their written statement and filed an application under Order VII Rule 11 of the Civil Procedure Code in the Civil Court. In the written statement they dubbed the complainant/plaintiff as bastard. They further asserted in the written statement that the mother of the plaintiff/ complainant became pregnant while she was unmarried and out of fear of death at the hand of his family she slipped away from her house and started living with their father. It was further alleged that after the birth of the complainant their father entered into Nikah with the mother of complainant. All the imputations made by the respondents in their written statement were reproduced by the complainant in para No.4 of the complaint. It was, therefore, urged that the respondents had committed an offence under section of the 7/11 of Offence of Qazf (Enforcement of Hadd) Ordinance VIII of 1979 so they be summoned and be punished accordingly.

3. After preliminary inquiry, the accused were summoned and a formal charge was framed against them under Section 7 of the Offence of Qazf (Enforcement of Hadd)

Ordinance VIII of 1979. The accused pleaded not guilty and claimed trial.

4. The prosecution in support of its contentions produced three witnesses. The gist of prosecution witnesses is as

under:-

- (i) PW.1 Maqsood Ahmad complainant reiterated the story as narrated in Private Complaint Ex.PF.
- (ii) PW.2 Muhammad Hanif deposed that Fazal Muhammad, father of Maqsood Ahmad complainant, contracted two marriages, one with Hameedan alias Aziza out of which Maqsood Ahmad was born and the second marriage was contracted with Mst.Hashmat Bibi, the mother of the accused. The witness further deposed that he had seen the mother of Maqsood Ahmad. She was a pious woman. Maqsood Ahmad is the real son of Fazal Muhammad. Fazal Muhammad died one year ago. Dispute regarding landed property is pending adjudication between the complainant and accused in civil court at Hasilpur. The accused had stated in their written statement that the complainant is not legitimate son of their father Fazal Muhammad. It is

a false imputation. In this respect a Panchayat was held in which the accused admitted their guilt and sought pardon and promised to give the due share from the landed property to the complainant. However, they resiled later on.

- (iii) PW.3 Muhammad Rafique corroborated the version of PW-2.

5. The statements of accused Bashir Ahmad and Munir Ahmad were recorded under Section 342 of the Code of Criminal Procedure on 22.04.2004, wherein they denied the allegations leveled against them and stated as under:-

“The complainant had grudge with me and my co-accused over landed property so he has deposed against me and the PWs are related to him so they deposed against me. We had already instituted a suit against the complainant in the year 1990 about the property in which we wrote the parentage of Maqsood Ahmad as un-known.”

6. The accused produced two DWs in their defence.

DW-1 Muhammad Shafee deposed as under:

- (i) "Fazal Muhammad, Bashir & Munir accused are known to me. Fazal Muhammad were six brothers namely, Rehmatullah, Ali Muhammad, Abdullah, Din Muhammad, Fazal Din and Ismail. Abdullah was the person who engaged and made preparation for the marriage of Fazal Muhammad with Hameedan Bibi. At that time Hameedan Bibi was pregnant and the relative women advised Abdullah not to arrange for the marriage of Hameeda with Fazal Muhammad. After some time Maqsood complainant born out of the womb of Hameedan Bibi. After expiry of Iddat then Hameeda was married with Fazal Muhammad and out of this wed-lock one female baby was born, whose name is not known to me and she is since dead. After the birth of above said baby one year later Hameeda also died. Then Fazal Muhammad married with Hashmat Bibi and out of this wed-lock five sons and three daughters born. Two sons are Bashir and Munir. Uptill now we could know regarding the paternity of Maqsood complainant. The complainant remained in Chak No.157/M for twelve years and he was looked after by his Tai, wife of Abdullah. When Maqsood became major and the people of locality

taunted the wife of Abdullah then accused came to Chak No.64/Fateh. Fazal Muhammad in his life time after feeling danger on the part of the complainant alienated his property to his sons accused Bashir & Munir 1½ years ago Fazal Muhammad died. When this property was alienated by Fazal Muhammad. This alienation was challenged in the Civil Court. The accused and their mother had not any false acquisition against the complainant.”

- (ii) DW.2 Shah Muhammad deposed the same story as narrated by DW.1.

7. The learned trial Court after assessing the evidence and hearing arguments on behalf of the parties found that the accused had committed an offence of Qazf liable to Tazeer and thereafter both the accused were convicted and sentenced as mentioned above in the opening paragraph of this Judgment.

8. I have gone through the file and also perused the evidence including the statements of both the appellants. I have heard the arguments of learned counsel for the appellants as well

as learned counsel for the complainant. Arguments of Additional Prosecutor General for the State have also been heard.

9. It is worth noting that the allegations leveled by the appellants in their written statement filed in the Civil Court were neither denied by the accused before the learned trial Court at the time of making statement as not having been made nor at the time of advancing the arguments before the learned trial Court or even at the time of hearing this appeal. A reference may be made to the answer of questions No.3, 6 and 10 of Bashir Ahmad and Munir Ahmad appellants where they have asserted that their father had contracted marriage with Mst.Hameeda mother of the complainant PW-1 Maqsood Ahmad after birth of the latter. Mother of Maqsood Ahmad had come from Faisalabad in their village while she was pregnant and it was only after the delivery and birth of Maqsood Ahmad that their father Fazal Muhammad contracted marriage with mother of the appellants. The

appellants also admitted this fact having been written in the written statement filed by them. The learned counsel for the appellant also admitted that paternity of the complainant was never challenged in any regular civil suit filed by the appellants.

It is also worth noting that deceased Fazal Muhammad had died only five years back and he had never during his life time disowned Maqsood Ahmad or declared that Maqsood Ahmad was his adopted son and not his real son. The learned counsel for the appellants after consulting the appellants also admitted both the facts as well.

10. Learned counsel for the appellants however relied upon the suit filed by the appellants against Maqsood Ahmad appended with the file as Ex.D-B. This was a suit for possession which was dismissed on 28.04.1992 wherein it was held that the suit property in possession of the complainant/defendant was not validly gifted to Maqsood Ahmad and was the property of the

plaintiffs/appellants. *This suit did not determine the question of paternity.* Learned counsel for the appellants also referred to the evidence of Muhammad Shafee DW-1 to assert that the witness did not know the paternity of Maqsood complainant. In cross-examination DW-1 however stated that Abdullah brother of Fazal Muhammad, father of the appellants, had brought Mst.Hameeda Bibi from Faisalabad for the purpose of marriage. He also stated in the cross-examination that it was correct that their family clan did not restrain Abdullah from marrying Fazal Muhammad with Mst.Hameedan. It was further stated that Mst.Hameeda had died some time after the partition of subcontinent. He also stated that during the life of Mst.Hameedan Bibi, the witness used to visit the house of Fazal Muhammad where she was living as a wife. He also stated that he had not received any negative report regarding the character of Mst.Hameedan and he also stated that he was not sure whether

Mst.Hameedan was virgin or pregnant or was previously married before her marriage with Fazal Muhammad. Similarly Shah Muhammad DW-2 has admitted in the cross-examination that the entire Bradri was present at the wedding of Fazal Muhammad with Mst.Hameedan. He further stated that Mst.Hameedan remained in the house of Fazal Muhammad for five years and during this period she was known as a pious woman.

11. The next point urged by the learned counsel for the appellant was that the trial Court has to certify that the evidence given by the party was false before recording conviction of the accused. Reliance was placed on the case of "Bakht Ali and another Versus. The State" reported in 1993 P Cr. L.J page 1872, a case decided by a full Bench of the Federal Shariat Court under the offence of Qazf. It was, therefore, contended that appellants merit acquittal. The case of Bakht Ali dealt with a situation where witnesses appeared in support of the allegation of Zina leveled by the prosecution. The question of determination was

whether “the mere failure of a complainant to prove his allegations in Court does not make the witnesses of the said offence liable to Qazf punishment unless it is proved that they had malafidely concocted a false accusation”. (Para 8 of the report). It was found “that the case was dismissed by him because he did not see any incriminating evidence involving the accused in this heinous offence. The learned trial Court however did not remark or observe that the appellants/accused *who had appeared as witnesses* had not preferred the accusation in good faith. Though their statements were merely found as not inspiring confidence but there is no finding of the Court that the evidence given by them was false.” (Emphasis added). The facts and the legal proposition in the said precedent is different from the one pertaining in this case.

12. Learned counsel for the complainant and the State supported the impugned judgment by stating that it was a well reasoned Judgment. It was further submitted that the appellants

for the sake of property have cast aspersions on the mother of the complainant. By so doing the appellants have also cast aspersions on their father as well. The appellants never got the matter conclusively determined either within the life time of their father or even after his death through a regular civil suit. It was, therefore, urged that appeal should be dismissed.

13. I have considered arguments of the parties as well as the different aspects of this case and found that the learned trial Court in para 12 of the impugned judgment had categorically stated that the appellants had recorded their allegations regarding the imputation of the anonymity of paternity of Maqsood complainant in their oral evidence as well as in the statements under section 342 of the Code of Criminal Procedure. The learned trial Court had also found in paragraph 10 of the impugned judgment that the documents produced by the appellants did not exonerate them from the imputation referred by them, In para 6 of the Judgment, the learned trial Court while

assessing the evidence of PW-3 observed that Mst.Hameedan was a pious woman. The appellants admitted their guilt, sought pardon and promised to give the due share to the complainant but they resiled thereafter and the appellants had leveled false allegations just to grab the share of Maqsood.

14. As noted above, Fazal Muhammad during his life time had never disowned the complainant and it is an admitted fact that he had married the mother of the complainant Maqsood and from their wedlock the latter was born during the subsistence of the marriage between Fazal Muhammad and Mst.Hameedan. It was only after the death of Mst.Hameedan that mother of the present appellants was married to Fazal Muhammad. Maqsood complainant was 65 years' old at the time of death of his father Fazal Muhammad. The appellants present in the Court today stated that it was only five years back that Fazal Muhammad had died and during his life or thereafter the appellants had not gone to the Civil Court to determine conclusively the fact that

complainant Maqsood was not the real son of Fazal Muhammad deceased. The appellants even today did not offer any apology.

15. It is a very serious matter to impute Zina to the mother of a person and to claim that the other person was a bastard. There was no proof whatsoever that deceased Fazal Muhammad entered into a marriage with the mother of Maqsood Ahmad after he was born as a result of Zina. It is very clear that the imputer not only intended to harm Maqsood Ahmad but he had reason to believe that the said imputation will harm his reputation and also hurt his feelings particularly when the mother of Maqsood Ahmad was the lawfully wedded wife of Fazal Muhammad. In such a case, the slanderer does not deserve any sympathy whatsoever. The Holy Quran in very clear terms in Surah Bani Israeel declares and upholds the principle of human dignity. According to this Islamic Injunction every person born in this world without reference to colour, caste, creed is cloathed with dignity. It is a free gift from Allah Almighty and no human

being has the authority to tear asunder the cloak of honour conferred by the Lord Creator. It is a fundamental right which is not dependent on the sanction of human legislation. It is excellent in the highest degree. The edifice of social interaction is built upon this edict. It is the duty of persons in authority to honour the concept of human dignity. To establish this right is tantamount to enforcing a divine injunction.

16. In this view of the matter, the conviction recorded by the learned trial Court in Private Complaint No.70/2003 instituted on 22.05.2004 decided on 11.04.2005 under sections 11/7 of the Offence of Qazf (Enforcement of Hadd) Ordinance VIII of 1979 is maintained and this Criminal Appeal No125/L of 2005 is dismissed. The sentence is being maintained to the extent of three months imprisonment and a fine of Rs.10,000/- each and in default one month rigorous imprisonment. The sentence of 10 stripes each is being set aside. At the time of announcement of this Judgment, the appellants were present in the Court on bail.

Under the direction of this Court, they were taken into Police custody and sent to jail for undergoing the unexpired period of their sentence.

17. These are the reasons of my short order dated 19.03.2009.

Syed Afzal Haider

Justice Syed Afzal Haider

Dated, Lahore the 21st March, 2009
Amjad /*

Fit for reporting.

Syed Afzal Haider

Justice Syed Afzal Haider