IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE M.MAHBOOB AHMAD, CHIEF JUSTICE
MR.JUSTICE CH.EJAZ YOUSAF.

CRIMINAL APPEAL NO.194/I OF 1998.
JAIL CRIMINAL APPEAL NO.25/I OF 1999.

Syed Zaheer Hussain Shah son of
Syed Wazir Hussain Shah,resident
of village Thipra, Tehsil and
District Haripur.

... Appellant

Versus

The State	...	Respondent
For the appellant	..	Mr.Azmatullah Malik, Advocate
For the State	...	Mr.Sardar Khan, Advocate General NWFP
No.& date of F.I.R Police Station	...	No.80/1997 dt.24.3.1997 P.S Kot Najibullah
Date of judgment of trial court	...	1.12.1998
Date of Institution	...	16.12.1998.
Date of hearing and decision	...	1.7.1999.

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JUDGMENT

CH.EJAZ YOUSAF,J.- This appeal is directed against the judgment dated 1.12.1998 passed by the learned Additional Sessions Judge Haripur whereby the appellant has been convicted under section 10(3) of the Offence of Zina(Enforcement of Hudood) Ordinance,1979 (hereinafter referred to as the said Ordinance) and sentenced to undergo 25 years R.I. Benefit of section 382-B Cr.P.C has,however, been extended to the appellant.

2. Briefly stated, the prosecution case, as gathered from the record is that on 24.3.1997 complainant Mst.Uzma Syed aged about 21/22 years made a telephonic contact with the Prime Minister of Pakistan and complained to him that she was being subjected to zina-bil-jabr by her real father i.e the present appellant from the time when she was of 10/11 years of age. It was further disclosed by her that she had informed her mother about the ugly act of her father, but she remained silent and mum due to fear as well as family honour and did not disclose about the shameful act of her father to any other person. It was complained by her that since her father had an evil eye on her younger sister Mst.Mamona as well and that she did not want that life of her younger sister may also be spoiled therefore, perforce she had to approach

the Prime Minister so that machinery of law be set at motion and guilt of the appellant may be brrought home. Record reveals that in pursuance of the above complaint police was directed to approach the complainant and get record her statement,which was accordingly done and consequently a formal F.I.R bearing registration No.80 dated 24.3.1997 was registered at police station Kot Najeebullah,District Haripur under sections 6/10 of the said Ordinance. Investigation was initiated and on completion thereof appellant who was arrested in the meantime by the police, was challaned to the court for trial.

3. At the trial, the prosecution in order to prove the charge and substantiate the allegations levelled against the appellant produced eight witnesses, in all. P.W.1 Dr.Muhammad Irshad, Medical Officer,DHQ,Hospital Haripur,had examined the appellant on 24.3.1997 qua the potency test. P.W.2 Uzma Syed is the complainant. She, at the trial, reiterated the version contained in the F.I.R. P.W.3 Memoona-Syed is younger sister of the complainant. She corroborated the statement of P.W.2 in all material particulars. P.W.4 Mst.Afza Bibi is wife of the complainant. She,too, corroborated the statement of the complainant, in pith and substance. P.W.5 Zarbat Khan had on the receipt of Murasila

Ex.PA/1 registered the formal F.I.R Ex.PA. P.W.6 Lady doctor Farhat Yasmin had examined the complainant on 24.3.1997. She produced in court medico-legal report issued by her as Ex.P.W.6/1 and also the report of Chemical Analyst i.e Ex.PW.6/2. P.W.7 Nadeem Foot Constable, is a marginal witness of the recovery memo Ex.PW.7/1 vide which the investigating officer had taken into possession two phials, said to contain swabs, of the victim. P.W.8 Jamshed Anwar Khan,S.I CIA Staff, Haripur is the Investigating Officer. He on 24.3.1997 had recorded report lodged by the complainant on the direction of DSP, Haripur Circle in the shape of a murasila and sent the same to the police station for formal registration of the case. Complainant was also got examined in the hospital through his application Ex.PW.8/1. He had also received the phial said to contain swabs,vide recovery memo Ex.PW.7/1. He had also recorded the statements of PWs under section 161 Cr.P.C, besides arresting the appellant, who later on was produced before the doctor, for examination, vide his application Ex.PW.8/2. Subsequently he had also produced P.W.3 as well as P.W.4 before the Judicial Magistrate for the purpose of recording their statements under section 164 Cr.P.C on 25.3.1997.

4. On the conclusion of prosecution evidence appellant was examined under sections 342 as well as 340(2)

Cr.P.C. In his statements, he denied the charge and pleaded innocence. His stand before the Court was that from the year 1990 to 1996 he remained abroad in connection with his services. In his absence, the complainant developed love affairs with some people. On his return true facts were not disclosed to him by his wife i.e P.W.4 despite repeated requests. However, later on, when he came to know about the real facts then his wife hatched a conspiracy in order to eliminate the appellant and for that purpose also administered poison to him. It was also his case that his wife was not a woman of good character and had objectionable relations with her brother-in-law,namely Ghazan Shah,for which, she was reprimanded by the appellant a number of times. In nutshell, it was pleaded by him that the complaint was lodged in order to get rid of him.

A witness, namely,Roshan Din Khan,ASI,Police Station Kot Najeebullah, was also examined as C.W.1 to whom enquiry was entrusted vide application Ex.CW.1/1. He deposed that he in pursuance of the application undertook the enquiry and collected affidavits Ex.CW.1/1 to 1/6 from various persons and prepared his report Ex.CW.1/7. In cross-examination, he,however, deposed that enquiry was marked to him alongwith the application of the appellant i.e Ex.CW.1/D-1 and that he had submitted his report to the SHO . No evidence was led by the appellant in his defence. However, he relied on the evidence of C.W.1.

5. After hearing learned counsel for the parties, the learned trial court convicted the appellant and sentenced him to the punishment as mentioned in the opening para hereof.

6. We have heard Mr.Azmat Ullah Malik,Advocate,learned counsel for the appellant and Mr.Sardar Khan,Advocate General NWFP,for the State.

7. Mr.Azmat Ullah Malik,Advocate,learned counsel for the appellant has inter-alia, raised the following contentions:-

a) That the learned trial court after hearing arguments of the learned counsel for the parties had called Mr.Safeer Hussain Shah brother of the complainant in court,discussed the matter with him and evidently based conviction on the information conveyed by him. The circumstances/ information received from said Safeer Hussain Shah neither forms part of the judgment nor were/was put to the appellant nor opportunity within the purview of section 342 Cr.P.C was afforded to him to explain his position with regard thereto, thus the impugned judgment is unsustainable.

b) That there is a delay of 11 years in reporting the matter to the police.

c) That the report lodged by Mst.Uzma Syed being an offshoot of malice is otherwise,not worthy of credence because relations between the parties were strained.

8. In order to supplement his first contention; that the learned trial court could not have based conviction on the evidence/ information conveyed by Safeer Hussain Shah brother of the complainant, Mr.Azmatullah Malik,learned counsel appearing for the appellant submitted; that said Safeer Hussain Shah

brother of the complainant was called by the learned trial Judge in court on the closure of prosecution as well as defence evidence. He was questioned on the salient features of the case and evidently conviction was based on the information conveyed by him whereas, neither his statement was reduced into writing nor he was permitted to be questioned or cross-examined by the defence nor the information received from him was put to the appellant within the purview of section 342 Cr.P.C nor the appellant was afforded an opportunity to explain his position with regard thereto thus, the omission made by the learned trial court,having materially prejudiced the appelllant, in his defence,has rendered the impugned judgment as un-sustainable.

9. Mr.Sardar Khan,learned Advocate General NWFP, appearing for the State, having been confronted with the proposition candidly conceded and submitted that legally, the learned trial court, could not have relied upon the statement made by Safeer Hussain Shah without formally recording the same. He submitted, that if at all, Safeer Hussain-Shah, in the opinion of the court, was a material witness, and his statement was essential for the just and proper decision of the case then in all fairness, he should have been examined as a court witness with a proper notice to both

the parties and defence should have been afforded an opportunity to cross-examine him and it was also obligatory for the court to confront the appellant with the information conveyed by said Safeer Hussain Shah thereby seeking his explanation with regard thereto within the purview of section 342 Cr.P.C. Learned Advocate General NWFP however, submitted that since said Safeer Hussain Shah appears to be a material witness therefore, case may be remanded to the trial court for recording of his statement and thereafter to decide the case afresh, in accordance with law.

10. Notwithstanding the fact that the learned Advocate General NWFP has not controverted the above contention, we have given our anxious consideration to the contention raised by the learned counsel for the appellant. A perusal of the impugned judgment shows that the learned trial Judge before recording conviction against the appellant had also heard Syed Safeer Hussain Shah who appeared before him on the conclusion of the parties' evidence as well as the arguments. Para-13 of the judgment is indicative of the fact. However, in doing so he appears to have lost sight of the fact that in conducting a criminal trial procedure prescribed by law must be adhered. Section 5 of Cr.P.C

which is reproduced here in below for ready reference and convenience; shows that all offences, in the P.P.C or under any other law for which,no separate procedure for trial is provided must be tried in accordance with the provisions of the Code of Criminal Procedure:-

> "Sec.5 **Trial of offences under Penal Code:** (1) All offences, under the Pakistan Penal Code shall be investigated, inquired into,tried,and otherwise dealt with according to the provisions hereinafter contained.
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> (2) **Trial of offences against other laws:** All offences,under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences".

11. Whereas, Chapter XXII-A of the Code of Criminal Procedure, provides for the procedure and manner of trials before the High Courts and Courts of Sessions. Having regard to the express provisions of section 265-F as well as section 265-G of the Code of Criminal Procedure, it may be pointed out here that a trial court has to take evidence and examine witnesses of the parties in accordance with law and in the manner and order provided in these sections which shall follow a judgment of acquittal or conviction as prescribed by section 265-H of the Code of Criminal Procedure. It would be profitable to reproduce here-in-below relevant extract from sections 265-F and 265-G of the Cr.P.C:-

"Sec.265-F. **Evidence for prosecution.**- (1) If the accused does not plead guilty or the Court in its discretion does not convict him on his plea,Court shall proceed to hear the complaint (if any) and take all such evidence as, may be produced in support of the prosecution:

Provided that.....

(2) The Court shall ascertain from the Public Prosecutor or, as the case may be,from the complaint, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon such persons to give evidence before it

(3) .....

(4) When the examination of the witnesses for the prosecution and examination(if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

(5) If the accused puts in any written statement, the Court shall file it with the record.

(6) If the accused, or any one of several accused, says that he means to adduce evidence,the Court shall call on the accused to enter on his defence and produce his evidence.

(7) .....

Sec.265-G. **Summing up by prosecutor and defence.**--

(1) In cases where the accused,or any one of several accused, does not adduce evidence in his defence,the Court shall,on the close of the prosecution case and examination (if any) of the accused, call upon the prosecutor to sum up his case whereafter the accused shall make a reply.

(2) In case where the accused, or any of the several accused, examines evidence in his defence, the Court shall, on the close of the defence case, call upon the accused to sum up the case whereafter the prosecutor shall make a reply."

Further a perusal of section 265-B Cr.P.C shows that the provisions contained in Chapter XXII-A of the Code of Criminal Procedure which includes section 265-F and section 265-G of the Cr.P.C are mandatory in nature and no departure therefrom is permissible in law. Section 265-B Cr.P.C reads as follows:-

> "Sec.265-B, **Procedure in cases triable by High Courts and Courts of Sessions.--** The following procedure shall be observed by the High Courts,and the Courts of Session in the trial of cases triable by the said Courts."

Reference in this regard may also be made to the provision of section 356 Cr.P.C which lays down that in a trial before the Courts of Sessions the evidence of each witness has to be taken down in writing and in the language of the court. Section 356 Cr.P.C reads as under:-

> "Sec.356.**Record in other cases:** (1) In trial before Courts of Session and in inquiries under Chapter XII, the evidence of each witness shall be taken down in writing in the language of the Court by the Magistrate or Sessions Judge,or in his presence and hearing under his personal direction and superintendence and shall be signed by the Magistrate or Sessions Judge."

In the wake of the above it thus proceeds that trial of a case has to be conducted not only in judicious and legal but prescribed manner. Thus if at all examination of said Syed Safeer Hussain Shah was imparative then firstly, he should have been examined in accordance with law thereby

taking down his statement in writing with an opportunity of cross-examination to the defence and thereafter,the appellant should have been questioned with regard thereto, within the purview of section 342 Cr.P.C enabling him to explain the circumstances appearing in the statement of the said witness, before being called to enter upon his defence. It may be pertinent to observe here that the compliance with section 342 of the Code of Criminal Procedure is essential in accordance with its terms and departure therefrom is not permissible in law, if some prejudice appears to have been caused to the accused. The use of word "shall" in latter part of sub-section(i) of section 342 implies that the provision in question is not permissive but imperative. Perusal of section 342(1) Cr.P.C further leads to the inference that the object of the examination of the accused is, to give him an opportunity of explaining the circumstances which may tend to incriminate him or likely to influence mind of the judge in arriving at a conclusion adverse to him. Likewise, the addition of the words"for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him" in section 342(i) further suggests that examination of the accused under the section is not a mere formality but a mandate to enable the

accused to explain any circumstances appearing against him in the prosecution evidence. To our mind, these words have been thoughtfully inserted therein to ensure that the principle contained in Judicial Maxim "Audi Alteram Partem" is fully complied with.

Though in some cases it has been held that an error or omission which falls within the category of "curable irregularities" within the ambit of section 537 Cr.P.C. does not necessarily vitiate the trial, yet in certain cases where, the accused is not questioned at all, or his explanation is not sought for with regard to an important piece of evidence, which otherwise, implicates him and contributes towards his conviction, the omission so made would be prejudicial to him.

12. Since in the instant case the trial Judge has not adopted the mandatory procedure in the conduct of the trial and has based the judgment inter alia on considerations not borne on record,therefore, the impugned judgment, to our mind, is not sustainable. There is no need to attend to rest of the contentions, lest it may prejudice case of either of the parties at any subsequent stage. Consequently,the impugned judgment dated 1.12.1998 passed by the learned Additional Sessions Judge Haripur is set aside and the case is remanded to the trial court for its decision

afresh, in accordance with law, with the direction that said Syed Safeer Hussain Shah be called and examined as a court witness, thereafter, appellant may be re-examined under section 342 Cr.P.C and he be confronted with all the circumstances, evidence which may come on record against him through the statement of the said witness. The appellant shall also be permitted to lead evidence in his defence, with regard thereto or to get recorded his statement within the purview of section 340(2) Cr.P.C,if he chooses to do so.

(CH.EJAZ YOUSAF)
JUDGE

(M.MAHBOOB AHMED)
CHIEF JUSTICE

(APPROVED FOR REPORTING)

JUDGE

Islamabad, 1.7.1999.
M.Akram/