IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT:

Mr.Justice (Rtd) Salahuddin Ahmad	Chairman
Mr.Justice Agha Ali Hyder	Member
Mr.Justice Aftab Hussain	Member
Mr.Justice Karimullah Durrani	Member

CRIMINAL APPEAL NO.3-L OF 1981

Nawaz Masih ..... Appellant

Versus

The State ..... Respondent

On appeal from the judgment dated the 20th December, 1980 of the Additional Sessions Judge, Sheikhupura in Hadood Case No.13 of 1980, Trial No.51 of 1980 (State Versus Nawaz Masih alias Baggi).

For the Appellant	Mr.Haji Mohammad Anwar Buttar, Advocate.
For the Respondent	Nemo.
Date of hearing	20.5.1981.
Date of decision	20.5.1981.

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JUDGMENT:

KARIMULLAH DURRANI, MEMBER: This appeal has arisen from the Judgment of Ch.Taj Muhammad, Additional Sessions Judge, Sheikhupura delivered on 20.12.1980, whereby accused-appellant, Nawaz Masih alias Baggi, son of Hidayat Masih, Christian, aged 25 years, resident of Chak No.25 Sathiali Kalan, Police Station Sangla Hill, District Sheikhupura was convicted under Section 10 of the Offence of Zina (Enforcement of Hadood) Ordinance (VII of 1979) and sentenced to undergo rigorous imprisonment for a period of 7 years and also to pay a fine of Rs.1,000/-, or in default to undergo rigorous imprisonment for a further period of 6 months.

2. The prosecution story in brief is that the prosecutrix, Mst.Perveen wife of Maqbool Masih, on 16.7.1979 at 11.00 A.M., when she was alone in the house ,was lying asleep under a tree in the courtyard of her house when the accused-appellant entered the house and after placing his hand on the mouth of the prosecutrix bodily lifted and carried her to a room in the house where after taking off her trousers he committed sexual intercourse with her by force. When the prosecutrix became in a position to raise hue and cry by getting her mouth freed from the grip of the accused, two persons namely Sadiq Masih and Rehmat Masih reached the spot on her cries. On their arrival the accused decamped from the scene. In the meanwhile the father-in-law of the prosecutrix, Kamal Masih, P.W.7 also arrived and found her in the naked condition. It was further alleged in the First Information Report lodged by the prosecutrix on the following day at the same hour that soon after the

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occurrence she accompanied by her father-in-law, the said P.W., started towards the Police Station for lodging the Report but was prevented from doing so by two persons, namely Akram and Nazir who threatened her of being killed in case the matter was reported to the Police. She was thus prevented from going to the Police Station on the day of the occurrence and reported the matter on the following day. The prosecutrix also produced before the Police her Shalwar Ex.P.1 which was allegedly used by the accused for cleansing his genitals after committing the zina-bil-Jabr on her.

3. None of the four persons mentioned in the First Information Report , the two who arrived at the scene of occurrence on the cries of the complainant or those two who prevented her from going to the Police, xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx was produced as a prosecution witness. The evidence against the accused consists of the solitary statement of the prosecutrix who appeared as P.W.6 during the trial. Her father-in-law, Kamal Masih, P.W.7, was produced as a corroborating witness who supported the prosecutrix in that when he reached the house he found her clothes torn and she lying in the courtyard and weeping in the naked state. The accused, according to him by that time had decamped from the spot but Rehmat and Sadiq were present. He was told by the victim that the accused had committed rape on her. He also stated that Akram and Aslam did not allow them to go to the Police Station on the day the occurrence took place and that it is why he and the prosecutrix went to the Police Station on the following day. It may be noted that according to the First Information Report it was Akram and Nazir who were said to have prevented the prosecutrix from

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going to the Police Station although the complainant has not alluded to this aspect in her statement in Court. It is not only that P.W.7 named different persons in this connection but the prosecutrix in the witness Box stated positively that the matter was reported on the same day on which the occurrence took place. Even Rehmat Masih, one of the two eye witnesses, who is an uncle of the prosecutrix, was withheld as a prosecution witness. Admittedly the prosecutrix, being of a young age, is a married woman, who, according to her own statement has been married for the last 5/6 years and as per P.W.7 is in the matrimonial state since three years. She was examined by P.W.2, Dr.Zahida Sajjad, WMO., Civil Hospital, Sangla on 17.7.1979. No mark of violence or any external injury was noticed on the body of the prosecutrix. The hymen was found torn and had only tags left with the vaginal wall. The tears were old one. Hymen admitted three fingers easily. Two vaginal swabs taken and sent for chemical examination were found stained with semen and so was found her shalwar Ex.P.1 by the Chemical Examiner. The rest of the prosecution witnesses are either formal who had witnessed the recoveries or are Police Officers connected with the investigation of the case. P.W.1, Dr.Muhammad Aslam, M.O., D.H.Q., Sheikhupura, examined the appellant and found him capable of performing sexual intercourse. The accused produced Mohammad Siddique and Younas Masih as defence witnesses who asserted that the accused bore good moral character. The accused himself denied all allegations levelled against him and stated that he had been falsely implicated in the case due to party faction.

4. Haji Mohammad Anwar Buttar Advocate, the learned counsel for the appellant, in an attempt to show

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that the evidence available against the accused was not sufficient according to the tenets of Islam for the proof of the offence of this sort, sought to refer to a number of Books on the topic. This proposition of the learned counsel does not warrant any two views. But this Court has repeatedly held in a number of cases that it is only when the evidence required under Section 8 of the Ordinance VII of 1979 or confession on the part of the accused is lacking that the provisions of Section 10 ibid come into play and confer ample discretion on the Court to rely on any legally admissible evidence under the general criminal law for the conviction of an accused person for the offence of Zina or Zina-bil-Jabr not liable to "Hadd". I need not enter into any further discussion on this point as it will be presently seen that the evidence available in the instant case would not be sufficient to bring home guilt to the accused without reasonable doubt even under Section 10 of the Ordinance.

5. A study of the site plan Ex.PG, in the light of the statements of the prosecution witnesses, would point out that the courtyard of the house of the complainant is an open space which is not walled in and it is accessible from many sides. It is surrounded by a number of residential quarters. It is stated that one Havali intervens between the house of the accused-appellant and the place of occurrence. Moreover, the room whereto the prosecutrix is stated to have been bodily carried away for the commission of the offence of Zina by the accused after placing a hand on her mouth, is at a distance of about a dozen karams from the tree whereunder she was lying asleep before the alleged assault was made on her person. The particulars of the incident given by the prosecutrix are such as would not inspire confidence

in her truthfulness. According to her right upto the completion of the offence the accused had kept her mouth covered with one hand and with the other performed all other necessary acts of removing her Shalwar and forcing her to submit to his lust which ordinarily would not be so easy as it is stated. On the one hand it has been alleged by the complainant that she attracted two persons to the spot with her cries and that it was after their arrival that the accused decamped from the spot and on the other, if she is to be believed, the accused had ample time even after the arrival of these persons to affect cleansing of his private parts with the Shalwar of the victim. The prosecutrix was found naked by the witnesses who, according to her, were attracted to the spot on her cries and had already left the scene by the time her father-in-law, Kamal Masih P.W.7 returned from the fields which was after about half an hour of their departure, but strangely enough, the prosecutrix did not cover herself during all this interval as she was found by this witness too in the state of nakedness. Then there is another contradiction in between the statements of these two P.Ws. While the prosecutrix states that the two persons named by her had left the scene before the arrival of her father-in-law this gentleman asserts that on his arrival they were still present at the spot. There is also a discrepancy in the statements of the two in the names of the two persons who are alleged to have prevented the prosecutrix from lodging the First Information Report on the day of occurrence. Even the actual scene of rape also gets shifted from the middle room of the house, as alleged by the complainant in the Examination-in-chief to the courtyard of the house in her cross-examination.

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6. The staining with human semen of the swabs taken from the vagina of the prosecutrix and her Shalwar and also the condition of the hymen of the prosecutrix as found in the medical examination is neither here nor there in view of the fact that she is a married woman and the husband is living with her and also in that a very significant interval of a night and a day had elapsed in between the alleged occurrence and the lodging of the Report to which the medical evidence had followed. Thus apart from the ipse dixit of the prosecutrix there is no evidence to connect the accused-appellant with the offence. The non-production of the so-called two eye witnesses, out of whom one is an uncle of the prosecutrix, goes a long way to cast doubt on the authenticity of the prosecution version of the occurrence. The guilt of the accused is, therefore, not established without reasonable doubt.

7. For the foregoing reasons, the appeal was allowed and the conviction and sentences passed upon the appellant were set aside and he was acquitted of the charge on 20.5.1981, when a short order to this effect was passed by the Court. He was also required to be released forthwith on the said day, if not required under any other matter.

8. Before departing with the case I would like to make some comments on the reasoning of the learned trial Judge for not passing sentence of whipping upon the accused. The learned trial Judge has said, "I have not awarded the punishment of stripes because both the parties are non-Muslim." This is not a solitary instance where the accused was a non-Muslim and the trial Court had refrained from awarding whipping for the very same reason. We have come across more than one case of the similar nature. This tendency which results

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from a misconception of law on the part of the trial Judges makes it imperative that the position should be clarified for once and all for the guidance of the subordinate Courts, regardless of the fact that the conviction of the appellant and even the other sentences passed upon him have been set aside. Needless to say that the Prohibition(Enforcement of Hadd) Order, 1979, the Offence of Zina(Enforcement of Hadood) Ordinance, 1979, the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 are all a part of the Penal Law of the Country. These being public laws are equally enforceable throughout the Country as these have been extended to /and made applicable on all individuals who fall within the mischief of these laws irrespective of their caste, creed or religion excepting of course, those provisions which create certain exceptions in case of non-Muslims. Some of the instances of these exceptions are, Sections 4, 8 and 9 of the Prohibition (Enforcement of Hadd) Order, 1979 (President's Order No.4 of 1979). The first of these Sections i.e. Sec. 4 contains a proviso to general rule which makes permissible for a non-Muslim citizen of Pakistan /to possess or own intoxicating liquor for use as a part of a ceremony of his religion and allows a non-Muslim foreigner the use of the same at a private place. Section 8 ibid has been made applicable only in case of an adult Muslim who takes intoxicating liquor by mouth and thereby becomes /liable to "Hadd" which, according to the Scheme of this law, is not enforceable on a non-Muslim. Similarly, Section 9 of the Order lays down the criterion of proof for the said offence in case it is committed by Muslims only. The rest of these provisions of law are intended to be applied to

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all citizen of Pakistan and foreigners alike. Then coming to the Offence of Zina (Enforcement of Hadood) Ordinance, 1979, it creats an exception under Section 5 thereof for the benefit of non-Muslim who on the commission of Zina cannot be stoned to death by virtue of not falling within the definition of " محصن ", which has to be, interalia, a Muslim. The same is the case for this class under Section 6 ibid. Then again the proof required under Section 8 for the offence liable to "Hadd" has a slight variation in this case from that of a Muslim offender in that if the accused be a non-Muslim the eye witnesses may also be non-Muslims. No such proviso or exception can be found in the application of Section 10 of this Ordinance or for the matter of that in any other provison thereof except Section 21 ibid whereunder it has been provided that if the accused is a non-Muslim the Presiding Officer may also be a non-Muslim which in other case has to be a Muslim. The position in the case of the Offences Against Property(Enforcement of Hadood) Ordinance, 1979 is entirely different than these laws as in contradistinctio of the other Hadood Laws it does not make any distinction in its applicability on the ground of the religion of the accused. The Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 has somewhat similar application as of the Offence of Zina (Enforcement of Hadood) Ordinance in that while the whole Ordinance is enforceable against all or any of religious class the offenders, the exception will only be found in the application of Sections 5 and 14 of the said Ordinance which is to the effect that while under the former Section the offence of Qazf liable to "Hadd" can only be committed against a person who is " محصن " and such a person by definition is essentialy a Muslim male or female, under the latter the provision of 'lian' is only

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made in the case when a husband accuses before a Court his wife who is a " محصن ". This again could only be a Muslim female. In addition, Section 6 ibid requires as is in the case of other Hadood Offences, Muslim witnesses to prove the offence against a Muslim culprit.

10. The above analysis of the Hadood Ordinances would make it crystle clear that the law as it stands does not allow any differential treatment in the award of sentence of whipping to an accused for the reason of his professing a different religion than Islam.

11. This Court in Shariat Petition No.1 of 1980 entitled as "Mr.Noshir Rustum Sidhwa Versus The Federation of Pakistan", on the question of validity of prohibition of intoxicants to non-Muslims under the above quoted President's Order No.4 of 1979, has approved the following proposition:

> "The Jurists are agreed that non-Muslims will be given freedom to profess and practise their religion and they will be treated alike in an Islamic State. Non-Muslims, however, will not be allowed to violate any public law or to do an un-Islamic act openly. This freedom is given to the non-Muslims on the basis of the aforesaid Quranic verse " لا اکراہ فی الدین " and on the principle accepted by the Sahaba, Tabieen and the Jurists "لھم مالنا وعلیھم ما علینا".

12. In this view of the matter there should not be any hesitation on the part of the trial Courts in awarding the punishment of whipping even to a non-Muslim accused of an offence under the above mentioned Hadood laws where such punishment is warranted by or under any of the provisions contained therein.

MEMBER - III

Islamabad, dated
the 24th of May, 1981.

CHAIRMAN

MEMBER - I

Reportable.

MEMBER - II