

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT

MR.JUSTICE FAZAL ILAHI KHAN, CHIEF JUSTICE
MR.JUSTICE DR.FIDA MUHAMMAD KHAN.

CRIMINAL APPEAL NO: 89/L OF 1999

Mst.Kalsoom W/o Muhammad
Ramzan,r/o Mauza Aloorred,
Tehsil Kot Adu, District
Muzaffargarh. ... APPELLANT

VERSUS

1. Bashir Ahmad S/o Kaora.
2. Muhammad Ameer S/o
Ghulam Muhammad.
3. Manzoor Hussain S/o
Allah Diwaya
All R/o Mauza Aloorred, Tehsil
Kot Adu, District Muzaffargarh... RESPONDENTS

Counsel for the
appellant. ... Mr.Iftikhar Shah,
Advocate

Counsel for the
Respondents. ... Mr.Asif Mehmood Chughtai,
Advocate

Counsel for the
State. ... Mr.Imtiaz Ahmad Chaudhry,
Advocate

No.Date of FIR and
police station. ... 187,dated 28.11.1996
P.S.Mahmood Kot.
(Complaint case).

Date of decision of
the trial court. ... 23.4.1999

Date of Institution ... 24.6.1999

Date of hearing ... 10.2.2000

Date of decision ... 10.2.2000

JUDGMENT

DR.FIDA MUHAMMAD KHAN,J.- This appeal filed by Mst.Kalsoom, wife of Muhammad Ramzan is directed against the judgment dated 23.4.1999 passed by learned Additional Sessions Judge, Kot Adu, District Muzaffargarh whereby, exercising his powers under section 265-K Cr.P.C, he has acquitted the three respondents, namely Bashir Ahmad son of Muhammad Nawaz alias Kaora, Muhamamd Ameer son of Ghulam Muhammad and Manzoor Hussain son of Allah Diwaya, from charge under section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, hereinafter referred to as the said Ordinance, in a complaint (Ex.PB) case which was filed by appellant Mst.Kalsoom Bibi on 30.4.1997. It may be mentioned that earlier on 28.11.1996 an FIR of the same occurrence was registered on the statement of this appellant, i.e. Mst.Kalsoom Bibi, at police station, Mahmood kot under the provisions of section 10 of the said Ordinance and thereupon the respondents/accused were duly arrested. After their arrest, they made an application for bail but that was rejected by the learned Additional Sessions Judge on 5.2.1997. However, thereafter the Hon'ble Lahore High Court, Multan Bench, vide order dated 20.3.1997 granted them bail and they were released. After release on bail, the respondents/accused allegedly in

connivance with the police, got the charge under section 10 of the said Ordinance made against them in FIR, deleted and altered into one under section 354 PPC. Aggrieved by the same the appellant/complainant filed the aforementioned complaint Ex.PB. According to the FIR as well as the said complaint she alleged that the respondents/accused had committed zina-bil-jabr with her on 23.11.1996 while she had gone out at the call of the nature. It was further alleged in Ex.PB that her hue and cry attracted her husband Muhammad Ramzan and her brother Noor Muhammad who overpowered one respondent/accused i.e. Manzoor Hussain while the other accused ran away. It was also stated therein that Ghulam Farid, Ghulam Rasool, Faiz Bakhsh, Allah Ditta and Mai Pathano also gathered over there and, after apprehending Manzoor Hussain, respondent/accused, the matter was reported to the police. Nadir Hussain, ASI alongwith Amir Bakhsh Cosntable came at the place of occurrence and took the complainant, witnesses, as well as the apprehended respondent/accused Manzoor Hussain, to the police station where statements of the complainant and witnesses were recorded, semen-stained shalwar of the complainant was taken into possession, FIR was registered and the complainant got medically examined. Since the section of offence was altered, she expressed the apprehension in her complaint Ex.PB that respondents/accused in connivance with the police were trying to damage her

case. Thereafter the learned Illaqa Judicial Magistrate conducted inquiry, submitted report under section 202 Cr.P.C and subsequently the respondents/accused were summoned and formally charge-sheeted by the learned trial court on 19.4.1999. They did not plead guilty to the charge.

2. At the trial the complainant Mst.Kalsoom Bibi, victim of the case, her husband Muhammad Ramzan and her brother Noor Muhammad were examined as P.W.1, P.W.2 and P.W.3 respectively. In the meantime while the complainant moved an application for summoning of the remaining witnesses as court witnesses, the respondents/accused also submitted an application under section 265-K Cr.P.C. The learned trial Court issued notices on both applications to the opposite parties and, after hearing their arguments and perusing the record, acquitted the respondents/accused. Being aggrieved by that, the appellant/complainant preferred the present appeal.

3. Before admitting this appeal, record of the case was summoned and perused. After hearing the counsel for the appellant/complainant, the appeal was admitted to regular hearing and notices were issued. The appeal came up for regular hearing today. Mr.Iftikhar Shah, learned counsel for the appellant, Mr. Asif Mahmood Chughtal, learned counsel for the respondents and

Mr. Imtiaz Ahmad Chaudhry, learned counsel for the State made submissions and, with their assistance, the record including the impugned judgment was perused.

4. As is evident from the above, the learned trial court has acquitted the respondents/accused after recording evidence of three prosecution witnesses who were eye witnesses of the occurrence.

The statements of some of the witnesses were yet to come on record. The respondents/accused had also to make statements. In circumstances the case of prosecution was still in progress. It may be pertinent to mention here that recording of the whole evidence is not made, by the legislature, a pre-condition before taking action under section 265-K Cr.P.C. This fact is quite apparent from the use of expression "at any stage of the case " and it could be the very initial stage, after taking cognizance, or could be a middle stage, after recording some proceedings, or it could be later stage, after recording of the complete evidence. However, in order to prevent abuse of the process of the Court and secure the ends of justice, it has been emphasized over and over again by all the superior courts that the discretionary powers under this section are to be exercised sparingly and judiciously and in no way arbitrarily and capriciously. It may not be therefore fair for the court to pass order of acquittal without providing proper and full opportunity to the parties concerned to

produce evidence. The court is undoubtedly empowered to acquit the accused at any stage, as mentioned hereinabove, but it should do so only when, after hearing both prosecution and accused, it comes on the basis of adequate reasons to the definite conclusion that there is no possibility of accused being convicted of any offence. In any case the prosecution is not to be stifled at the outset.

5. We are constrained to observe that unfortunately in the instant case the learned trial court has proceeded to exercise its powers hastily without taking in consideration all facts and circumstances brought by the evidence on record. In the presence of evidence in the shape of depositions of three eye witnesses and positive chemical Examiner's report, it was pre-mature to determine guilt or innocence of the respondents/accused. The learned trial court also did not properly examine another significant aspect of the case. Allegedly Manzoor Hussain, respondent/accused had been apprehended on the spot and duly produced before the police at the time of registration of FIR. All the PWs who are eye witnesses of the case are consistent in this respect. Hence all facts and circumstances of the case including the statements of respondents/accused were therefore to be brought on record for proper evaluation. The available record does not contain to this effect even explanation of the aforementioned respondent/accused who was allegedly caught

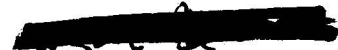
red-handed. Keeping in view the depositions of PWs and other attendant circumstances, the reasons given in para 4-6 of the impugned judgment do not appear sufficiently convincing to reach a definite conclusion. The respondents/accused could have been given proper opportunity to make statements and, if advised to do so, lead evidence in their defence. The prosecution could also do so. Even the Court could summon and examine the material witnesses considered to be acquainted with facts of the case. Here we may also add that summoning of some of the witnesses as Court witnesses does not necessarily mean creation of evidence for any party. The criminal procedure code contains certain provisions for summoning material witnesses and recording additional evidence if it appears to the court that such evidence is necessary for just decision of the case.

6. In the light of our above observations, we are of the opinion that, in the given circumstances, the impugned order is perverse, arbitrary and shocking. Therefore, without any comment on the merits of the case, lest either side be prejudiced, we set aside the impugned judgment and remand the case to the learned trial court to provide full opportunity to the parties to produce their evidence and, if considered necessary in the interest of justice, may

also summon and examine or re-examine any person/persons whom it considers material for just decision of the case and thereafter shall re-write the judgment in accordance with law.



(Dr. Fida Muhammad Khan)
Judge



(Fazal Hahi Khan)
Chief Justice

Lahore, 10.2.2000.
/M. Arshad Khan/

File for reporting .



10.2.2000