

**IN THE FEDERAL SHARIAT COURT**

( Appellate/Revisional Jurisdiction )

**PRESENT:**

**Mr. Justice Agha Rafiq Ahmed Khan, Chief Justice**  
**Mr. Justice Syed Afzal Haider**  
**Mr. Justice Shahzado Shaikh**

**Criminal Appeal No. 245/L of 2004**

Mukhtar Ahmed son of Muhammad Nawaz,  
Caste Bhatti, resident of Shori Maneka,  
Police Station Pindi Bhattian, District Hafizabad. ---Appellant

Versus

The State --- Respondent

**Criminal Appeal No. 284/L of 2004**

Irfan Ali son of Fateh Sher, Caste Bhatti,  
resident of Shori Manika, Police Station  
Pindi Bhattian, District Hafizabad. ---Appellant

Versus

The State --- Respondent

**Criminal Reference No. 2/L of 2006**

The State Vs. Mukhtar Ahmed & Irfan Ali

Counsel for the appellants --- Mr. Nazeer Ahmad Ghazi,  
Mr. Masood Sadiq Mirza,  
Mr. Muhammad Riaz Chaudhary  
& Mr. Zulfiqar Ali Noon, Advocates.

Counsel for the complainant --- Mr. Muhammad Ashraf, Advocate

Counsel for the State --- Ch. Abdul Razzaq, D.P.G.

FIR No. date & --- 10/03 dated 11.01.2003  
Police Station Pindi Bhattian, District Hafizabad

Date of Judgment of --- 28.07.2004  
the trial Court

Date of Institution --- 04.08.2004 & 11.09.2004  
of appeals respectively

Date of Hearing --- 29.09.2010

Date of Decision --- 29.09.2010

Criminal Appeal No.245/L of 2004  
Criminal Appeal No.284/L of 2004  
Criminal Reference No.2/L of 2006

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**JUDGMENT**

**Justice Agha Rafiq Ahmed Khan, Chief Justice:-** Criminal

Appeal No.245/L of 2004 filed by Mukhtar Ahmad, Criminal Appeal No.284/L of 2004 filed by Irfan Ali against their conviction and sentence and Criminal Reference No.2/L of 2006 are being disposed of through this judgment as all the three matters arise out of the same judgment dated 28.07.2004 delivered by learned Additional Sessions Judge, Pindi Bhattian whereby both the appellants i.e. Mukhtar Ahmad and Irfan Ali were convicted under section 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and sentenced to Death for committing Zina-bil-Jabr with Mst.Razia Bibi while Irfan Ali appellant was also convicted under Section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and sentenced to 25 years imprisonment with a punishment of whipping amounting to 30 stripes for committing Zina-bil-Jabr with

Mst.Kalsoom Bibi. Benefit of Section 382-B of the Code of Criminal

Procedure was also given to accused Irfan Ali.


2. Brief facts of the case as set out in the crime report registered as FIR No.10/2003 dated 11.01.2003 under sections 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 at Police Station Pindi Bhattian, District Hafizabad, regarding an incident that occurred on 04.01.2003 are that Khan Muhammad complainant moved a written complaint Ex.PD stating therein that he resides about five acres away from Mouza Shori Maneka alongwith his two daughters, Mst.Razia Bibi aged 20 years, Mst.Nabila Bibi aged 16 years and two sons Ghulam Murtaza aged 10 years, Ghulam Mustafa aged 8 years and his wife Mst.Kalsoom Bibi. About one month prior to the occurrence Mukhtar Ahmad accused demanded the hand of his daughter Mst.Razia Bibi which was refused on account of his bad habits. Mukhtar accused nourished a grudge on this score. On 04.01.2003, Mukhtar accused alongwith one unknown person, armed

with rifles entered the house. The complainant and his wife were sleeping in courtyard under 'Tup' whereas his daughters and sons were sleeping in a room on the eastern side of the house. The accused awakened him and asked him to open the room as they want to teach him a lesson for refusing the hand of his daughter to Mukhtar accused. They made him sit in the kitchen and the unknown person committed Zina-bil-Jabr with the complainant's wife. After that the accused got the room opened on gun point. The unknown person entered the room and committed Zina-bil-Jabr with his daughter Mst.Razia Bibi while Mukhtar accused, armed with rifle, stood as guard. After half an hour, the unknown person came out of the room and stood guard while Mukhtar accused entered the room and committed rape with Mst.Razia Bibi, daughter of the complainant. The accused then threatened the complainant with dire consequences if he informed any one about the occurrence. The FIR was lodged after seven days because the accused made several attempts to settle the matter outside the Court.

3. Investigation ensued as a result of registration of crime report. During the investigation the local police found both the accused guilty of the offences.

4. The learned trial Court on receipt of the report under section 173 of the Code of Criminal Procedure framed charge against accused Mukhtar Ahmad and Irfan Ali on 25.10.2003 under sections 10(3) and 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. The accused denied the charges and claimed trial.

5. The prosecution in order to prove its case produced 15 witnesses at the trial. The gist of evidence of the witnesses is as under:-

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- i) PW-1: Constable Jahangir Ahmad was entrusted with non bailable warrants of arrest Ex.PA against accused Irfan Ali. He visited the given address of the accused but the accused deliberately concealed himself. He made report Ex.PA/1. On 30.01.2003 he was entrusted with proclamation Ex.PB against

Irfan Ali accused. He affixed one copy of the proclamation at the house of Irfan Ali accused, one copy at the thoroughfare and the third copy in the Kuchery. He made report Ex.PB/1 in this respect.

ii) PW-2: Constable Mansab Ali is a witness of recovery of .12 bore gun P/1 alongwith cartridge P/2 which was recovered on the disclosure of accused Mukhtar Ahmad.

iii) PW-3: Khan Muhammad is complainant of the case. He endorsed the contents of the crime report.

iv) PW-4: Mst.Kalsum Bibi is wife of the complainant. She is a victim of Zina-bil-Jabr, committed by accused Irfan on gun point. She supported the occurrence and prosecution story.

v) PW-5: Mst.Razia Bibi is the main victim with whom Zina-bil-Jabr was committed by both the accused one after the other on gun point. She supported and corroborated the prosecution story as narrated by the complainant.

vi) PW-6: Mst.Nabila Bibi is younger sister of the victim Mst.Razia Bibi and is daughter of the complainant and his victim wife. At the time of occurrence she was present in the house. She also supported the occurrence as disclosed by her father in the FIR.

vii) PW-7: Dr.Asghar Ali Hunjra conducted potency test of accused Mukhtar Ahmad and found him fit to perform sexual intercourse.

viii) PW-8: Dr.Shagufta Shaheen medically examined both the victims Mst.Kalsum Bibi wife of the complainant and daughter Mst.Razia Bibi. The former is a married lady. Chemical Examiner's report as regards semen swabs is negative. As regards the examination of victim Mst.Razia Bibi is concerned, her hymen was torn, margins irregular and healed completely, vagina admitted two fingers easily, no marks of fresh injury on any part of the body. In the opinion of this doctor, the examinee

was not virgin. Chemical Examiner's report with regard to her semen swabs was positive.

ix) PW-9: Muhammad Asif ASI is the author of the FIR.

x) PW-10: Head Constable Raj Muhammad received two sealed envelopes from Muhammad Yaqoob S.I which he handed over to Muhammad Yousaf Head Constable for onward submission in the office of Chemical Examiner, Lahore.

xi) PW-11: Muhammad Yousaf Head Constable corroborated the statement of PW-10 Head Constable Raj Muhammad with regard to delivery of sealed parcels in the office of Chemical Examiner, Lahore.

xii) PW-12: Constable Muhammad Sharif is a witness of recovery of .12 bore gun at the pointation of accused Irfan Ali.

xiii) PW-13: Muhammad Yaqoob ASI visited the spot, prepared site plan without scale, recorded statements of four PWs under Section 161 of the Code of Criminal Procedure; got



both the female victims medically examined, arrested the accused Mukhtar Ahmad, obtained non bailable warrants of arrest of accused Irfan Ali, recovered .12 bore gun on the pointation of accused Mukhtar Ahmad, got him medically examined and also prepared site plan of the place of recovery.

xiv) PW-14: Dr. Muhammad Hussain Vaseer conducted potency test of accused Irfan Ali and found him potent.

xv) PW-15: Khalid Mehmood ASI arrested the accused Irfan and recovered .30 bore pistol from his possession. He stated that accused Irfan during custody confessed the commission of Zina-bil-Jabr with the victim Mst.Razia Bibi on gun point. This witness also prepared unscaled site plan of the place of recovery and recorded statements of witnesses for prosecution under Section 161 of the Code of Criminal Procedure.

6. The learned trial court after close of the prosecution evidence recorded statements of the accused Mukhtar and Irfan. Both the accused pleaded innocence in the occurrence. In reply to question,

“Why this case against you and why the P.Ws have deposed against you?” the accused Mukhtar stated as follows:-

“All the PWs are interested and inimical towards me. No alleged occurrence has taken place. I and my co-accused are falsely involved in this case after ordinate delay of seven days and after deliberation and consultation by the complainant party.”

In reply to question, “Why this case against you and why the P.Ws have deposed against you?” the accused Irfan Ali stated as follows:-

“I was not nominated accused in the FIR. Complainant party with malafide intention subsequently with connivance of police involved me in this case. I am innocent.”

7. We have perused the record. The relevant portions of the impugned judgment have been scanned. We have heard the learned counsel for the contending parties.

8. Learned Counsel for the appellants at the outset stated that a compromise has been effected between the parties and placed on record. It was, therefore, prayed that the compromise be accepted and acquittal of the appellants be ordered.

9. The complainant party was also present in Court. Both the victims appeared before us and stated that they have voluntarily forgiven the appellants in the name of Allah Almighty. The complainant's Counsel confirmed that neither undue influence nor force was employed by accused party upon the complainant group to secure forgiveness. Learned Counsel also confirmed that the appellants had repented genuinely and on Court question the learned Counsel further stated that the behaviour of appellants in the prison has been good. The jail authorities have not registered any complaint against the appellants.

✓ 10. The argument about the composition of offence, advanced by learned Counsel for the appellants, has no force. Section 345 of the Code of Criminal Procedure deals with compounding of offences. According to this provision only those offences which are punishable under various sections of the Pakistan Penal Code, specified in the first two columns of the table attached with this section, can be compounded. The offences under

*Hudood* laws are not compoundable even with the permission of the Court. The effect of composition of offence, as stipulated in sub-section (6) *ibid* is acquittal. In this view of the matter we are unable to allow composition of offences as prayed for.

11. However we have taken notice of the fact that a compromise has been effected between the appellants and the complainant party. Both the victims were present in the Court and they also appeared before us. They were duly identified. Both of them verified the factum of compromise and stated that they had voluntarily forgiven the accused in the name of Almighty Allah.

✓ Though section 345 of the Code of Criminal Procedure enumerates the offences in which alone a compromise can be effected, yet this section does not debar the Court from considering the element of compromise *for the purpose of reduction of sentence provided the compromise is voluntarily and the accused have repented and expressed their willingness not to repeat the offence and they have*

*been forgiven in the name of Allah. Moreover their conduct during*  
confinement in jail should also support the element of repentance  
expressed by the accused who have expressed firm resolve not to  
create social problems in future. In so far as the question of  
forgiveness is concerned this has been established by the  
statements of the two victims and the other aspect has been  
confirmed by Counsel for the parties.

12. We are supported in our view by the deliberations in  
the judgment in the case of Muhammad Arif Vs. The State, 2002  
YLR 3077, also reported as 2003 S.D 79 wherein Division Bench  
of this Court has, at page 3084 in paragraph No.15, held as under:-

“Although the compromise deed tendered by  
the prosecutrix/victim, duly placed on record,  
would legally be not a relevant document, as  
the case in hand is non-compoundable but  
keeping in view the fact that the accused, was  
repentant, and through the efforts of the elders  
of the family has successfully prevailed upon  
the complainant party and was forgiven by the  
victim in the name of Almighty Allah, we feel

constrained to consider it a mitigating circumstance to reduce the sentence of the appellant appropriately, as it was so done in the case cited-supra.”

We endorse this view with the condition of repentance, forgiveness and a firm resolve to behave in future as stated above.

13. Learned Counsel for the appellants at the end submitted that he would not challenge the conviction and would urge that death sentence be not confirmed and alternate penalty may be awarded to them in the light of repentance on the part of appellants and consequent forgiveness accorded by the victims. It was also contended that forgiveness implies that the commission of offence is admitted.

14. In view of the peculiar facts and circumstances of the case and the position taken up by the parties before us as well as the situation that we have observed <sup>and</sup> we feel that the factum of compromise was effected between the parties voluntarily. It is being considered by us at judicial level as it will advance the

purposes of social harmony and peace. Forgiveness in Divine and this attribute finds honourable mention in the sacred texts of Muslim.


15. In the light of what have stated above we are inclined to convert the death sentence awarded to both the appellants under section 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 into life imprisonment because the appellants have repented and have been forgiven by the victims themselves in the name of Allah. The sentence of Irfan appellant under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 is reduced from twenty five years to fourteen years and his sentence of whipping is set aside. The appellants shall be entitled for the benefit of section 382-B Cr.P.C. Both the sentences awarded to Irfan appellant shall run concurrently. Consequent upon what has been stated above Cr. Reference No.2/L/2006. is no more relevant and hence answered in negative.

Criminal Appeal No.245/L of 2004  
Criminal Appeal No.284/L of 2004  
Criminal Reference No.2/L of 2006

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16. These are the reasons for our short order passed on

29.09.2010.

  
JUSTICE AGHA RAFIQ AHMED KHAN  
CHIEF JUSTICE

Syaid  
JUSTICE SYED AFZAL HAIDER

  
JUSTICE SHAHZADO SHAIKH

Dated Lahore the  
06.10.2010  
M. Imran Bhatti/\*

Fit for reporting.

  
JUSTICE AGHA RAFIQ AHMED KHAN  
CHIEF JUSTICE