IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL REVISION NO.11/L/2007

1. Tanveer Ahmad son of Abdul Rehman
2. Tariq Naseem son of Abdul Rehman
3. Anees Ahmed son of Abdul Rehman
4. Zahida Bibi alias Guddo daughter of Abdul Rehman
5. Abdul Rehman son of Muhammad Ramzan
6. Saqlain alias Naseem son of Muhammad Saddique
7. Waseem Anjum son of Muhammad Saddique
8. Razia alias Rajo daughter of Muhammad Saddique
9. Shamim alias Sheemo daughter of Muhammad Saddique
10. Altaf son of Muhammad Din

All Kamyana by Caste, residents of Mauza Kamman, Police Station Choochak, District Okara.

..... Petitioners

Versus

1. The State.
2. Mst. Azra Riaz (deceased) daughter of Muhammad Riaz, Kamyana by Caste, resident of Mouza Kamman, Police Station Choochak, District Okara.

..... Respondents

Counsel for the petitioners	...	Mian Abdul Quddous, Advocate
Counsel for the State	...	Ch. Abdul Razzaq, Deputy Prosecutor General
No.& Date of F.I.R	...	Private Complaint dated 25.09.2004
Police Station, district	...	F.I.R No281/03 dt. 27.07.2003 Choochak, District Okara.
Date of order of trial Court	...	05.05.2004
Date of Institution	...	17.02.2007
Date of hearing	....	06.01.2009
Date of Judgment	....	20.01.2009

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JUDGMENT:

Justice Syed Afzal Haider, Judge: This Revision Petition seeks to challenge order dated 05.05.2004, passed by learned Additional Sessions Judge, Okara whereby the application under Section 265-K of the Code of Criminal Procedure filed by the petitioners/accused was dismissed.

2. The facts of the case are that a crime report, F.I.R No.281/2003 dated 27.07.2003 under Section 10(4) and Section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, was registered at Police Station Choochak, District Okara on the complaint of one Mst. Azharan Riaz against certain persons including the petitioners. Allegation of Zina-bil-jabr was leveled against four persons, who find mention in the list of petitioners.

3. That on 31.07.2003 after registration of her crime report, the statement of the said complainant was recorded under Section 164 of the Code of Criminal Procedure regarding the occurrence mentioned in Crime Report 281/2003 who had also

become pregnant during that period. During the investigation nine accused persons were found innocent. Accused Wasim Anjum and the complainant herself were found guilty.

4. That on being declared an accused person in case F.I.R No.281/2003 which was registered on her written complaint, she initiated criminal proceedings by way of a private complaint in the court of learned Additional Sessions Judge, Okara. After recording preliminary evidence, the trial Court was pleased to summon all the accused mentioned in her complaint. All the said accused were the same who were nominated in the Crime Report 281/2003 dated 27.07.2003.

5. Before the trial could proceed the complainant was murdered by her own father and Crime Report of the murder was registered at Police Station Choochak as F.I.R No.83/2004 dated 19.03.2004. The father of the deceased complainant Riaz Ahmad was consequently acquitted as a consequence of the compromise between the accused and legal heirs of deceased

vide judgment dated 05.08.2004 of the Additional Sessions Judge, Okara. Statements of legal heirs, confirming the fact that they forgave the accused in the name of Almighty Allah, were made before the learned Additional Sessions Judge.

6. Thereafter the petitioners, who were cited as accused in the Private Complaint of deceased Mst. Azharan Riaz, moved a joint application under Section 265-K of the Code of Criminal Procedure before the learned Additional Sessions Judge which was dismissed on 05.05.2004. Hence this Revision Petition against the said order of dismissal.

7. On 16.12.2008 arguments were advanced by learned Counsel for the petitioners whereafter I passed the following order:-

> "Explanation given by the petitioner is sufficient for condoning the delay. The delay is condoned. The question involved in this case is whether in the case of death of the complainant, the accused should automatically be acquitted because direct evidence is not available and no conviction can be based on

corroborative evidence alone. Another question would arise whether the previous statement made by the deceased can be brought on the record. The point raised needs consideration. Let notice be issued to the State for 6th January, 2009."

8. These observations were made because the learned trial Court while dismissing the application of petitioners had observed as follows:

"In the referred authority witness whose statement was recorded under section 164 Cr.P.C. did not appear before the court despite her availability while in present case witness is not available (since dead) so her previous statement even un-cross examined would become material since the said witness is not available due to her death and that piece of evidence would become relevant even without any opportunity of cross examination by the accused side in view of the principle laid down in section 512 Cr.P.C. and under Article 46 of Qanoon-e-Shahadat Order. In these circumstances, application being without merits is hereby dismissed. Now to come up for framing of charge on 15.05.2004."

9. Learned Counsel for the petitioners was, therefore, asked to address this Court on the legal issue emerging out of the

impugned order particularly when the present proceedings pertain to the revisional jurisdiction of this Court.

10. Learned Counsel for the petitioners has raised the following points in support of its contentions:-

(i) That statement of victim recorded under Section 164 of the Code of Criminal Procedure could not be read as evidence as she had not been examined as a witness in the Court. It was further contended that the requirements for admitting such a statement, as contemplated by article 47 of the Qanoon-e-Shahadat Order, 1984, were not available in the instant case. Reliance for this proposition was placed upon the case of Ghulam Muhammad Versus The State reported as 1992 P.Cr.L.J 2394, a case decided by the Federal Shariat Court.

(ii) Relying on the case of Mst. Naheed Mehmood alias Shahbo Versus Mehmood Khan, reported as 1991 P.S.C. 1036, learned Counsel for the petitioners laid emphasis on the point that the statement of a witness recorded at the inquiry stage by a Magistrate in the absence of accused, when there was no opportunity to cross-examine the witness and thereby test the veracity of his deposition, could not be used against the accused person.

(iii) Leaned Counsel for the petitioner also put forward the argument that the learned trial Court was not legally justified to invoke section 512 of the Code of Criminal Procedure.

11. Learned Counsel for the opposite party however stated that since the statement of the victim had been recorded in solemn proceedings so it has to be deemed as substantive piece

of evidence. In this view of the matter the learned trial Court was justifying in dismissing the application and proceeding with the trial.

12. I have gone through the record of the case and have also perused the impugned order in the light of the arguments advanced by the learned Counsel for the parties. However it is not possible to maintain the impugned order for the following reasons:-

(i) The statement of the victim recorded during enquiry in the absence of accused and not subjected to cross-examination cannot be treated as substantive piece of evidence capable of being corroborated by reinforcing evidence. It would not be at all safe to hold that, in the absence of substantive piece of evidence itself, the corroborative evidence would suffice to convict an accused in criminal trial. The reason is not far to seek. Supportive evidence is only complementary in character and is employed to supplement some substantive evidence.

Corroborative evidence does not corroborate another corroborative piece of evidence. The purpose of statement recorded under section 164 of the Code of Criminal Procedure is to procure evidence during the course of investigation. It is at par with the efforts of an Investigating Officer to collect evidence during investigation, for the purpose of production in a court of law, and consequently cannot be considered at a higher pedestal unless so declared by any provision of law. However the evidentiary value of a statement depends upon the facts and circumstances of each case and in so far as the peculiar circumstances of the present case are concerned it is not risk free to rely upon her statement particularly when there are no chances of conviction otherwise.

ii) With regard to the objection that the learned trial Court was not justified in invoking provisions of section 512 of the Code of Criminal Procedure, I find that the objection is valid for the simple reason that the said legal provision covers those

cases in which it is proved that the accused has absconded and there is no immediate prospect of the accused being apprehended that the court becomes legally competent to try the accused in absentia and proceed to record deposition of witnesses. Such evidence, recorded in the absence of accused persons, can be given in evidence, on the arrest of a person in any inquiry or trial for the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience. Before invoking this section the court has to be judicially satisfied about the grounds that the accused charged therein has in fact absconded and there is no prospect of his arrest in the near future. The purpose of section 512 of the Code of Criminal Procedure, therefore, is to preserve the recorded evidence against the accused who has a) absconded and b) there is no immediate prospect of his being apprehended and then c) such deposition can be given in

evidence only if the deponent is dead, or his evidence cannot be procured without any amount of delay, expense or inconvenience.

13. I might as well, at this stage, advert to Article 47 of Qanun-e-Shahadat Order, 1984. The Article reads as follows:-

"Relevancy of certain evidence for proving in subsequent proceeding, the truth of facts therein stated.---Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence or is kept out of the way by the adverse party or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided that-

the proceeding was between the same parties or, their representatives-in-interest:

the adverse party in the first proceeding had the right and opportunity to cross examine:

the questions in issue were substantially the same in the first as in the second proceeding.

Explanation. A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this Article."

14. It is, therefore, abundantly clear that this provision refers to another exception to the general rule as to the inadmissibility of indirect evidence. This article is based on the principle that the best possible evidence must always be considered for deciding the fate of a party. This article would be applicable:-

(i) If the proceeding was between the same parties or their representatives-in-interest;

(ii) If the adverse party had the right and opportunity to cross-examine;

(iii) If the questions in issue were substantially the same in the first as in the second proceeding.

Evidence recorded in the absence of accused, when he is not a proved absconder, whose veracity has not been tested on the

touchstone of cross-examination cannot be availed under article 47 of the Qanun-e-Shahadat Order, 1984. It may be seen in this connection that article 151 envisages impeaching the credit of a witness and article 153 envisions production of former statement to corroborate later testimony as to same fact.

15. In this view of the matter, the impugned order dated 05.05.2004 passed by learned Additional Sessions Judge, Okara on the application of Tanveer and nine others, moved under section 265-K of the Code of Criminal Procedure, to seek acquittal in case initiated on private complaint of Mst. Azharan, whereby the said application was dismissed cannot be maintained. Consequently the said order is set aside and the application of the petitioners is accepted and all of them are acquitted.

[redacted]

Justice Syed Afzal Haider

Announced at Lahore the
20 January, 2009
*M. Imran Bhatti/**

20.1.09

Fit for reporting.

[redacted]

Justice Syed Afzal Haider