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IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE AFTAB HUSSAIN	...	CHAIRMAN
MR. JUSTICE MUHAMMAD SIDDIQ	...	MEMBER
MR. JUSTICE MAULANA MUHAMMAD TAQI USMANI	...	MEMBER

Criminal Appeal No.16/L of 1981.

Muhammad Hussain	versus	1. Muhammad Ramzan son of Mohammad Sharif, Caste Rajput R/o.House No.Nil , Gali No.4, Data Nagir Badami Bagh, Lahore.
		2. State.
Counsel for the appellatant	...	Mr. Ghulam Fareed Ahmad, Advocate.
Counsel for the Respondent (Muhammad Ramzan)	...	Mr.K.H. Khurshid, Advocate.
Counsel for the State	...	Mr. Sh. Riaz Ahmad, Advocate- General for Punjab. and Mr. Mushtaq Ali Tahir Kheli, Advocate.
Date of hearing and decision	...	8th August, 1981.

JUDGMENT

MUHAMMAD SIDDIQ, MEMBER:- According to the prosecution the brief facts of the case are that on 24.3.1979, Muhammad Hussain, complainant alongwith his wife Mst.Khurshid Bibi (P.W.3); and their children except their daughter Mst. Zahida Perveen, prosecutrix, had gone for walima in the house of their neighbour. At about 4.00 P.M., when the function was over, the family members were returning to their house, Mst. Khurshid Bibi and other companions heard shrieks of Mst. Zahida Perveen coming from the chobara of Muhammad Sharif, father of Muhammad Ramzan, accused respondent. Mst. Khurshid Bibi

alongwith others rushed upstairs towards the said chobara and saw that her minor daughter Mst. Zahida Perveen lying naked on the floor while Ramzan accused also naked was sitting over her. The accused on seeing Mst. Khurshid Bibi, ran away after scaling over the wall. Mst. Zahida Perveen was bleeding from her vaginal region. She was lifted by her mother, Mst. Khurshid Bibi (P.W) and was taken to the Police Station Misri Shah where Muhammad Hussain, complainant, father of Mst. Zahida Perveen, lodged the first information report ex.P.E. ASI Sarwar Hussain (P.W.7) took Mst. Zahida Perveen to the hospital alongwith her parents where she was medically examined by lady doctor Shahda Naseem (P.W.8) at 7.00 P.M. on the same day. Investigating Officer then went to the place of occurrence, prepared the site plan (ex.PE), recorded the statement of respectables. He also took into possession vide memo ex.PD, the pajama of Mst. Zahida Perveen and one sandel belonging to her. He arrested the accused Muhammad Ramzan on the same day at about 11.00 P.M. The accused was medically examined by Dr. Sabir Ali (P.W.4) on 25.3.1979. After the completion of the investigation, ASI Sarwar Hussain challaned Muhammad Ramzan accused under section 7 of the Offence of Zina (Enforcement of Haddood) Ordinance, 1979. He was tried by the Additional Sessions Judge, Lahore.

2. In support of its case, the prosecution produced Muhammad Hussain, complainant (PW.1) Mst. Zahida Perveen prosecutrix appeared as PW.2, but could not be examined as a witness because the learned Additional Sessions Judge did not think she had enough understanding for a testimony. She was therefore given up by the State. Mst. Khurshid Bibi (PW.3) mother of the victim has stated how she and other members of her family were attracted by the shrieks of her daughter Mst. Zahida Perveen from the chobara of the accused and then she went upstairs and saw the accused committing zina-bil-jabr with her and seeing them succeeded in running

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away. Mst. Zahida Perveen was carried by her mother to the Police Station where F.I.R. was lodged by Muhammad Hussain, PW1, Dr. Sabir Ali (P.W.4) on 25.3.1979, medically examined Muhammad Ramzan accused. The accused was also examined by Dr. Muhammad Akram Chaudhary, Assistant Radiologist, Mayo Hospital, Lahore. The Doctor gave the following opinion (ex.PE):-

"The secondary sexual characters were not yet developed in the examinee. The phenomena of erection starts from the early infancy and the competency of penetration exists in a child. The act of pushing the organ (erected) in a hole/depression may be under a sexual desire or an act of child play, depending upon the socio-economic factor of the family, the brought up of the child and the surroundings".

According to Dr. Muhammad Akram Chaudhury, Radiologist, the age of Muhammad Ramzan, accused respondent was between 12 to 14 years. Munir aged 10 years son of the complainant, is also an eye witness as he was accompanying her parents at the relevant time. Abdul Aziz (P.W.6) is the tenent of the complainant. According to him he saw Mst. Khurshid Bibi (P.W) holding in her arms, her daughter Mst. Zahida and when he asked she told him that Ramzan accused had committed zina-bil-jabr with her daughter. The Investigating Officer appeared as PW.7. The lady Doctor Shahda Naseem who examined the prosecutrix appeared as P.W.8. She gave the following opinion (ex.PF):-

"No mark of violence on any part of her body. Bleeding per vagina plus patient was very irritable, resists examination. Hymen torn posteriorly at six O' clock position. Fresh bleeding from the tears was present. Vagina admits one finger only. Two swabs were taken from the perineum and inside of labia minora and sent to the Chemical Examiner for semen analysis. In my opinion she has been subjected to sexual intercourse".

According to the report of the Chemical Examiner the vaginal swabs were found stained with semen.

3. Muhammad Ramzan accused respondent when examined under section 342 Cr.P.C, denied the prosecution allegation. When asked why this case was made against him and why the PWs had deposed against him he stated as under:-

"On account of enmity with my father".

When asked whether he wanted to produce witnesses in the defence, he stated as under:-

"Yes. I produce my birth certificate again said school certificate showing my date of birth. This is ex.D.F".

The accused produced three witnesses in defence. Ghulam Rasool appeared as DW.I. According to him on the day of occurrence he was selling ice-cream on the rehri near the house of the marriage. He saw the house of Sharif, father of the accused respondent bearing a lock outside. According to this witness one boy named Saleem was being given beating by the Mohalladars and when he enquired he was told to mind his own business. According to this witness he did not see Muhammad Ramzan accused there. Rao Atta-ur-Rehman (D.W.2) has also deposed that on the day of occurrence it was about 12 noon or one P.M. that a boy named Saleem was with Muhammad Hussain, complainant who was being given beating by the complainant and others. He has further stated that there was a dispute between the father of the accused and the complainant because the latter had objections against Sharif for allowing entry to persons of ill-repute in that house. Dr. Tahir Anees, Deputy Police Surgeon, appeared as DW.3. According to him the accused took 15 minutes to produce semi erection by soap and water masturbation, and after enough stimulation there was no ejaculation.

4. The Additional Sessions Judge, Lahore, vide impugned judgment dated 20.1.1981, found Muhammad Ramzan, accused respondent guilty under section 7 of the Offence of Zina

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(Enforcement of Haddoo) Ordinance, 1979, and sentence-d him till the rising of the Court and to a fine of Rs.500/- which was to be paid by the father of the accused and in default of payment of fine the accused was ordered to undergo simple imprisonment for one month. The fine if realised was to be paid to the minor girl through the complainant as compensation under section 544A Cr.P.C.

5. Muhammad Hussain, complainant, feeling aggrieved applied to the District Magistrate, Lahore, for filing an appeal for enhancement of sentence against Ramzan accused. The District Magistrate vide memo No.RDM/417-16/7430, dated 4.5.1981, replied to him that the case had been examined and not considered fit for filing an appeal under section 417 Cr.P.C. as it was not a case of acquittal. However, the complainant might file a revision petition for enhancement of sentence before the Federal Shariat Court. Accordingly Muhammad Hussain, complainant initially filed a revision petition before this Court which was subsequently treated as an appeal. The case was placed before the Court for preliminary hearing. Vide order dated 21.6.1981 the Court admitted the appeal for regular hearing and issued notice to Muhammad Ramzan accused respondent to show cause why his sentence should not be enhanced.

6. Muhammad Ramzan accused respondent has not filed any appeal against his conviction, and claims to have already paid the fine. He is however opposing the present appeal filed by the complainant.

7. We have heard at length the counsel for the parties and have also perused the entire material available on the record.

8. Mr. K.H. Khurshid, learned counsel for Muhammad Ramzan, accused respondent has vehemently contended as

preliminary plea that neither the initially filed revision petition was maintainable nor the complainant has any locus standi to file the revision petition/appeal nor this Court has any power to enhance the sentence of his client Ramzan accused.

9. The Federal Shariat Court was constituted under Article 203C of the Constitution. Under Article 203D the powers, jurisdiction and functions of this Court were initially confined to original jurisdiction to examine and decide the question whether or not any law or provision of law was repugnant to the Injunctions of Islam as laid down in the Holy Quran and the Sunnah of the Holy Prophet (peace be upon him). No other jurisdiction was conferred upon this Court. The final decision given under this Article can be challenged in appeal before the Supreme Court of Pakistan under Article 203F. For the purposes of the performance of its functions this Court under Article 203E has been given the powers of a Civil Court trying a suit under the Code of Civil Procedure. The Constitution (Second Amendment) Order, 1980 (P.O.No.4 of 1980) was promulgated on 21.6.1980. By this amendment inter alia the following Article 203DD was inserted in the Constitution according to which further jurisdiction could be conferred on this Court by or under any law:-

"203DD. Further jurisdiction of the Court.- The Court shall have such other jurisdiction as may be conferred on it by or under any law".

10. Simultaneously on the same day i.e., 21.6.1980, the following statutes were enacted making necessary amendment in the relevant laws conferring appellate jurisdiction upon the Federal Shariat Court:-

- i) The Prohibition (Enforcement of Hadd) (Amendment) Order, 1980 (P.O.No.5 of 1980).
- ii) The Offences Against Property (Enforcement of Hudood) (Amendment) Ordinance, 1980 (XIX of 1980).

- iii) The Offences of Zina (Enforcement of Hudood) (Amendment) Ordinance, 1980 (XX of 1980).
- iv) The Offence of Qazf (Enforcement of Hadd) (Amendment) Ordinance, 1980 (XXI of 1980).

Thus it was for the first time on 21.6.1980, that this Court was vested with the powers of Court of Appeal under the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979, and the Prohibition (Enforcement of Hadd) Order, 1979.

11. In the instant case we are concerned with the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (VII of 1979), as amended (hereinafter referred to as the Ordinance). The following further proviso was added in section 20(1) of the Ordinance by Ordinance XX of 1980 referred to above:-

"Provided further that an offence punishable under this Ordinance shall be triable by a Court of Session and not by a Magistrate authorised under section 30 of the said Code and an appeal from an order of the Court of Session shall lie to the Federal Shariat Court".

This proviso has brought about two material changes - firstly the offences under the Ordinance which earlier were triable by a Magistrate (with section 30 powers) have been made triable by a Court of Session and secondly the Federal Shariat Court was made the Court of Appeal against an order of the Court of Session.

12. Since the Code of Criminal Procedure has been applied mutatis mutandis in respect of cases under the Ordinance, consequently as court of appeal this Court can exercise all the powers of appeal given under the said Code (Chapter XXXI). It can examine question of law or question of fact or question of mixed law and fact. In other words this Court is given unfettered powers of appeal to examine any aspect of the case whether relating to appreciation of facts or of law. Section 20 of the Ordinance imposes no restriction whatsoever on the jurisdiction of this Court. While exercising appellate

jurisdiction, this Court can quash, confirm, vary or modify the conviction or sentence awarded by a Court of Session. This Court also has the power to enhance the sentence after affording adequate opportunity of defence to the accused. The judgment of this Court in exercise of its appellate jurisdiction under section 20 of the Ordinance or similar provisions of other statutes referred to above, is final like that of the Supreme Court as the same cannot be challenged before any Court or forum.

13. It is true that at present this Court enjoys no revisional jurisdiction as there is no provision in the Ordinance conferring such jurisdiction upon it. It is for this reason that no revision petition as such lies before this Court. However, this does not in any way affect the present case because the revision petition has been rightly treated as an appeal, and there is no doubt about the competency of such appeals and power of this Court to enhance the sentence, as discussed below.

14. The next question which arises for consideration is as to which orders passed by a Court of Session are made appealable under section 20 of the Ordinance. The words used in the above quoted proviso are "an order of the Court of Session". Although the word "an" before the word "order" gives an impression that order may be of any kind - interlocutory or final, yet in fact the expression "an order" means an order finally disposing of the case by a Court of Session and it does not include interlocutory routine orders like summoning of witnesses, adjourning the hearing of the case or disposing of the bail application of the accused. In such interlocutory orders no right of appeal has been given to the aggrieved party. Further the expression "an order" will include final order or decision of the trial court whether resulting in conviction or acquittal of the accused. In other words every final order of a Court of Session irrespective of its result has been made appealable to this Court under section 20 of the Ordinance. Thus the expression "an order" is not confined to order of conviction but it includes order of acquittal.

as well. Similarly the expression "an appeal" in the said proviso has been used in a wider sense and includes appeal against conviction as well as appeal against acquittal or appeal for enhancement of sentence. In the absence of any express provision no restricted meaning can be placed upon this expression to include only appeals against conviction. Thus right of appeal cannot be confined against an order of conviction alone but appeal is also competent against order of acquittal as well as for enhancement of sentence.

15. As regards the question as to who can file an appeal before this Court under section 20 of the Ordinance against an order of a Court of Session, the argument of the learned counsel for the accused respondent is that only a convict or the state is competent to invoke the appellate jurisdiction of this Court as in criminal cases, the parties are the accused and the state and the status of a private complainant is that of a witness. No doubt in police challan cases the state and the accused are termed as parties but no such restriction can be placed upon the parties under the Ordinance for filing appeals before this Court. It is not denied that some times a private complainant can file a complaint direct before a Court of Session without approaching the police and in that case he will also be a party and will be competent to file an appeal against the order of the Court of Session. Similarly it is admitted that a complainant or an aggrieved person can move the Provincial Government to file an appeal against acquittal or for enhancement of sentence. If such an aggrieved person can seek redress indirectly through the provincial Government, the Ordinance does not impose any restriction to get the same relief by filing a direct appeal before this Court. In view of the above, and in the larger interest of justice, it can safely be held that apart from a convict or the state even a complainant or a person interested in, or adversely affected or aggrieved by an order of a Court

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of Session, can also file an appeal before this Court under section 20 of the Ordinance. Thus an aggrieved person seeking redress in appeal from this Court need not be a party to the proceedings in the strict sense of the term provided he satisfies the Court that either he has a genuine cause to feel aggrieved by the impugned order of the Court of Session or that he has an interest in moving the Court. Reliance in this behalf can be placed upon the following principle enunciated by the Supreme Court of Pakistan in Sikandar Hayat's case reported as PLD 1970 S.C. 224:-

"No distinction is made between an appeal referred by a private complainant, an appeal by the convict or an appeal by the Provincial Government. Leave to appeal is, therefore, given in suitable cases to private complainants, even though they are not stricto sensu persons aggrieved by the order of acquittal, and in case the Court is satisfied that the acquittal is not based on correct principles or is against the weight of evidence the respondent is convicted of the offence which he is proved to have committed."

16. The only difference between an appeal by a convict against his conviction/sentence and an appeal against acquittal or for enhancement of sentence by the state or by a complainant or by an aggrieved person is, that an appeal against conviction is treated as regular first appeal without any preliminary hearing whereas an appeal against acquittal or for enhancement of sentence is treated like a Supreme Court petition for special leave to appeal, where a petitioner first has to cross the hurdle of preliminary hearing and only if it is admitted for regular hearing then it becomes an appeal. As mentioned above while exercising appellate jurisdiction under the Ordinance or other relevant laws referred to above, the Federal Shariat Court is the last and final Court of the realm. Thus by way of analogy such appeals by the State or the complainant are like petitions for special leave to appeal. The practice adopted by this Court

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is that appeals against conviction are treated as regular first appeals without any preliminary hearing whereas all other appeals against acquittal or for enhancement of sentence whether filed by the state or a private complainant are first placed before the Court for preliminary hearing. The appellant in the preliminary hearing has to satisfy the Court that reasons given by the Court of Session are of speculative and artificial nature or finding is based upon no evidence or mis-reading of evidence or mis-appreciation of evidence or conclusions drawn about the guilt or innocence are perverse or foolish resulting in miscarriage of justice and then this Court as court of appeal will examine the whole evidence. The appellant has to show that the judgment of the lower court is manifestly wrong and unreasonable. Further in appeals against acquittal or for enhancement of sentence this Court has to satisfy itself that the impugned order is not based upon correct principle or is against the weight of evidence. In other words the appellant has to show that there has been a grave miscarriage of justice by some disregard of the forms of the legal process or by some violation of the principles of natural justice or otherwise substantial and grave injustice has been done.

17. Undoubtedly the above practice is based upon the principle that every procedure which furthers administration of justice is permissible even if there is no express provision permitting the same.

18. Applying the above principle to the facts of the instant case, we find that Muhammad Hussain, complainant being the father of unfortunate victim Mst. Zahida Perveen, who has been ravished by the accused respondent, is an aggrieved or affected person by the impugned decision and therefore, competent to file the appeal before this Court because it is not denied even by the learned defence counsel that in our

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society in cases like zina it is not only the honour and reputation of the prosecutrix but of her entire family which is adversely affected.

19. The Advocate-General for the state, supports this appeal for enhancement of sentence.

20. After going through the entire material available on the record we are satisfied that the prosecution has established the guilt of Muhammad Ramzan, accused respondent beyond any shadow of doubt through the testimony of eye witnesses Mst. Khurshid Bibi (P.W. 3), Muhammad Hussain (P.W.I) and Munir (P.W.5), corroborated by medical evidence and the report of the Chemical Examiner (ex.P.G). The trial Court, has, therefore, rightly found the accused guilty under section 7 of the Offence of Zina (Enforcement of Haddood) Ordinance, 1979. However in the circumstances of the case, we find that the sentence awarded to Muhammad Ramzan, accused respondent is grossly inadequate and amounts to mis-carriage of justice. It is proved on the record that Muhammad Ramzan, accused respondent committed zina-bil-jabr with Mst. Zahida Perveen a girl of 6 years of age. We are also conscious of the tender age of Muhammad Ramzan, accused (betwen 12 and 14 years) and therefore are not inclined to send him to the prison. Keeping in view the facts and circumstances of the case we feel that the ends of justice will be met by enhancing the fine from Rs.500/- to Rs.8000/- or in default to undergo rigorous imprisonment for two years plus 30 stripes. The fine will be realised within one month and the same shall be paid to Muhammad Hussain, complainant, father of the prosecutrix Mst. Zahida Perveen. We order accordingly.

21. This appeal is accepted in the above terms.

Aftab Khan
CHAIRMAN

M. Saad
MEMBER-III
[Signature]
MEMBER-VI

File for Reporting
Aftab Khan