IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO.118/L OF 2006

Manzoor Hussain son of Ghulam Rasool,
Caste Taili, Resident of Nabeel Town, New Abadi,
Police Station Manawan, District Lahore.

---Appellant

Versus

The State --- Respondent

Counsel for the appellant	---	Rana Shakeel Ahmed Khan, Advocate
Counsel for the State	---	Mr. Muhammad Ishaque D.P.G.
FIR No., date & Police Station	---	248/02 dated 04.11.2002 Railway Police, District Lahore.
Date of Judgment of Trial Court	---	29.04.2006
Date of Institution	---	19.05.2006
Date of Hearing	---	03.11.2010
Date of Decision	---	03.11.2010

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JUDGMENT:

Justice Syed Afzal Haider, Judge: Appellant Manzoor Hussain has, through this appeal, challenged the judgment dated 29.04.2006 delivered by the learned Additional Sessions Judge, Lahore whereby he was convicted under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to four years rigorous imprisonment with benefit of section 382-B of the Code of Criminal Procedure. The learned trial court ordered further that perpetual warrants of arrest be issued against the co-accused Mst. Kauser Begum who had been declared proclaimed offender, with direction to the SHO concerned to arrest and produce her in the Court to face trial.

2. The prosecution case in brief is that complainant Rasheed Ahmad, Head Constable, PW.1 lodged a crime report, registered as FIR No.248/02 dated 04.11.2002 Ex.PG, with Railway Police Station, Lahore, wherein he alleged that on

04.11.2002 at 3.20 a.m. he alongwith police officials namely Mushtaq Ahmad, Muhammad Arshad and Sarwer was on patrolling duty at Railway Yard, Badami Bagh. During the perambulation the party reached Peco Siding where they heard din of voice emanating from Bogie No. 64303 of the empty goods train. Suspecting foul play they entered the Bogie and found Mst. Kauser Begum and Manzoor Hussain in naked condition who were committing zina with each other while lying a quilt (Gadda) on the floor of the Bogie. The identity of both of them was revealed later on. The culprits were arrested at the spot.

3. Investigation ensued as a consequence of registration of crime report. Basharat Ali, Assistant Sub Inspector PW.4 was deputed to investigate the case. He prepared complaint Ex.PB and took into possession the quilt vide recovery memo Ex.PA which was produced by Rashid complainant and also took into possession the shalwar of

Kausar Bibi P-2 through recovery memo Ex.PC. He prepared rough site plan Ex.PD, recorded statements of witnesses under section 161 of the Code of Criminal Procedure and got both the accused medically examined and thereafter sent them to judicial lock up on 05.11.2002. The Station House Officer after completion of investigation submitted in the Court a report under section 173 of the Code of Criminal Procedure on 29.06.2003 requiring the accused to face trial.

4. The trial Court framed charge against the accused persons under sections 10 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 on 22.11.2004. The accused did not plead guilty and claimed trial.

5. The prosecution produced nine witnesses in order to prove its case. The gist of the deposition of the prosecution witnesses is as follows:-

(i) Rasheed Ahmad Head Constable, complainant, appeared as PW.1 and endorsed the contents of his crime report Ex.PG.

(iii) PW.2 Muhammad Rauf Constable had attested the recovery memo Ex.PC through which the Investigating Officer took into possession shalwar of Mst. Kausar Begum P-2. His statement was duly recorded by the Investigating Officer.

(iii) PW.3 Muhammad Arshad Constable and PW.4 Basharat Ali Constable corroborated the statement made by Rasheed Ahmad complainant PW.1.

(iv) PW.5 Ali Hussain Constable is the other attesting witness of the recovery memo Ex.PC through which the Investigating Officer had taken into possession shalwar P-2 of Mst. Kausar Begum. The witness had also deposited two sealed parcels in the office of the Chemical Examiner, Lahore

which he had received from Rao Majeed Moharrir on 21.11.2002.

(v) PW.6 Mubashir Ahmad, Assistant Sub Inspector had drafted formal FIR Ex.PG on receipt of complaint sent to him by Basharat Ali, Assistant Sub Inspector on 04.11.2002.

(vi) PW.7 Abdul Majeed, Assistant Sub Inspector stated that he was posted as Moharrir Malkhana at Railway Police Station, Lahore. On 04.11.2002 he handed over two parcels to Ali Hussain Constable, PW.5, for onward transmission to the office of the Chemical Examiner.

(vii) PW.8 Amanat Ali, Sub Inspector/SHO had prepared incomplete report of accused Manzoor Hussain and Kausar Bibi on the basis of material collected by the Investigating Officer.

(viii) PW.9 Dr. Najma Shoaib had medically examined Mst. Kausar Begum accused and observed as under:-

"**General Physical Examination**

No mark of violence on the whole body.

Local Examination

No mark of violence on her private parts. She is menstruating, hymen torn, old healed tears present which are visible after cleaning the area, vagina admitted two fingers easily. Three vaginal swabs taken, air dried and sent to the Chemical Examiner for detection of semen and seminal grouping.

Findings are consistent with old loss of virginity."

Final Opinion

Vide chemical Examiner report No.2308/S dated 23.11.2002 which reads that "the above swabs are stained with semen and blood, one swab is being sent for seminal grouping". Hence there is evidence of recent vaginal intercourse."

6. The prosecution closed its case on 01.04.2006. Thereafter statement of accused Manzoor Hussain was recorded

under section 342 of the Code of Criminal Procedure on 08.04.2006. He denied the charges and stated that *"I have been falsely involved in this case by the Railway Police due to my previous enmity whereas I am innocent and it is why no private person from the locality was made witness in this case"*.

7. Learned trial Court after concluding the codal formalities of the trial returned a verdict of guilt. The appellant was convicted and sentenced as mentioned in the opening paragraph of this judgment. The co-accused Mst. Kausar Begum had absconded and was consequently declared a proclaimed offender during the trial. The learned trial court at the end ordered issuance of a perpetual warrant of arrest against her with direction to the SHO concerned to arrest and produce her before the court for trial.

8. The learned trial court had, in paragraph 8 through 12 of the impugned judgment, considered the arguments of the contending parties. The court also found that the principle

enunciated in the case of Riaz Vs. Station House Officer, Police Station Jhang City and 2 others reported as PLD 1998 Lahore 35, the precedent relied upon by the appellant, was not applicable to the facts of this case because the place of occurrence in the appeal under consideration was a goods train bogie and it was not a residential house. The said bogie was stationed in the railway yard. It was only when the patrolling party heard some noise emanating from the empty bogie that they looked furtively in the compartment and found both the accused in compromising position. The learned trial Court also found that the medical evidence corroborated the prosecution version because the report of Chemical Examiner proved that the swabs obtained by the lady doctor were stained with semen and blood. The learned trial Court also believed the eye witness account of the police officers who were on patrolling duty and had actually witnessed the foul action. The officers were thus natural witnesses and their presence at the spot could not be

doubted. The learned trial Court also found that the case of Muhammad Azam Vs. Mehboob Iqbal and 2 others reported as 1991 P.Cr.L.J 651 (FSC) was not applicable in the peculiar facts and circumstances of this case. This precedent relates to the element of grouping of semen. It may be noted here that grouping becomes relevant when more than one person are charged with sexual offence. Grouping of semen is however not a legal requirement. It is undertaken as a matter of abundant caution particularly as a corroborative piece of evidence. However where ocular testimony is available and is of the nature that it can be relied upon and circumstances attending the case also lend support to the ocular version then it may not be essential to look for grouping report. Even otherwise the presence of semen is not an ingredient of Zina. According to its definition penetration is sufficient to attract the mischief of the offence of Zina. Any how grouping should be resorted to by the Investigating Officer particularly when the swabs are found

stained with semen. The facility of grouping is available to the officer incharge of investigation. There is no valid reason to avoid this type of test. It can, on the other hand, be of immense value to the person responsible for final preparation of the report under section 173 of the Code of Criminal Procedure. It is however, unfortunate that despite repeated judicial pronouncements the Investigating Department does not perform its duties in a proper manner. The Prosecutor General should ensure due compliance with directions issued by Courts from time to time.

9. The learned trial Court also found that the criminal action in this case was not motivated by malice as alleged by appellant Manzoor Hussain.

10. I have gone through the file. Evidence of witnesses of prosecution as well as the statement of accused has been perused. Relevant portions of the impugned judgment have been scanned.

11. Arguments of contending parties have been heard. Learned counsel for the appellant submitted as follows:-

(i) that the raid committed by the police officers in the railway bogie was illegal;

(ii) that there was no private person present at the time of raid;

(iii) that semen grouping had not taken place;

(iv) that the appellant runs a tea shop and he was involved in this case on account of his refusal to give free refreshment to the police officers;

Reliance was placed on the case of Riaz Vs. Station House Officer, Police Station Jhang City and 2 others reported as PLD 1998 Lahore 35 and Muhammad Azam Vs. Mehboob Iqbal and 2 others reported as 1991 P.Cr.L.J 651 (FSC);

(v) that there are contradictions in the statements of witnesses because PW.2, in his cross-examination, stated

that he does not remember the colour of *shalwar* produced by Mst. Kausar Begum. The second contradiction referred to by the learned counsel is relatable to the time of occurrence. According to PW.3 the occurrence took place at 3 O' clock in the morning and according to the statement of PW.4 the complainant produced the accused before him at 3.20 a.m. while according to this witness the occurrence had taken place at 2.45 and not at 3 O' clock. It is further stated that the time of departure of the patrolling team from the police station is also not clear;

(vi) that it is a case of false implication;

(vii) that it is an admitted fact that the appellant has a tea-stall near the railway station and if he had to commit zina, he could have done in his tea shop and there was no need for him to go to this isolated place and take the cover of railway bogie;

(viii) that the appellant has already suffered imprisonment of eleven months; and lastly

(ix) it was urged that he is an extremely poor man;

Most of the points urged by learned Counsel were addressed to by the learned trial court and it has not been shown that the observations of the learned trial court are not supported by facts or that the inferences drawn were palpably wrong.

12. The learned DPG made the following submissions:-

(i) that the appellant alongwith the absconding co-accused was caught red-handed and nominated in the prompt FIR and Mst. Kausar Begum was consequently produced before the lady doctor, PW.9, without delay on 04.11.2002 for her medical examination;

(ii) that the co-accused had absconded on 03.01.2005 which shows that she was not in a position to prove her innocence in this case;

(iii) that the *shalwar* worn by Mst. Kausar Begum was stained with semen and blood as per report, Ex.PH, of the Chemical Examiner;

(iv) no enmity has been proved though it was specifically alleged in the statement under section 342 of the Code of Criminal Procedure. The appellant also stated that the motive for his false implication was that refreshments were demanded free of cost by the complainant which had been refused by the police officers;

(v) that the four-walls of the house of accused was indeed not a suitable place for such an activity and the vacant vehicle stationed at the unfrequented railway yard was chosen by the accused to pursue the nefarious activity with impunity. The presence of *gadda* suggested that the couple spent the entire night in this corner which

is generally not within public reach and consequently they could not have been surprised, and lastly;

(vi) that no private person would possibly be available in the lone railway yard at this odd hour. Learned DPG also stated that the sentence awarded is already lenient and the appellant does not deserve any concession;

(vii) that the contradictions pointed out by the learned counsel for the appellant are not significant because after a lapse of time a witness is not supposed to remember minute details like the colour of the *shalwar* worn by the accused or the colour of *shalwar* handed over by accused to the Investigating Officer. Moreover the difference in the time of occurrence and production of the accused before the police officer after he has been caught is not very material. The material aspect is that the culprits were caught red handed. It has not been established that

the patrolling party did not leave the police station for *GUSHT;*

(viii) there is no enmity between the witnesses and the appellant and there is no reason to implicate the latter falsely; and lastly;

(ix) the learned DPG relied upon the case of Shahzad alias Shaddu and others Vs. The State reported as 2002 SCMR 1009. Their Lordships in para 9 of the report observed as under:-

> "Admittedly no scientific test of semen grouping could be held but it would not materially diminish the value of other overwhelming incriminating evidence, which has come on record. In the presence of semen grouping test the report of Chemical Analyser regarding the presence of semen can be taken into consideration. It is well-established by now that "the omission of scientific test of semen status and grouping of sperms is neglect on the part of prosecution but not materially affecting the other evidence." In this

regard reference can be made to Haji Ahmad v. State (1975 SCMR 69) and Shahid Malik v. State (1984 SCMR 908). The Courts of law remain conscious regarding this aspect of the matter and it was held by learned Federal Shariat Court in case titled Ehsan Begum v. State (PLD 1983 FSC 204) as follows:-

> "The police investigation in Pakistan is not keeping pace with scientific developments. If facilities for grouping of semen be available, as indeed they are, it is not understandable why the Medical Officer examining the male for potency should not obtain the specimen of semen of the accused so that no doubt be left about the identity of the person committing Zina-bil-Jabr. The Police Officer in their reference to the Medical Officers should also in such cases invariably request the Doctor concerned to take the specimen of semen of the male accused. They should send them for chemical examination and serology alongwith vaginal swabs and clothes/cloth etc. having seminal stains."

13. I have considered the arguments of the contending parties. The judgment of the learned trial court is well reasoned. The entire evidence has been assessed. The defence of the appellant has been duly weighed. The conclusions arrived at by the learned trial court are neither fanciful nor capricious or contrary to the facts and circumstances of the case. It may also be noted that the alleged *raid* took place at 3.00 a.m. The culprits were not caught as a result of any incursion specifically arranged by local police. The whispers of the revelling couple in the lone compartment in the unfrequented railway yard at an odd hour could not have been missed by the patrolling team. It is notorious that evil commutes lonely spots in the dead of the night. The police party must have considered it a prize catch because the circumstances suggested some foul play. The police officers were not supposed to miss this opportunity. The absence of private persons at that place and time is quite natural. It was well nigh impossible for any respectable person

to be dawdling in the out of the way railway yard at this late hour in order to become a potential witness of an anticipated trial. It should not be expected that the police man would in such a situation tell the culprit to wait at the crime spot till some private person appears at the scene and opts to become a witness in an anticipated trial. Moreover such a situation does not attract the provisions of section 103 as it was, stricto senso, not a case of search to attract provisions of Chapter VII of Part III of the Code of Criminal Procedure. It has not been proved on record that the police officers were not present at the spot. The factum of the swab being stained with blood and semen was not challenged by the defence. The stage of production of *shalwar* by Mst. Kausar to the police during investigation was also not challenged while cross-examining PW.4 and PW.5. The recovery of quilt by PW.4 was also not impugned. It is significant to note that even the fact of zina alleged by eye-witness Muhammad Arshad Constable PW.3 and Head

Constable Rasheed Ahmad PW.1 was not questioned by the convict during cross-examination of eye witnesses. The statement of the eye-witnesses is worthy of credence because the crime report was lodged promptly and both the accused were arrested at the spot. The question of any deliberation, consultation or fabrication had not surfaced in the record. The contents of the crime report were supported by oral testimony and nothing beneficial to the appellant was elicited in the cross examination. Minor discrepancies in the statement of the witnesses recorded after almost three years of the incident are not worthy of serious consideration. No evidence has been brought on record to show that the appellant was involved maliciously.

14. In this view of the matter the appeal fails. Appellant is present on bail. He is directed to be taken into custody and sent to jail to serve out the remaining sentence awarded to him by the trial Court.

15. Before parting with this judgment I cannot help observing that the Investigating Officer failed to undertake grouping of semen. This lapse is endemic with officers entrusted with investigation of such grave offences. This practice must be curbed with strong hand. It amounts to a deliberate attempt to promote lascivious proclivities. It reflects non-serious and indifferent attitude to a Divine injunction. It has also been noticed that in certain Hudood cases even DNA tests are intentionally avoided. Investigation should keep pace progressively with the scientific developments particularly when crucial evidence can be made available on account of modern devices or techniques as mandated by Article 164 of Qanoon-e-Shahadat Order, 1984. The grouping of semen can be a reliable source of identifying the person accused of illicit sex. Let a copy of this judgment be sent to the Inspector General Police Railways who will detail some responsible officer to enquire into the matter and submit a report as to why the

grouping was abandoned. The compliance should reach this Court before 15.12.2010 through Registrar of this Court. The case may be put up before me on the administrative side after 17.12.2010 at Islamabad for perusal of the report and further action.

16. These are the reasons for the short order passed on 03.11.2010.

Justice Syed Afzal Haider

Dated Lahore the
4th November 2010
M. Imran Bhatti/*

Fit for reporting.

Justice Syed Afzal Haider