

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT

**MR. JUSTICE DR. SYED MUHAMMAD ANWER
MR. JUSTICE KHADIM HUSSAIN M. SHAIKH**

CRIMINAL APPEAL NO. 10-P OF 2020

MST. NABEELA DAUGHTER OF REHMAT SHARAF,
RESIDENT OF PENORAI, TEHSIL KABAL, DISTRICT
SWAT.

APPELLANT

VERSUS

1. THE STATE.
2. AFZAL KHAN SON OF GUL ZARAY, RESIDENT OF
PENORAI, TEHSIL KABAL, DISTRICT SWAT.

RESPONDENTS

| | | |
|------------------------------------|-----|---|
| COUNSEL FOR THE APPELLANT | ... | MR. GUL MUHAMMAD KHAN, ADVOCATE. |
| COUNSEL FOR THE STATE | ... | MALIK AKHTAR HUSSAIN AWAN, ASSISTANT ADVOCATE GENERAL, KHYBER PAKHTUNKHWA. |
| FOR RESPONDENT NO.2 | ... | IN PERSON |
| DATE OF JUDGMENT OF TRIAL COURT | ... | 15.01.2019 |
| DATE OF INSTITUTION OF APPEAL | ... | 14.03.2019 |
| DATE OF HEARING | ... | 22.04.2021 |
| DATE OF JUDGMENT | ... | 05.05.2021 |

JUDGMENT

DR. SYED MUHAMMAD ANWER, J: After conclusion of trial in Complaint Case No.02/PC of 2016, registered under Section 5 of Qazf (Enforcement of Hadd) Ordinance VIII of 1979, a learned Additional Sessions Judge/Izafi Zila Qazi Kabal, Swat, acquitted the respondent No.2 from the charge of "Qazf" through judgment dated 15th of January, 2019, resulting in preference of present appeal, by the appellant, complainant of private complainant, questioning the legality and validity of adverse conclusion, seeking its annulment with prayer to record conviction against the Respondent No.2, awarding him appropriate sentence.

2. The appellant, Mst. Nabeela (P.W.1) filed private complaint, with the stance that her father Rehmat Sharaf filed an application under Section 156(3) of the Code of Criminal Procedure, 1898 to the local police for conducting inquiry against respondent No.2 Afzal Khan, who leveled false accusation against his daughter Mst. Nabeela/the appellant of committing zina/fornication with one Bakht Baidar. The accused also claimed that he will produce before *Jirga* the person, who witnessed the alleged illegal act of zina, but when the respondent No.2 failed to produce the witness before *Jirga* as claimed by him, he admitted his crime of leveling false allegation of fornication/zina against the complainant/appellant and promised to tender apology to complainant and her family before *Jirga*. On the contrary instead of

tendering apology to the complainant and her family before *Jirga*, the respondent No.2 backed out from his promise which prompted the complainant's father to approach the local police to initiate criminal proceeding against him. Then he filed a private complaint to learned Judicial Magistrate, which was later on dismissed on 20th April, 2016 for want of jurisdiction.

3. Ultimately, the appellant/complainant filed a criminal complaint under Section 5 of the Qazf Ordinance for commission of Qazf against the accused/respondent Afzal Khan for imputation of fornication (Zina) upon the complainant.

4. Upon submission of complaint, proceeding was initiated against the respondent No.2, who was summoned and indicted under Section 5 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979, for allegedly making imputation of 'Zina' against the complainant.

5. The complainant/appellant appeared as P.W.1 at the trial and also produced *Jirga* witnesses i.e., Khan Zada/P.W.2, Dorary/PW.3, Adalat Khan/PW.4. Besides, the learned trial court examined Fazal Subhan ASI/PW.5, who had conducted inquiry in the instant case and got the complainant/appellant medically examined by a lady doctor. PW.6 was Lady Dr. Salma Habib who conducted medical examination of the complainant/appellant on

03.05.2016 and produced her medical report (Ex:PW-6/1) according to that medical report, the complainant was a virgin girl.

6. The respondent No.2 denied the incriminating evidence put to him in his statement under Section 342 of the Code of Criminal Procedure, 1898, pleading false implication. The respondent neither opted to be examined on oath under Section 340(2) Cr.P.C. nor produced any evidence in his defence.

7. The learned Trial Court after hearing the arguments recorded judgment of acquittal, which is assailed by way of present appeal.

8. Learned counsel appearing on behalf of the appellant forcefully argued the case and highlighted the efforts made by the complainant and her father to seek justice. According to him, the complainant and her father kept on running from pillar to post to pursue the case, first they filed an application in the Police Station Shah Dherai, Swat, under Section 156(3) of the Code of Criminal Procedure, 1898 on 27.11.2015. Then, they knocked the door of Judicial Magistrate on 03.01.2016 and finally they filed a complaint before the Additional Sessions Judge/Izafi Zila Qazi, Kabal Swat, on 27.04.2016. He admitted the fact that there is an enmity between the parties and according to him this enmity is the motive and the reason for leveling the false allegation of zina by the accused against the daughter of his enemy, who is the appellant/complainant in this case.

9. The learned Law Officer supported the impugned judgment of the learned Trial Court and mainly forwarded two arguments in its favour. Firstly, there is a delay in filing the criminal complaint and secondly, there is enmity between the parties; hence, the complaint is false.

10. We have heard the learned counsel for the appellant as well as the respondent No.2, who appeared in person, assisted by the learned law officer and perused the record.

11. The crime of Qazf is a very serious and different nature of crime. Shariah provides the protection to every person in a society from defamation and disgrace, which one could experience in situation of facing the false allegation of zina or fornication. Such false allegation becomes more grave with serious consequences in societies like ours. This crime of Qazf has serious repercussions upon woman, married or unmarried, in every society. The trial court while proceeding cases of "Qazf" should keep in mind all these hard and harsh realities of the society. The delay in filing the complaint against the accused in the court of law was considered fatal by the learned trial court in this case. This approach of the learned Trial Court considering the delay in filing a complaint in Qazf cases fatal, like any other criminal trial, is utterly misplaced and wrong due to the nature of the alleged offence. Unlike other criminal cases, in Qazf the honour, reputation, respect, social

norms and values associated with the victim and her whole family are deeply interlinked. Hence, delay in filing a complaint is not only natural but permissible in Islamic Law in cases of Qazf. According to Imam Kasani "Unlike other Hudood cases, in case of Qazf the promptness in filing complaint is not a requirement or condition. So much so, if the witnesses of *Maqzoof* (upon whom the false allegation of zina is levelled) take some time in giving evidence that is also permissible." Reference is made to [Dr. Wahbah Zuhayli, *al-Fiqh al-Islami wa-Adilatuhu*; Dar al-Ash'at Karachi, Vol. IV, Page-165]. This difference in *Hadd* of Qazf from the rest of the *Hudood* is natural due to the nature of the crime and involvement of the whole family of the victim. The crime of Qazf is taken so seriously by the Islamic law that in case if a *Maqzoof* (victim of Qazf) dies during the proceeding of the Court, her/his legal heirs can proceed with the complaint against the alleged Qazif (one who commits Qazf). Similarly, if someone commits Qazf against a dead person then her or his legal heirs can file criminal complaint of Qazf in the Court of Law against the accused. Reference is made to [al-Bada'i al-Sana'i Fi Tartib Al-Shara'i, Al-Imam Alauddin Abi Bakar Bin Mas'ud al-Kasani Al-Hanafi' d. 587 hijri, Dyal Singh Trust Library, Lahore, Page-158]. Reference: Crl. Appeal No.04-P of 2019 filed in this Court titled: "MST. NASEEMA BIBI VS. MURAD AND ANOTHER".

12. Under the prevalent laws, the remedy available to a person upon whom a false allegation of fornication or zina is leveled lies under Section 203-B of the Code of Criminal Procedure, 1898 which provides the manner and forum to file a complaint. Section 203-B was inserted in the Code of Criminal Procedure, 1898 through an amendment made by the Protection of Women (Criminal Laws Amendment) Act (VI of 2006) dated 02.12.2006. It only reads the matter and manner of taking the cognizance by the court of law in a Qazf case. (Ref. 2015 PCr.L.J. Page-305) [Federal Shariat Court].

Section 203-B states:

“203-B. Complaint in case of Qazf.--(1) Subject to sub-section (2) of Section 6 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (VIII of 1979), no Court shall take cognizance of an offence under Section 7 of the said Ordinance, except on a complaint lodged in a Court of competent jurisdiction.

(2) The Presiding Officer of a Court taking cognizance of an offence on a complaint shall at once examine on oath the complainant and the witnesses as mentioned in Section 6 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (VIII of 1979) of the act of Qazf necessary to the offence.

(3) The substance of the examination of the complainant and the witnesses shall be reduced to writing and shall be signed by the complainant, and the witnesses, as the case may be, and also by the Presiding Officer of the Court.

(4) If in the opinion of the Presiding Officer of a Court, there is sufficient ground for proceeding the Court shall issue summons for the personal attendance of the accused.

(5) The Presiding Officer of a Court before whom a complaint is made or to whom it has been transferred may dismiss the complaint, if, after considering the statements on oath of the complainant and the witnesses there is, in his judgment, no sufficient ground for proceeding and in such case he shall record his reasons for so doing.”

13. The definition of Qazf liable to Hadd is defined in Section 5 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979, which is reproduced as under:

5. Qazf liable to hadd. Whoever, being an adult, intentionally and without ambiguity commits qazf of zina liable to hadd against a particular person who is a muhsan and capable of performing sexual inter-course is, subject to the provisions of this Ordinance, said to commit qazf liable to hadd.

In the Explanation 1. of the same section, the term “muhsan” is defined as::

Explanation 1.--In this section, “muhsan” means a sane and adult Muslim who either has had no sexual inter-course or has had such inter-course only with his or her lawfully wedded spouse.
[Emphasis added]

14. In the instant case, the complainant has irrefutably fulfilled the requirement of being *muhsan* within the meaning of Section 5, when she presented her medical certificate proving her virginity. Although, it is not at all a necessary requirement for filing a complaint under Section 203-B Cr.P.C., only the statement of the complainant is sufficient because the presumption of chastity and piousness is attached to every adult woman and man in a Muslim society. This is a fundamental reason under Islamic law that nobody is allowed to level any allegation directly or indirectly about the chastity of any woman or man without providing any proof, that too with the required level of standard mentioned in Section 6 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979, which states:

- 6. Proof of qazf liable to hadd.**—(1) Proof of qazf liable to hadd shall be in one of the following forms namely:--
- (a) the accused makes before Court of competent jurisdiction a confession of the commission of the offence;
 - (b) the accused commits qazf in the presence of the Court;
and

- (c) at least two Muslim adult male witnesses, other than the victim of the qazf about whom the Court is satisfied, having regard to the requirements of tazkiyah al-shuhood, that they are truthful persons and abstain from major sins (Kabair), give direct evidence of the commission of *qazf*.

15. In Qazf cases the trial court has following options while deciding the complaint after recording the evidence:

- (a) Acquit the accused from the charge; or
- (b) Convict the accused and award him punishment of hadd under Section 7 of the Qazf Ordinance, which provides the punishment as:

“7. Punishment of qazf liable to hadd.(1) Whoever commits qazf liable to hadd shall be punished with whipping numbering eighty stripes.

(2) After a person has been convicted for the offence of qazf liable to hadd, his evidence shall not be admissible in any Court of law.

(3) A punishment awarded under sub-section (1) shall not be executed until it has been confirmed by the Court to which an appeal from the Court awarding the punishment lies; and, until the punishment is confirmed and executed, the convict shall, subject to the provisions of the Code of Criminal Procedure, 1898, relating to the grant of bail or suspension of sentence, be dealt with in the same manner as if sentenced to simple imprisonment.

- (c) In case, if the trial Court concludes that in case of Qazf the accused is not liable to hadd punishment but otherwise he is guilty of committing the crime of Qazf or leveling false accusation of fornication then the accused will be punished under Section 496-C of PPC, which reads as:

“496-C. Punishment for false accusation of fornication.—(1) Whoever brings or levels or gives evidence of false charge of fornication against any person, shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine not exceeding ten thousand rupees;

Provides that a Presiding Officer of a Court dismissing a complaint under section 203-C of the Code of Criminal Procedure, 1898 and after providing the accused an opportunity to show cause if satisfied that an offence under this section has been committed shall not require any further proof and shall forthwith proceed to pass the sentence."

16. The Trial Court failed to follow the mandatory provisions of Section 367 Cr.P.C. while announcing the judgment. The trial Court has failed to make point or points for determination while passing the impugned judgment, decision thereon and reasons for the said decision. These requirements are mandatory in nature as decided in several judgments of the Superior Courts. Reference is made to "Rafiullah Vs. The State" (2006 SCMR 1594), "MUDDASSAR alias JIMMI Vs. The State" (1996 SCMR 3), "ABDULLAH JAN Vs. The STATE and others" (2019 SCMR 1079), "SAHAB KHAN and 4 others vs. THE STATE and others" (1997 SCMR 871). In addition to that, the trial Court did not proceed the trial under Section 203-B Cr.P.C. as required by law as elaborated in para-12 supra.

17. In this case, the accused wants to tender his unconditional apology, whether his apology is acceptable or not depends upon its acceptance by the victim/complainant of the case and after that upon the trial Court; hence, this matter of acceptance of apology will also be decided by the trial Court during *de novo* trial. According to the overwhelming majority of prominent Muslim jurists, including some Hanafis, the offence of *Qazf* is a crime where the right of individual is predominated; hence, pardon may be granted to the accused by the victim/complainant. Reference: (PLD 2018 FSC 6) "FIAZ AHMAD and another Vs. THE STATE and another".

18. For the reasons stated hereinabove, the impugned judgment dated 15.01.2019 passed by the learned trial court is set aside and the case is remanded to the trial court for proper *de novo* trial as per relevant law of Qazf Ordinance and the provisions of the Protection of Women (Criminal Laws Amendment) Act (VI of 2006). The appeal is accordingly disposed of.

19. The trial court shall complete this process within a span of two months after receipt of this judgment under intimation to this Court.

JUSTICE DR. SYED MUHAMMAD ANWER

JUSTICE KHADIM HUSSAIN M. SHAIKH

Announced in Open Court

Islamabad,
the 05th May, 2021.

*Mubashir**