

IN THE FEDERAL SHARIAT COURT

Appellate Jurisdiction

**PRESENT**

**HON.MR.JUSTICE SHAHZADO SHAIKH, ACTING CHIEF JUSTICE**

**HON.MR.JUSTICE MUHAMMAD JEHANGIR ARSHAD**

**HON.MR.JUSTICE SHEIKH AHMAD FAROOQ**

**JAIL CRIMINAL APPEAL NO,150-I-2009**

1. Mumtaz Ahmad son of Noor Muhammad, Caste Lang
2. Nazeer Ahmad son of Allah Wasaya caste Lang
3. Muhammad Ishfaq son of Shamsuddin caste Khokhar  
Now confined in New Central Jail,Multan

...

Appellants

Versus

The State ...

Respondent

For the appellants

Barrister Salman Safdar  
and Malik Muhammad  
Saleem,Advocates,

For the State ...

Mr.Nisar Ahmad Virk,  
D.P.G

For the complainant ...

Mr.Nazir Khan,Advocate

No.& Date of FIR  
Police Station ...

No.52/2002,dt.30.4.2002  
P.S Pak Gate,Multan

Date of judgment  
of trial court ...

26.10.2002

Date of institution ...

17.12.200

Date of hearing  
and decision ...

18.7.2012

**CRIMINAL REFERENCE NO.5-L-2010**

The State ...

Appellant

Versus

Mumtaz Ahmad etc. ...

Respondents

**JUDGMENT:**

**SHEIKH AHMAD FAROOQ, J.**---The appellants/ Muhammad Ishfaq, Nazeer Ahmed and Mumtaz Ahmed were tried in a case arising out of F.I.R No.52 of 2002 dated 30.4.2002 registered in Police Station Pak Gate Multan for offence, under section 10(4) /19 Offence of Zina (Enforcement of Hudood) Ordinance, 1979 read with sections 377/384/148/149/292 PPC by the learned Additional Sessions Judge, Multan, who, by virtue of his judgment, dated 26.10.2009, after having found them guilty, convicted and sentenced them as under:

1) Appellants /Mumtaz Ahmed & Nazeer Ahmed:

- | <b><u>Offence:</u></b>  | <b><u>Sentence:</u></b>                                   |
|---|---|
| i. under section 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 | : death sentence as ta'zir each.                          |
| ii. under section 377 P.P.C   | : life imprisonment each with fine of Rs.2,00,000/- each. |

2) Appellant /Muhammad Ishfaq:

- | <u>Offence:</u>  | : | <u>Sentence:</u>   |
|--|---|--|
| i. under section 10(4)/19(i)<br>of the Offence of Zina<br>(Enforcement of Hudood)<br>Ordinance, 1979 read<br>with section 109 PPC. | : | death sentence.  |
| ii. under section 377/109/34<br>PPC  | : | life imprisonment as ta'zir<br>with fine of Rs.2,00,000/-. |
| iii. under section 292 P.P.C   | : | three months imprisonment<br>with fine of Rs.25,000/-.     |

In default of payment of fine, all the convicts were ordered to further suffer one year simple imprisonment each. In case of recovery of fine, 1/2 of the same was ordered to be paid to the victim Mst. Sughran Mai. The sentences of imprisonment were ordered to run consecutively. However, the learned trial Court acquitted co-accused Muhammad Shafi and Muhammad Iqbal by extending benefit of doubt to them.

The appellants, by filing this appeal from jail, have called in question the conviction and sentences awarded to them vide the impugned judgment, whereas the learned trial court has sent Criminal Reference No. 5/L of 2010 for

confirmation of sentence of death. We intend to decide both the above matters through this single judgment.

2. Succinctly, the prosecution story as narrated by complainant/Abid Hussain, (PW.1) in his complaint (Ex.PL), is that that he was married with Mst. Sughran Bibi (PW.2) about 16 years ago and five children were born out of the said wedlock. The complainant stated that he had to recover the labour charges regarding embroidery on *dopatta* from accused/Nazir and his wife Mst.Memo. He contended that about one year and three months earlier, he and his wife were called for payment of labour charges by the accused at Multan in a *chobara* of one Hakeem Noor Muhammad situated in street Shaikhanwali, police station Pak Gate, where Muhammad Shafi (brother of Mst. Memo) was living. Mst. Memo and Muhammad Shafi were present in the said *chobara*. Muhammad Shafi accused took him to bazar for collecting money and they visited different shops. On their return, after about one hour, he found his wife Mst. Sughran Bibi standing at Chowk Haram Gate alongwith Khadim Hussain and Iqbal Hussain.

He stopped the vehicle, whereupon Muhammad Shafi accused hurriedly alighted from the vehicle and slipped away. The complainant's wife informed him in the presence of said Khadim and Iqbal that when he alongwith Muhammad Shafi had gone to bazar, after a little while, accused Mumtaz armed with knife, Nazeer Ahmed, Muhammad Ishfaq having a camera and Allah Ditta armed with pistol and having a camera entered the room and closed the door. Mumtaz and Allah Ditta/accused pointed their respective weapons upon her, while Nazeer Ahmed accused forcibly removed her clothes. Accused Mumtaz committed zina-bil-jabr with her, followed by Nazeer Ahmed/accused who also committed zina-bil-jabr as well as carnal intercourse with her, while accused /Ishfaq and Allah Ditta took her nude snaps. She resisted and raised hue and cry. The witnesses told the complainant that on hearing alarm, they went to the *chobara* of Hakeem Noor Muhammad and had seen the occurrence from the broken window. They knocked the door, whereupon the accused fled away through the door of the adjoining room. Mst. Sughran also told the complainant that when accused removed her

clothes then Mst. Memmon went in the adjoining room. The motive behind the occurrence is that the accused/Nazir Ahmad had suspicion that the complainant had illicit relation with his wife/Mst.Memon and he had taken her naked pictures. The accused blackmailed the complainant and after extorting Rs.10,000/- from him, burnt the said snaps of his wife. After some days, the accused again showed him more snaps and started to blackmail him. The complainant remained quiet for the sake of his honour. At last, he got registered a crime report at police station City Jalalpur, which was cancelled due to lack of jurisdiction. The complainant alleged that the accused namely Nazir, Allah Ditta, Ishfaq and Mumtaz have committed the offences in connivance with Mst.memon and Muhammad Shafi. Hence, FIR No.52/2002 was registered at police station Pak Gate, Multan.

3. After completion of the investigation, report under section 173, Cr.P.C was submitted in the learned trial court for taking cognizance of the offences.

4, The learned trial court on 17.06.2003 framed the charges against the convicted accused/present appellants as well as the acquitted accused namely Muhammad Shafi and Muhammad Iqbal for the commission of offences falling under the mischief of Sections 10(4) and 19 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 read with section 109 PPC, Sections 377, 148 and 149 PPC and section 292 PPC. The accused did not plead guilty and claimed trial.

5. The prosecution in order to prove its case produced eight witnesses at the trial. Furrugh Hafeez, ASI and Attaullah Inspector were examined as C.W.1 and 2 respectively. The gist of the evidence of prosecution witnesses is as follows:-

P.W.1/Abid Hussain is the complainant of the case, who repeated the contents of his complaint and fully supported the version of the victim.

P.W.2/Mst. Sughra Mai, who is the victim of the occurrence, reiterated the allegations leveled by her husband namely Abid Hussain/complainant(P.W.1). She stated that the accused/Mumtaz and Nazir not only committed zina-bil-jabr but also sodomy with her. She further stated that the accused Iqbal and Ishfaq facilitated their co-accused in the commission of the offence and took her photographs while she was

naked. She contended that on her hue and cry Nazir/ accused put his hand on her mouth, whereupon she made a bite on his finger. She also deposed that Khadim and Iqbal P.Ws were attracted to the scene of crime on hearing her hue and cry and witnessed the whole occurrence. She further deposed that Ex.PA to Ex.PK are the photographs which were prepared by the accused persons during the commission of sodomy,zina-bil-jabr and molestration.

P.W.3/Muhammad Iqbal who is real brother of the victim and an eye witness of the occurrence, stated that he saw the occurrence from the broken window of the room. He fully supported the version of the prosecution as narrated by P.W.2/Mst.Sughra Mai.

P.W.4/Riaz Hussain is witness of recovery memo Ex.PM wherein an amount of Rs.1000/- and one Camera were recovered from accused Ishfaq while in police custody.

P.W.5/Dr.Fayyaz Khan Durrani conducted the potency test of accused/Mumtaz Ahmad and Nazir Ahmad and found them fit to perform the sexual act. In this regard he produced M.L.C Ex.PN and Ex.PO.

P.W.6/Saeed Ahmad,Sub Inspector who is investigating officer in this case narrated the various steps taken by him during the investigation of the case including the arrest of the accused/Nazir and Mumtaz Hussain and recovery of naked photographs of Mst.Sughran Mai vide recovery memos Ex.PJ and Ex.PK. He stated that Abid Hussain/complainant, Mst.Sughran Mai/victim, Khadim Hussain and Iqbal/P.Ws in their statements dated 11.5.2002 exonerated accused Allah Ditta from the commission of the offence. The said P.Ws clarified that they have nominated Allah Ditta due to 'mis-understanding whereas the name of the original accused was Muhammad Iqbal son of Allah Qadir. P.W.6 found that Allah Ditta was not involved in this case. However, he specifically stated that in his



investigation accused/Iqbal, Mumtaz, Nazir, Shafi and Mst. Memon Mai were found to be fully involved in this case.

P.W.7/Mukhtar Ahmed Inspector had also undertaken the investigation. On 16.10.2002 he recovered Rs.1000/- and one naked photograph of Mst. Sughran on the pointation of Shafi accused and took the same into possession through recovery memo Ex.PT and Ex.PU respectively which were attested by Khadim Hussin and Din Muhammad PWs.

PW.8/Muhammad Ramzan Sub Inspector had arrested Ishfaq/accused on 28.11.2002 when his petition for pre arrest bail was dismissed. During investigation, Ishfaq accused got recovered a camera and cash Rs.1000/- from the residential *chobara* of Hakeem Noor Muhammad and the same were taken into possession through recovery memo Ex.PM which was attested by Riaz Hussain and Mulzam Hussain He also prepared site plan of the place of recovery Ex.PV. During investigation, Ishfaq accused disclosed that he had destroyed the 'negative' of the photographs of Sughran Bibi.

The learned trial court summoned Farrukh Aziz, ASI, Atta Muhammad, Inspector and Mumtaz Hussain, DSP as court witnesses and recorded their statements as C.W.1 to C.W.3. respectively. The said C.Ws testified the registration of FIR No.64 dated 2.4.2002 in police station City Jalalpur Pirwala on the statement of Abid Hussain/P.W.1. C.W.2 deposed that during investigation of the said FIR, it transpired that the occurrence had taken place at Multan and as such, FIR No.64/2002 dated 2.4.2002 was cancelled. C.W.3 during the course of his cross-examination, clarified that Mst.Sughran Mai/victim had never stated before him that the occurrence had taken place at Multan.

6. After closure of the evidence of the prosecution and recording of the statements of the C.Ws, the accused/appellants were examined under section 342

Cr.P.C and in response to the crucial questions regarding their involvement in the case and the reasons for deposition of prosecution witnesses against them, the ,  
accused/ Mumtaz Ahmed replied as under:-

“The case is false and frivolous. The complainant of this case No.52/02 i.e. this case was registered by Abid Hussain and his version is supported by the statement of Mst. Sughran. PWs Iqbal and Khadim also supported the version of above said case. This case was registered on 19.07.2002 under section 10(4)/7/79 Zina Ordinance read with section 377/384/292/148/149 PPC, P.S. Pakgate, Multan. The same Abid Hussain complainant lodged FIR No.64/02 on 2.4.02, at P.S. City Jalalpur Pir Wala under section 10(4)/16/7/79 Zina Ordinance read with 506/292 PPC in which Abid Hussain, the same complainant stated that he alongwith his wife Mst. Sughran went in the house of Nazeer Ahmed to collect money of embroidery labour where Shafi took Abid Hussain to the Bazar at Jalalpur city and during his absence in the house of Nazeer Ahmed at Jalalpur Pir Wala, Nazeer and Mumtaz committed alleged rape and when Abid Hussain came back his wife Mst. Sughran was not present in the house of said Nazeer Ahmed accused nor she reached in her own house and during her search made by PWs, they found Sughran near the Bus Stand near graveyard of Jalalpur city and on the statement of Abid Hussain FIR No.64/02 above mentioned was registered repeating the same allegations which has been narrated in present FIR NO.52/02 and then the I.O. Ata Ullah Inspector recorded the statements of the PWs Mst. Sughran, the alleged victim, Iqbal and Khadim Hussain PWs. The I.O. prepared the site plan on the pointation of the PWs

and the I.O. also prepared the place of recovery of Mst. Sughran and inspection note were also prepared by the I.O. of the house of Nazeer accused. Throughout the investigation, none of the PWs ever alleged before Ata Ullah Inspector I.O. of case FIR No.64/02 at P.S. City Jalalpur Pir Wala. That the occurrence has not taken place at Jalalpur Pir Wala city but at Multan city. None of the PWs of case FIR No.64/02 ever stated that the occurrence did not take place at locality of Jalalpur City rather it was committed at Pakgate Multan within jurisdiction of PS. Pakgate, Multan. No witness and the owner of the alleged Chobara were ever associated with this investigation nor they were cited or produced before this court later on. All the witnesses are imported from Shuja Abad at a distance of about 50 KMs from Multan because no such occurrence was committed at Multan so no PW of the locality supported the false and concocted version of the complainant party. It is false case. All the PWs are interested and are related inter-se inimical to me and my co-accused. They have falsely deposed against me and my co-accused. In fact Abid Hussain complainant had friendly relations and was a (WASDA) of said Mushtaq Lang. I have previous dispute with Khuda Bukhsh Lang who is close relative of said Mushtaq Lang who was Tehsil Nazim at that time. Due to enmity with Khuda Bukhsh Lang, regarding Lamberdari with Lang family this complainant was engaged to get a false case registered against me and my co-accused. Mushtaq Lang had very close relation with Saeed Gujar Inspector who is a notorious police officer of Punjab Police and this Saeed Gujar with the connivance of the Lang family above mentioned, complainant Abid Husain and his wife Mst. Sughran were used as sex tool against me and my co-accused with a concocted story prepared by Saeed Gujar. The prosecution has also belied his own version by declaring/got acquitted Mst. Memo Mai

one of the co-accused. The Lang family had been approaching me that if you give us Lamberdari of your village we will drop this false case against you. I am innocent. I have been victimized due to my local Lamberdari rivalry with the Lang family who is big Zamindar of our area.”

Appellants/Muhammad Ishfaq and Nazeer Ahmed relied upon the statement/reply of Mumtaz Ahmed regarding their involvement in this case.

However, accused/appellants neither opted to make statement, under section 340(2) Cr.P.C on oath nor produced any witness in defence in disproof of the charge/allegation made against them.

7. Upon conclusion of the trial, the learned trial court vide judgment dated 26.10.2009 acquitted the accused Muhammad Shafi and Muhammad Iqbal by giving them benefit of doubt. However, the present appellants were found guilty and sentenced as mentioned herein before in para-1 of this judgment.

8. Being aggrieved by the impugned judgment dated 26.10.2009, the appellants have challenged the legality and validity of their convictions and sentences through the instant appeal before this Court.

9. Barrister Salman Safdar, learned counsel for the appellant/Mumtaz Ahmad contended that the prosecution has failed to prove the case beyond shadow of doubt. He submitted that the ocular account was not worthy of reliance as the presence of the only eye witness i.e P.W.3 who is a resident of Jalalpur Pirwala is not established at the place of occurrence i.e Pak Gate Multan. He submitted that complainant/P.W.1 was untrustworthy and unreliable witness, who made dishonest improvements in his statement. Even otherwise he was not an eye-witness of the occurrence. The complainant had initially got registered FIR 64/2002 on 02.04.2002 at Police Station Jalalpur Pirwala. He further submitted that earlier, the complainant and eye witnesses, including the victim, had narrated a totally different story of the alleged occurrence. The date of the alleged incident, place of occurrence, the accused and their roles were all variance with present FIR/Ex.PL which cast serious doubts on the prosecution version. The prosecution has miserably failed to give any reasonable explanation regarding inordinate delay of 15 months in lodging the FIR. The prosecution case was itself

not clear whether the occurrence had taken place 3 months or 15 months prior to registration of the case. Khadim Hussain, alleged eye-witness was given up by the prosecution as having been won over by the accused. Complainant and eye-witnesses had exonerated Allah Ditta by replacing him with Muhammad Iqbal, who was ultimately acquitted by the learned trial court. The ocular account was disbelieved by the learned trial court to the extent of Muhammad Shafi, Muhammad Iqbal and Mst. Memo. He further contended that Mst. Sughran Mai (P.W.2)(victim) made dishonest improvements in her statement. The presence of P.W.3 at the scene of occurrence is doubtful; that the statements of PW-1 and PW-2 regarding FIR 64/02 were at variance with their statements with respect to the present case. The medical evidence did not support the ocular account. No D.N.A test was conducted in this case. He claimed that the learned trial court had given undue importance to the photographs, ignoring the fact that the negatives of the said photographs were not available. While concluding his arguments, the learned counsel pleaded that the appellants deserve a quittal because all the

evidence and attending circumstances prove that the prosecution case is highly doubtful and it is case of no evidence.

Learned counsel for the appellant Mumtaz Ahmad has relied upon the

following case law in support of his arguments:

**2010 SCMR 1706** (Muhammad Asghar v. The State), **2011 SCMR 45** (Mushtaq Hussain v. The State), **2011 SCMR 208** (Abid Ali v. The State), **1996 SCMR 176** (Abdul Rehman v. Fateh Sher), **1995 SCMR 599** (Ata Muhammad v. The State), **1972 SCMR 651** (Sher Bahadur v. The State), **2003 SCMR 647** (Mst. Mumtaz Begum v. Ghulam Farid etc.), **PLD 2011 SC 554** (The State v. Abdul Khaliq), **2006 SCMR 1846** (Lal Khan v. The State), and **2001 SCMR 25**. (Allah Wadhayao v. The State)

10. Malik Muhammad Saleem, Advocate, who appeared on behalf of appellants/Nazir Ahmad and Muhammad Ishaque, submitted that prosecution has failed to establish the guilt of the appellants as no reliable evidence has been produced in this regard, that the learned trial court has not properly appreciated the evidence available on record and passed the impugned judgment on the basis of surmises, that there are many contradictions in the statements of the prosecution witnesses and no sentence could be awarded on the basis of such like contradictory/shaky evidence, He maintained that co-accused/ Muhammad Iqbal

and Shafi have been acquitted from the charges by the learned trial court and on the basis of the solitary statement of victim, the present appellants have been convicted. He contended that there is neither any medical report, or report of chemical examiner nor serologist report available on the record regarding matching of semen, which were necessary in a case where gang rape is alleged to have been committed. The FIR was registered with the delay of fifteen months and no plausible explanation has been furnished for the said delay, the allegedly recovered photographs are not substantive piece of evidence and cannot be used against the appellants. Even otherwise, it is not revealed from the photographs that both the appellants committed the rape with Mst.Sughra at the same time as both have not been found to be together in any of the photographs. Further-more, it cannot be said with certainty that the person shown in the photographs is the same original person, particularly after introduction of computer technology. It is a well known practice to black mail the people in the society through this device, particularly when the Negative and original



photographs are not available on the record. He argued that the photographs are only admissible in evidence when the same are proved through reliable witnesses which is missing in this case. He contended that the story introduced by the prosecution seems to be unnatural, fabricated and false because no wife would allow her husband to commit rape with another lady in her presence, particularly, with the connivance of her real brother as alleged in this case. He further argued that the trial court has disbelieved the half story of prosecution and the remaining evidence is neither independent nor any corroboration is available on record. He claimed that the recovered Camera in this case is planted and no actual pictures available on the record and also no technical witness was produced to prove this. Finally, he argued that the judgment of the trial court is not well reasoned and the conviction recorded and sentences awarded by the learned trial court are only on the basis of conjectures as there was no evidence available on record which could justify the imposition of sentence of death.

11. Learned counsel for the appellants /Nazir Ahmad and Muhammad Ishfaq has relied upon the following judgments in support of his arguments:

- 1) 1998 MLD 1592  
(WAPDA Vs. Ghulam Shabbir)
- 2) PLD 2003-Karachi-148  
(Mst. Mariam Haji and others Vs. Mrs. Yasmin R. Minhas and others)
- 3) 2005 YLR-1716  
(Najma Shahzadi alias Rani Bibi Vs. The State)
- 4) 2000 MLD 1193  
(Ashique Ali Lashari Vs. The State)
- 5) PLD 2004 Lahore-829  
(Rehmat Shah Afridi Vs. The state)
- 6) PLD-1996-Lahore-28  
(Sajjad Hussain Vs. The State)
- 7) 2002 P.Cr.L.J-1765  
(Government of Sindh through Advocate General Sindh Vs. Fahad Naseem and 3 others.)

12. Conversely, Mr. Nazir Khan, Advocate, for the complainant has contended that the impugned judgment dated 26.10.2009 is based on well reasoning and the learned trial court has rightly convicted the appellants. He stated that the recoveries effected from the accused/appellants have proved the prosecution case and the prosecution witnesses were duly cross-examined but no specific question regarding the details of occurrence was put to them. He maintained that the delay has been properly explained by the complainant and the prosecution had the option to leave the witness, which was won over by the accused party. He asserted that the Negatives of the photographs were burnt by the accused party to destroy the evidence. He argued that the act of the accused has been elaborately explained in the F.I.R and evidence and it is a case of direct evidence. Lastly, he

submitted that the occurrence has not been challenged or denied and all the witnesses supported the statement of the victim.

13. Learned D.P.G appearing on behalf of the State has supported the impugned judgment and contended that the prosecution has fully proved its case against the appellants. He contended that ocular account is proved by P.W.3, who is real brother of the victim and P.W.1, The statement of complainant/P.W.1 is relevant under Article 19 of the Qanun-e-Shahadat Order,1984 as he has described the whole occurrence. The recovery of photographs from Mumtaz and Nazir and Camera which was recovered from the possession of Ishfaq/ accused, further strengthen the prosecution case. The Photographs Ex.PA and Ex.PB show the accused Mumtaz committing zina-bil-jabr with the victim. Similarly, Ex.PC, PD and PG clearly show accused Nazir committing zina-bil-jabr with victim, that photograph/ Ex.PH depict that victim is crying and weeping helplessly, that photographs/ Ex.PA to Ex.PH were produced by the complainant while appearing in the court as witness, while photographs/Ex.PK were recovered from the accused/ Nazir. He contended that the defence cannot confront the P.Ws with statements recorded under section 161 Cr.P.C in case FIR No.64 according to law. He claimed that the charges were proved against the accused/present appellants and they were rightly convicted and awarded punishment.

14. We have heard the learned counsel for the parties at length in addition to scanning the evidence on record with their able assistance.

15. Admittedly, in the present case two FIRs were got registered by the complainant/Abid Hussain regarding the same occurrence. The first FIR No.64/02, dated 2.4.2002, under sections 10(4) and 16 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 read with sections 292, 506/384 PPC was lodged at Police Station, Jalal Pur Pirwala, wherein investigation was conducted and statements of the complainant, victim and the P.Ws. were also recorded under section 161 of the Cr.P.C. However, during the course of investigation, it transpired that the occurrence had taken place at Multan in the jurisdiction of Police Station, Pak Gate Multan and as such, the aforesaid FIR was cancelled. The second FIR No.52/02, dated 30.4.2002, was registered under sections 10(4)/19 of the Offence of Zina (Enforcement of Hadood) Ordinance, 1979 read with sections 377/148/149/292/114/109 PPC, at Police Station, Pak Gate, Multan. Though both the FIRs are regarding the same alleged occurrence but there is a difference of venue, date of the occurrence and names of the accused in both these FIRs. Abid Hussain/complainant while appearing as P.W.1 in his examination-in-chief admitted that he had first reported the occurrence to Police Station, Jalalpur Pirwala. However, during cross-examination he tried to change his stance by stating that the SHO had registered FIR No.64/2002 on his own accord and that he had put his signatures on a blank paper. He, however, admitted that he had nominated Mumtaz, Nazir, Memon, Shafi and two unknown persons as accused in the said FIR. Mst. Sughran/victim while appearing as P.W.2 showed her ignorance about the registration of the first FIR at Police Station, Jalalpur Pirwala. Muhammad Iqbal, who has been cited as an eyewitness

in the second FIR, appeared as P.W.3 and during the cross-examination, deposed that he did not know about the registration of first FIR at Police Station, Jalalpur Pirwala. In this view of the matter, the learned trial Court summoned Farrukh Hafeez, ASI, Atta Ullah, Inspector and Mulazam Hussain, DSP as court witnesses (i.e C.W.1 to C.W.3) as at the relevant time, they had been performing duties at Police Station, Jalalpur Pirwala. Farrukh Hafeez, ASI appeared as C.W.1. On 2.4.2002, he was posted as Head Constable/duty officer at Police Station, Jalalpur Pirwala. He stated that on the statement of Abid Hussain(P.W.1) he chalked out FIR No.64/02, without any addition or omission. This witness had also brought with him the original record of FIR No.64. It is worthy to note that this witness was not cross-examined by the prosecution despite being provided an opportunity. In absence of any cross-examination, whole of the examination-in-chief of C.W.1 is presumed to have been admitted by the prosecution. Ata Ullah, Inspector/SHO, Police Station, Jalalpur Pirwala, appeared as C.W.2. He had recorded the statement of Abid Hussain,(P.W.1). In his cross-examination, this witness stated that the complainant/Abid Hussain(P.W.1) had not disclosed to him that the occurrence took place at Multan. This witness denied the suggestion that Abid/complainant did not make any statement before him. He stated that the complainant alleged that the accused persons Nazir and Mumtaz had committed 'zina-bil-jabr' with his wife Mst. Sughran in the house of Nazir Hussain situated in Islampura Colony, Jalalpur City and Dr. Bilal and an-other person had taken photographs of his wife. C.W.2 categorically stated that he had recorded the statement of Mst. Sughran, who did not mention in her statement that she was

subjected to rape at Multan. According to C.W.2, even the complainant/Abid Hussain and the P.Ws., namely, Khadim Hussain and Iqbal did not depose that the occurrence had taken place at Multan. C.W.2 further stated that on the pointation of the P.Ws, he prepared the site plan wherein the house of Nazir has been mentioned as the place of occurrence. Mulazam Hussain, DSP while appearing as C.W.3 clarified in his cross-examination that Abid Hussain, the complainant had verified FIR No.64/02 word by word. In answer to a question put to C.W.3 by the defence counsel, he replied that "it is correct that Mst. Sughran, P.W. (alleged victim) had also stated that the occurrence happened at Jalalpur Pirwala and at any stage she never divulged that it so happened at Multan. /

16. The evidence discussed above has fully proved the fact that the complainant had first lodged FIR at Police Station, Jalalpur Pirwala and after its cancellation, a second FIR, in which the present appellants were tried, was lodged at Police Station, Pak Gate, Multan. There are noticeable and major contradictions in the prosecution story as narrated in both the FIRs. In first FIR No.64/02, dated 2.4.2002 it is alleged that the occurrence took place three months prior to the registration of the FIR, whereas in the second FIR bearing No.52/02 dated 30.4.2002 it is alleged to have taken place 15 months prior to the lodging of the FIR, though there is a difference of only 28 days in between the period of lodging of the aforesaid two FIRs. In the first FIR, the venue of the alleged occurrence is shown at the house of Nazir, at Jalalpur Pirwala and in the second

FIR it is stated to be the 'chobara' of Hakim Noor Muhammad, at Multan, and distance between the two places is about 100 k.m. In the first FIR, Dr.Bilal and two unknown persons have been attributed the act of taking photographs of the victim during the commission of 'zina-bil-jabr' by the other co-accused. In the second FIR, this role has been assigned to another set of accused i.e. Ashfaq and Allah Ditta. Though the P.Ws. in both the FIRs are the same i.e. Iqbal and Khadim Hussain but their evidence is totally different in both the cases. In the first FIR, they are not shown to be the eyewitnesses of the occurrence. On the other hand, in the second FIR they claimed to have witnessed the alleged occurrence. Ex.D.D. is the statement made by the complainant/Abid Hussain in case FIR No.64/02, registered at P.S. Jalalpur Pirwala and Ex.DE, Ex.DF are the statements of the alleged victim/Mst. Sughran and the P.Ws/Khadim Hussain and Muhammad Iqbal. A perusal of the said statements would reveal that these are totally contradictory to the statements made by them during the investigation conducted in the second FIR at P.S. Pak Gate, Multan. The said P.Ws. were confronted with their statements under section 161 Cr.P.C. made in FIR No.64/02, to which the learned counsel for the complainant had objected to. He had submitted that those statements could not legally be read or confronted in the present case. We do not agree with the contention of the learned counsel for the complainant. The statements made by the P.Ws. under section 161 Cr.P.C. in the first FIR No.64/02, registered at P.S. Jalalpur Pirwala had a direct nexus with the matter in issue in the second FIR No.52/02 and as such, confronting the P.Ws. with their previous statements was not illegal and it was in accordance with the

provision of Article 140 of the Qanun-e-Shahadat Order, 1984. For facility of reference it is advantageous to reproduce Art.140 hereunder:

“A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved: but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.” (underlining is for emphasis).

Learned counsel for the appellants has placed reliance on the cases of **The State** v. **Abdul Khaliq** (PLD 2011 SC 554) and **Sajjad Hussain** v. **The State** (PLD 1996 Lahore 286). In the case of Said Munir and another Vs.The State (PLD 1964 Peshawar 194) while dealing with the application of Art. 140 of the Qanun-e-Shahadat Order, 1984 following observations have been made:

“The contradicting a witness by a previous inconsistent statement of his is a usual and often effective mode of discrediting him. This Article, therefore, provides that a witness may be cross-examined as to previous statements in writing, but that if it is intended to contradict him, his attention must be drawn to that part of the previous statement by which it is intended to contradict him, in order to enable him to explain the inconsistency between the statement in the Court and the previous inconsistent statement.”

In **Sher Bahadur** v. **The State** (1972 SCMR 651) it has been held that the defence is thus entitled to ask the Court that an inference adverse to the prosecution be drawn that if the statement had been produced it would not have supported the prosecution.

17. The above discussion has persuaded us to hold that the prosecution had failed to lay a strong foundation to build up its case against the accused persons



and such a defect in the prosecution case had created a serious doubt qua the truthfulness of the prosecution version.

18. Delay in lodging the FIR has also caused another serious set back to the prosecution case. The present FIR No. 52/02 dated 30.4.2002 was lodged after an inordinate delay of 15 months. The explanation furnished by the prosecution is not plausible. Very serious allegations have been leveled in the FIR against the accused. Withholding such an information from the police for a pretty long time not only cast a serious doubt about the authenticity of the commission of offence but also resulted in destroying the material evidence expected to be collected by the investigating agency during the investigation, which ultimately prove to be fatal to the case of the prosecution. The delay in lodging the FIR also provides an opportunity to the prosecution to fabricate evidence with due consultation and deliberations. Reliance in this regard is placed on the case of **Mushtaq Hussain v. The State** (2011 SCMR 45). In view of the fact that the prosecution had taken ample time of 15 months in carving out the prosecution story against the accused, the possibility of the same being a concocted one and the result of due deliberation and consultation cannot be ruled out.

19. In the case in hand, the appellants have been tried on the allegation of 'zina-bil-jabr' and sodomy, in addition to taking nude photographs of the alleged victim/Sughran. To prove these allegations against the appellants/convicts, the prosecution has produced oral as well as documentary evidence. Admittedly, the alleged occurrence was not witnessed by Abid Hussain (P.W.1) complainant

himself and the same was reported to him by Mst.Sughran Mai (P.W.2)/ alleged victim and the P.Ws., namely, Khadim Hussain and Muhammad Iqbal, who are shown to be the eyewitnesses of the alleged occurrence. The prosecution withheld the evidence of Khadim Hussain, P.W. on the ground of being won over by the accused. He was cited as an eyewitness in the FIR and he had also got recorded his statement under section 161 Cr.P.C. during the investigation by the police. Giving up this witness by the prosecution would lead to an adverse inference against the prosecution that had this witness been produced, he would have not supported the prosecution case. Reliance is placed on the case of Lal Khan Vs.The State (2006 SCMR 1846).

20. The second eyewitness/Muhammad Iqbal appeared as P.W.3 and supported the FIR version in his examination-in-chief. After giving up Khadim Hussain, P.W, the prosecution was left only with P.W.3 to furnish the ocular account of the occurrence. In order to test the veracity and reasonability of the statement of P.W.3, we have gone through the evidence of this witness with full care and caution. Admittedly, P.W.3 is real brother of the alleged victim/Mst. Sughran and a resident of Jalalpur Pirwala, which is about 100 k.m. away from the place of occurrence i.e Multan. He claimed to have seen the entire occurrence in the company of Khadim Hussain, P.W. (given up). As such, he is a chance witness. The veracity of his statement wholly depends upon proving his presence at the scene of crime. As per his statement as P.W.3 he along with Khadim Hussain went to Multan to see Abid Hussain for the purposes of taking some money from

him for the purchase of Peter Engine as they are cultivators by profession. In his examination-in-chief P.W.3 deposed that they were told by the complainant and his wife that they were going to the house of Hakim Noor Muhammad for receiving their labour charges from Mst.Memo, wife of Nazir Ahmed. As per version of P.W.2/Sughan/victim, she along with her husband reached at the shop of Hakim Noor Muhammad at 10.00 a.m. Similarly, in his statement P.W.3 also deposed that he along with Khadim Hussain, P.W. reached Multan at 10.00 a.m. Both the P.W.1(complainant) and P.W.2(victim) have not said a single word about their meeting with P.W.3 and Khadim Hussain, P.W (given up) at their house at Jalalpur Pirwala and telling them about their purpose to visit Multan. They have also not supported the version of P.W.3 that he had to receive some money from P.W.1/Abid Hussain for purchasing Peter Engine from Multan. As such, the stance taken by P.W.3 to prove his presence at the scene of crime remained uncorroborated. Hence, the only source of P.W.3's knowledge about the program of the P.W.1(complainant) and P.W.2 (victim) of visiting the shop of Hakim Noor Muhammad at Multan was not proved on the record. P.W.3 also did not state as to how he traced the shop of Hakim Noor Muhammad. Even if his statement is presumed to be true to the extent of his meeting with the complainant and his wife, the question arises why he did not accompany them to receive money for purchase of peter engine, particularly when the complainant had the facility of a jeep and their destination was the same. His traveling along with Khadim Hussain to Multan separately is nothing but a mere concoction and after-thought.

21. The alleged place of occurrence is the upper portion of the shop of Hakim Noor Muhammad. P.W.3 claimed to have been attracted to the scene of crime along-with Khadim Hussain, P.W. (given up), on hearing hue and cry of the victim, who was at the 'chobara' of Hakim Noor Muhammad. It has also come on the record that a portion of the said premises is used by Hakim Noor Muhammad as his residence. It is surprising that none else present in the shop or the inmates of the house heard the hue and cry of the victim. According to P.W.3, when he along with Khadim Hussain reached the scene of crime, they saw the accused, namely, Nazir and Mumtaz committing 'zina-bil-jabr' and carnal intercourse with the victim and also inserting their fingers in the vagina of the victim. They also saw Ishfaq and Allah Ditta, taking photographs of the victim in nude condition and while being subjected to 'zina-bil-jabr' by the co-accused. As per P.W.3, the door of the room was closed from inside and they witnessed the occurrence by peeping through a broken window. He stated that on their knocking the door, the accused fled away from the scene of crime by using the door of the adjacent room. This version of P.W.3 does not appeal to a man of even ordinary prudence that a real brother despite having reached the place of occurrence and witnessing the occurrence, instead of making efforts to get released the victim from the clutches of the accused, would opt to view the commission of offence of 'zina-bil-jabr' with her sister as silent spectator, providing the culprits sufficient time to succeed in satisfying their evil lust. Resultantly, we do not find the testimony of P.W.3 as being worthy of any credence. In this back-drop, we feel no hesitation to hold that the alleged occurrence was not witnessed by P.W.3 and it was an un-

seen occurrence. Hence, the learned trial court has wrongly relied upon the statement of P.W.3 to record conviction against the appellants, and imposition of capital punishment of death.

22. There is another reason to discard the evidence of P.W.3. The acquitted accused/Muhammad Shafi, who was alleged to have taken the complainant to "bazaar" for collecting money from different shops is brother-in-law of the accused/Nazir. The accused /Mst. Memon Mai, who was nominated as an accused but was not tried by the learned trial Court, is the wife of the accused/Nazir. It has also come on the record that Ishfaq /accused is cousin of Nazir, while the acquitted accused/Iqbal is also his relative. It does not seem plausible that the accused/Nazir would commit such a heinous offence in the presence of his close relations i.e wife and brother-in-law and he would also have their assistance. The alleged behaviour and action of the accused Nazir and his wife/Mst. Memon Mai being not common in our society, is not believable.

23. The prosecution had failed to find any support from the ocular account to prove its case. Similarly, the prosecution had also lacked the support of medical evidence to prove 'zina-bil-jabr' and carnal intercourse with the victim by the accused as the victim was not medically examined, due to the reason that the alleged occurrence had taken place 15 months prior to the registration of the FIR. In absence of medical examination of the victim, potency test of the accused/appellants was of no use, particularly when the accused had not claimed to be impotent. Neither D.N.A test was got conducted nor any report regarding

semen grouping was obtained. The absence of medical evidence had given a fatal blow to the alleged case of gang rape.

24. The learned trial court had given undue importance to the coloured photo-copies of the pictures of Mst.Sughran Mai/P.W.2 alongwith accused/ Mumtaz Ahmad and Nazir Ahmad while ignoring the fact that Negatives of the said photos were not available. So far as the proof of commission of 'zina-bil-jabr' or sodomy by production of photographs is concerned, the same is also not helpful to the prosecution as the original photographs were not produced and instead, only the photostat copies of the original were placed on record. The original photographs and their negatives were neither recovered from any of the accused nor brought on record by the prosecution. In the case of **Mst. Marium Haji and others** v. **Mst. Yasmin R. Minhas and others** (PLD 2003 Karachi 148) it has been observed that technology has so immensely advanced, that the photographs or even video tapes can be manipulated and maneuvered. Advancement in the technology besides being advantageous, has also caused adverse effect on the society. Commission of cyber crime was not imaginable three decades before. In such circumstances, unless it is proved that the photographs are not manipulated, these could not be allowed to be produced in evidence. Reliance is also placed on the case of **Kashif Saddique and 2 others** v. **The State** (2008 P.Cr.L.J. 1039). In such circumstances, photocopies of the original photos could not be relied upon to record conviction against the appellants. Even the accused nominated in the first FIR No.64/02 namely Dr. Bilal and Allah Ditta, who were attributed the act of

taking nude pictures of the victim with their respective cameras have been exonerated by the complainant. The accused Allah Ditta was substituted with Muhammad Iqbal, who has been acquitted by the learned trial Court, on the ground that recovery of camera could not be effected from this accused. The accused/appellant/Ishfaq has been convicted only on the ground that he had got recovered a camera from the place of occurrence i.e, 'chobara' of Hakim Noor Muhammad. Mere recovery of camera which is also highly doubtful and not proved in accordance with law does not disentitle the appellant/Ishfaq from the same treatment of acquittal as extended to Muhammad Iqbal by the learned trial Court. Further-more, acquittal of Muhammad Iqbal and Shafi had also made the prosecution story highly doubtful.

25. The recoveries of photographs made by the police in this case are also highly doubtful. According to Ex.D.P, five photo-copies of nude photos of the victim/Sughran were recovered from the pocket of the accused/Mumtaz Ahmed at the time of his arrest i.e 2.5.2002. Recovery memo. ( Ex.P.W(28.6.2008) was attested by two witnesses, namely, Khadim Hussain and Iqbal Hussain. It is not believable that the accused would keep with him nude photos for fifteen months. Furthermore, one of the recovery witness Khadim Hussain was not produced as P.W. being won over and Iqbal Hussain did not narrate the fact of recovery of the said photos from the accused/Mumtaz Hussain while recording his examination-in-chief. In the similar manner, four photos of the victim are shown to have been recovered from the accused/Nazir, vide Ex.DO and the recovery witness/Iqbal

Hussain has not deposed about the same. It is pertinent to mention here that Ex.P.J (1-4) and Ex.P.K. (1-4) are photographs of the victim available on record, which were produced by the complainant/P.W.1 while recording his statement before the learned trial Court and the same could not have been allowed to be produced in evidence as being not part of the report submitted under section 173 Cr.P.C. It is worth mentioning that the pictures available on the record seem to have been printed on ordinary papers, rather than on paper which is usually used for photographs. Even otherwise, it cannot be ascertained from the said photographs as to whether the same were taken at the place of occurrence. Moreover, in none of the photo copies of the pictures, two accused are found together committing "zina-bil-jabr" to attract the provisions of section 10(4) Offence of Zina(Enforcement of Hudood) Ordinance, 1979. We are also not convinced that appellant/Muhammad Ishfaq, who was accused of taking nude pictures of Mst.Sughran Mai, could be held guilty for abetment of an offence of "zina-bil-jabr" and carnal intercourse, falling within the mischief of section 10(4) Offence of Zina(Enforcement of Hudood) Ordinance, 1979 and section 377 PPC.

26. Lastly, the motive for the alleged occurrence as set out in the FIR is not only devoid of logic but also was not proved through any evidence whatsoever during the trial. In case, the complainant/ P.W.1 was suspected of having illicit relations with wife of accused Nazir (Mst.Memon), he would not have left his wife alone in the company of the said Mst.Memon. Similarly, Mst.Memmon, who is wife of convicted accused Nazir cannot be expected to facilitate



commission of "zina-bil-jabr" and sodomy with the wife (Mst. Sughran Mai) of his alleged paramour (Abid Hussain/complainant). It is also worth consideration that Mst. Memon was not only specifically nominated in the FIR but was also found fully involved in this case and challaned by the investigating officer/Saeed Akhtar/P.W.6. However, she could not be arrested and was declared proclaimed offender. Nevertheless during the trial, she appeared before the learned trial court but the prosecution got her acquitted for reasons best known to them, particularly the complainant. This also leads us to conclude that even the motive for the alleged occurrence was not true and the prosecution story is highly doubtful.

27. The nutshell of the above discussion is that the prosecution case is not free from doubt. It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by the Hon'ble Supreme Court of Pakistan in the case of Tariq Pervez Vs. The State (1995 SCMR 1345) that for giving the benefit of doubt to an accused, it is not necessary that there should be many circumstances creating doubts. If a simple circumstance creates reasonable doubt in a prudent mind about the guilt of the accused, then he will be entitled to such benefit, not as a matter of grace and concession but as a matter of right.

28. For the foregoing reasons, we are inclined to hold that the prosecution had failed to prove its case beyond any shadow of doubt against the appellants and the judgment of the learned trial court dated 26.10.2009 cannot be maintained. Resultantly the instant appeal filed by the appellants is allowed and the

J. Cr. Appeal No.150/I/2009  
Cr. Ref. No.5/L/2010

34

convictions recorded and sentences awarded to the present appellants by the learned trial court vide judgment dated 26.10.2009 are set aside. The appellants are acquitted from the charges. They shall be released forthwith, if not required in any other case.

The Reference for confirmation of death sentence is answered in the Negative and accordingly, not confirmed.

*Scd -*  
  
JUSTICE SHEIKH AHMAD FAROOQ

*Scd -*  
  
JUSTICE SHAHZADO SHAIKH  
ACTING CHIEF JUSTICE

  
*Scd -*  
JUSTICE MUHAMMAD JEHANGIR ARSHAD

**APPROVED FOR REPORTING.**

  
*Scd -*  
JUSTICE SHEIKH AHMAD FAROOQ

Lahore, 18.7.2012  
M.Akram