IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR.JUSTICE CH. EJAZ YOUSAF, CHIEF JUSTICE

JAIL CRIMINAL APPEAL NO.105/I OF 2001

Mst.Jamila Jan daughter of Khani Zaman,resident of Tanawal Mohra,Tehsil and District Haripur.	--	Appellant
	Versus	
The State	--	Respondent

LINKED WITH

CRIMINAL APPEAL NO.113/I OF 2001

Muhammad Jamroze son of Muhammad Iqbal, resident of Tanawal Mohra,Tehsil and District Haripur.	--	Appellant
	Versus	
The State	--	Respondent
Counsel for appellant Mst.Jamila Jan	--	Mr.Mohsin Akhtar Kiyani, Advocate.
Counsel for appellant Muhammad Jamroze	--	Mr.Munir Elahi Qureshi, Advocate.
Counsel for the State	--	Mr.Muhammad Sharif Janjua, Advocate, and Mr.Shafqat Munir Malik, as amicus curiae.
No.date of FIR and Police station	--	No.102 dated 4.6.1997 P.S.Khanpur.
Dates of institution	--	14.5.2001 & 18.5.2001 Respectively.
Date of hearing	--	7.6.2005
Date of decision	--	20.12.2005

JUDGMENT

CH. EJAZ YOUSAF, CHIEF JUSTICE.- This judgment will dispose of two connected appeals i.e. Jail Criminal Appeal No.105/I of 2001 filed by Mst.Jamila Jan daughter of Khani Zaman and Criminal Appeal No.113/I of 2001 filed by Muhammad Jamroze son of Muhammad Iqbal against the judgment dated 12.4.2001 passed by the learned Additional Sessions Judge, Haripur whereby the afore-named appellants were convicted under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as "the Ordinance") and sentenced as under:-

Mst.Jamila Jan	Five years' R.I. and a fine of Rs.10,000/- or in default thereof to further undergo six months' R.I.
Muhammad Jamroze	Ten years' R.I. and a fine of Rs.20,000/- or in default thereof to further undergo one year's R.I.

Benefit of section 382-B Cr.P.C. was, however, extended to the appellants.

2. Facts of the case, in brief, are that on 4.6.1997 report was lodged by Mst.Jamila Jan with SHO, P.S. Khanpur of District Haripur, wherein, it was alleged that, three months ago, when she was all alone in her house appellant Jamroze son of Iqbal, who was her neighbour, scaled over a wall of her house, closed the door from inside, laid her on a cot, took out a pistol from the fold of his trousers and committed zina-bil-jabr with her, on gun point. While leaving, said Jamroze also threatened her with dire consequence, in case the incident was disclosed by her, to some body. Subsequently, she was also subjected to zina forcibly, in all seven times, by the said appellant. Being frightened, the incident was not disclosed by the complainant to any body including her father. About two days prior to lodging of the report, her father, however, asked her aunt, to take the complainant to Hospital as she was looking pale. Resultantly, it transpired that the complainant was pregnant. Having been enquired, the complainant, perforce, disclosed the entire incident to her father who, in turn, took her to the police station for the purpose of lodging the report. On the stated allegation formal FIR No.102 dated

4.6.1997 was registered at the said police station under sections 10 and 5 of "the Ordinance". It would be pertinent to mention here that though the case was registered against appellant Jamroze only yet, in the challan the complainant was also shown as an accused. Both were, however, charged under section 10(2) of "the Ordinance" at the trial.

3. Both the appellants pleaded not guilty to the charge and claimed trial. At the trial, the prosecution in order to prove the charge and substantiate the allegation leveled against the accused persons produced four witnesses, in all. P.W.1 Zia Muhammad, SHO, P.S. Khanpur had, on the statement made by the complainant, registered the formal FIR i.e. Exh.PA. He had also sent her for medical examination. After obtaining report from the Radiologist he had also arrayed the complainant in the case as an accused. P.W.2 Mst.Nagina Parveen, lady doctor of Rural Health Centre Khanpur had, on 4.6.1997, examined Mst.Jamila Jan. She confirmed that she, at the time of examination, was pregnant for about 26 weeks. She produced in Court the MLR as Exh.PW.2/1. P.W.3 Khani Zaman is father of the complainant. He, at the trial, while corroborating

the version contained in the FIR, in pith and substance, confirmed that on the disclosure made by her daughter; that she was subjected to zina-bil-jabr by the male appellant, he had taken her to the police station for the purpose of lodging the report. He added that when he visited the police station, for registration of the case, he was given beating by the SHO due to which he fell down. Thereafter, the SHO gave him some water and recorded his statement. Further added that since he was illiterate, therefore, he was not aware as to what was written therein and that after recording his statement though his thumb impression was obtained on the report yet, it was never read over to him. P.W.4 Dr.Sajjad Husain Shah had, on 7.6.1997 examined appellant Muhammad Jamrose qua the potency test. He produced in Court the report as Exh.P.W.4/1.

4. On the conclusion of the prosecution evidence both the appellants were examined under section 342 Cr.P.C. In his above statement appellant Jamroze in answer to the question as to why the case and PWs deposed against him stated that since PW Khani Zaman was inimical

towards him, therefore, he was involved in the case. In answer to the question as to why he was charged? He stated that he was falsely dragged by the female co-accused, who being pregnant, was trying to save her skin. Then stated that he was also dragged in the case at the instance of Channi Khanum aunt of female accused because she was having criminal and civil litigation with her. Further, the complainant party prior to registration of the case was suspecting him for spreading the rumour about the pregnancy of the female accused in the village.

5. Appellant Mst.Jamila Jan, in her above statement, in answer to the similar question stated that since appellant Jamroze had committed zina-bil-jabr with her on pistol point once, about six months prior to lodging of the report, therefore, she had herself lodged the report against him. She added that no other person had committed zina-bil-jabr with her except the male accused. She further stated that the police officials had falsely cited her as an accused in the instant case. She also appeared as her own witness in terms of section 340(2) Cr.P.C. and deposed that five months prior to lodging of the report she was subjected to zina-bil-jabr

by the male accused on pistol point and since at the time of occurrence she was threatened for dire consequences by the male accused, therefore, she had to keep quiet for about five months and it was only, on the enquiry made by her father that she had to disclose the entire incident to him, who in turn took her to the P.S. for the purpose of lodging the report. In the course of her cross-examination, she denied the suggestion as incorrect that in the report lodged by her she had stated that she was subjected to zina not once but on several occasions. She admitted the suggestion as correct that after recording her statement the police had though obtained her as well as her father's thumb impressions on their statements yet, it were never read over to them.

6. After hearing arguments of the learned counsel for the parties, the learned trial Judge convicted the appellants and sentenced them to the punishments as mentioned in the opening para hereof.

7. I have heard Mr.Mohsin Akhtar Kayani, Advocate, learned counsel for appellant Mst.Jamila Jan in Jail Criminal Appeal No.105/I of 2001, Mr.Munir Elahi Qureshi, Advocate, learned counsel for

appellant Muhammad Jamroze in Criminal Appeal No.113/I of 2001, and Mr.Muhammad Sharif Janjua, Advocate, learned counsel for the State. In addition Mr.Shafqat Munir Malik, Assistant Advocate General, Punjab was also directed to assist the Court, as amicus curiae.

8. Mr.Munir Elahi Qureshi, Advocate, learned counsel for appellant Jamroze has contended that there was an inordinate delay of about five months in lodging the FIR which rendered the allegation contained therein as doubtful; that since no direct evidence was available to substantiate the charge against the male appellant, therefore, in the absence of DNA test, it could not have been said with certainty that the female accused had conceived from the male accused; that appellant could not have been convicted on the statement made by the female accused under section 342 as well as 340(2) Cr.P.C. In the end, he pleaded that since the prosecution has miserably failed to prove its case against the male appellant, therefore, he may be acquitted of the charge.

9. M/s Mohsin Akhtar Kiyani, Advocate, learned counsel for Ms.Jamila Jan has contended that the instant case is a glaring example

of highhandedness of the police authorities who, despite categoric allegation, made by the complainant, against the male offender for commission of zina-bil-jabr, also involved her in the offence so that not only the male accused be benefited but the prosecution be stifled and case be hushed up. He added that the learned trial Judge has also gone wrong in law by charging the complainant under section 10(2) of "the Ordinance" without appreciating that instant was not a case of zina-bil-raza but was a patent case of zina-bil-jabr. He prayed that since proceedings carried out by the trial Judge were wrong abinitio, therefore, the impugned judgment may be set aside and case be remanded to the trial Court for retrial, in accordance with law.

10. Mr.Muhammad Sharif Janjua, Advocate, learned counsel for the State, while controverting the contentions raised by the learned counsel for the male appellant submitted that since no evidence on record was available to believe that Mst.Jamila Jan was a consenting party, therefore, the learned trial Judge ought to have charged the male appellant under section 10(3) of "the Ordinance".

11. Mr.Shafqat Munir Malik, Assistant Advocate General, Punjab has stated that the complainant had specifically charged the male accused for zina-bil-jabr and since at the time of framing of the charge it did not reflect from the evidence that the female accused was also involved in the offence, therefore, it was not proper for the trial Judge to charge her for zina-bil-raza alongwith the male accused. He added that since delay in lodging the report in such like cases was not unusual, therefore, proper course for the trial Judge, in the circumstances of the case was to try the male offender only under section 10(3) of "the Ordinance". He too, was of the opinion that the case be remanded to the trial Court.

12. No doubt, FIR in the instant case, was lodged with considerable delay and there is also some discrepancy with regard to the timing of the occurrence. In the FIR it has been mentioned that occurrence took place about three months prior to lodging of the FIR whereas, in her statement on oath, at the trial, it has been stated by the complainant that occurrence took place about five months prior to lodging the report. As per statement of P.W.2 i.e. lady doctor Nagina Parveen who had examined

the complainant on 4.6.1997, the complainant at the time of her medical examination was having pregnancy of about 26 weeks but the fact remains that delay in lodging the report was duly explained in the FIR and it was stated therein that since male accused, being a neighbour, had threatened the complainant for dire consequences, therefore, the report could not be lodged earlier,hence,in the absence of evidence to the contrary, it was not safe and proper for the trial Court to straightaway charge the complainant for zina-bil-raza. I am mindful of the fact that in the FIR, it has also been mentioned that zina was also committed with the complainant subsequently, on different occasions, in all several times but since the complainant has, at the trial, denied the same by stating that she was subjected to zina-bil-jabr only once and that too, on gun point, therefore, in the absence of evidence to the contrary there was no occasion to disbelieve her. I have, with the assistance of the learned State counsel, tried to search out, as to on how many times complainant was allegedly subjected to zina and have, for the purpose, searched for 161 Cr.P.C. statement of her father as well as her mother but the same

are not available. Learned State counsel after consulting Abdul Ghafoor, ASI of P.S Khanpur has stated that since thumb impressions of all the three i.e. complainant as well as her parents were obtained on the FIR, therefore, police did not think it proper to record their statements under section 161 Cr.P.C. Such omissions at the part of the police authorities is crucial particularly, when it has been, at the trial, categorically stated by the father of the complainant that when he visited the police station he was maltreated by the SHO resultantly, he fell down and, therefore, was served drinking water. It may be mentioned here that the above statement is made by him while he was appearing as a prosecution witness. In the circumstances, allegation leveled by the complainant in her statement on oath, at the trial, that facts of the case were twisted by the police and it was wrongly recorded that occurrence had taken place about five and three months prior to the report and that she was subjected to zina-bil-jabr seven times, appears to have substance.

13. In my view, there should be no difficulty in dealing with a case of zina, bil-jabr or of bil-raza where, eye-witnesses are available because in

such a case trial Court can, in view of the nature of the accusation and material collected by the prosecution including statements of the witnesses, conveniently decide to frame charge under a particular section and proceed with trial of the case accordingly but situation is tangled when male accused is charged by a female for zina-bil-jabr, no eye-witness is available and the police due to some reason e.g. delay in reporting the matter or pregnancy of the women etc believing that she herself was a consenting party instead of presenting challan against the male accused alone, under section 10(3) of "the Ordinance" for committing zina-bil-jabr forwards the same under section 10(2) of "the Ordinance" for committing zina-bil-raza thereby arraying the female as an accused as well. Whereas, the situation may be other way round because in the back-drop of our traditions, social conditions, lack of education, shyness, family honour, fear and apprehension of being ostracized by the society or due to other similar reasons, she may be hesitant to report the matter at the very outset and may due to pregnancy or, in some case, possibly in order to get rid of the blackmailing of the

offender etc may opt to report the matter at a later stage which does not necessarily give rise to the presumption that she herself was involved in the offence. Here, it may be noted with concern that, in some of the cases, it has also been found that the complainant is arrayed as an accused by the police with malafide intention in order to oblige and benefit the male accused and in doing so two birds are killed with one stone because if the female herself is charged for the offence of zina she, in order to save her skin, normally denies the occurrence or disowns the report which is quite natural or if she is courageous enough to still stick to the charge of zina-bil-jabr then her statement being a statement of co-accused, becomes inadmissible against the male accused and it adds insult to the injury when the male accused due to "lack of evidence" or "for want of proof" is acquitted and the complainant/female accused on her own admission or on the basis of circumstantial or medical evidence, particularly, in case of pregnancy, is convicted.

14. It may be mentioned here that in cases of zina, delay in lodging report does not necessarily mean that the complaint was false or the

female was a consenting party. Hesitation in reporting such like cases is quite natural because in the western society even where, standard of education is higher, women are conscious of their rights and society itself is much advanced, delay in reporting such like cases is a common phenomenon, rather a large number of cases remain unreported. Dr.Alfred Swaine Taylor in his famous book "Taylor's Principles and Practice of Medical Jurisprudence" edited by A.Keith Mant, Thirteenth Edition, has found it rather uncommon to report the sexual offences without delay and that too, directly. Usually, the complaints are lodged by the near relatives. The following passage from page 82 of his book, is explicit, in this regard, which reads as follows:-

> "It is uncommon for complaints of this offence to be made early. In the majority of cases the complaint is made to police, welfare services, or school only after the offences have been going on for some considerable time. The complainant is frequently the mother or sister of the 'victim', or it is the victim herself who makes the complaint because the incestuous activities are damaging her social activities or because she feels that she is being unfairly punished.

15. It would also be pertinent to mention here that when a female, particularly an unmarried girl, opts to report a case of zina then she in fact

takes a great risk because thenceforth, due to loss of chastity, she is likely to carry the social stigma attached to the victim of zina for the rest of her life and may be unable thereafter, to have a suitable match, even. In my view, the injury caused to a victim of zina is not simply physical but is an opprobrious attack on her dignity and integrity as well. That is why, most of the victims prefer to bear the personal insult and trauma of zina-bil-jabr instead of reporting the matter. And, therefore, against so many odds if she still chooses to come forward and complain about the incident, which otherwise is likely to reflect on her chastity, then her statement should be given due importance and must not be viewed with suspicion, at the very outset.

16. It may be noted here that since the case at investigation stage is twisted normally by lower rank police officials, therefore, the legislature, taking notice of the situation, has vide Criminal Law (Amendment) Act, 2004 inserted the new section 156B in Chapter XIV of the Criminal Procedure Code, thereby providing that where a person is accused of offence of zina under the Offence of Zina (Enforcement of Hudood)

Ordinance, 1979 then no police officer below the rank of Superintendent of Police shall investigate such offence nor shall such accused be arrested without permission of the Court. The relevant provision, for ready reference and convenience, is reproduced herein-below, which reads as follows:-

> "156B. Investigation against a woman accused of the offence of Zina.—Notwithstanding anything contained in this code, where a person is accused of offence of Zina under Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (VII of 1979), no police officer below the rank of a Superintendent of Police shall investigate such offence nor shall such accused be arrested without permission of the Court.
>
> Explanation.—In this section 'Zina' does not include 'Zina-bil-jabr'."

17. There is yet, another aspect of the matter, when the complainant is also charged for zina-bil-raza, the best evidence against the male accused is lost because in cases of zina the occurrence hardly takes place in view of others, therefore, in such a situation when the case is proceeded with then the trial Court, in the absence of victim's statement finds it extremely difficult, if not impossible, to convict the male accused on the basis of the remaining available evidence. In a number of cases it has

been noticed that the Judges while holding trial under the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, automatically frame charge, on the basis of the police reports, without applying their mind independently to the facts of the case, and thus, are caught in the trap set for the purpose. The trial Courts, therefore, should be alive to the situation and must check misuse of the law.

In order to avoid such a situation it is, therefore, for guidance of all concerned, particularly the trial Courts, suggested that when a male accused is charged by a female for zina-bil-jabr then notwithstanding , the delay, pregnancy or any other reason, the female accused should not be, in the first instance, charged under section 10(2) of "the Ordinance" for zina-bil-raza unless material/evidence is available on record. Instead, the case should be proceeded with as per the allegation and male accused should be charged accordingly thereby affording opportunity to the complainant to substantiate the charge. The suggested mode of trial would not only eliminate chances of wrong prosecution of the female but

would enable her to come in the witness box and furnish evidence, which may be used appropriately.

Benefit in doing so would be that if the prosecution/complainant is able to prove its case against the male accused then the matter, having reached its logical conclusion, would end there and then or otherwise if the female herself is found involved in the offence then the male accused may, in view of section 237 Cr.P.C. be convicted under section 10(2) of zina-bil-raza, at the same trial and the female, if required and evidence is available, may be prosecuted separately.

18. In the instant case, since it has been categorically pleaded by the complainant that she was subjected to zina-bil-jabr and that too, only once and her statement finds support from the other evidence, particularly, from the statement of her father Khani Zaman, who has appeared as P.W.3, therefore, the possibility cannot be ruled out that she having been threatened by the appellant who was residing in her neighbourhood, could not have been able to disclose the incident, at the very outset, hence, I see force in the contention raised by the learned

counsel for appellant Mst.Jamila Jan that it was not proper for the trial Court to straightaway charge the complainant under section 10(2) of "the Ordinance" alongwith the male accused. Proper course for him, in the circumstances, was to proceed against the male accused as per accusation, at the first instance.

19. The upshot of the above discussion is that the impugned judgment dated 12.4.2001 passed by the learned Additional Sessions Judge, Haripur is set aside and the case is remanded to the trial Court for its trial and decision afresh, in accordance with law. Since, the case is being remanded, therefore, rest of the contentions raised by the learned counsel for the appellants need not to be attended to.

20. Both the appellants are on bail. Appellant Jamroze shall remain on bail till such time he is summoned by the trial Court, whereafter it would be at the discretion of the trial Court to allow him the concession or otherwise. Bail bonds furnished by Mst.Jamila Jan are, however, discharged. Since, this is an old matter, therefore, the learned trial Judge is directed to decide the same expeditiously.

Copies of this judgment, for guidance, shall be sent to all the Sessions Judges holding trial under the "Hudood Ordinance".

Sd/-

(Ch. Ejaz Yousaf)
Chief Justice

Announced on 20.12.2005
at Islamabad

FIT FOR REPORTING

Sd/-

ABDUL RAHMAN/

CHIEF JUSTICE