

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE

JAIL CRIMINAL APPEAL NO.89/I OF 2006

1. Muhammad Saleem Arshad son of
Ghulam Muhammad and

--- Appellants

2. Mst. Bhagh Bhari wife of
Jahan Khan, Both residents of
Pakka Sandan Wala, Tehsil and
District Mianwali

Versus

The State

--- Respondent

For the Appellants

--- Mr. Muhammad Sharif Janjua,
Advocate

For the State

--- Mr. Shafqat Munir Malik,
Assistant Advocate General

FIR No, date and Police Station

--- 103, 16.6.2004 P.S.
Wan Bhachran

Date of the Order of the
Trial Court

--- 5.4.2006

Date of Institution

--- 27.4.2006

Date of Hearing

--- 2.10.2006

Date of Decision

--- 2.10.2006

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JUDGMENT:

JUSTICE HAZIQUUL KHAIRI, CHIEF JUSTICE:- This appeal is directed against the judgment dated 5.4.2006 passed by the learned Additional Sessions Judge, Mianwali, whereby appellant Muhammad Saleem son of Ghulam Muhammad and Mst. Bhagh Bhari wife of Jahan Khan were convicted under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as "the Ordinance") and sentenced to undergo seven years R.I. each alongwith fine of Rs. 20,000/- each or in default in payment of fine to further suffer three months S.I. each. ~~They were~~ extended benefit under section 382-B, Cr.P.C.

2. Briefly stated, Jahan Khan, complainant, husband of the appellant Mst. Bhagh Bhari lodged an FIR Ex.P-D stating that he was married to her about 20/22 years back and from the wedlock two daughters namely Mst. Mehreen Bibi and Mst. Yasmeen Bibi were born. Muhammad Saleem the other appellant was on visiting terms with him and he developed illicit relationship with Mst. Bhagh Bharri his wife with the result that he forbade Muhammad Saleem from visiting his house. On 2.6.2004 at about 9 a.m. when he came to this house from his duty he found appellant Mst. Bhagh

Bhari and his two daughters were missing. He started their search and ~~daughters and~~ when he reached at Adda Shadiya, Fateh Khan and Maqbool, PWs. met him and disclosed that at 08.00 a.m. they had seen Mst. Bhagh Bhari, her minor daughters and Muhammad Saleem, appellant going alongwith Muhammad Naeem and Muhammad Iqbal towards Mianwali in a car. The complainant came back to his house and made search of his house and found house hold articles and gold ornaments missing which Mst. Bhagh Bhari, appellant had taken away with her. He tried his level best for her return and return of his daughters from Muhammad Saleem, appellant but it was in vain. Hence he filed F.I.R. against them.

3. On 17.6.2004 Ghulam Shabbir, ASI, PW-11 reached the spot, where he recorded the statements of PWs. He also inspected the spot and prepared the rough sketch Ex.P-G thereof. On 24.6.2004, he recorded the supplementary statement of Jahan Khan, complainant who informed him about the car No.3773/FDS which was used by Muhammad Saleem, appellant in the occurrence. On 27.6.2004 the above said car was taken into possession vide the recovery memo Ex.P-E attested by Manzoor Ali and

Raza Muhammad PWs. On 5.7.2004, he arrested Muhammad Saleem, appellant and on 6.7.2004 he arrested Mst. Bhagh Bhari, appellant. On the same day the Investigating Officer got medically examined Mst. Bhagh Bhari for the determination of the act of rape on her and Muhammad Saleem accused for potency. On the same day, Mst. Asiya, Lady constable No.634/C produced the medical report of Mst. Bhagh Bhari accused and a sealed envelope before Ghulam Shabbir ASI. He took the above said parcel into his possession vide recovery memo Ex.P-A. In the same way on the same day Fateh Khan, constable produced the medical report of Muhammad Saleem accused before the I.O. alongwith parcel of swabs which was taken into possession vide recovery memo Ex.P-F.

4. After the necessary completion of investigation, both the appellants were challaned on the charge of Zina-bil-Raza.

5. On 30.11.2004, the accused Muhammad Saleem was charged under section 16 of the Ordinance for the abduction of appellant Mst. Bhagh Bhari for Zina while both the appellants Muhammad Saleem and Mst. Bhagh Bhari were charged under section 10(2) of the Ordinance for having

committed Zina-bil-Raza with each other. The accused persons denied the charge and claimed to be tried.

6. The prosecution produced 12 PWs in all while Raza Muhammad, constable was given up as being un-necessary. The report of Chemical Examiner Ex.P-L and Ex.P-M alongwith report of Serologist Ex.P-N and Ex.P-O were tendered in evidence by the SPP.

7. Jahan Khan, the complainant as PW-8 supported his version set up in the F.I.R. Fateh Khan and Maqbool as PW-9 and PW-10 have deposed about their Waj-Taker with the accused persons. Doctor Raheela Iqbal Niazi PW-2, Women Medical Officer supported her report Ex.P-B where she recorded that 'Sexual intercourse' had been committed with Mst. Bhagh Bhari accused. Doctor Ishfaq, Medical Officer as PW-3 proved his report Ex.P-C to the effect that Muhammad Saleem accused is fit for performing the 'Sexual intercourse'. Mst. Asia, Lady Constable No.634/C PW-1 has attested her signature on recovery memo Ex.P-A where she produced the medical report of Mst. Bhagh Bhari accused and a sealed envelope before Ghulam Shabbir ASI. Sana Ullah, Constable No.120/C PW-4 received two

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sealed parcels for safe custody and onward transmission which he kept the same in Malkhana of Police Station in tact and on 7.7.2004 he handed over the same to P.W.5 Muhammad Jameel No. 435/C for onward transmission to the office of Chemical Examiner Rawalpindi who stated that on 7.7.2004 he received two sealed parcels, which he delivered to the Office of Chemical Examiner Rawalpindi on 8.7.2004 in tact. Manzoor Ali No.239/HC, as PW-6 recorded the F.I.R. Ex.P-D on 16.6.2004. On 27.6.2004 Car No.3773/FDS alongwith registration book was taken into possession in his presence vide recovery memo Ex.PE. He has attested his signature on this recovery memo. Fateh Khan constable as PW-7 deposed that on 6.7.2004 he go medically examined Muhammad Saleem accused and produced the medico-legal report alongwith sealed parcel of swabs before the I.O. which was taken into possession vide the recovery memo Ex.P-F and attested by him. Mr. Muzaffar Nawaz Malik, Civil Judge/Judicial Magistrate appeared as PW-12 and has stated that he has recorded the statement of Mst. Bhagh Bhari accused under section 164 Cr. P.C. Ex.P-K by his own hand and signature.

8. The statements of the accused persons under section 342 Cr.P.C. were recorded in reply to the questions as to why this case was filed against them.

Their reply was as under:-

“1). M. SALEEM ACCUSED SAYS:-

I am a jeweler by profession. Mst. Bhagh Bhari gave me some golden ornaments to make new one, when Mst. Bhagh Bhari disappeared from his house, the complainant Jahan Khan came to me and asked me to hand over the aforesaid gold ornaments. I refused because of fear that he would sell them and spend the money on his immoral activities, as he is a man of bad character. On my refusal he annoyed with me and got registered a false case against me and Muhammad Naeem my brother and Muhammad Iqbal son of Muhammad Yar r/o Pakka Sandan Wala. After receiving handsome money he exonerated both the said accused and falsely deposed against me in the court as I could not fulfill his demand. PWs are closely related to complainant and on his instigation they have deposed against me falsely.

2). MST. BHAGH BHARI ACCUSED SAYS:-

The complainant who is also my husband was working in Khalkiya School situated in Sargodha. In the days of June, 2004. During his stay he developed illicit relation with many volure women there. He did not maintain me or my girls. I owned land measuring about 09 acres in Mauza Shadia. On 16.6.2004 the complainant returned from the place of his duty and asked me to sell the land as he is in need of money. I refused to do so as I feared that he will spend the money on his immoral activities for the reasons he after beating me turned out from my house alongwith minor girls and I went to my friend in

Mianwali City to stay with her. The PWs Maqbool and Fateh Khan are closely related to complainant and on his asking he deposed falsely against me.”

9. While the learned trial Court on the one hand rightly held that appellant Muhammad Saleem did not abduct Mst. Bhagh Bhari and could not be charged under section 16 of “the said Ordinance”, on the other hand he erroneously held that since appellant Mst. Bhagh Bhari had developed intimacy with appellant Muhammad Saleem, therefore, she was a consenting party to zina with him. Learned Sessions Judge relied on the statement of appellant Mst. Bhagh Bhari under section 164 Cr.P.C. which may advantageously be reproduced as under:-

12/11/06
“I went alongwith Saleem, accused at my free will in consultation with my brothers. I took away 8 Tolas of gold and Rs.50,000/- and handed over to Saleem. I am a sinner. I want to go to my brothers. My minor daughters are with them.”

Her confession was recorded by P.W.12, Muzaffar Nawaz

Malik, Judicial Magistrate, Mianwali , who in cross-examination stated;

“It is correct that the examinee in her statement did not state that she eloped with Saleem, accused for commission of zina.


It is correct that she did not allege commission of zina against Muhammad Saleem, accused or anybody else.”

10. It is also pertinent to note that there was not a single eye witness to the alleged zina-bil-Raza except the general accusation of zina by P.W.8 Jahan Khan, the husband of Mst. Bhagh Bhari against her and appellant Muhammad Saleem. It will be a grave fallacy to infer that if a married woman at her own will leaves her house in the company of another man, she intends to commit zina with him. In the same way if a man accompanies an adult married woman to help her or otherwise he intend to commit zina with her. There are a number of cases every day when married women leave on their own or on account of cruelty of their husbands and are helped even by strangers. In the present case the appellant Mst. Bhagh Bhari, left her house alongwith her two daughters who would be quite grown up as she was married to the complainant 20/22 years ago. What learned Additional Sessions Judge, Mirawali further lost sight of was the fact that appellant Muhammad Saleem was arrested on 5.7.2004 whereas Mst. Bhagh Bhari, was arrested on 6.7.2004 from different places. Unless

zina-bil-Raza between a man and a woman is established first, medical or chemical report by itself shall have no evidentiary value.

Appellant Mst. Bhagh Bhari was a married woman and the evidence of Dr. Raheela Iqbal Niazi that sexual intercourse had been committed with her and as per chemical report the swabs taken from her were found to be stained with semen have no nexus with the report of P.W.3 Dr. Ishfaq, Medical Officer that appellant Muhammad Saleem was fit for performing the sexual intercourse. Semen grouping was also not carried out during investigation.

11. The impugned judgment of the learned Additional Sessions Judge, Mianwali is whimsical based on surmises and conjectures in utter violation of established principles of criminal justice and is liable to be set aside. Accordingly the appeal is accepted with direction to jail authorities to set free the appellants, if not required in any other criminal case. Mst. Bhagh Bhari, appellant is on bail. Her bail bonds stand discharged.

Sd/-

(Justice Hazique Kinnari)
Chief Justice

Islamabad, the
2nd October, 2006.
M. Khalil

Approved for reporting.