

28

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE S. A. MANAN

Jail Criminal Appeal No. 219/I of 2004

1. Mukhtar Ahmad alias Tara son of Muhammad Sharif,
2. Mst.Surayya Bibi wife of Tufail Hussain Shah

Both residents of Village Mandair, Tehsil Kharian District
Gujrat

.... Appellants

Versus

The State Respondent

Counsel for appellants Mr. M. Javed Aziz Sandhu,
Advocate

Counsel for State Mr. Shafqat Munir Malik,
Assistant Advocate General

FIR.No. Date & 439, 24-10-2002
Police Station Saddar Lala Musa Distt. Gujrat

Date of judgment of 10-7-2004
trial court

Date of Institution 19-7-2004

Date of hearing 30-9-2004

Date of Judgment 30-9-2004

12
-29-

JUDGMENT

S. A. MANAN, JUDGE.- Mukhtar Ahmad alias

Tara and Mst. Surayya Bibi have filed this joint appeal against the judgment dated 10-7-2004 of the Additional Sessions Judge, Kharian whereby both appellants were convicted and sentenced under section 10(2) of Offence of Zina (Enforcement of Hudood) Ordinance (Zina-bil-Raza) for a term of ten years R.I. each with a fine of Rs.20,000/- each and in default of payment to further undergo six months imprisonment each.

2. Briefly stated FIR.No. 439 dated 24-10-2002, police station, Saddar Lala Musa District Gujrat was registered under section 10 of Offence of Zina (Enforcement of Hudood) Ordinance at the instance of Tufail Hussain Shah, complainant with allegations that appellant Mukhtar Ahmad committed zina-bil-jabr with his wife Mst.Surayya Bibi. Both of them were charge-sheeted on 24-1-2003 who did not plead guilty and claimed trial.

62

3. Prosecution produced their evidence and P.W.1 Tufail Hussain is the complainant. He deposed that on 24-10-2002 at about 1.00.a.m. at night, he came to his house after duty hours and when entered therein the door of the house was open. Room was locked. The light was on and he saw from the window which was open that both the accused were lying on the cot with their shalwars off and they were committing zina. He left the place of occurrence to inform to his father and brother. When all of them came back the two accused were still committing zina. According to his statement as P.W.1 Mukhtar Ahmad accused had a carbine in his possession who fired at them but the shot was missed.

4. In cross-examination, he deposed to have married the female accused 18 years back now with three daughters and one son, all young between the age of 13 to 16 years. The complainant admitted that he had strained relations with the accused Surayya Bibi for the last 8 years and he told her many time to restrain from relationship with Mukhtar Ahmad accused. It is further stated that he

had divorced her after 15 days of the present incident. According to him he suspected the lady three days before the occurrence but finally was satisfied when the allegation was denied on oath by Mst.Surayya Bibi.

5. It is also stated that one and half year prior to the occurrence co-accused Mukhtar Ahmad had thrown acid on Surayya Bibi but the matter was not reported to the police nor any case was registered against the offender. He also admitted that Mst.Surayya Bibi was admitted in ABS Hospital Gujrat for 15 days and the complainant in this case did not obtain any MLR from the hospital. It is admitted that Mst.Surayya Bibi got the treatment of her own. A suggestion was made to him about the killing of his father by him but this was denied. The complainant also stated that he was staying at Rawalpindi while Mst.Surayya Bibi was living alone with maintenance paid by the complainant. The complainant further deposed that the reason for his strained relations with his wife was due to bad relationship of his wife with Mukhtar Ahmad accused.

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6. It is also admitted that shalwars of both the accused and cot were not taken into possession by the police during investigation and the cot was without any bed sheet. Even this item was not taken into possession by the police.

7. P.W.2 Nawazish Ali brother of P.W.1/complainant corroborated the statement of the complainant. According to his deposition both the accused were lying on the same charpai having taken off their shalwars and this was witnessed by P.W.2 through the window. According to his statement, he tried to catch hold of Mukhtar Ahmad but the latter fired at them and the shot was missed. In this way both the accused fled away. A suggestion was put to him in response to which the witness denied having thrown acid on Mst.Surayya accused. In response to another question the witness deposed that the children were in the house at the time of occurrence but he does not know if they were in the same room where the accused was.

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8. P.W.4 is the lady Dr. Rashida Javed who on 25-10-2002 medically examined Mst.Surayya Bibi and two vaginal swabs were taken and sent to Chemical Examiner for analysis whose report dated 21-11-2002 is positive that, " the above swabs are stained with semen. One swab is being sent to Serologist for semen grouping".

It appears that no semen grouping was conducted in the case.

9. Learned counsel for the appellant has doubted the result of the Chemical Examiner with a plea that the swabs were received on 18-11-2002 in the Office of the Chemical Examiner while the same was received by the police on 25-10-2002.

10. The matter was investigated by P.W.7 Syed Mushtaq Ali, S.I. who completed the investigation and accused was sent to the court to face trial without giving his own opinion.

11. Accused Mst.Surayya Bibi was examined under section 342 Cr.P.C. on 19-1-2004 and she pleaded as under:-

"On 23-10-2003 the son of the complainant and mine, Gulzar quarrelled with the nephew of accused Mukhtar

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Ahmad alias Ilyas, I reprimanded my son Gulzar. On hearing the same the complainant became furious, I quarrelled with complainant and I threatened that I will lodge a case against the accused. The complainant had thrown acid on me. As a counterblast the complainant lodged the instant case against me and my co-accused, so that I could not lodge the above mentioned case. The P.Ws are closely related to the complainant”.

12. On the same day accused Mukhtar Ahmad was examined under section 342 Cr.P.C. and he adopted the answer by Mst.Surayya Bibi co-accused in her statement under section 342 Cr.P.C. He pleaded innocence.

13. There is positive statement of the complainant of strained relationship with his wife for about 8 years before the present occurrence yet he did not inform any one nor lodged any report with the police. He was also extremely callous and not helping his wife when allegedly acid was thrown on her and she remained in the hospital. This goes to show that because of strained relationship the complainant completely deserted Mst.Surayya Bibi inasmuch as no help was given to her during the time she remained in the hospital.

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14. It appears that, in the circumstances, Mst. Surayya Bibi was helpless to report to the police of the above incident namely alleged throwing of acid on her by the complainant. However, she deposed under section 342 Cr.P.C. that she threatened the complainant for registration of a case against him.

15. Tufail Hussain, complainant admitted in the cross-examination that about one and half year prior to the occurrence the co-accused Mukhtar Ahmad had thrown acid on Mst.Surayya Bibi while the latter has positively stated in her statement under section 342 Cr.P.C. that the acid was thrown on her by the complainant. There is also third version that the acid was thrown on Mst.Surayya Bibi by P.W.2 Nawazish Ali, brother of the complainant which was denied.

16. On one hand there were strained relations between Mst.Surayya Bibi and the complainant for the last 8 years as stated by the complainant while on the other hand attempt was being made to injure her. The relations between the husband and the wife were such that they could not reside under one roof.

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17. After considering the entire evidence on the record it appears that the allegations of the complainant against both the accused seem to be correct but it is not ascertainable as to the fate of the children after divorce of Mst.Surayya Bibi by the complainant. In view of the allegations and counter allegations both complainant and his wife co-accused are to blame.

18. During arguments a question was debated to make the co-accused Mukhtar responsible for the whole disaster but the lady cannot be completely absolved of her relations with her paramour.

19. The trial court has believed the evidence of the complainant and thereafter convicted and sentenced both the appellants as aforesaid.

20. After hearing the learned counsel for the appellants and the State, I am of the view that on the facts and circumstances of the case and keeping in view the previous relationship of the husband and wife the conviction of Mst.Surayya Bibi is maintained but her sentence reduced to having already undergone. She shall be released

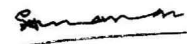
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forthwith, if not, required in any other case. This might help her to look after her three daughters in accordance with law/or subject to any direction by the Family Court. It is expected that she will reform herself in future without placing herself in any awkward position.

21. The conviction and sentence awarded by the lower court to Mukhtar Ahmad with fine of Rs.20,000/- and in default to further undergo imprisonment for six months is maintained.

22. With above modification in the sentence of Surayya Bibi, this joint appeal is rejected.

Approved for Reporting.


S. A. MANAN
Judge

Islamabad the 30th September, 2004.

UMAR DRAZ/