

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE

JAIL CRIMINAL APPEAL NO. 237/I OF 2005 (LINKED WITH)
CRIMINAL APPEAL NO. 32/P OF 2005

1. Mst. Siraja wife of Ahmad Khan --- Appellants
2. Aziz-ur-Rehman son of Dowray
respectively, Both residents of Penoray,
Tehsil Kabal, District Swat
Malakand Agency

Versus

The State --- Respondent

For the appellants --- Mr. Azir-ur-Rehman Khan and
Khawaja Muhammad Khan
Gara, Advocates respectively

For the State --- Mr. Nazar Muhammad Mayar
Deputy Advocate-General,
N.W.F.P.

F.I.R. No., dated and --- 485, 19.8.2004
Police Station P.S. Kabal

Date of the Order of the --- 6.8.2005
Trial Court

Date of Institutions --- 3.9.2005 and 27.8.2005
respectively

Date of Hearing --- 10.11.2006

Date of Decision --- 4.12.2006

JUDGMENT:

HAZIQUL KHAIRI, CHIEF JUSTICE.- These two appeals Nos. 237/I of 2005 and 32/P of 2005 filed by appellants Mst. Siraja and Aziz-ur-Rehman respectively are directed against the judgment, dated 6.8.2005, passed by the learned Sessions Judge/Zila Qazi, Swat whereby they were convicted under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as "the said Ordinance") and sentenced to undergo six years R.I. each along with a fine of Rs.50,000/- each or in default thereof to further suffer three years S.I. each with benefit under section 382-B Cr.P.C. each. As both these appeals arise from the same judgment, therefore, I propose to dispose of these two connected appeals by this judgment.

2. Briefly the facts of the case are that on 26.7.2004 at about 10.00 a.m. Timber Khan alongwith his uncle Fazal-ur-Rehman and maternal uncle Bakht Zamin came down to Police Station, Shah Dheri to report that on Thursday the 22nd July, 2004 his mother Mst. Siraja told

him that she was not feeling well and wanted to see a doctor. He along with mother Mst. Siraja took a coach to Kabal Bazar. She told him that she would see a doctor herself and asked him to bring a pipe from Mangora Bazar. At Kabal Bazar he saw appellant Aziz-ur-Rehman, resident of Dihae, standing nearby. When he returned to his residence after purchasing pipe he did not find his mother at home. Next morning hectic search was made to locate her but her whereabouts remained unknown. He suspected that Aziz-ur-Rehman, alias Hazir Rehman who had illicit relations with his mother, might have enticed her away for zina. It was within his knowledge for long that he had illicit relations with her. Pursuant to registration of F.I.R. both the accused were arrested and after completing enquiry challan was submitted before the trial Court.

3. After completing the legal formalities under section 265-C of the Criminal Procedure Code, both the appellants were formally charge sheeted but they refused to plead guilty and claimed trial. Both the accused persons were examined under section 342 Cr.P.C.

However, they neither offered themselves nor produced any witness in their defence under section 340(2) Cr.P.C.

4. The prosecution produced ten witnesses in support of its case.

Complainant Timber Khan (PW.4) in his statement before the Court reproduced exactly the same version as contained in his first report.

This witness further stated that "It came into his knowledge in subsequent period that two other witnesses, namely Shah Bahadar and

Muhammad has also seen his mother while roaming about with the

appellant Aziz-ur-Rehman." During the cross-examination, this

witness stated that he along with his paternal uncle Fazal-ur-Rehman

and maternal uncle Bakht Zamin searched her for two days within the

surrounding areas including the residence of his aunt, situated at

Buner and residences of Miskeen and Resam, situated at Kabal.

Mst. Asmat Bibi (PW.6), the real daughter of the appellant Mst.

Siraja, stated in her statement that her father, Ahmad Khan was living

in Saudi Arabia in connection with earning livelihood and

occasionally visited his native town. The appellant Aziz-ur-Rehman

is his relative on paternal side. He often visited their residence at night and remained with appellant Mst.Siraja till the morning when he would leave the house. This created doubts in her mind that the appellant Aziz-ur-Rehman might have developed illicit relation with her mother. When she brought it to the notice of his uncle Fazal-ur-Rehman, he directed her not to disclose it to any one and said that he himself would inform her father on telephone. When her uncle informed her father, he told him that the matter would be dealt with on his return to Pakistan. She further stated that one day, her mother on a pretext of medical check up had left the house along with her brother Timber Khan and did not come back whereupon the matter was reported to Police Chowki. During cross-examination, she further stated that it was correct that appellant Aziz-ur-Rehman had developed illicit relation with her mother prior to her disappearance with him. He used to visit their residence regularly for the past two or three years. She had witnessed with her eyes zina being committed by them. She had informed her uncle Fazal-ur-Rehman in time but

neither she nor her uncle reported it to the police authorities.

Likewise, her brother Timber Khan did not report the case to local police station. She had also brought to the notice of her brother and father, Ahmad Khan about the illicit relation of her mother with Aziz-ur-Rehman but he (her father) directed her not to disclose it to anyone and on his return he himself would take legal action against them.

PW.7 Muhammad stated in his statement that he had gone to Kabal Market at 8.00 a.m. in connection with his personal work and while standing on the road side, opposite Wapda Office he saw the appellant Aziz-ur-Rehman and Mst. Siraja talking to each other. When he returned back home he came to know that Mst. Siraja was missing. He informed a relative of Mst. Siraja of her roaming in Kabal Bazar along with the appellant Aziz-ur-Rehman and also informed the local police, in this respect.

PW.8 Sultan Mehmood deposed that he is an employee of Shangla Hotel situated at Shahdara, Mangora City where for the past 3 or 4 months appellant Aziz-ur-Rehman was coming once in a month

along with a woman and would leave the hotel room after ½ hour.

The purpose of his visit as stated by him was appointment with a doctor and medical check up. In cross-examination he stated that it is correct that no entry was made in a register maintained by the hotel about his frequent visits because he had known appellant Aziz-ur-Rehman personally and secondly, he was not hiring a room for over night stay but for two or three hours only.

PW.9 Sajid Ali, resident of Asmat Abad, Charsada deposed that a month ago, while he was standing outside his residence after dinner where a woman came to him and sought shelter stating that she was a stranger and nobody is known to her in Charsada. Therefore, he provided shelter to her on humanitarian grounds. The other day his mother told him that her husband was living in Saudi Arabia and she left her house because of the fear of her husband's brother. She stayed for 20/25 days leaving behind her baggage in her custody, by saying that she was going to enquire about her husband and children. After two days, she along with policemen came to his residence and in

baggage, the following items were found:- (1) one Jumar (an ornament worn by the women on their fore-head) which is Ex.P-1, (2) Two pairs of ear-rings, Ex.P-3, three pairs of Mekhaki (Nath) (An ornament worn by the women in their nose), Ex.P4, (4) Cash amount of Rs.14,000/-, (5) various currency notes, Ex.P-4, (6) Foreign currency of worth 1620 Saudi Riyal, Ex.P-5, (7) seven pairs of clothes, which is Ex.P-6. These items were taken into possession according to recovery memo Ex.PW-9/1, which correctly bears his signature.

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PW.10 Habib Zaman, ASI, Police Chowki Shah Dheri and Investigating Officer stated that on 26.7.2004 noted down the report of the complainant in daily diary and after preparing Murasila, Ex.PA/2, it was sent to Police Station, Kabal for the purpose of registration F.I.R.. Appellant Aziz-ur-Rehman was arrested on 20.8.2004 while appellant Mst. Siraja offered her arrest on 24.8.2004 and was arrested. In cross-examination he stated that he took no steps in the matter from 28.7.2004 till 14.8.2004 about their relationship. In

fact, he conceded that he did not have any evidence at all that both the appellants had lived together at any place. Her remand was obtained on 25.8.2004 when her husband was present.

PW.1 Lady Dr. Salvia Ikram conducted the medical examination of appellant Mst. Siraja stating that on 25.8.2004 she examined Mst. Siraja age about 40 years, resident of Penori at about 11.00 a.m. and found that there was no scratch, bite or bruise seen anywhere on her body. She was multi gravida having given birth to several children so the hymen was not present. Three high vaginal swabs were taken to find out any recent intercourse and handed over the same to the ASI Habib Zaman. She was advised pregnancy test for determination of pregnancy. The pregnancy test was negative.

PW.2 Mst. Jahana, Lady Constable took appellant Mst. Siraja to the lady doctor for the purpose of medical examination. After medical examination, the doctor handed over swabs taken from the accused to Investigating Officer. As per laboratory report swabs taken from Mst. Siraja revealed that semen of human organ was detected on the swabs.

PW.5 Dr. Muhammad Ibrahim examined appellant Aziz-ur-Rehman and submitted his report that on 21.8.2004 he examined Aziz-ur-Rehman. He was 20 years old and was potent.

PW.3 Umar Rehman, Police Inspector registered F.I.R. of this case, with reference to (FIR Ex.PA) on the basis of Murasila, Ex.PA/2, and after completing investigation, submitted challan of this case before the Court.

5. What transpires from the facts enumerated above is that PW.4 Timber Khan, complainant is the real son of appellant whereas Mst. Siraja, while prosecuting witness PW.6 Mst. Asmat Bibi is her real daughter. Both had deposed that their mother had illicit relation with appellant Aziz-aur-Rehman, appellant. On 22.7.2004 PW.4 Timber Khan took appellant Mst. Siraja to a flying coach to Kabal so that she could see a doctor. After reaching there he went away leaving her to bring a pipe from Mangora Bazar as per her direction. There he also saw appellant Aziz-ur-Rehman standing at flying coach station Kabal. PW.7 Muhammad also saw both the appellants together at Kabal.

There is no dispute so far as this position is concerned. PW.6 Mst.

Asmat Bibi, the real daughter, spoke at length of illicit relation between her mother Mst. Siraja and Aziz-ur-Rehman, the appellants herein. She brought it into notice of her father through telephone contact and other relatives but she was told not to disclose the matter to anyone. In her cross-examination she stated the history of their illicit relation was not new rather they continued committing zina with each other long before the date of lodging of F.I.R. against them. Chemical report is also to the effect that semen of human organ was detected from the swabs of appellant No.1 and the appellant No.2 was potent as per the report of PW.5, Dr. Muhammad Ibrahim.

6. Learned Deputy Advocate-General, N.W.F.P. referred to the deposition of PW.9 Sajid Ali in whose house she stayed for 20/25 day. She also carried with her, as admitted by her in her statement under section 342 Cr.P.C. gold ornaments (Jumar) ear-rings, Mikhaki (Nath), foreign currency, cash amount and seven pairs of clothes from her house. According to the learned trial Judge what was the

justification of her carrying these things. However, the appellant's

counsel submitted that the reasons for leaving her house as mentioned

by her were quarrels she had over money, tense relation with family

members, fear of her brother and brothers of her husband. According

to learned Deputy Advocate-General the circumstantial evidence

also corroborates with the story of the prosecution. According to

prosecuting witness, appellant Aziz-ur-Rehman was arrested on

20.8.2004 rather his father handed him over to local police for arrest,

while on 24.8.2004 appellant Mst. Siraja herself appeared before the

local police Chowki of Shah Dheri for giving arrest. This also

supports the story of the prosecution.

7. Learned trial Court had held that the criminal intention of both

the appellants were individually as well as collectively the same,

followed by the criminal act, with specific reference to present case.

They remained well informed about each other and there was great

coordination between them in materializing their intentions jointly.

Here it may be mentioned that on 20.8.2004 Aziz-ur-Rehman, the

appellant, was handed over by his father to police and after four days of his arrest, Mst. Siraja, the appellant, herself appeared before the Police Chowki for giving arrest.

8. Now with all the lengthy evidence brought on record by the prosecution, the question is whether the learned trial Court rightly convicted the appellants. This is perhaps one of the most tragic cases where the children have accused their own mother (appellant No.1) of adultery and thrown her into gallows for conviction for her misdeeds.

As per record she is woman with seven children and is of 40 years of age whereas appellant No.2 Aziz-ur-Rehman is a young man of 20 years. Her husband was employed in Saudi Arabia and she was living in a joint family system in Pakistan.

9. The prosecution has been able to successfully establish that appellant No.1 was on visiting terms with appellant No.2. She was seen on 22.7.2004 in company of appellant No.2 by PW.1 and PW.7. According to prosecution she was next seen at Shangla Hotel at Shahdara in Mangora City in the company of appellant No.2 who used

to take her there once a month and both used to stay there for about ½ hour. What is pertinent to note here is that PW.8 Sultan Mehmood nowhere had identified or recognized appellant No.1 as the woman who used to come along with appellant No.2. This woman in Burqa could be any other woman not necessary the appellant No.1, Mst. Siraja. The prosecution has failed to establish zina between them. It has also come on record vide deposition of PW.9 Sajid Ali that he provided shelter to Mst. Siraja on humanitarian grounds and she remained in his house for 20/25 days. Last but not the least is the admission made by PW.10 Habib Zaman, A.S.I. that the prosecution had no evidence at all that both the appellants had lived together at any place.



10. No Doubt, the allegation of her son Timber Khan, PW.5, the complainant and daughter Mst. Asmat Bibi, PW.6, could be true but much more is required for her conviction and of appellant No.2. I would like to refer particularly to the deposition of her daughter PW.6 who in cross-examination had stated in unequivocal terms that she

herself had seen zina being committed by appellants No.1 and 2. True though it may be but it relates to an event before the machinery of law was geared up into action on the basis of F.I.R. and cannot form basis of their conviction.


11. Lastly, I would refer to the medical and chemical report. According to PW.5 Dr. Muhammad Ibrahim the appellant was potent for purposes of sexual intercourse whereas as per chemical report semen of human organ was detected on the swabs taken from appellant No.1. But what may be noted down is that as per PW.10 Habib Zaman, ASI, appellant No.2 was arrested on 20.8.2004, while appellant Mst. Siraja was arrested on 24.8.2004, when her husband had already arrived in Pakistan. She was not arrested either from the house of the appellant No.2 or the house of PW.9 Sajid Ali who had provided shelter to her. Rather she had come down from her house after offering her arrest to Police and then accompanied PW.10, A.S.I. and I.O. to Sajid Ali's house to collect her belongings. What was overlooked by the learned trial Court was the fact that the husband of


appellant No.1 was present in Pulai when she offered herself for arrest on 24.8.2004. Such being the case the chemical report also becomes doubtful as swabs from her were taken after the arrival of her husband and after her arrest on 24.8.2004. I had specifically asked the learned Deputy Advocate-General as to whether the husband of appellant No.1 was in Pulai on 24.8.2004 to which he replied in affirmative, which is also borne out from the record. This has created doubt in my mind whether chemical report has any nexus with appellant No.1 or not. Even otherwise chemical report serves as corroborative evidence.

12. I, accordingly set aside the impugned judgment, dated 6.8.2005, with the direction to the jail authorities to release the appellants forthwith if not required in any other case. Mst. Siraja, appellant is on bail. Her bail bonds stand discharged.



(JUSTICE HAZIQUL KHAIRI)
Chief Justice

Lahore, the
4th December, 2006.
Bashir/*

APPROVED FOR REPORTING. 


CHIEF JUSTICE