IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT
MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE MEHMOOD MAQBOOL BAJWA

CRIMINAL APPEAL NO.26-L OF 2011

1. RAHIB ALI SON OF SAEED AHMED,

2. MST. RUQAYA BIBI WIFE OF MUSHTAQ HUSSAIN,

BOTH GHARO BY CASTE, RESIDENT OF MOHALLAH ZULFIQAR ALI KHAN, GARH MAHARAJA, TEHSIL AHMEDPUR SIAL, DISTRICT JHANG.

APPELLANTS

VERSUS

1. THE STATE.

2. BILAL AHMED SON OF SAEED AHMED, CASTE GHARO, RESIDENT OF MOHALLAH ZULFIQAR ALI KHAN, GARH MAHARAJA, TEHSIL AHMEDPUR SIAL, DISTRICT JHANG.

RESPONDENTS

COUNSEL FOR THE APPELLANT		MEHRAM ALI BALI, ADVOCATE.
COUNSEL FOR THE COMPLAINANT		MALIK ABDUL SATTAR CHUGHTAI, ADVOCATE.
COUNSEL FOR THE STATE		RAI MUSHTAQ AHMAD, DPP.
DATE OF JUDGMENT OF TRIAL COURT	…	05.10.2011
DATE OF PREFERENCE APPEAL	…	17.10.2011
DATE OF HEARING	…	26.10.2017
DATE OF DECISION	…	26.10.2017

JUDGMENT:

Mehmood Maqbool Bajwa, J: Consequent upon the completion of trial in a private complaint filed by Bilal Ahmad (respondent No.2) against Rahib Ali, Mst. Ruqayya Bibi (appellants before this Court) Mst. Hameeda Bibi (since acquitted) and Abdul Ali (died during the trial), a learned Additional Sessions Judge, Ahmad Pur Sial (District Jhang), through judgment dated 5th October, 2011, acquitted Mst. Hameeda Bibi from both heads of charge framed under Section 10 of The Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (Ordinance VII of 1979) (Hereinafter called The Ordinance) and Section 380 of The Pakistan Penal Code, 1860 (Act XXV of 1860) (Hereinafter called The Code). Acquittal was also recorded in favour of appellants in an offence under Section 380 of The Code but concluding proof of charge under Section 10(2) of The Ordinance, awarded each appellant sentence of five years rigorous imprisonment with whipping ten in number and fine to the tune of Rs.20,000/- each and in case of failure to pay fine to further undergo six months simple imprisonment.

Benefit of Section 382-B of The Code of Criminal Procedure, 1898 (Act V of 1898) (Hereinafter called Act V of 1898) was extended.

2. Through present appeal, appellants two in number call in question vires of judgment recording conviction and awarding sentence.

3. Facts in brief for the disposal of present appeal are that Bilal Ahmed, complainant (cited as respondent No.2 in the present appeal) filed

complaint against appellants, Mst. Hameeda Bibi and Abdul Ali. Rahib Ali (appellant No.1) is real brother of said respondent while appellant No.2 and Mst. Hameeda Bibi were the wives of Iqbal Hussain, real brother of complainant-respondent No.2 as well appellant No.1.

Allegations as setout in the complaint are that Abdul Ali (since dead) who was father of appellant No.2 with the help and assistance of said ladies made theft of gold ornaments weighing 3 tolas and silver ornaments having the weight of 15 tolas which act was un-earthed on 20th August, 2004, when Iqbal Hussain (P.W.2) checked his household articles. The appellant No.2 and Mst. Hameeda Bibi on inquiry made extra-judicial confession disclosing that occurrence was committed by them in the company of Abdul Ali.

In complaint, occurrence of Zina was also allegated with stance that on 1st of September, 2004 at about 5:00 p.m., the respondent No.2, his brother Iqbal Hussain (P.W.2) (husband of appellant No.2 and Mst. Hameeda Bibi) and Zahid Hussain (since given up) when came back at their residence, they found, Mst. Hameeda Bibi sitting outside and both the appellants were found in a comprising position when they all entered in the room.

4. Prior to filing complaint by Bilal Ahmad, Iqbal Hussain (P.W.2) reported the matter to police on 2nd September, 2004, and as per grievance, the local police got the signatures of his brother, Iqbal Hussain (P.W.2) on blank papers and lodged the F.I.R. No.258 of 2004 while distorting the facts and ultimately declared the appellants and others innocent.

5. After investigation, the Investigating Officer concluded about the falsity of allegations, submitted cancellation report which was endorsed by learned Area Magistrate, Shorkot through order dated 21st February, 2006. The learned Area Magistrate also directed S.H.O. police station Garah Maharaja to initiate proceedings against Iqbal Hussain for committing offence of "Qazf".

6. Complaint through which present appeal has arisen was filed on 26th April, 2006 by Bilal Ahmad, respondent No.2.

7. In order to prove its case complainant appeared as his own witness (P.W.1) besides producing Iqbal Hussain (P.W.2).

The complainant through statement dated 10th May, 2011 gave up Zahid Hussain and Moharrar P.S. Garah Maharaja having been wonover.

8. The appellants in their statements recorded under Section 342 of Act V of 1898 controverted the evidence regarding both occurrence. Pleading false implication, it was alleged by appellant No.1 that he was falsely implicated by his brothers (P.W.1, P.W.2) due to dispute of property.

According to Mst. Ruqayya Bibi, story of occurrence was concocted due to dispute of property. She further alleged that on 18th of July, 2004, Najaf Ali, respondent No.2 and her husband Iqbal Hussain (P.W.2) caused her injuries, was medically examined and also approached the local police for registration of case.

The appellants produced Yousaf Ali Haral, SSP (Retd.) who as D.W.1 deposed that after hearing the parties, he reached to the conclusion that the allegations contained in F.I.R. are false.

9. Heard adversaries and perused the record.

10. Learned Counsel for the appellants at the very outset while drawing our attention to the contents of cancellation report prepared in case F.I.R. No.258 of 2004 registered at instance of Iqbal Hussain (P.W.2) stated that contents of F.I.R. were totally silent about the date and time of occurrence of theft and Zina. Submitted that the fact by itself was sufficient to cast serious doubt about the veracity of version of said complainant. Making reference to the order dated 21st February, 2006 made by Area Magistrate, Shorkot cancelling the crime Report, it was asserted that respondent No.2 filed complaint in order to save the skin of his brother, Iqbal Hussain (P.W.2), complainant of F.I.R against whom proceedings of "Qazf" were recommended. Making reference to the date of filing complaint, i.e., 26th of April, 2004 and date of order of learned Area Magistrate about cancellation of case (21st February, 2006), it was submitted that delay in filing complaint is sufficient to question the veracity of accusation contained in it. Reliance was placed upon the dictum laid down in "ZAFAR and others v. UMER HAYAT and others (2010 SCMR 1816).

Referring to the statements of respondent No.2 (P.W.1) and Iqbal Hussain (P.W.2), it was argued that there are material contradictions, sufficient to negate their stance but said discrepancies were totally ignored by the learned Trial Court.

Referring to statements of appellants under Section 342 of Act V of 1898, copy of complaint filed by Hameeda Mai (Ex.DD) against Iqbal Hussain and others, certified copy of order dated 10th September, 2004

made by Judicial Magistrate, Shorkot (Ex.DE) and deposition of Yousaf Ali Haral, SSP (Retd.) (D.W.1), it was contended that prosecution of appellants is clothed with malice and outcome of property dispute.

11. Controverting the arguments, the learned Counsel for respondent No.2 while defending the impugned judgment, highlighting inter-se relationship of respondent No.2 (P.W.1), Iqbal Hussain (P.W.2), with appellants, argued that it was not possible for both (P.W.1-P.W.2) to level false allegation of zina against appellant No.1 and that too with appellant No.2 (wife of P.W.2). It was contended that no sane person will put at stake the honour and reputation of his family in such a manner and that too without any motive.

Referring to the evidence of respondent No.2 (P.W.1) and Iqbal Hussain (P.W.2), it was submitted that both the witnesses in a straightforward manner disclosed the whole episode which remained un-rebuttal as the credibility of both the witnesses could not be shaken in cross-examination.

Replying the contention of adversary, regarding false implication, outcome of disputes including property dispute, it was argued that the evidence led in defence cannot establish this fact.

Questioning the evidentiary value of the statement of Yousaf Ali Haral, SSP (Retired) (D.W.1), it was contended that his opinion being *ipse dixit* is not binding upon the Court.

12. Perusal of the allegations contained in F.I.R. as reflected in cancellation report (Ex.DC) and contents of private complaint reveals that

there is a reference of two occurrence. First about the theft, which was not endorsed by learned Trial Court and second, allegation of zina which according to the conclusion assailed, stands proved against appellants.

13. As per allegations, occurrence of zina was held on 1st of September, 2004 at 5:00 p.m. Said fact was disclosed by Iqbal Hussain as P.W.2 in cross-examination, who is complainant of F.I.R and husband of appellant No.2. He in reply to another question stated that he approached the local police for registration of case on 2nd of September, 2004. However, time is not known. In para (5) of the complaint (Ex.PA), same fact was disclosed with addition of malice to the local police by suggesting that police did not lodge the FIR and after hectic efforts, case was registered on 12th September, 2004. The respondent No.2 (complainant) disclosed the same fact in his direct statement.

14. Assuming the assertion contained in the complaint (Ex.PA) and deposition of both the witnesses as gospel truth, foremost and important query which disturbs the prudence is delay in approaching the police on 2nd September, 2004. At least, Iqbal Hussain (P.W.2) should have disclosed the compulsion due to which matter was not reported to police with promptness. For the purpose of clarification and at the cost of repetition, we may make it clear that we are not dealing with the aspect of delay till 12th of September, 2004 on which day F.I.R. was lodged by the police.

Since it was serious and sensitive matter, therefore, we are unable to reconcile with the conduct of Iqbal Hussain (P.W.2).

We are not un-mindful that trial was commenced and concluded against the appellants on the private complaint filed by respondent No.2 and they were not convicted in the trial on the basis of F.I.R. lodged by Iqbal Hussain (P.W.2) but factum of admitted delay in lodging F.I.R. has been examined in order to highlight the conduct of said complainant.

We are cognizant of the allegation of Iqbal Hussain (P.W.2) as well as accusation contained in paras (5) and (6) of the complaint (Ex.PA) that signature of Iqbal Hussain (P.W.2) were taken on blank paper and facts were distorted in the F.I.R. Time of knowledge of Iqbal Hussain (P.W.2) about distortion of facts is another important fact. Explaining the fact he at page (3) of his statement in cross-examination stated as follow:

> *"At the time of chalking out the formal FIR it came into my knowledge that the police has twisted my story and the police has not registered my case as per my version"*

Keeping in view the reply referred, it becomes crystal clear that dishonest intention of the police came to the notice of P.W.2 on 12th of September, 2004, the date when F.I.R. was registered as per stance.

Argument of learned Counsel for respondent No.2 that distortion of facts came into the notice of P.W.2 when cancellation report was endorsed on 21st of February, 2006 by learned Area Magistrate, Shorkot stands negated in view of the reply re-produced.

If the factum of distortion of facts came to the knowledge of P.W.2 on 12th of September, 2004, why he remained mum?

We are conscious of the half-hearted attempt of P.W.2 who stated in the next breath that since S.H.O. was in league with the accused party,

therefore, he did not make any application to S.H.O. Replying next question, he stated that he also did not complain to the high-ups of the police.

Even if the S.H.O. was in league with the accused party, there was no restriction upon P.W.2 to approach the higher authority for redressal of his grievance. Admittedly, no action was taken by him.

Leaving aside all the things, the witness (P.W.2) or the respondent No.2 could have filed the complaint promptly. Wait till 26th of April, 2006 when the complaint was filed is not understandable. This is a delay of about 1½ year in filing the complaint.

It can be argued that complaint was filed by Bilal Ahmad (respondent No.2) and not by Iqbal Hussain (P.W.2).

However, this presumptive argument would not advance the plea of respondent No.2 for two-fold reasons. First, respondent No.2 (Bilal Ahmad) is real brother of Iqbal Hussain and as such, it would not be possible for him to state that he was unaware of the foul played by police. Second, he is the eye-witness of the stated occurrence who remained associated in the investigation as admittedly his statement under Section 161 of The Code of Criminal Procedure, 1898 (Act V of 1898) was recorded. One also cannot dispute as it has come on record that they are living under one and the same roof.

Bilal Ahmad, respondent No.2 (P.W.1) in cross-examination (page (3) of his statement) while attributing malice to the police stated that police did not record their statements "rightly and correctly".

15. Since the factum of distortion of facts and collusion of police with accused was in the knowledge of both brothers (P.W.1 and P.W.2) right from the very beginning, therefore, delay of about 1½ year in filing complaint (Ex.PA) cast serious doubt about the veracity of version.

Rule of law enunciated in the Report "ZAFAR and others v. UMER HAYAT and others" (2010 SCMR 1816) relied upon by learned Counsel for the appellants in the circumstances is fully attracted to the facts of the case.

Same rule of law was expounded in "MUHAMMAD SALIM and 4 others v. FAZAL MUHAMMAD and another" (2001 SCMR 1738) and "MUHAMMAD AZAD v. AHMAD ALI and 2 others" (PLD 2003 S.C. 14).

16. Story narrated in the complaint (Ex.PA) and as deposed by both the witness highlighting the mode and manner of occurrence does not appeal to reason.

Stated place of occurrence is joint and common residence of respondent No.2 (P.W.1), Iqbal Hussain (P.W.2) and appellant No.1 as per stance of respondent No.2 which fact was disclosed by him in cross-examination. The respondent No.2 (P.W.1) at page (5) of his statement in cross-examination stated that "Families of Iqbal and me and Rahib Ali himself used to live jointly at the place of occurrence". The respondent No.2 as per his own saying got two children.

Commission of occurrence in the stated circumstances at the place of occurrence does not appeal to the reason and story in our considered view is highly doubtful.

17. Learned Counsel for the appellant while making reference to the replies given in cross-examination by Bilal Ahmad (P.W.1) stated that main gate and door of the room in which occurrence was held were lying open. We have gone through the replies. For ready-reference, we re-produce the same:

> *"The outer gate of Haveli was opened at the time of commission of offence of zina Bil-Raza. The door of the room in which the accused persons had committed zina was opened at the time of commission of zina"*

Learned Counsel for the respondent No.2 controverted the argument by adding that both the doors as per deposition were opened.

Keeping in view the replies, stance of learned Counsel for respondent No.2 appears to be correct.

However, in order to satisfy ourselves, we have examined Urdu version of the statement. The relevant replies at page (5) of the statement (page 121 of the Index File) are as follow:

Comparison of both versions clearly reveals that in English version, word "opened" is result of clerical mistaking while typing.

Un-deniably, Urdu version has to be given preference. We are fortified in our view by law laid down in "NAEEM HUSSAIN v. THE STATE" (1968 P.Cr.L.J. 1469) and "MUHAMMAD ASHRAF and another v. THE STATE" (2011 YLR 767).

Replies given by respondent No.2 (P.W.1) creates more doubt about the veracity of his version. Sanity by no stretch of imagination can expect that the appellants will commit occurrence without bolting the doors and that too in the house where other family members are also putting up.

18. Even if it is presumed that English version on this aspect is correct, same by itself would not substantiate the case of respondent No.2. Perusal of direct statements of both the witnesses (P.W.1 and P.W.2) clearly suggest that they both entered in the room. If the door of room of occurrence was not lying open and "It was opened", then there must have been some explanation, how both the doors were opened? Nothing is available on record to disclose this aspect. Question of "opening the door" would arise only if it was bolted from inside. Any mode and manner to open the door would have been sufficient alarm to alert the appellants.

Story coined by the complainant (P.W.1) and Iqbal Husain (P.W.2) is an afterthought which does not appeal to the prudence.

19. Matter can be examined from another angle as well. The learned Trial Court acquitted Mst. Hameeda Bibi from both head of charge through judgment assailed. Though respondent No.2 assailed the findings by preferring Appeal No.33-L of 2011 but same was dismissed as withdrawn. The appellants were also acquitted on the head of charge framed under Section 380 of The Code.

Evidence of both the witnesses was not acted upon by learned Trial Court in its totality against Mst. Hameeda Bibi and was partly rejected against the appellants.

We are conscious that principle of "Falsus in Uno Falsus in Omnibus" is not recognized in criminal administration of justice in Pakistan and in order to prove culpability of the appellants, corroboration was required.

Reliance is placed upon the dictum lid down in "QUTAB-UD-DIN v. THE STATE" (PLD 2001 S.C. 101), "ALLAH DITTA v. THE STATE" (PLD 2002 S.C. 52), "GHULAM MUSTAFA v. THE STATE" (2009 SCMR 916) and "MUHAMMAD ASIF v. THE STATE" (2017 SCMR 486).

Admittedly, there is no corroboration at all to strengthen the evidence of witnesses (P.W.1, P.W.2) which even otherwise does not inspire confidence as discussed.

20. Learned Counsel for the respondent No.2 contended that appellant No.1 is real brother of respondent No.2 (P.W.1) and Iqbal Hussain (P.W.2), therefore, question of false implication does not arise all.

Argument advanced though cannot be questioned on factual premises but legal consequences with reference to corroboration cannot be endorsed. Plea is based on supposition and as such cannot provide corroboration by itself.

Suspicion, however, strong, cannot take the place of proof. Reliance is placed upon "YASIN alias GHULAM MUSTAFA Vs. THE STATE" (2008 SCMR 336).

21. We find ourselves in agreement with the contention of learned Counsel for respondent No.2 that evidence of Yousaf Haral, SSP (Retired) (P.W.1) cannot be acted upon.

Opinion of D.W.1 who supervised the investigation in F.I.R. concluding falsity of allegations by no stretch of imagination can be taken into consideration as held in "MUHAMMAD AHMAD (MAHMOOD AHMAD) v. THE STATE" (2010 SCMR 660).

22. Plea of appellants regarding enmity also could not be substantiated by them.

Perusal of copy of the complaint (Ex.DD) reveals that it was filed by Hameeda Bibi (since acquitted) against respondent No.2 (P.W.1) and Iqbal Hussain (P.W.2) and not by appellants.

23. Copy of order dated 21st February, 2006 made by learned Judicial Magistrate, Shorkot cancelling the crime report, even if ignored, would not be sufficient to prove the case of respondent No.2.

24. Viewed from whichever angle, the respondent No.2 could not prove the charge beyond shadow of doubt. Evidence scanned clearly reveals that it does not inspire confidence.

25. There is little cavil with the settled proposition of law that one reasonable doubt would be sufficient to grant premium to the accused not as a matter of grace and concession but as a matter of right. Reliance is placed upon "TARIQ PERVEZ v. THE STATE" (1995 SCMR 1345), "AKHTAR ALI and others v. THE STATE" (2008 SCMR 6) and "ALLAH BACHAYA and another v. THE STATE" (P.L.D. 2008 S.C. 349).

26. Epitome of above discussion is that benefit of doubt has to be extended in favour of appellants which is accordingly granted.

27. Rahib Ali (appellant No.1) is present on bail whose sentence was suspended through order dated 3rd of February, 2012. He and his surety are discharged of their respective bonds.

28. Personal attendance of Mst. Ruqayya Bibi (appellant No.2), whose sentence was also suspended on 3rd of February, 2012 was dispensed with vide order dated 28th of November, 2013 and Mr. Mahram Ali Bali, Advocate (Counsel for the appellants) undertook to appear on her behalf. The said advocate is absolved of his responsibility.

Mst. Ruqayya Bibi and her surety are also discharged of their respective bonds.

29. On 26th of October, 2017, after hearing arguments, we accepted the appeal through short order acquitting the appellants while setting aside the judgment assailed. Above-mentioned are the reasons to accept the appeal.

MR. JUSTICE MEHMOOD MAQBOOL BAJWA

MR. JUSTICE DR. FIDA MUHAMMAD KHAN

Dated, Islamabad the
31st October, 2017