IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT
MR. JUSTICE SH. NAJAM UL HASAN, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE MEHMOOD MAQBOOL BAJWA

CRIMINAL APPEAL NO.41-L OF 2005

ZULFIQAR ALI SON OF GHULAM QADIR, CASTE WARRAICH, RESIDENT OF PATTI ARAIN, MOUZA CHOBARA, DISTRICT LAYYAH.

APPELLANT

VERSUS

1. SARFRAZ AHMED SON OF SALEH MUHAMMAD, CASTE KANG, RESIDENT OF PATTI ARAIN, TEHSIL CHOBARA, DISTRICT LAYYAH.

2. THE STATE.

RESPONDENTS

COUNSEL FOR THE APPELLANT		CH. ABDUL WAHEED, ADVOCATE.
COUNSEL FOR THE RESPONDENTS		MALIK ASIF MEHMOOD NISSOANA, ADVOCATE.
COUNSEL FOR THE STATE		RAI MUSHTAQ AHMAD, DPP.
FIR NO. AND POLICE STATION	…	41 OF 2003 P.S. CHOBARA, DISTRICT LAYYAH.
DATE OF JUDGMENT OF TRIAL COURT	…	29.11.2004
DATE OF PREFERENCE APPEAL	…	10.02.2005
DATE OF HEARING	…	18.10.2017
DATE OF DECISION	…	18.10.2017

JUDGMENT:

Mehmood Maqbool Bajwa, J: Conclusion of trial in Crime Report bearing No.41 of 2003 registered under Sections 10 and 11 of The Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 (President Order No.VII of 1979) (Hereinafter called the Ordinance) at police station Choubara, District Layyah, resulted in recording judgment of acquittal by a learned Additional Sessions Judge, Layyah, on 29th November, 2004, assailed by way of present appeal by Zulfiqar Ali, appellant-complainant.

2. Initially challan was submitted jointly against three persons including Sarfraz Ahmad (Hereinafter called the respondent) but later on local police was required to submit separate Report under Section 173 of The Code of Criminal Procedure, 1898 (Act V of 1898) (Hereinafter called The Code) as the respondent was declared "child" within the meaning of Section 2(b) of The Juvenile Justice System Ordinance, 2000 (XXII of 2000).

3. As per accusation contained in the F.I.R. (Ex.PB-1) recorded on the strength of written application (Ex.PB) of appellant, the respondent alongwith his two unknown associates caught hold of his daughter, Mst. Raheela Parveen, (victim) (P.W.4), when on 5th of Mach, 2003, at about 9:00

p.m. she went out to ease herself. As the victim did not come back even after considerable time, therefore, due to anxiety, the appellant alongwith his brother, Muhammad Rafique (P.W.7) and Muhammad Siddique started search and at the distance of about one rectangle from his house, near the tree, report of weeping was heard, upon which they all rushed to the pointed place, saw the victim in the grip of three persons including respondent in the nearby field of gram. The victim was laid on earth by the said accused. Due to extension of threats, the appellant fell down. Finding an opportunity, the respondent and his associates fled away while taking victim.

F.I.R. further reveals that on 7th of March, 2003 at about 9:00 a.m. one Shimla Ranjha and his two sons dropped the victim to the house of appellant who provided shelter to her in their house at night who got an opportunity to escape.

4. Heard adversaries and perused the record.

5. Learned counsel for the appellant contended that the respondent was nominated in the F.I.R. with specific role of commission of Zina-bil-Jabar, as deposed by victim (P.W.4), finding support from the evidence of appellant (P.W.5) and an eye-witness, Muhammad Rafique (P.W.7).

Submitted that all the three witnesses with one voice narrated the mode and manner of occurrence which could not be shaken in cross-examination. Argued the undue importance was given by the learned Trial Court to the minor discrepancies in the statements of appellant (P.W.5) and eye-witness (P.W.7) which are natural due to lapse of time.

Continuing the arguments, it was submitted that statement of victim (P.W.5) coupled with Medico-Legal Certificate (Ex.PC) and statement of Dr. Rizwana Rafique (P.W.8) was sufficient to prove the charge against the respondent.

To substantiate the contention, help was sought from the dictum laid down in "SHAHZAD alias SHADDU V. THE STATE" (2002 SCMR 1009), and "SHAKEEL and 5 others V. THE STATE" (PLD 2010 SC 47).

6. Taking us to the case of prosecution setup in the F.I.R. (Ex.PB-1) and statement of Zulfiqar Ali, appellant (P.W.5), it was argued by learned Counsel for the respondent that F.I.R. was lodged with delay of more than two days and no justified cause was shown for such delay, sufficient to put serious dent in the case of prosecution.

Referring to the statements of victim (P.W.4), appellant (P.W.5) and Muhammad Rafique, an eye-witness (P.W.7), it was submitted that there

are material contradictions in it besides dishonest improvements, sufficient to brush aside the evidence and as such no exception can be taken to the conclusion arrived at by the learned Trial Court.

7. Exercising right of rebuttal, the learned Counsel for the appellant submitted the delay in lodging F.I.R has been explained in the F.I.R. (Ex.PB-1) and the appellant in his statement as P.W.5 also put explanation that due to request of Mushtaq, Bashir, Akhtar, etc., to forgive the respondent and others, he did not promptly report the matter to police.

8. Prior to re-appraisal of evidence in the light of arguments, pro and contra, canvassed, it is desirable to make reference to the yardstick to set at naught the conclusion recording acquittal.

Moot point was examined by Apex Court in "Sheo Swarup and others Vs. King Emperor" (AIR 1934 P.C. 227 (2), "MUHAMMAD ASHIQ VS. ALLAH BAKHSH and another" (PLD 1957 Supreme Court (Pak) 293) "LALU Vs. THE STATE" (PLD 1959 Supreme Court (Pak) 258), "GHULAM SIKANDAR AND ANOTHER V. MAMRAZ KHAN AND OTHERS" (PLD 1985 SC 11), "MUHAMMAD KHAN V. MAULA BAKHSH and another" (1998 SCMR 570), "FAZALUR REHMAN Vs. ABDUL GHANI AND ANOTHER" (PLD 1977 SC 529), "ABDUR RASHID

VS. UMID ALI and 2 others" (PLD 1975 SC 227), "THE STATE and others V. ABDUL KHALIQ and others (PLD 2011 SC 554), "MUHAMMAD ZAFAR and another v. RUSTAM ALI and others" (2017 SCMR 1639) and "Mst. ANWAR BEGUM v. AKHTAR HUSSAIN alias KAKA and 2 others" (2017 SCMR 1710).

Perusal of the case-law suggests following points to be kept in view while deciding appeal against acquittal:-

(i) Having Judgment of acquittal in his favour, there is a double presumption of innocence in favour of person acquitted.

(ii) Slowness of the appellate court to set at naught the conclusion of Trial Court recording acquittal having opportunity to watch the demeanor of the witnesses.

(iii) View of the Trial Court as to the credibility of witnesses.

(iv) Right of the accused to the benefit of any reasonable doubt.

(v) Judgment based on evidence or otherwise (mis-reading and non-reading of evidence).

(vi) Receipt of any evidence illegally.

Possibility of formulation of other view keeping in view the evidence by itself would be no ground for interference.

9. Keeping in view the above-yardstick, evidence has to be re-appraised.

10. Implication of respondent in the crime report was heavily canvassed by learned Counsel for the appellant in order to substantiate culpability of appellant. Factual position explained though cannot be questioned but we regret to share and endorse the legal consequences highlighted.

Occurrence took place on 5th of March, 2009 at 9:00 p.m. Mst. Raheela Parveen, victim (P.W.4) as per prosecution case was brought to the house of appellant on 7th of March, 2003. The appellant submitted application in writing to get the F.I.R. recorded on 8th of March, 2003, upon the strength of which crime report was lodged on 9th of March, 2003.

Delay in lodging F.I.R. is an important factor. Though attempt was made by the appellant to justify delay by adding in report (Exh.PB-1) that respectables of locality were making request for compromise but their names and other particulars were not disclosed. We are conscious that appellant (P.W.5) in his statement disclosed the names of said persons but it appears to be an afterthought. Others particulars alongwith social status of said persons was not disclosed. Omission, in our considered view, is significant, deliberate and thus fatal to the case of appellant.

Element of deliberation and pre-meditation in the circumstances qua the respondent cannot be ruled out, sufficient to put a serious dent in the case of prosecution. Reliance is placed upon the dictum laid down in "FARMAN AHMED V. MUHAMMAD INAYAT and others" (2007 SCMR

1825) and "MUSHTAQ HUSSAIN and another Vs. THE STATE" (2011 SCMR 45).

11. Even if element of delay is ignored, it would not improve the case of appellant in view of discussion going to be made in the proceeding paras. We are also conscious that delay in lodging F.I.R. can be ignored if the ocular account is found convincing and trustworthy as held in "MUHAMMAD MUSHTAQ V. THE STATE" (PLD 2001 S.C. 107) but the Ratio referred to will not advance plea of appellant for mani-fold reasons, to be enumerated.

12. Question of credibility of witnesses including victim (P.W.4) is another important fact upon which submissions were made from both sides. As observed earlier, occurrence took place on 5th of March, 2003 at 9:00 p.m. while application (Ex.PB) for registration of case was made on 8th of March, 2003 and F.I.R. was reduced into writing on 9th of March, 2003. However, statement of Muhammad Rafique (P.W.7), an eye-witness under Section 161 of The Code was recorded on 12th of March, 2003. The victim, Mst. Raheela Parveen (P.W.4) who came back to the house of appellant on 7th of March, 2003 was medically examined on 9th of March, 2003 but her statement too, strangely enough, was recorded on 12th of March, 2003.

Statements of both the witnesses (P.W.4-P.W.7) and even that of appellant (complainant) (P.W.5) does not suggest any compulsion to justify such delay. Their statements are nowhere suggestive of any malice on the part of Investigation Officer to justify the delay.

Resultantly, how reliance can be placed upon the respective statements of victim (P.W.4) and an eye-witness (P.W.7)? We are fortified in our view by law laid down in "Syed SAEED MUHAMMAD SHAH and another Vs. THE STATE" (1993 SCMR 550), "GHULAM QADIR and 2 others V. THE STATE" (2008 SCMR 1221), and "MUHAMMAD ASIF V. THE STATE" (2017 SCMR 486).

13. Question of credibility of witnesses has to be examined from another angle as well.

As per allegations contained in the F.I.R. (Ex.PB-1), the victim was laid to earth by the respondent and his associates, when the appellant (P.W.5), Muhammad Rafique (P.W.7) and Muhammad Siddique (since given up) reached at the place of occurrence. Accusation does not suggest commission of Zina by respondent with victim in the presence of complainant and eye-witnesses. The appellant (P.W.5) did not state commission of Zina by respondent at the said place but Muhammad

Rafique (P.W.7) turned the table by deposing that they all saw the respondent committing Zina with victim under tree. He was confronted with his statement under Section 161 of The Code, copy of which is Exh.DB, which does not suggest any such allegation.

The appellant (P.W.5) and eye-witness (P.W.7) are not in agreement with each other on this aspect. Statement of the victim (P.W.4) when examined also does not suggest the commission of Zina by respondent in the presence of appellant and eye-witnesses. Analysis of her deposition clearly reveals that the appellant and eye-witnesses attracted to the spot on raising alarm by her when the act complained of was complete.

Even if it is presumed that coitus was done in the presence of witnesses, it cannot be acted upon keeping in view the contents of F.I.R (Ex.PB-1) and deposition of appellant as referred earlier.

Since Muhammad Rafique (P.W.7) did not disclose factum of commission of Zina by respondent in their view in his statement before police, therefore, his deposition as a witness on this aspect is result of dishonest improvement, sufficient to brush aside his deposition. Reliance is placed upon the dictum laid down in "FARMAN AHMED V. MUHAMMAD INAYAT and others" (2007 SCMR 1825) "AKHTAR ALI

and others Vs. THE STATE" (2008 SCMR 6) and "SARDAR BIBI and another V. MUNIR AHMED and others" (2017 SCMR 344).

14. It is the case of prosecution that victim (P.W.4) was also subject to Zina-bil-Jabar at some un-known place which fact was also disclosed by her as a witness. Admittedly, there is no eye-witness of this occurrence.

Scanning of the statement of victim reveals that she made conscious improvements while appearing as a witness. She in her statement disclosed that respondent pointed pistol on her neck and threatened to murder her if she does not act according to his command. The said fact was not disclosed by her in statement recorded by I.O. as is evident from copy of said statement (Ex.DA), with which she was confronted. She also named the associates of respondents in her deposition but their names were not highlighted in the statement under reference (Ex.DA). She in her statement (P.W.4) also named Shimla Ranjaha who according to her provided shelter to her in his house. Same fact was also not disclosed by her during the course of investigation as is evident from Ex.DA. We have just given few examples of improvements. Wisdom behind the improvements was to justify her omission suggesting inaction and resistance.

Pursuant to above, we are not inclined to believe, rely and act upon the statement of victim.

15. Since statement of victim does not inspire confidence, therefore, Rule of law expounded in "SHAHZAD alias SHADDU V. THE STATE" (2002 SCMR 1009), and "SHAKEEL and 5 others V. THE STATE" (PLD 2010 SC 47), cited at bar by learned Counsel for the appellant is of little help to the appellant.

16. While re-appraising evidence, we have also noticed the conduct of appellant (P.W.5) and eye-witness (P.W.7). Though it is the case of prosecution that respondent threatened to murder appellant and eye-witnesses in case of intervention but there is nothing on record to substantiate the allegation that respondent was armed.

Crime report (Ex.PB-1) does not specially suggest it. Reply given in cross-examination by victim (P.W.4) when she was confronted with her statement under Section 161 of The Code has made it vividly clear that it was improvement on the part of victim deposing that respondent had weapon. It demonstrates deliberate attempt to justify omission of the appellant and witnesses who even did not raise noise while watching the occurrence.

17. There is another aspect which cast serious doubt about the veracity and probability of prosecution version.

According to the appellant (P.W.5) initially he went alone to trace victim and he heard "cry of Mst. Raheela from a distance of one square beneath the tree of Beri. I came back and called my brothers Siddique and Muhammad Rafique, Thereafter we three brothers went to search for Raheela Bibi."

Suffice it to state that the way appellant behaved cannot be expected from father.

18. There is another important factor which had put another dent to the case of prosecution. According to the appellant, Shimla Ranjha alongwith his two sons dropped the victim at his residence. If it was so, the prosecution should have produced said Ranjha to substantiate the allegations. It was the best evidence which was withheld by prosecution, sufficient to draw adverse presumption under Article 129(g) of The Qanun-e-Shahadat Order, 1984 (President Order No.10 of 1984). (SEE "LAL KHAN VS. THE STATE" (2006 SCMR 1846).

19. Opinion of lady Dr. Rizwana Rafique (P.W.8) in the light of report of chemical examiner (Ex.PE) about the commission of sexual intercourse

with the victim being corroborative piece of evidence by itself would not prove the case of appellant in view of discussion made in preceding paragraphs.

20. Viewed from whichever angle, conclusion drawn by learned Trial Court recording acquittal of respondent is neither perverse nor speculative and as such we do not find any merit in appeal.

21. On 18th of October, 2017, after hearing arguments, we dismissed the appeal through short order. Above-mentioned are the reasons to dismiss the appeal.

MR. JUSTICE MEHMOOD MAQBOOL BAJWA

MR. JUSTICE SH. NAJAM UL HASAN
CHIEF JUSTICE

MR. JUSTICE DR. FIDA MUHAMMAD KHAN

Dated, Lahore the
20th October, 2017
*Mubashir**