

IN THE FEDERAL SHARIAT COURT

(Original Jurisdiction)

PRESENT

**MR. JUSTICE DR. ALLAMA FIDA MUHAMMAD KHAN
MR. JUSTICE SHEIKH NAJAM UL HASAN
MR. JUSTICE ZAHOOR AHMED SHAHWANI
JUSTICE MRS. ASHRAF JAHAN**

SHARIAT PETITION NO. 9/I OF 2004

Shahid Orakzai.

House 105, Street No.7, Chaklala Scheme III,
Rawalpindi.

..... Petitioner

Versus

1. Pakistan through Secretary Law, Ministry of Law, Federal Secretariat, Islamabad.
2. Balochistan through Secretary Law, Provincial Secretariat, Quetta.
3. NWFP through Secretary Law, Provincial Secretariat, Peshawar. (Now Khyber Pakhtoonkhwa)
4. Punjab through Secretary Law Provincial Secretariat, Lahore.
5. Sindh through Secretary Law, Provincial Secretariat, Karachi.

..... Respondents

Counsel for the Petitioner	....	In person
Counsel for the Federation	....	Mr. Pervez Khan Tanoli, Standing Counsel
Counsel for the Punjab Govt.	....	Mr. Saleem Murtaza Mughal, Advocate
Counsel for the KPK Govt.	....	Mr. Arshad Ahmad, Assistant Advocate General
Counsel for the Sindh Govt.	....	Mr. Ahsan Hameed Dogar, Advocate
Counsel for the Balochistan Govt.		Mr. Muhammad Fareed Dogar, Advocate
Date of Institution	....	28.07.2004
Date of hearing	....	08.11.2016
Date of decision	....	.12.2016

JUDGMENT

DR. ALLAMA FIDA MUHAMMAD KHAN, Judge.- The learned Petitioner, Shahid Orakzai, has challenged Section 8 of the Offence of *Zina* (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the said Ordinance), as amended, on the ground that it is in conflict with the Injunctions of Islam. The impugned Section reads as under:-

“Proof of *zina* liable to *Hadd*. Proof of *zina* liable to *Hadd* shall be in one of the following forms, namely:-

- (a) The accused makes before a Court of competent jurisdiction a confession of the commission of the offence; or
- (b) at least four Muslim adult male witnesses, about whom the Court is satisfied, having regard to the requirements of *tazkiyah al-shuhood*, that they are truthful persons and abstain from major sins (*kabair*), give evidence as *eye witnesses* of the act of penetration necessary to the offence:

Provided that, if the accused is a non-Muslim, the *eye-witnesses* may be non-Muslims”.

2. This petition was admitted to regular hearing on 13.03.2008 but, somehow or other, on account of various reasons, including the retirements of Hon’ble Members in the Bench, it could not be decided. Finally it was fixed for hearing on 08.11.2016 when, after hearing the

parties, the Judgment was reserved. The following paras contain reasons for our Judgment which is being delivered.

3. We have heard the Petitioner in detail. He submitted that:-

- * the impugned Section is in sharp conflict with the Injunctions of Islam because:-
- * the proof required for *zina* liable to *Hadd* is irrational, illogical and in conflict with the Injunctions of Islam. The word *shahid* (شاهد) does not mean an eye witness at all but any prudent person, whose testimony about the unseen facts removes a doubt regarding two conflicting claims or statements, is called *shahid* (شاهد).
- * so far as Verse 15 of Surah An-Nisa is concerned, it deals with factual misconduct strictly among women without involvement of opposite gender, as the word used therein is *fahisha* (obscene conduct);
- * the standard laid down in the impugned Section is in direct conflict with Verse No. 15 of Surah Al-Nisa and Verses No. 4,6 and 13 of Surah Al-Noor;
- * the standard laid down in the impugned Section is also in direct conflict with Verses No. 26, 27 and 28 of Surah Yousuf;
- * the prequalification imposed upon potential witnesses termed as *Tazkiyah al-shuhood* in Section 8(b) etc. deny the fundamental Quranic right granted to every believer to bear witness as per information and, therefore, against the Injunctions contained in Verse 81 of Surah Yousuf as well as Verse 4 of Surah Noor and Verse 135 of Surah An-Nisa.

The learned Petitioner dwelt at large on several Quranic words as derived from Arabic roots like رأى، انس، نظر، وجد، etc.

4. The learned Petitioner who had initially also challenged Section 5A of the Offence of *Zina* (Enforcement of Hudood) Ordinance, 1979 inserted by Section 12A of the Protection of Women Act, 2006, however, did not press the said portion of the impugned Section in his contentions. Regarding the number of witnesses and their gender which have been challenged in the written petition, he also candidly conceded to a Court query that he did not press the same. In any case the same question, even if raised by someone at any stage, has been elaborately discussed in a judgment of this Court reported as PLD 1989 FSC page 95 (Rashida Patel Vs. Federation of Pakistan).

5. The Petitioner addressed his arguments only in respect of the “*eye witnesses*” as well as system of *Tazkiyah al-Shuhood* (تزكية الشهود), which, according to him, are repugnant to the Injunctions of Islam. He contended that so many social and moral evils prevailed in the society on

account of these two qualifications prescribed for the witnesses because no one is convicted or awarded *Hadd* punishment.

6. We have also heard Dr. Shafiq-ur-Rehman, juris-consult, who vehemently supported the impugned Section and defined various meanings of the word (شاهد) mentioned in various places in the Holy Quran. He also explained Verse No. 26 of Surah Yousuf. All other respondents namely Federal Government, Governments of Baluchistan, NWFP (now Khyber Pakhtoon Khwa), Punjab and Sindh fully supported the impugned Section and adopted the arguments put forward by the said juris-consult. They also pointed out that in case interpretation of the Petitioner regarding the word *shahid* (شاهد) is accepted, the whole system of judicial proceedings would totally collapse as it is based on the Qanoon-e-Shahadat Order, 1984 which has not been challenged by the Petitioner.

7. At the outset, we would like to mention that Arabic is a very rich language. So many words are uttered for only one thing and, likewise, so many meanings are attached to only one word. For example, there are approximately 80 words for city, 200 for snake, 500 for tiger, 1000 for

camel, 1000 for liquor, 4000 for sword and so on. The word *shahid* (شاهد) is one of such words which, according to its context, has several different meanings.

8. The root of the word *shahid* (شاهد) is *shahida* (شهد) and its different derivatives have been mentioned 180 times in the Holy Quran, each signifying various meanings according to the context used in the Verse. Sometimes, in its original root, it refers to the mere presence while on some other occasions it means bear testimony to a fact, bear witness, produce evidence, bring proof, offer demonstration, attest, cite example/ instance/ illustration etc. In view of this, meaning of the word *shahid* (شاهد) cannot be confined to only one interpretation.

(See

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|--------------------------|--------------------------------|
| (راغب اصفهانی) | 1- مفردات |
| (ابن منظور) | 2- لسان العرب |
| (مرتضى الزبيدي) | 3- تاج العروس |
| (محمد بن ابى بكر الرازى) | 4- مختار الصحاح |
| (مجمع اللغة العربية) | 5- المعجم الوسيط |
| (ابو نصر الفارابى) | 6- الصحاح فى اللغة |
| (دكتور روى بعلبكى) | 7- المورد |
| By Edward William Lane | 8- Arabic-English Lexicon |
| By M. Abdul Haleem | 9- Dictionary of Quranic Usage |

9. So far as the word *shahid* (شاهد) used in Verse No.26 of Surah Yousuf is concerned, it is not at all used in the sense of a witness who had testified before the Court about the innocence of Hazrat Yousuf (عليه السلام). That Shahid (شاهد) was just a prudent man belonging to the family of that woman who had levelled a baseless allegation against him and in his personal capacity, he had given a verdict on the basis of circumstantial evidence. That case is completely distinguishable from the witness who appears before the Court of law and make a deposition. We may also add that in the case mentioned above, there was no charge about the commission of any heinous offence but that was only allegation about an “evil intention” attributed to Hazrat Yousuf (عليه السلام), as is evident from the Verse itself.

مَا جَزَاءُ مَنْ أَرَادَ بِأَهْلِكَ سُوءًا إِلَّا أَنْ يُسْجَنَ أَوْ عَذَابَ أَلِيمٍ 25

“What should be the recompense for him who has intended to do something evil with your wife- except imprisonment or a grievous punishment?”

That prudent person was called *shahid* (شاهد) in the sense of an arbitrator who decided the issue on the basis of common sense.

10. Before proceeding further, we deem it appropriate to mention that this Court by virtue of Article 203D of the Constitution is bound to base its judgments not only on the Holy Quran but also on the Sunnah of the Holy Prophet (ﷺ) as well. The significance of Sunnah has been discussed in great detail in our judgment delivered in Shariat Miscellaneous Application No. 01/I of 2016. It is pertinent to refer to Verses Nos.2:129, 2:151, 62:2, 16:44, 53:3,4, 7:203, 46:9, 3:31, 33:21 and mention that since Sunnah is in fact the interpretation, explanation, elaboration, implementation and specific demonstration of Quranic Injunctions by the Holy Prophet (ﷺ) himself, its binding authenticity cannot be questioned on any ground. It is extremely pertinent to point out that without Sunnah no one could ever be able to properly understand or act in accordance with the Islamic Injunctions, as required by the Holy Quran. Not to speak of civil, criminal and personal laws etc. we would not be able to take even a step to act upon the Islamic Injunctions concerning *Ibadaat* (عبادات), like Salath (صلوة), Zakat (زكوة), Saum(صوم),

Hajj (حج) etc. because none of these terms are explained nor even defined

in the Holy Quran. Therefore, The Holy Quran has explicitly emphasized:

“..... He who obeys the Messenger, infact obeys Allah.....”. (4:80)

11. To understand the exact position regarding the impugned Section which pertains to the commission of *zina*, we have to find out what is the meaning of *zina* as this term is also not defined in the Holy Quran. Literally the word *zina* (الزنا) means both fornication and adultery. While the punishment of *zina* liable to *Hadd* is different for both, as provided in Section 5(2) of the said Ordinance, the proof of *zina* liable to *Hadd*, for both, is one and the same as mentioned in the impugned Section. The proof required for *zina* as Ta'zir is, however, not fixed and it may be awarded on any reliable credible evidence, even on a solitary statement of the prosecutrix if that is confidence-inspiring and duly corroborated. The Holy Quran has used the word *zina* as well as the word *fahishah* (فاحشه) in the following Verse:-

وَلَا تَقْرَبُوا الزَّانِيَ إِنَّهُ كَانَ فَاحِشَةً وَسَاءَ سَبِيلًا 32-

Do not draw near any unlawful sexual intercourse; surely it is a shameful indecent thing and an evil way (leading to individual, social and moral corruption). (17:32)

Since the Holy Quran has used the word *fahisha* (فاحشه) mentioned in Verse No.15 of Surah An-Nisa, contention of the learned Petitioner that it means only “Obscene Conduct” is not correct in the context of verse 15 of Surat An-Nisa. Four male Muslim witnesses are required to come forward only to prove commission of *zina* liable to *Hadd*. Verse No. 15 initially provided the specified punishment for female offenders and Verse No. 16 prescribed initial punishment for both –male and female- offenders who are found guilty of the commission of *zina* (زنا). Thereafter Surah Al-Noor prescribed fixed punishments for both the culprits. The same number of witnesses are required for repulsion of the sentence of *Hadd* for committing offence of *Qazaf*. In case of husband and wife the number of witnesses is, however, substituted by five oaths by each and, thereafter, both are separated by way of Lian (لعان).

12. In order to fully comprehend the meaning of *zina*, we have to refer to the judicial verdicts passed by the Holy Prophet (صلى الله عليه وآله وسلم). The impugned Section and other similar rulings are based on the same. These rulings are found in different works of Ahadith. The most

outstanding precedent of all such cases, occurred during the period of the Holy Prophet (ﷺ), is the case of Hazrat Ma'iz (حضرت ماعز) which has been reported by a large number of narrators on the authority of several Companions. The same is contained in most authentic Hadith collections.

13. Hazrat Ma'iz (حضرت ماعز) was an orphan who belonged to the tribe of Aslam, and was brought up by Hazzal ibn Nu'aym. Maiz had unlawful sexual intercourse with a freed slave girl. Hazzal advised Maiz to go to the Prophet (ﷺ) and inform him of the incident. He realized he had committed a grave sin. So he went to the Masjid Nabvi (مسجد نبوی) and said to the Prophet (ﷺ): 'O Messenger of Allah! Purify me. I have committed unlawful sexual intercourse.' The Prophet (ﷺ) turned his face away from him, saying: 'Woe unto you. Go back and seek God's pardon.' Maiz appeared again before the Prophet (ﷺ) and repeated his plea, but the Prophet (ﷺ) once again turned his face away. Exactly the same thing happened a third time, and at this stage Abu Bakr warned Maiz that if he confessed for a fourth time, the Prophet (ﷺ) would have him stoned to death. Undeterred even by this, Ma'iz appeared again before the Prophet and repeated his request. The Prophet (ﷺ) would have him stoned to death. Undeterred even by this, Ma'iz appeared again before the Prophet and repeated his request. The Prophet (ﷺ)

(عليه وآله وسلم) on this occasion turned to him, saying: ‘Perhaps you *kissed* her, or *amorously vexed* her, or *looked at her with sexual passion.*’ Maiz replied that that was not the case. The Prophet (ﷺ) then asked him: ‘Did you *lie with her* in the same bed? He said: ‘Yes.’ The Prophet (ﷺ) then asked him again: ‘Did you have *mubasharah* with her? Maiz replied in the affirmative. The Prophet (ﷺ) once again made the same query of him. Then the Prophet (ﷺ) asked him if he had had *mujama’ah* with her, a term which clearly means ‘sexual intercourse’ in Arabic usage. He again replied in the affirmative. The Prophet (ﷺ) asked him once again, using a term which means nothing but sexual intercourse and one which even has a somewhat unseemly nuance. This was a term which the Prophet had never used before, nor did he use it again afterwards. Had a person’s life not been at stake, the Prophet (ﷺ) would never have uttered such a word. Ma’iz, however, once again replied in the affirmative. The Prophet (ﷺ) then asked him again in these words: Did you approach her in such manner that your organ disappeared into her organ? He again said: ‘Yes!’ The Prophet (ﷺ) further asked him: ‘Did it disappear as does the staining needle in the collyrium or a rope disappears in a well? He said: ‘Yes.’ The Prophet (ﷺ) asked him further: Do you know what *zina* is? To this he

replied: ‘Yes! I did with her unlawfully what one does legitimately with one’s wife.’ The Prophet (ﷺ) asked him whether he was *married*. He replied in the affirmative. The Prophet (ﷺ) then asked him: Are you *drunk*? This Ma’iz denied. A person stood up and checked his breath and confirmed that he was not drunk. The Prophet (ﷺ) then inquired of his neighbours about Ma’iz whether he was *insane*. This was also denied by them. The Prophet (ﷺ) then said to Hazzal. If you had left this matter covered with your garment, it would have been much better for you. However, the matter having been brought to the Court where Maiz had made an independent confession, the Prophet (ﷺ) then directed that Ma’iz be stoned to death. Ma’iz was taken out of the town and there he was stoned.

(كتاب الحدود = سنن ابوداود and صحيح مسلم، صحيح بخارى)

14. As is clearly evident from a bare reading of the above authentic narration, *Zina* means commission of sexual intercourse by a man with a woman, without having being married to each other. It is thus obvious that no one can be accepted as a witness of *zina* unless he actually sees with his own eyes commission of (زنا) -- the shameful act being committed by a male and female who are not validly married to each other.

15. We may also mention that a witness must be a competent witness in all cases. Conditions for a competent witness, interalia, includes possession of sound reasoning faculty, puberty, probity, absence of enmity/bias/interest, eyesight in case of facts which require to have been seen, capacity to speak or communicate with rectitude, and to be male and not convicted of perjury or giving false evidence as well as being a Muslim in cases of Hudood. Since award of *Hadd* sentence entails a very severe harsh punishment, therefore, its proof requires extremely strict conditions, as laid down in the law.

16. That is why that, in addition to giving an ocular account of the commission of the specific act by a witness, the Court is bound to strictly scrutinize the evidence with due care and caution and, besides seeking corroboration by other reliable evidence, direct or circumstantial, further probe about the truthfulness of all witnesses. Though the above Hadith relates to infliction of punishment of *Hadd* after four times of independent confession made by an offender before the competent Court of jurisdiction i.e. the Holy Prophet (ﷺ), the principles derived from the several queries

make it incumbent upon the Court to have full satisfaction about the guilt of the accused. Therefore, for the sake of abundant extra-ordinary caution in the administration of justice, the Court, before awarding punishment, in a case of *Hadd*, is required to make further inquiry “(تزكية الشهود)” about the witnesses as prescribed.

17. Regarding the submissions made by the learned Petitioner regarding *Tazkiyah al-Shuhood* “(تزكية الشهود)”, being repugnant to the injunctions of Islam, we may refer to the following Verses of the Holy

Quran:-

يَا أَيُّهَا الَّذِينَ آمَنُوا شَهَادَةُ بَيْنِكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ حِينَ الْوَصِيَّةِ اثْنِ ذَوَا عَدْلٍ مِّنكُمْ أَوْ آخَرَينَ مِنْ غَيْرِكُمْ إِنْ أَنتُمْ صَرَيْتُمْ فِي الْأَرْضِ فَاصْبِرْ لِمَصِيبَةِ الْمَوْتِ تَحْسِبُونَهُمَا مِنْ بَعْدِ الصَّلَاةِ فَيُقْسِمْنَ بِاللَّهِ إِنْ أَرْتَبْتُمْ لَا نَشْتَرِي بِهِ ثَمَنًا وَلَوْ كَانَ ذَا قُرْبَىٰ وَلَا نَكُفُّمْ شَهَادَةَ اللَّهِ إِنَّا إِذَا لَمِنَ الْأَيُّمِينَ ۝ ١٠٦ فَإِنْ غَرَّ عَلَىٰ آيَتُهُمَا اسْتَحَقَّا إِثْمًا فَأَخْرَجِ يَقُومِينَ مَقَامَهُمَا مِنَ الَّذِينَ اسْتَحَقَّ عَلَيْهِمُ الْأَوْلِيَّينَ فَيُقْسِمْنَ بِاللَّهِ لَشَهَادَتُنَا أَحَقُّ مِنْ شَهَادَتِهِمَا وَمَا اعْتَدَيْتَا لِكُ إِنَّا إِذَا لَمِنَ الظَّالِمِينَ ۝ ١٠٧ إِنْ تَرَىٰ تُرِيدُونَ أَنْ تَسْأَلُوا رَسُولَكُمْ كَمَا سَأَلُوا مُوسَىٰ مِنْ قَبْلُ وَمَنْ يَتَّبِعِ الْكُفْرَ بِالْإِيمَانِ فَقَدْ ضَلَّ سَوَاءَ السَّبِيلِ ۝ ١٠٨

- a) “O you who believe! Let there be witnesses among you when death approaches you, at the time of making bequests – two straightforward and trustworthy persons form among your own people (the Muslim community), or two other persons from among people other than your own (from among the People of the Book) if you are on a journey (and there are no Muslims) when the affliction of death befalls you. Then, if any doubt arises (concerning their testimony), have the two of them stay (in the

mosque) after the Prayer, and they shall swear by God: “We will not sell our testimony for any price, even if it concerns one near of kin, nor will we conceal the testimony of God (namely, the truth), for then we would surely be among the sinful.”

“Then if it is discovered later that the two (witnesses) have been guilty of sin, then have two others stand in their place from among those (rightful heirs of the deceased) whom the first two have deprived of their right, and these shall swear by God: “Our testimony is truer than the testimony of the other two, and we have not exceeded the bounds (of what is right, nor violated the rights of any others), for then we would indeed be among the wrongdoers.”

“That (way) it is more likely that people will offer correct testimony or else they will (at least) fear that their oaths will be rebutted by other oaths. Keep from disobedience to God in reverence for Him and piety, and pay heed (to His commandments). God does not guide transgressing people.” (5 : 106-108)

يَا أَيُّهَا الَّذِينَ آمَنُوا إِن جَاءَكُمْ فَاسِقٌ بِنَبَأٍ فَتَبَيَّنُوا أَن تُصِيبُوا قَوْمًا بِجَهَالَةٍ فَتُصْحَبُوا عَلَيَّ مَا فَعَلْتُمْ لَادِيمِينَ ﴿٥٨﴾

- b) “O you who believe! If a sinner brings you some report (or makes a statement), investigate it thoroughly (before you take action accordingly), lest you harm a people in ignorance and then become regretful for what you have done.” (49: 6)

وَالَّذِينَ يَزُمُونَ الْمَحْضَنَاتِ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَخَالِدُوهُمْ فَمَنْ يَنْصُرُهُمْ فَهُوَ فَسِقٌ مُّبِينٌ وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ الْمُفْسِقُونَ ﴿٤٤﴾

c) “Those who accuse chaste, honorable women (of illicit sexual relations) but do not produce four male witnesses (who will witness that they personally saw the act being committed): flog them with eighty stripes, and do not accept from them any testimony ever after. They are indeed great sinners,” (24 : 4).

18. These Verses contain certain important principles concerning Islamic jurisprudence, moral values and good social order. They could be summed up as follows:-

- * a bare perusal of the above Verses reveals that if the Court feels it necessary it can call for other or additional witnesses to testify before the Court who may decide the case on their testimony;
- * the Court is bound to investigate a report/verify a statement given by a person whose veracity is doubtful and to confirm whether or not he is involved in any major sin.
- * evidence of a person convicted of **قذف** is not admissible. So the Court has to confirm his eligibility as a witness, especially in cases of *Hudood* (حدود). Those who are convicted of perjury and giving false evidence are not credible as witnesses. Therefore, it is incumbent on the Court to conduct inquiry and verify the antecedents of witnesses, in *Hadd* cases.

- * although we should always hold good opinion about all believers, the transaction in society must be based on proper legal procedure. Since there are many habitual or compulsive or “stock” witnesses available all around in the society, the Courts are duty-bound to vigilantly examine the status of witnesses, particularly in cases which involve capital punishments.
- * evidence of فاسق (a person who commits major sins) is to be subjected to strict scrutiny. For this purpose his conduct as a witness has to be minutely checked and carefully verified (49:6)
- * those whom people regard as trustworthy and straightforward may not always be so. We should regard everybody as trustworthy until contradictory evidence emerges and proves him liar or incredible;

19. We, may add, that *Tazkiyah al-shahood* (purgation of witnesses) is a peculiarity of Islamic procedure. In its intent, scope and extent it is distinguishable from the normal cross-examination. *Tazkiyah* is a technical term of Islamic System of evidence which requires clearing a witness from accusation or suspicion cast upon him by the opposite party, by holding an enquiry by a Qadi, openly or secretly, himself or through an

official purgator. Under Islamic system of law, like other legal systems, the opposite party has every right to test, weaken, or destroy the credit of a witness by cross-examination. Purgation does not bar that right of the opposite party but at the same time, it should not be used to the disadvantage of the party producing the witness. We may mention that while cross examination is the right of defence, *Tazkiyah al-Shuhood* “(تزكية الشهود)” is a duty of the Court to ascertain the veracity of witnesses in cases of *Hudood* (حدود), that each one of them is just and righteous, worthy of credence, reliable, truthful and not a previous convict of perjury or other major offence. The sentence of *Hadd*, as stated above, is extremely harsh and deterrent, therefore all necessary precautions are to be duly taken and positive confirmation is made to ascertain, beyond doubt, the commission of exact and precise offence, as is most clearly mentioned in the above mentioned case of Maiz. The questions put to Hazrat Ma’iz by the Holy Prophet (ﷺ), as duly italicized in para 13, provides guidelines for the Courts to firstly, make all possible efforts to ascertain and specify the commission of *zina*, as underlined in the same para, and, secondly, find out

whether there is any doubt which could be extended to the accused, as is mentioned in para 23. As is evident, all these questions were put to the accused just to confirm whether the offence of *zina* committed by him was liable to *Hadd*.

20. Sir Abdur Rahim in "*Principles of Mohammedan Jurisprudence*" discussed the question of purgation of a witness as follows:-

"It is one of the important duties of a Judge, if the witness who is put forward by the party going into evidence as eligible, has given relevant evidence against the opposite party and the latter challenges the evidence by alleging that his evidence is false or due to his having forgotten the occurrence, to make inquiries into the witnesses' competence and particularly as to the fact of his being a man of rectitude. The inquiry is to be made by him either privately or in Court with the help of persons whom he knows to be reliable and who are acquainted with the life and character of the witness cited. The other party is also at the liberty to take exception or objection (جرح - طعن) to such evidence by showing that the witness is disqualified such as by reason of bias or interest or otherwise. Public investigation into a witness's character which prevailed in the early days of Islam has, it is said, been discontinued because of the strifes and disturbances which it led to. If a witness is a stranger to the place, the Qadi of the locality where he resides should be asked to make the inquiry. The Qadis are also

required to keep a register of persons who are proved to be ‘adil (عادل) or men of rectitude and to revise the register from time to time. However, the inquiry into the conduct of a witness in *Hudood* and *Qisas* cases is invariably adhered to as a matter of abundant caution to remove all doubts about the competency of the witness and to avoid imposing punishment upon a Muslim as far as possible. In other cases where the probity of the witnesses is not challenged by the opposite party, the Qadi can forego with the question of *Tazkiya* particularly. In cases involving civil rights the Qadi need not hold *Tazkiya* of a witness where it is admitted by the opposite party that the witness is a just and competent person. The purgation of a witness should follow the statement of a witness and not precede it. In other words the proper time for purgation is after evidence of a witness has been recorded and his probity has been challenged by opposite party. However in *Hadood* and *Qisas* cases the Court in order to remove all doubts should get the purgation done even if probity of the witness is challenge.

21. We agree with the petitioner that the culprits of commission of *zina* must be dealt with iron hand and no one proved guilty should ever be spared. The Holy Quran has strictly ordained:

وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلَيْشَهِدَ عَنَّا بَيِّنَةٌ مِّنَ الْمُؤْمِنِينَ ﴿٢٤﴾

“and do not let pity for them hold you back from carrying out God’s law, if you truly believe in God and the Last Day; and let a group of believers witness their punishment.”

(24: 2)

Shaikh Saadi has rightly said

ترحم برپلنگ تيز دندان ستمگاری بود برگو سفندان

(Showing mercy to a wolf would amount to inflicting tyranny on the sheep)

In this connection, however, we would like to mention that in order to bring home guilt and establish offence of the accused to the hilt, the evidence against him/her has to be strictly scrutinized. *Tazkiyah al-Shuhood* “(ترکیبة الشهود)” is the mode which is being adopted just for excluding all possibilities of innocence of an accused and ensuring absolute justice in each and every case.

22. We may also add that, in an Islamic State, no one can be subjected to any punishment for committing unlawful sexual intercourse unless that charge is fully established by due evidence. Unless there is definite evidence against someone that he/she was guilty of unlawful sexual intercourse, he/she may not be subjected to the *Hadd* punishment regardless of all other external sources wherefrom information about the commission of that offence is gathered but not duly proved in the Court of Competent Jurisdiction, as is required by the Injunctions of Islam-- laid

down in the Holy Quran and Sunnah. Here we may refer to the case of a woman in Madina about whom it was generally said that her sexual immorality was widely known. According to a tradition, she made a display of her wickedness even after embracing Islam. (See صحیح بخاری -

(باب ما يجوز) In another tradition, it is said that she made her immorality known publicly. (See كتاب الحدود - صحیح بخاری). According to these traditions, suspicion was attached to her because of her way of talking, her demeanour and because of the kind of people who frequented her. Nevertheless, since there was no definite proof of her being guilty of this act, she was not punished. This despite the fact that the Prophet (صلى الله عليه) said about her: 'If I had to stone someone to death without proof, I would certainly have had her stoned.' (See كتاب الحدود - سنن ابن ماجه)

23. In view of the above, one of the basic guiding principles of Islamic Law is that the accused shall be granted the benefit of doubt. The Holy Prophet (ﷺ) said:

"ادفعوا الحدود ما وجدتم لها مدفعا"

"Avoid enforcing *Hadd* as much as you can" (سنن ابن ماجه)

ادرؤا الحدود عن المسلمين ما استطعتم فان كان له مخرج فخلوا سبيله فان الامام
ان يخطئ في العفو خير من ان يخطئ في العقوبة
(كتاب الحدود – سنن ترمذى)

“Keep *Hudood* away from Muslims as much as possible. If there is any way to spare people from punishment, let them go. For it is much better that an Imam (ruler/Qazi) should err in acquitting someone rather than that he should err in punishing someone (who is not proved guilty).”

24. All that has been discussed above confirm that no one can be punished on the basis of conjectures, surmises and suspicions. The presumption of innocence exists till the contrary is established by reasonable cogent evidence, as is required by the law. Where the required evidence fails to satisfy the Court affirmatively and bring home guilt of the accused beyond reasonable doubt, the accused stands entitled to acquittal.

25. For the reasons stated above, we found this Petition misconceived and, therefore, dismiss it accordingly.

JUSTICE DR. ALLAMA FIDA MUHAMMAD KHAN

JUSTICE SHEIKH NAJAM UL HASAN

JUSTICE ZAHOOR AHMAD SHAHWANI

JUSTICE MRS. ASHRAF JAHAN

Announced in open Court
onat Islamabad
*Mujeeb/**