

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE MUHAMMAD ZAFAR YASIN
MR. JUSTICE SYED AFZAL HAIDER

Criminal Appeal No. 245/L of 2002 Linked with

1. Abdul Rashid son of Abdul Majid, Caste Ansari, r/o House No. 2079, Bilal Chowk, Samanabad, Faisalabad
2. Talib Hussain son of Muhammad Naeem, Caste Kharal, r/o Chak No.70/GB, Tehsil Jarranwala District Faisalabad

	.....	Appellants
	Versus	
The State	....	Respondent

Criminal Appeal No. 246/L of 2002 Linked with

Muhammad Idrees son of Muhammad Ismail, Caste Cheema, r/o Chak No. 112/GB, Tehsil Jarranwala District Faisalabad

	.....	Appellant
	Versus	
The State	....	Respondent

Criminal Appeal No. 279/L of 2002

Mst. Hafeezan Begum w/o Younis, Caste Rajput, r/o Near Taimur Travel Service, G.T.S. Faisalabad

	.....	Appellant
	Versus	
The State	....	Respondent
Counsel for appellants	....	M/s. Muhammad Aslam Riaz, Gohar Razzaq Awan, Advocates for appellants in all three appeals
Counsel for State	....	Ch. Abdul Razzaq, D.P.G.
F.I.R.No. Date & Police Station	....	308/1999, 18.05.1999 Peoples Colony Faisalabad
Date of Judgment of trial court	....	16.07.2002
Dates of Institution	....	23.08.2002, 23.08.2002 & 18.09.2002 respectively
Date of hearing	....	07.10.2009
Date of Announcement of Judgment	....	08.10.2009

JUDGMENT:

Justice Syed Afzal Haider, Judge: This single judgment will dispose of three connected criminal appeals: a) Criminal Appeal No.245/L/2002 filed by appellants Abdul Rashid & Talib Hussain, b) Criminal Appeal No.246/L/2002 filed by appellant Muhammad Idrees and c) Criminal Appeal No.279/L/2002 filed by appellant Mst. Hafizan Begum. All the three appeals arise out of judgment dated 16.07.2002 delivered by learned Additional Sessions Judge, Faisalabad. The appellants were convicted and sentenced as follows:-

A. Criminal Appeal No.245/L of 2002 has been filed by appellants Abdul Rashid and Talib Hussain

Abdul Rashid and Talib Hussain	Conviction under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979	Sentenced to three years rigorous imprisonment each.
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B. Criminal Appeal No.246/L/2002 is filed by appellant Muhammad Idrees

Muhammad Idrees	Conviction under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979	Sentenced to three years rigorous imprisonment
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*C. Criminal Appeal No.279/L/2002 filed by appellant Mst.
Hafizan Begum*

Hafizan Begum	Conviction under section 13/14 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979	Sentenced to life imprisonment
	Conviction under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979	Sentenced to three years rigorous imprisonment

Sentences of appellant Mst.Hafizan Begum were ordered to run concurrently. All the convicts were extended benefit of section 382-B of the Code of Criminal Procedure.

D. Accused Sajida wife of Sajjad, Sajida wife of Amjad, Sajida wife of Mukhtar and Nasreen also were convicted under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to three years rigorous imprisonment each but no appeal was filed on their behalf.

E. The remaining accused namely Meraj Din, Muhammad Javaid, Gulnaz, Tehmina and Sumaira were acquitted. Two of the accused

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namely Shabana and Sonia were declared absconders and consequently the learned trial court deferred their trial till their arrest.

F. Accused Liaqat Ali had filed Criminal Appeal No.254/L/2002 against his conviction and sentence but he expired during its pendency and the same was accordingly disposed of vide order dated 21.05.2004.

2. The brief facts of the case as mentioned in crime report

F.I.R No.308/99 dated 18.05.1999, Ex.PA/1 are that

i) On 18.05.1999 Maqsood Ahmad Sub Inspector, PW.6, received a secret information that accused Mst. Hafizan Begum was running a brothel in her house situated behind Taimur Travels, Canal Road;

ii) Mian Muhammad Akmal Inspector, Station House Officer consequently obtained a search warrant from the Court of Mr.Muhammad Akram, Magistrate Ist Class Faisalabad and marked the same to Maqsood Ahmad, Sub Inspector, PW-6;

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iii) PW-6 alongwith Rana Habib ur Rehman, Sub Inspector,
PW-5 and other Police officers (not produced at the trial), namely
Abdul Qayyum Assistant Sub Inspector, Anwaar Hussain Shah
Assistant Sub Inspector, Naseer Ahmad Constable, Muhammad
Shakeel Constable, Aurangzeb Constable, Irshad Elahi, Zafar Hussain
Constables and Allah Rakhi Lady Constable raided the house of
Mst.Hafizan Begum wife of Muhammad Younas;

iv) During the raid they found accused Liaqat Ali and Sajida
wife of Sajjad, Meraj Din and Shabana, Muhammad Javaid and Sonia,
Abdul Rashid and Sajida wife of Muhammad Amjid, Talib Hussain and
Sajida wife of Mukhtar Ali, Muhammad Idrees and Zaini in naked
condition in separate rooms all of whom were committing Zina
whereas Hafiza Begum was on guard. Accused Gulnaz and v) Tehmina
and Sumaira were sitting in a room after having committed Zina.

3. Police investigation in this case in fact ensued as a
consequence of the raid. After the raid, search and arrest of accused

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was effected. Thereafter a crime report by way of information was drafted by Maqsood Ahmad, Sub Inspector PW.6. This report Ex.PA was sent and formally registered at the Police Station. The latter initiated investigation and arrested the accused and recovered currency notes as well as other articles from their personal search and taken into possession through recovery memos. He had prepared complaint Ex.PA and dispatched the same to police station for registration of formal F.I.R. He recorded the statement of the witnesses and prepared rough site plan Ex.PS of the place of occurrence. The Station House Officer subsequently submitted a report under section 173 of the Code of Criminal Procedure before the Court requiring the accused to face trial.

4. The learned trial court framed charges against the accused on 15.02.2001 under sections 10, 13 & 14 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. The accused did not plead guilty and claimed trial.

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5. The prosecution produced six witnesses to prove its case.

Five witnesses were Police officers and the sixth witness was the

Medical Officer. There was no independent witness from the public.

The gist of the statement of the prosecution witnesses is as follows:-

(i) PW.1 Abdul Shakoor, Assistant Sub Inspector stated that on 18.5.1999 he formally registered FIR Ex.PA/1 on receipt of complaint Ex.PA.

(ii) PW.2 Zafar Iqbal Head Constable had received nine sealed parcels from Maqsood Ahmad Sub Inspector on 19.05.1999 for keeping the same in Malkhan and on 25.05.1999 he handed over the same to Shahid Iqbal Constable for delivery in the office of Chemical Examiner, Lahore.

(iii) PW.3 Shahid Iqbal Constable had delivered nine sealed envelopes and nine phials in the office of Chemical

Examiner, Lahore on 26.05.199 which were handed over to him by Zafar Iqbal Head Constable.

(iv) Dr. Kausar Parveen had medically examined the female accused persons and opined that accused namely Sajida wife of Sajjad, Shabana, Sajida wife of Amjad, Sonia, Sajida wife of Mukhtar Ali, Nasreen, Gulnaz, Mst.Tehmina and Mst. Hafeezan Bibi were used to sexual intercourse. However she stated that accused Mst. Sumaira was virgin.

(v) Habib-ur-Rehman Sub Inspector appeared as PW.5. He was member of the raiding party. He furnished the details of the raid conducted at the house of accused Mst. Hafizan Bibi.

(vi) Maqsood Ahmad Sub Inspector, complainant was the Investigating Officer in this case. He appeared as PW.6. He endorsed the contents of his crime report Ex.PA/1. He

had also undertaken the investigation whose detail has already been mentioned in paragraph 3 of this judgment.

6. The prosecution closed its case on 21.01.2002. Thereafter the learned trial Court recorded statements of accused under section 342 of the Code of Criminal Procedure on 16.07.2002. The accused denied the allegations levelled against them and claimed innocence.

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7. Learned trial Court after completing codal formalities of the trial returned a verdict of guilt. The accused were convicted and sentenced as mentioned above.

8. We have gone through the file. Evidence of witnesses of prosecution and statements of accused have been perused. Relevant portions of the impugned judgment have been scanned.

9. The reasons that found favour with learned trial Court to record conviction of the accused may be summarized as follows:-

i) On spy information, the Police conducted a raid, after obtaining a search warrant, and found six accused, in couples committing offence of Zina;

ii) The entire episode took place in a house which belonged to Mst. Hafizan Begum accused who was allegedly managing it as a brothel;

iii) The persons found indulging in the sexual offences belonged to different areas and they had not collected there to celebrate the birthday of the son of Mst.Hafizan Begum;

iv) That the accused are not related to Mst.Hafizan Begum to justify their presence at her house;

10. It might as well be observed that out of 14 accused facing trial for Zina the learned trial Court observed that i) swabs obtained from Mst.Shabana and Mst.Sonia were not found to be stained with semen ii) that three accused namely Gulnaz, Mst.Tehmina and Mst.Sumaira were found sitting in separate room, iii) that the medical

examination of Mst.Sumaira revealed that she was virgin iv) that Meraj Din, an electrician by profession, was aged 70 years whereas his son Muhammad Javaid was driver of Mst.Hafizan Begum. Consequently accused Meraj Din, Muhammad Javaid, Gulnaz, Mst.Tehmina and Mst.Sumaira were acquitted while the other 9 accused were convicted as mentioned above.

Analysis of Prosecution Evidence

11. PW-1, Abdul Shakoor, Assistant Sub Inspector is a formal witness. He received complaint Ex.PA and formally lodged F.I.R Ex.PA/1. PW-2 Zafar Iqbal, Head Constable 2890, is another formal witness. He received 9 sealed parcels for safe custody in Malkhana which were given to Shahid Iqbal Constable 2844/C PW-3 for safe delivery in the office of Chemical Examiner. PW-4 Dr.Kausar Parveen had undertaken medical examination of nine female accused brought before her by Police.

12. PW-5 Habib ur Rehman Sub Inspector Incharge of Police Post Tariq Abad was part of the raiding team constituted under the direction of Akmal Hussain Station House Officer/Inspector Police. Maqsood Ahmad was working as Sub Inspector, Police Station Peoples Colony on 18.05.1999. He received spy information that Mst.Hafizan was running a prostitution den in her house whereupon the Station House Officer obtained search warrant from Mr.Muhammad Akram Magistrate. The file was marked to this witness. He arranged a raiding team. He is the complainant and the Investigating Officer.

13. It is significant to note that out of ten Police officers constituting the raiding party only two Police officers appeared at the trial. PW-6 is the complainant as well as an Investigating Officer and has also given an eye witness account. The solitary female Constable Mst.Allah Rakhi was also not produced at the trial. It is also worth noting that though the Investigating Officer had prior knowledge of alleged offence being committed in a well populated area yet he did not

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deem it necessary to call independent witnesses of locality. There is no evidence either that witnesses were summoned by Investigating Officer through a written notice and they had refused to participate. In other words there is no genuine reason available on record to justify avoidance of mandatory provisions relating to searches as visualized in the Code of Criminal Procedure.

14. Learned Deputy Prosecutor General on the other hand supports the conviction and sentences on the following grounds:-

i) Managing and maintaining a brothel house is a social evil and it should be curbed with strong hands;

ii) A sum of Rupees 5200/- was recovered from Mst.Hafizan Bibi at the time of raid;

iii) All the accused were caught red handed by the raiding Police party;

iv) The accused could not give any reasonable explanation for being in the house of Mst.Hafizan when they were neither related to each other nor did they belong to the same locality;

v) Independent witnesses are generally shy in appearing as witnesses for prosecution in such incidents;

vi) Search warrant was duly obtained by Police officer before conducting raid and the whereabouts of the house to be raided had also been disclosed;

vii) The learned trial Court had very carefully assessed the entire evidence. Benefit of reasonable doubt was given to the deserving accused; and

viii) The episode was duly witnessed by the Police officers who were natural witnesses of the occurrence because they were deputed to conduct the raid. Investigation had also to be undertaken by the same set of Police officers. There is no legal bar for a Police officer to assume three different roles.

15. A perusal of the prosecution evidence further shows that:

i) spy information was not identified either before the learned Magistrate who authorized issuance of search warrant or at the time evidence was recorded at the trial;

ii) No enquiry was held by the learned Magistrate who was pleased to issue a search warrant just on the asking;

iii) PW-5, Incharge of Police Post Tariq Abad admitted that there was no written complaint about the house being used as a brothel; that there were a number of shops around the house of Mst.Hafizan Bibi; that the office of Newspaper Daily Business was situated close to the place of occurrence and on the back of the house is a busy wagon stand of Taimur Travels but the Investigating Officer did not associate any one from the locality;

iv) PW-5 admitted that there was "no material to suggest that there was any hiring of the women by any of the male accused for Zina".

v) PW-5 admitted that he "cannot identify any couple by pointing but towards them today."

vi) The complainant did not mention in the F.I.R that there were six rooms in the first floor in the house of Mst.Hafizan nor did he mention that the six couples were busy committing Zina. 15
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viii) The entire case centres around the statement of complainant and he admitted interpolation in the crime report Ex.PA/I as well as Ex.PT, the application to procure search warrants;

viii) Application Ex.PT, apparently stating facts for issuance of a search warrant, has not been proved by the maker of the application. The search warrant itself authorized the Inspector alone and required him to undertake the raid which was not done. Learned Magistrate who directed issuance of a search warrant did neither disclose identity of a person nor the reasons that justified exercise of discretion for issuance of search warrant. There was no application of any person from the locality before the learned Magistrate. We are unable to appreciate the

reasons for withholding different pieces of information from the trial Court;

ix) On the same set of evidence the learned trial Court found that the prosecution failed to establish its case against five accused persons. In fact medical evidence disclosed that Mst.Sumaira was a virgin lady though she was shown as having served as a sex worker;

x) It is well nigh impossible that two Police officers were able to see seven couples committing Zina in different rooms at one and same time when the internal gauze doors of each room were closed.

15. It is in evidence that all the transgressing couples were engaged in illicit sex in different rooms of the first floor but Ex.PS, the documentary evidence by way of the site plan, prepared allegedly on 18.05.1999 by Maqsood Ahmad Sub Inspector PW and produced by prosecution during the trial, does not indicate existence of any first floor or the rooms where the various accused were found involved in

illicit sex. This significant omission casts serious doubts on the prosecution story.

16. Chapter V of the Prohibition (Enforcement of Hadd)

Order, 1979 authorises the Magistrates to issue search warrants by

Magistrate, upon information and after such inquiry as is deemed

necessary, that an offence has been committed and these provisions

also authorize the person entrusted with the execution of warrants, to

detain and search and arrest any person found in the place searched. No

such power is provided in the Offence of Zina (Enforcement of

Hudood) Ordinance VII of 1979 which authorizes the Magistracy or

Police establishment to detect or hunt pursue the sinners.

17. Mst.Hafizan Begum has been convicted and sentenced to

life imprisonment under sections 13 and 14 of the Offence of Zina

(Enforcement of Hudood) Ordinance VII of 1979. Section 13 covers

the cases of persons who sell persons for the purpose of prostitution

and section 14 deals with culprits who buy persons for the purpose of

prostitution. The explanations of both the sections state that a person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female, shall until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution. It, therefore, clearly means that before a presumption can be drawn it must be proved that *the accused was keeping or managing a brothel*. There is no evidence at all coming either from any resident of the locality or some independent source that Mst.Hafizan Begum was keeping or managing a brothel. The Police Officer Incharge of the Police Post admitted that there was no written complaint about the existence of a brothel by Mst.Hafizan Begum. The evidence of sale or purchase of a particular woman for the purpose of using her as an illegal sex worker has also not been adduced by prosecution. The record available at the Police Post or Police Station did not show that activities of this nature were taking place within the jurisdiction of this Police Station. It is, therefore, clear that there was no

basis to record conviction of Mst.Hafizan Begum under sections 13 and 14 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. There is no evidence or even allegation at all that Mst. Hafizan was seen indulging in illegal sex. Conviction even under section 10(2) is not legally justified.

18. The purpose of promulgating Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 was certainly not to authorize Police Officers to undertake raids upon the private residential premises of citizens and detect the offenders and involve them in Hudood cases. Section 8 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 relates with proof of Zina liable to Hadd whereas section 10 of the Ordinance ibid deals with cases liable to Tazir. Both the sections do not contemplate a raid as the mode of proof of Zina.

19. The provisions relating to search as mentioned in the Code of Criminal Procedure are mandatory in nature. In case of departure

from these provisions the prosecution must bring on record strong reasons to convince the trial as well as the appellate Court that special circumstances of the case necessitated departure and non-observance of the legal provisions. The Police officer is not a judge of the situation. It is for the Court to adjudge whether non-observance of mandatory provisions was justified:

20. In the case of Mst.Noshi Vs. The State, reported as 2000 MLD 302, a single judge of the Federal Shariat Court held that a raid conducted in violation of the mandatory provisions of section 103 of the Code of Criminal Procedure was an illegality which was not curable particularly when the Police officer had received information in advance about the alleged commission of offence.

21. There is no direct evidence available on record to prove that the appellants were actually found committing carnal intercourse within the mischief of section 4 of Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. The act of Zina has to be specifically

attributed to the couple. It is not possible to convict a male and a female on the basis of surmise that since they were sitting in a room so they were presumably engaged in illegal sex. The position of witnesses and couples in separate room was admittedly not shown by PW-6 Maqsood Ahmad Sub Inspector in site plan Ex.PS. 5/

22. As regards bodily search it has been stated by PW-5 Habib-ur-Rehman Sub Inspector that a sum of Rs.5200/- was recovered from Mst.Hafizan Bibi vide Ex.PM. The document reveals that two lady Constables searched the person of Mst.Hafizan but not a single lady Constable has appeared to verify the correctness of this statement.

23. PW-5 also stated that a currency note valuing Rs.100/- was recovered from Muhammad Javaid, the acquitted accused, while a sum of Rs.2000/- was recovered from Adrees accused. It seems strange that 14 persons allegedly got together to enjoy illegal sex in an alleged den but twelve of them did not have a

single penny in their pockets. It is also stated that they are not residents of the said area. All broke strangers, who did not have even a penny in their pocket to reach back their distant destinations after attending sensual session, had collected in a pleasure house, is a phenomenon beyond comprehension. It could not be a customary coincidence. This aspect of the case is rather intriguing.

24. Islam certainly discourages transgression. Islam also provides punishments for proven unlawful acts through Hudood and Taazir laws but Islam neither permits nor appreciates that a search of sinners be undertaken in the residential quarters out with the object of prosecuting and punishing the unknown evildoers. The reason for prescribing standard of proof, even in morally repugnant offences, is to over look sins committed in strict privacy. Hudood law does not contemplate a hunting spree for a Police officer to round up the city

sinner. It is now almost a decade since the case of Riaz Vs.

Station House Officer was reported as PLD 1998 Lahore 35

wherein it was held as under:-

- i) That the injunctions of Islam and law of the land are intended to protect and preserve fundamental right and the dignity of man and privacy of his home;
- ii) That absence of reasons by Magistrate before issuance of warrants would vitiate the order in the same manner as non application of mind;
- iii) Intrusion into the house is not provided under the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979; and
- iv) Section 154 of the Code of Criminal Procedure does not permit registration of a case on the information received from a 'mukhbar'.

The learned Judge referred to a number of authorities in arriving at the above decision. Reliance is also placed on the case of Mst.Shehnaz alias Asma and Mst.Naila alias Shamim

Versus. The State. Criminal Appeal No.142/L of 2005 decided
by Federal Shariat Court on 14.11.2008.

25. In view of what has been stated above it is not safe
to maintain convictions and sentences awarded to the
appellants as well as the other four accused namely Sajida
wife of Sajjad, Sajida wife of Amjad, Sajida wife of Mukhtar
and Nasreen who did not file appeals. It appears that the said
four female accused must have served their sentences.
However, the benefit of acquittal will accrue to them as well
as the two absconding accused namely Shabana and Sonia.

26. Criminal Appeals No.245/L of 2002, Criminal
Appeal No.246/L of 2002 and Criminal Appeal No.279/L of
2002 are consequently accepted. Abdul Rashid, Talib Hussain,
Muhammad Idrees and Mst.Hafizan Begum are present in

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Court on bail. The sureties of these appellants are discharged of the obligation of their bail bonds. The appellants are acquitted and free to move about.

Sd/- [Redacted]

Justice Syed Afzal Haider

Sd/-

[Redacted]

Justice Muhammad Zafar Yasin

Dated 08.10.2009

*Amjad/**

Fit for reporting

Sd/-

[Redacted]

Justice Syed Afzal Haider