IN THE FEDERAL SHARIAT COURT PESHAWAR CIRCUIT
(Appellate Jurisdiction)

(26)

PRESENT

Mr.Justice Karimullah Durrani Member

Mr.Justice Maulana Malik Ghulam Ali Member

CRIMINAL APPEAL NO. 114/OF 1981

Azmat Khan	---	Appellant
	Versus	
The State	---	Respondent
For the appellant	---	Syed Zafar Abbas Zaidi, Advocate.
For the respondent	---	Mr.Amirzada Khan Assistant Advocate General, NWFP.
Date of hearing	---	18-10-1981 at Peshawar.
Date of decision	---	.

JUDGMENT: KARIMULLAH DURRANI, MEMBER

This appeal has been preferred by Azmat Khan son of Sona Khan, caste Gandapur, resident of Garah Pathar, Tehsil Tank, District D.I.Khan against the judgment of Sardar Muhammad Raza Khan, Sessions Judge, D.I.Khan, dated 17-6-1981, whereby the accused/appellant was convicted under Section 16 and 10(2) of the Offence of Zina (Enforcement of Hadood) Ordinance, 1979 for concealing/detaining co-accused Mst.Zubaida and for committing Zina with her. He was sentenced under Section 16 ibid to undergo 2 years' R.I., whipping numbering 10 stripes and a fine of Rs.1000/- or in default of payment of fine to undergo further R.I. for 6 months. He was under the latter Section awarded rigorous imprisonment for a period of 5 years with whipping numbering 30 stripes plus a fine of Rs.2000/- or in default of payment thereof further R.I. for one year.

Contd.....2.

(27)

Both the substantive sentences of imprisonment were ordered to run concurrently.

2. This appeal was filed in this Court on 58th day after the pronouncement of judgment. During this period a single day i.e. 13-8-1981 was spent for obtaining a certified copy of the judgment. This one day is to be deducted from the time spent in filing the appeal. A question arose as to whether a criminal appeal filed under Section 20 of the Ordinance would be barred after 30 days by application of Article 154 of the Limitation Act, 1908 or a limitation period of 60 days would be available as is in the case of appeals to a High Court under Article 155 of the Limitation Act. The learned Assistant Advocate General NWFP, Mr.Amirzada Khan appearing on behalf of the State is of the view that this Court, having succeeded High Courts in the matter of these appeals against the sentences awarded by the Sessions Judges by virtue of Section 20 of the Ordinance, will have to be treated as a High Court for all practical purposes and intent in the matter of exercise of its appellate jurisdiction. The period of limitation according to the learned counsel would therefore be that which is available under Article 155 of the Schedule to the Limitation Act. The learned counsel for the appellant on the other hand being of the opinion that the period of limitation available to his client was 30 days under Article 154 of the Limitation Act has preferred an application for condonation of delay with the appeal on the ground that a copy of the judgment was not delivered to his client on the pronouncement of judgment whereafter he was sent to jail and had no means to contact his relations for requesting them to obtain the certified copy of the judgment and to arrange for legal assistance in filing the appeal. We would like to refrain from entering into discussion on the merits of

Contd.....3.

(28)

the application for condonation of delay and would confine ourselves to putting on record our views on the question of period of limitation only. Articles 154 and 155 of the Limitation Act read as under:-

154-Under the Code of Criminal Procedure 1898, to any Court other than a High Court.	Thirty days..	The date of the sentence or order appealed from.
155-Under the same Code to a High Court, except in the cases provided for by article 150 and article 157.	Sixty days ..	The date of the sentence or order appealed from.

As the wording of the above reproduced Articles suggest both these Articles govern those appeals which are preferred to the relevant Courts under the Code of Criminal Procedure. Chapter XXXI of the Code relates to appeals. Section 404 of the Code lays down that no appeal shall lie from any judgment or order of a Criminal Court except as provided by this or any other law. This Code under its Section 408 provides for appeals to the Court of Sessions from the conviction on trial held by an Assistant Sessions Judge, District Magistrate or other Magistrate of the Ist Class or any other person sentenced under Section 349, with the exception that where the sentence awarded is of a term exceeding 4 years or where conviction is under Section 154 PPC appeal shall lie to the High Court. Under Section 410 ibid any person convicted on trial held by a Sessions Judge or any Additional Sessions Judge may appeal to the High Court. Section 20 of the Ordinance replaces the above-mentioned two Sections of the Code in that a trial is held by Sessions Judge or an Additional Sessions Judge in any offence under the Ordinance and the appeal is to be preferred to this Court against any sentence passed or order made by the said Judges under the Ordinance. Thus it would be clear that appeals of the nature of the present one are not preferred to

Contd.....3.

(29)

this Court under the Code of Criminal Procedure but these are competent under special statutes, namely the Hadood Order and Ordinances. As Articles 154 and 155 of the Code govern only those appeals which are preferred under the Code of Criminal Procedure these cannot place a bar of limitation against the appeal under the Ordinance. The Ordinance does not contain any provision fixing the period of limitation for filing an appeal to this Court. Also the Schedule to the Limitation Act in its division on appeals does not contain a residuary article of the nature of the Articles 120 and 181, on appeals. The Federal Shariat Court (Procedure) Rules 1981 also do not lay down any period of limitation for filing of an appeal to the Court. As such there does not exist at present any statutory period of limitation for an appeal under Section 20 of the Ordinance or for ~~th~~ the matter of that for an appeal to this Court under any of the Hadood Laws. The Supreme Court of Pakistan for the exercise of its Constitutional Appellate Jurisdiction has provided a period of limitation of 30 days for filing appeals in that Court by Rule I of Order XVII of the Supreme Court of Pakistan Rules, 1980. As the position emerging from the above discussion can only lead to Chaos, it would be highly desirable that a period of limitation for filing of such appeals as these should be prescribed either by way of insertion of statutory provisions in the Hadood Laws or by way of framing of statutory Rules on the subject. Till then we would prefer to take guidance from Article 155 of Limitation Act as these appeals are from the decisions and orders of the Sessions Judges against which ordinarily a period of 60 days is provided for appeals under the Code from such orders. This appeal is, therefore, held not barred by limitation.

3. The appellant Azmat Khan and the co-accused Mst.Zubaida, wife of Jehangir both residents of the same

(30)

village were put to trial in the Court of learned Sessions Judge, D.I.Khan in consequence of the first information report lodged on 20-7-1980 at 2020 hours, in the Police Station Tank by one Muhammad Nisar (PW.7), a brother of the husband of Mst.Zubaida wherein it was alleged that Jehangir Khan a brother of the complainant, in 1974, in an attempt to murder Azmat Khan appellant had actually killed Speen Khan, a brother of the said accused, and was sentenced to life imprisonment for that murder. It was alleged that the motive for the said murder was that Azmat accused had established illicit relations with the wife of the said prisoner, Mst.Zubaida now co-accused. The complainant claims that the wife of his brother Jehangir Khan since the imprisonment of the latter, was residing with him in his house and was being maintained by him alongwith her 4 children from his said brother. It was further alleged that Azmat continued to maintain liason with the co-accused even after the imprisonment of her husband. That, on 20-7-1980, at 12 noon, Azmat Khan succeeded in enticing away the co-accused from his house and that at the time complainant was absent from his house and, at Peshi Wela, on his return to his house his sister Shah Bibi informed him of the occurrence. The complainant on enquiry came to know that Mst.Zubaida was in the house of Azmat accused. The complainant then went in search of the village Matabar in seeking advice. It was further opined in the FIR that Azmat must have committed Zina with the co-accused Mst.Zubaida. The accused/appellant was charged under Section 11 and 10(2) of the Ordinance and the co-accused Mst.Zubaida under the latter Section only. Both of them pleaded not guilty to the charge and were therefore put to trial.

4. The prosecution evidence against the two accused consisted of two Medical experts, namely Drs Ghulam

Contd.....6.

(31)

Hussain Khan and Mrs.Perveen Jadoon, PWs.1 and 2. Out of whom the former had examined the accused/appellant on 21-7-1980. In his opinion there was nothing to suggest that the examinee was incapable to perform sexual intercourse. This witness took one swab from external genital organs and one from internal urinary meatus and sent this to the Laboratory for chemical examination. Alongwith these swabs the Police also sent the Shalwar of the appellant which was took off his person for the said examination. Later on the Chemical Examiner, Lahore found vide report Ex.PJ, these two swabs were not stained with semen but the Shalwar revealed as per Ex.PK, seminal stains of human origin which were found unfit for grouping.PW.2 Dr.Perveen Jadoon on the same day at 11 A.M examined the co-accused Mst.Zubaida and found nothing on her person to account for pecent rape. She took two vaginal swabs for Chemical analysis. The report of the Chemical Examiner, Ex.PJ, which was later on received, was in the positive. PWs 5 and 6 Khadim Hussain and Haibat Khan, respectively were produced as witnesses of the recovery of the co-accused from the custody of the appellant. The complainant Muhammad Nisar appeared as PW.7 and proved his report Ex.PA. Muhammad Sakindar Khan S.H.O., Police Station, City Tank, (PW.4) the I.O, placed on record a copy of the previous FIR Ex.PI (bearing No. 153 dated 20-11-1974) said to have been lodged by Azmat Khan accused appellant in the murder of his brother Speen Khan. Pw.3 Ashraf Zaman Khan SI appeared as a marginal witness to the recovery memos of the Shalwar of the two accused which were later on sent for chemical examination. On the conclusion of the evidence learned Court found both the accused guilty of the offences charged and while sentencing the appellant as stated above also convicted co-accused Mst.Zubaida under Section 10(2) of the Ordinance and sentenced her to 3 yeers R.I with 30 stripes plus a fine of Rs.500/- or in default of payment of fine a further

R I for three months. Mst.Zubaida has not so far appealed to this Court.

5. From the above summary of the evidence it would be apparent that the ocular evidence produced by the prosecution of the offences alleged against the appellant relates only to the alleged recovery of the co-accused from his custody which is claimed to have been effected by the I.O Muhammad Sakindar Khan PW.4 and witnessed by Khadim Hussain and Haibat Khan PWs 5 and 6. Khadim Hussain who is the Lambardar of Garah Pathar stated that his house was adjacent to the house of Abdul Hamid. He was listening the conversation of the Police who after having raided the house of accused appellant were alleging that the abductee was in the house of Abdul Haimd and that when he reached the house of Abdul Hamid, he saw Mst.Zubaida accused in the custody of Police and did not know where from she was recovered. This witness was got declared hostile by the P.P.. In cross-examination by the P.P. this witness denied having stated to the Police that the house of the appellant was raided in his presence and alleged that his thumb impression was obtained on a paper by the Police at the Police Station. Thus whatever was the worth of the evidence of this witness for the prosecution was washed away. This left PW.8 Haibat Khan and I.O Muhammad Sakindar Khan PW.4 as witnesses of the recovery. Both of them are unanimous in that the co-accused Mst.Zubaida was recovered from the house of Abdul Hamid and not from the house of Azmat appellant, but they allege that on seeing the Police the co-accused crossed over to that house through a window which opens in the courtyard of the house of the appellant. These houses are described as having a common boundary wall which surrounds different Kothas in which the appellant, said Abdul Hamid and some other relatives of the appellant reside. PW.7 Muhammad Nisar complainant

in addition to whatever he stated in FIR has deposed that about 3½ months before recording of the statement which was done on 25-5-1981 Mst.Zubaida co-accused gave birth to a child. In cross-examination he had admitted that he had got the co-accused, Mst.Zubaida bailed out during the trial and had obtained a house for her in village Khaura where she was residing after her release and that he himself was also residing in a contiguous Kotha to that house because of having stood surety for her. He, however, denied the suggestion that he was having illicit relations with Mst.Zubaida and that owing to such relationship he had arranged residence for them both in another village. The birth of the child was not denied by the co-accused. It was alleged by her that it was conceieved from Alamgir, another brother of her husband and the complainant. The admitted position vis-a-vis the birth of the child is that(a) it has been conceived during the absence of her husband who is in jail for the last 5/6 years (b) that the birth in the month of February, 1981 would show it was conceived some times in April 1980, and (c) that the conception took place about 3½ months before the date of occurrence. Apart from the above stated evidence there does not exist any other worth the name of either abduction of the co-accused by the accused/appellant or of his committing Zina with the co-accused except, of course, the detection of the seminal stains on his Shalwar alleged to have been taken in possession from his person at the time of his arrest. The accused/appellant in his statement under Section 342 Criminal Procedure Code denied the allegations levelled against him and also the ownership of the Shalwar. He also denied the correctness of the recovery of the co-accused from his custody. As far as the ownership of the Shalwar is concerned which was subject matter of the chemical examination report, ExPJ,

we have the evidence of PW.3 Ashraf Zaman Khan ASI in whose presence the Shalwar worn by the accused at the time of arrest was taken into possession and sealed in a parcel. As to where the parcel was kept and when it was sent to the Chemical Examiner and through whom and under what conditions of seals the prosecution failed to adduce any evidence. The absence of this evidence is the missing link of the chain in between the analysis of the article in question and its ownership. We would, therefore, have no hesitation to hold that the prosecution has failed to establish without reasonable doubt that the Shalwar of the accused appellant was stained with human semen. Even otherwise the mere presence of seminal stains on the clothes of a male would not necessarily lead to the conclusion that the clothes were stained as a result of the commission of sexual intercourse. As a matter of fact many other factors other then the sexual intercourse can help bring about such stains on the clothes of a male. Also birth of the child or its conception cannot be linked with the accused/appellant in view of the fact that both the respective families of the complainant and the accused were inimical to each other on the murder of the brother of the accused from the hands of a brother of the complainant. In such conditions a woman belonging to one could not be easily accessible to a member of the other family. As for the abduction of the co-accused is concerned Mst.Shah Bibi, who is alleged to have informed the complainant of the occurrence was a material witness who has not been produced . The complainant has admittedly not witnessed the departure of the lady from his house. Only connection of the accused appellant with the charges levelled against him, was saught to be established from the alleged recovery of the co-accused from his custody. Admittedly she has not been recovered from the house of the accused

but from the house of one Abdul Hamid who has also been withheld by the prosecution. The only eye-witness of the recovery apart from the I.O namely Haibat Khan PW.6 is proved a partisan to the complainant's party as he had been a defence witness in the murder case against the husband of the co-accused. Moreover, his statement contains such contradictions which would not allow one to place confidence in him. For example, he states that he had accompanied the Police from the P.S while going to the house of the accused/appellant for the recovery of the co-accused, which is clearly against the testimony of the Investigating Officer, PW.4 who has unimbiguously stated that on reaching the spot he had called the witnesses. Incidently Haibat Khan supports the contention of the other recovery witness, namely Khadim Hussain in that the papers were prepared by the Police in the Police Station. Now, this leads to the question whether the statement of I.O to the effect that the co-accused Mst.Zubaida on seeing the Police crossed over to the house of Abdul Hamid through a window from the house of accused/appellant Azmat is to be believed? On the one hand site plan Ex.PD/1 would show the situation of the two houses in question such as it would not be very difficult for a person to take refuge in one house on fleeing from the other, but one the other if a raid is carried out on a house for the recovery of a certain person and that person is found in the adjacent house it would be but natural for the searching Police Officer to presume that the person concerned had crossed over to the other house in order to escape recovery. The recover of the co-accused Mst.Zubaida from the custody of Azmat appellant is therefore, not free from reasonable doubt.

Contd.....11.

6. Mr.Amirzada Khan, the learned Assistant Advocate General has pressed into service copy of the FIR No.153 dated 20-11-1979, Ex.P.1, as a corroborative piece of evidence to bring home guilt to the accused-appellant. This document does not serve his purpose in that at the most it shows that the accused-appellant, who was a complainant in that case, entertained fear that the brother of the complainant, Jehangir Khan intended to murder him on the suspicion of his having illicit liason with his wife but killed Speen Khan, a brother of the accused-appellant in his stead. From the said alleged motive it has been attempted on behalf of the State to establish that the liason existed even at the time of the occurrence in this case. Needless to say motive for certain offence could only be that which is found by the trial Court from the evidence brought before it during the trial and not from the allegations of the complainant made in the first information report. Moreover, a first information report is never a substantive piece of evidence in itself even in that trial which ensues in its wake. Motive for a crime mentioned in an earlier FIR therefore cannot corroborate a subsequent commission of offence. What it at the most shows is that similar suspicion was once, at an earlier stage, also entertained by the opposite party as well. Multiplicity of suspicion no matter how frequent and in what number by itself would not prove the fact of the commission of an offence.

7. Lastly, there is a delay of about 10 hours in lodging the report from the time of occurrence. The distance between the place of occurrence and the Police Station is about 7/8 Kilometers. Reasonable time for covering this distance even on foot would be between 2 and 3 hours. Thus a delay of about 7 hours remains unexplained. According to the complainant on his return

at Peshiwela he was informed by his sister that the wife of his brother was abducted by the accused-appellant. He, therefore, should ordinarily have rushed to the Police Station without the loss of any time for lodging the report. The story of going out in search of a Mutaber for obtaining advice or ascertaining the correctness of the allegation of Shah Bibi could not consume much time in view of the fact that houses of the complainant and the accused have only 3/4 houses in between. This inordinate delay of several hours was enough to give ample time to the complainant to concoct any story.

8. The result of the above discussion is that there does not exist any reliable evidence connecting the accused-appellant with the offences alleged against him and thus the prosecution has failed to establish his guilt without any reasonable doubt. Consequently, the appeal is accepted and the conviction of the appellant under Sections 11 and 10 of the Ordinance and the sentences awarded against him thereunder are set aside. He is acquitted of the charge and should be set at liberty forthwith if not required in any other charge.

MEMBER II.

Judgement is announced
1/11/81

MEMBER IV

Announced at
Islamabad on 1st Oct:1981

Approved for reporting in law journals.

5/11/81