

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

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Present:

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HON:MR. JUSTICE B.G.N. KAZI.

CRIMINAL APPEAL NO.57/I OF 1983.

- (1) Ghulam Hassan son ofAppellants.
Mehmood Zoar.
- (2) Mst. Ghulam Fatima wife of
Ghulam Hyder Zoar.

Versus

The State.Respondent.

For the appellants: Mr. Fazal Ellahi Siddiqui,
Advocate.

For the State: Mr. S.Q. Zahidi, Advocate.

Dates of hearing: 20.6.1983, 27.6.1983 and
29.6.1983.

Date of decision: 29.6.1983.

JUDGMENT:

B.G.N. KAZI, J.- Ghulam Hassan who was charged with enticing and taking away Mst. Ghulam Fatima wife of Ghulam Hyder with the intent that she may have illicit intercourse with him and for committing zina with her and also Mst. Ghulam Fatima aforesaid who was charged with committing offence of zina, were tried by the Additional Sessions Judge, Leiah who convicted Ghulam Hassan under Section 16 of the Offence of Zina(Enforcement of Hudood) Ordinance, 1979 and sentenced him to R.I. for a term of 5 years and whipping numbering 20 stripes and also to pay a fine of Rs.3000/- or in default to undergo simple imprisonment for a period of 18 months. He also convicted both Ghulam Hassan and Mst. Ghulam Fatima under Section 10(2) of the aforesaid Ordinance and

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sentenced each of them to R.I. for 7 years, whipping numbering 30 stripes and a fine of Rs.5000/- or in default to undergo R.I. for two years. This appeal has been filed against the aforesaid sentences and convictions.

2. At the very outset it is observed that the so called FIR in the case allegedly lodged by Ghulam Hyder is dated 3.6.1981 whereas earlier proceedings were started against the appellants before the Assistant Commissioner and Magistrate 1st Class, Lora Lai on 25.5.1981. It may further be observed that although the husband of Mst. Ghulam Fatima namely Ghulam Hyder son of Mehmood was the only person who could have appropriately made allegation or report in the case which incidently involves his own reputation and that of his family, in the instant case it was Ghulam Hassan son of Allah Bakhsh who made application before the A.C. and Magistrate 1st Class, Lora Lai which was in fact, the first intimation about the commission of the offence. It is also remarkable that in the heading of the application he had used the following words which translated in English read as under:-

"State through Ghulam Hyder
son of Mehmood.

Versus

Hassan son of Mehmood"

It, therefore, appears that before the learned A.C. and Magistrate 1st Class, Lora Lai the application was made in such form as to indicate that there was already registered criminal case against appellant ^{Ghulam} Hassan at the instance of Ghulam Hyder husband of appellant Ghulam Fatima, although this was far from the fact. Since on the making of the application the learned Magistrate ordered Jamadar of Levy and other officials to accompany the applicant and further since due to the aforesaid
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order which was endorsed on the application, the two appellants were actually arrested by the Levies and brought before him, it is considered important enough to reproduce the application with the endorsement on it, which reproduced in English reads as under:-

"In the Court of Magistrate, Lora Lai.

May God bless you with prosperity.

State through
Ghulam Hyder son of
Mehmood.

Versus

Hassan son of Mahmood,
Caste Baloch,
resident of Bait Balu,
Muzaffargarh, Police Station,
Kot Sultan.

In the case of abducted wife
of the complainant.

Sir,

It is prayed that the accused has abducted the wife of complainant. The accused and the abductee have been absconding since the last four months. Now I came to know that both the accused are at present residing with one Haji Abdul Ghafoor Rashi at Sarbolak. It is therefore requested that the Government officials may be deputed to get them arrested.

I will remain praying.

Sd/-
Ghulam Hassan son of
Allah Bakhsh, caste Baloch,
District Muzaffargarh.
25.5.1981.

Endorsement on the application
made by Ghulam Hassan son of
Allah Bakhsh, dated 25.5.1981
by the Magistrate.

Reader.

Jamadar Levies with the other
officials may be deputed to accompany the applicant.

Sd/-
Magistrate.
25.5.1981."

It is apparent from a perusal of the record that the two appellants were arrested on the same date i.e. 25.5.1981 and produced by the Levies before the A.C.

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and Magistrate 1st Class, Lora Lai where their statements were recorded. I shall consider and discuss the legality of the aforesaid statements which have been construed as confessions by the two appellants. Suffice it to say at present that the so-called FIR which was registered as such at Kot Sultan Police Station on 3.6.1981 allegedly by Ghulam Hyder son of Mehmood Zore the husband of appellant No.2 has not been supported by him on the ground that he had not made the complaint in the first instance but he had been taken to the Police Station by Ghulam Hassan son of Allah Bakhsh who had earlier made the application quoted in extenso above to the A.C. and Magistrate 1st Class, Lora Lai. In his evidence before the trial Court he did not support the case against the appellants and stated that he had no suspicion even that the appellants had illicit intimacy. In his deposition he further asserted that appellant No.1 is the husband of appellant No.2's sister Mst. Aziz. He further stated that in view of the close relationship and the fact that appellant No.1 is married to the sister of appellant No.2, he had never prevented appellant No.1 from visiting his house. About the FIR he stated that he had been taken to the Police Station by Ghulam Hassan son of Allah Bakhsh and his thumb impression had been taken. Ghulam Hyder husband of appellant No.2 has further asserted that his wife had not been abducted by anyone but had gone to Lora Lai for harvesting. He also took the stand that he had never complained to police at Lora Lai. He had further stated that he had never accompanied the police to Lora Lai. In his cross examination the witness stated that there was dispute between appellant No.1 and Ghulam Hassan son of Allah Bakhsh as both of them were taking parties to Lora Lai for harvesting(labour) and his wife had not gone with Ghulam Hassan son of Allah Bakhsh

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but had gone with the party of appellant No.1. He however, admitted that he had deputed Ghulam Hassan son of Allah Bakhsh who had finished the work at Lora Lai, to bring back his wife from Lora Lai as she had written to him to come and take her. Ghulam Hassan son of Allah Bakhsh had gone there but had not brought back Mst. Ghulam Fatima and that he had told him that he was not permitted by appellant No.1 to bring her back and therefore, he had made report to the police and had managed with the authorities so that, the police would bring back his wife.

3. Ghulam Hassan son of Allah Bakhsh in his deposition had admitted that he was the suitor for the hand of Mst. Ghulam Fatima but she had not been married to him but to Ghulam Hyder.

4. The version as given in the so called FIR was that P.Ws. Koru son of Imam Bakhsh and Sikandar son of Muhammad who were going from Tounsa had seen both the appellants at Lankhan Wala Pattan and appellant No.1 had told them that since his wife was ill he was taking appellant No.2 to his house at Tounsa. It was further asserted that both these witnesses had informed Ghulam Hyder about the fact of having seen the appellants together. In their depositions before the trial Court, they have not said anything to support the case of the prosecution against the appellants. It may also be pointed out that although both the witnesses are supposed to have seen the appellants together at the same time; whereas P.W. Koru stated that they had met them at about 7-8 a.m. P.W. Sikandar had stated that it was afternoon time. Be that as it may, the only fact about seeing the two appellants going together has no bearing upon the commission of the alleged offences by them. P.W. Koru had admitted in his cross examination

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that the two appellants are cousins interse and also appellant No.1 is married with the sister of appellant No.2. Since the parties are Muslims, marriage to sister of the wife is prohibited to them and moreover relationship being of such a close nature appellant No.1 being the husband of the real sister of appellant No.2, no adverse inference can be drawn from the mere fact that they were seen together. It is clearly stated by Ghulam Hyder husband of appellant No.2 that he had permitted her to go with the party of appellant No.1 for doing labour.

5. The only other evidence led on behalf of the prosecution is that of Abdul Hameed son of Haji Abdul Ghafoor about such conduct on the part of the two appellants which according to the learned trial Judge created a presumption of their having committed the offence of zina. It was the prosecution case that appellant No.1 had got employment under Abdul Hameed and used to work in his garden and do duty at the tube-well. The appellant No.1 had with him appellant No.2 for whom the appellant No.1 had requested Abdul Hameed for providing labour. It was this witness Abdul Hameed who was stated to have provided a room for residence of the two appellants. However, in his cross examination the witness had stated that Mst. Ghulam Fatima appellant No.2 used to live with his women folk and appellant No.1 used to stay at the tube-well and he had denied that he had seen both the appellants living together as husband and wife. He has clearly stated that appellant No.1 used to live during the night hours at the tube-well and appellant No.2 with his women folk. He has further asserted that the Levies had arrested both the appellants from different places.

6. Except for the evidence discussed above, there

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was further evidence of Ghulam Hassan son of Allah Bakhsh who was summoned as a Court witness. He had admitted the relationship between the parties and had further stated that Mst. Nazir is the wife of appellant No.1. He had, however, stated that the two appellants were suspected of being on terms of illicit intimacy. He had further stated that his party had gone to the area of Tehsil Tounsa for harvesting and that appellant No.2 was in one party and he was in the other party. Ghulam Hyder had not gone for harvesting. After the harvesting both the appellants had gone to Lora Lai. He further stated that complainant Ghulam Hyder had asked him to go to Lora Lai for bringing her back but appellant No.1 had refused to allow appellant No.2 to go with him and therefore he had complained to the A.C. and Magistrate 1st Class, Lora Lai. In his cross examination this witness has admitted the fact that he had asked for the hand of Mst. Ghulam Fatima who was ultimately married to Ghulam Hyder.

7. It is apparent from the evidence on record that after the arrest of the two appellants at Lora Lai the case was got registered at Police Station, Kot Sultan and Ghulam Hassan son of Allah Bakhsh had admitted that he had taken a letter of Khawaja Suleman Tounsvi to SHO, Kot Sultan for registration of the case. The difficulty in registering the case is obvious because of the action that had already been taken which had ended in the arrest of the two appellants and their detention at Lora Lai. It is also apparent from the evidence of Abdul Ghafoor, Head Constable that Ghulam Hassan son of Allah Bakhsh had accompanied him to Lora Lai for bringing the two appellants to Kot Sultan. ASI Amanullah Khan who on 3.6.1981 was Incharge of Police Station, Kot Sultan had made it clear that the two appellants were arrested and taken

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into custody from jail authorities on 16.6.1981. The ASI had further admitted that complainant Ghulam Hyder had not accompanied the police party to Lora Lai although Abdul Ghafoor, H.C. had stated that complainant Ghulam Hyder had also accompanied him to Lora Lai. Amanullah Khan had further admitted that he had gone to Lora Lai on receiving a wireless message. He had further admitted that it is true that Khawaja Suleman is a political and spiritual leader of Tounsa and a man of influence.

8. The evidence of Dr. Mushtaq Ahmad who examined appellant No.1 and gave the opinion that the appellant was able to perform sexual act could have no connection at all with the proof about guilt of the two appellants as undoubtedly appellant No.1 is married to Mst. Aziz. Similarly the evidence of Dr. Firdaus Ara Mirza who examined appellant No.2 Mst. Ghulam Fatima is of no consequence at all in as much as Ghulam Hyder husband of appellant No.2 had stated in his evidence that his wife was pregnant at the time that she had gone for labour with the party of the reapers. On the contrary looking to period during which the two appellants are stated to have been living together the evidence that on 20.6.1981 appellant No.2 was having 8 months pregnancy makes it conclusive that pregnancy could not be attributed to appellant No.1.

9. It is apparent from the discussion of the evidence on record that so far as the oral evidence of the witnesses is concerned, it is to say the least insufficient for proving the commission of the offence by the appellants. The conjecture of the trial Court that the appellants had lived in the room provided by P.W. Abdul Hameed and therefore, there was presumption of their having committed zina, cannot be accepted as there is no evidence on record that they had lived

in the same room and on the contrary as deposed by Abdul Hameed, appellant No.2 was sleeping with his womenfolk. The appellants being Muslims, on the contrary, the presumption should have been drawn as indicated by the evidence of Abdul Hameed that although appellant No.1 had been given a room, appellant No.2 used to sleep with other women folk in his house. Sura Nisa (IV) verse 23 of the Holy Quran prohibits marriage to two sisters at one and the same time. The prohibition is included under the general prohibition against marriage with mothers, daughters, sisters etc., and therefore unless there is strong evidence about the actual fact of zina, such presumption should not have been drawn on a mere conjecture. The allegation that appellant No.1 did not allow Mst. Ghulam Fatima -appellant No.2 to go with Ghulam Hassan son of Allah Bakhsh should in fact have been understood as objection by a 'Mahram' within the prohibited degrees to allow his wife's sister to go escorted by a 'Namahram' who had previously asked for her hand in marriage and had been refused. However, the learned trial Judge has also depended on the so called confessions of the two appellants made in their statements before the A.C. and Magistrate 1st Class, Lora Lai.

10. With regard to presumption as to documents produced as record of evidence, section 80 of the Evidence Act, 1872 provides that before such presumption can be drawn with regard to statement or confession of any person it has to be shown that the same was taken in accordance with law. No doubt the evidence of Mr. Mirani Khan, A.C. Lora Lai was recorded at the trial and he has stated that on 25.5.1981 Ghulam Hassain son of Allah Bakhsh had submitted an application to him (the aforesaid application has already been reported above in extenso). It is

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in his evidence that Baluchistan Levy produced the two appellants for recording their statements. Here I would pause to consider as to on the basis of which complaint the Baluchistan Levy could have started the investigation. It is apparent that the entire action taken by the A.C. and Magistrate 1st Class, Lora Lai was not strictly in accordance with the Cr.P.C. There was no preliminary inquiry held or ordered to be held. There is no issue of process against the two appellants but on the mere wrong representation of Ghulam Hassan son of Allah Bakhsh purporting to show that he was giving information about a pending criminal matter, a prompt order was passed asking the Levy and officials concerned to accompany Ghulam Hassan son of Allah Bakhsh and the two appellants were actually arrested and brought before the learned Magistrate. There was no complaint of the husband of appellant No.2 on which action could have been taken and the application shows that although there were no criminal proceedings pending against the two appellants, in the heading of the application it was sought to show that in fact such criminal case was pending. The expedient of mentioning the husband as complainant in the application was also due to the fact that the Criminal Law(Special Provisions)Ordinance, 1968 made the offence of adultery under section 14 thereof cognizable only on complaint made by the husband.

11. A question has arisen whether the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 applies to Lora Lai which is Provincially Administered Tribal Area of Baluchistan as shown in Article 246 of the Constitution. It was further contended that as such the provisions of the aforesaid Ordinance had to be extended by the Provincial Government under Article 247 of the Constitution. In this respect reference was made to Notification

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No.127-H.D.(TA.III)/79-II dated 31st May, 1979 issued by the Government of NWFP making the Ordinance along with 4 other Ordinances applicable to the Provincially Administered Tribal Areas of NWFP. Mr. S.Q. Zahidi, the learned counsel for the State sought adjournment to find out the position and he has stated that in spite of his best efforts he could not contact the Advocate General, Baluchistan for making the enquiry with regard to the matter. The question whether the Offence of Zina(Enforcement of Hudood)Ordinance, 1979 applies to Lora Lai is not important for decision of this appeal as the trial and conviction are by the Additional Sessions Judge, Leiah where undoubtedly the aforesaid Ordinance applies. Under the Ordinance proof of offence of zina could only be by confession of a person accused of offence before a Court of competent jurisdiction/^{or}by evidence of witnesses. It is, therefore, necessary to consider whether the statements made by the appellants can be called confessions for the purpose.

12. In any case before the presumption about the confessions recorded is to be drawn under Section 80 of the Evidence Act, it was for the prosecution to show that the same had been recorded in accordance with the legal provisions. For reasons already given the confessions could not have been recorded in connection with the offence under Section 14 of the Criminal Law(Special Provisions) Ordinance, 1968 (Ordinance II of 1968); as there was no complaint by the husband.

13. Since the trial at Leiah was under the Offence of Zina(Enforcement of Hudood)Ordinance, 1979 by Section 20 whereof the provisions of the Criminal Procedure Code, 1898 are made applicable mutatis mutandis in respect of cases under the Ordinance, it is necessary to consider whether the statements recorded by the A.C. and Magistrate 1st Class, Lora Lai could be considered as evidence.

The power to record statements and confessions has been provided for under Section 164 Cr.P.C., 1898. It is provided that Magistrate of 1st Class may record any statement or confession made to him in the course of investigation under Chapter XIV of the Code but as already stated, it is apparent that no such investigation under the aforesaid Chapter had taken place. Even otherwise under sub-section (2) of section 164 aforesaid, such confessions shall be recorded and signed in the manner provided in Section 364 Cr.P.C. and under sub-section 3 the Magistrate before recording any such confession shall explain to the person making it that he is not bound to make a confession and if he does so it may be used as evidence against him and further the Magistrate is required by questioning the person making it, to satisfy himself that the same was being made voluntarily and further requirements of sub-section 3 aforesaid is that he shall make a memorandum at the foot of the record, in the words which read as under:-

"I have explained to (name) that he is not bound to make a confession and that if he does so, any confession he make shall be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct and it contains a full and true account of the statement made by him.

14. There is nothing on record to show that any of the provisions mentioned above were complied with in recording the so called confessions of the two appellants. Moreover the confessions to be called as such should be directly on the point admitting facts which leave no doubt that the person making the confession, after understanding the matter about offence alleged had admitted commission of the same and should not merely be a statement of facts from which it could be presumed or conjectured to be a confession. Replies to interrogation by the Magistrate can under no circumstances be considered a voluntary confession.

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15. Section 364 Cr.P.C. which is about recording statement of the accused makes it necessary that every question be put to accused and every answer given by him is to be recorded in full and again under sub-section 2 of Section 364 Cr.P.C. the Magistrate or Judge shall certify in his own hand that the examination was taken in his presence and hearing ^{and} contains a full and true account of the statement made by the accused. No such memorandum as required under the aforesaid Section were ever appended to the statements made by the appellants. It is, therefore, not a matter of doubt in the instant case that the so called confessions were recorded without observing any formalities as required by law and therefore the so called confessions could not be admitted in evidence at all. Since the confessional statements were not made in an inquiry or trial and further since there was no investigation at all at the time, the same cannot be treated as made under Section 164 or Section 364 of Cr.P.C.

16. A perusal of the statements made by appellants Ghulam Hassan and Mst. Ghulam Fatima would show the same do not amount to confession about committing zina. The presumption is made by the learned trial Court in the case of Ghulam Hassan stating as under:-

"I am married. The name of my wife is Nazir Ghulam Fatima. I have a son from this wife namely Majeed".

It is rather doubtful whether at all the appellant could have added name was Ghulam Fatima after naming Nazir who according to the evidence on record is his wedded wife being sister of Ghulam Fatima. With regard to the so called confession of appellant No.2 she is stated to have said, on being interrogated, that appellant No.1 was her husband but she had not married him till that time and would marry him. She is further stated to have said that her marriage had not taken place earlier. It is not easily understandable how she could make such contradictory statements unless due

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to fear or due to assertions of Ghulam Hassan son of Allah Bakhsh who was present and who had got the two appellants arrested. The provisions referring to the record of confessions as already stated had been completely overlooked. It is also evident that at the time the statements were made the two appellants had been brought by the Levy and were in their custody. There is admission by the learned A.C. and Magistrate 1st Class, Lora Lai that the accused were arrested after his order, and on the very day Baluchistan Levy produced them before him for statements which were recorded. There is nothing at all to indicate that the requisite information that he was a Magistrate had been given to the appellants. On the contrary in their statements before the Court they both stated that they did not know who was the person before whom they had been produced. The learned Magistrate had also admitted in cross examination that he had recorded the statements as dictated without making any such indication and that he had not given the memorandum as required under Section 164 Cr.P.C. in the statements. He has further admitted that he had recorded statements immediately when accused were produced before him without giving them any time for contemplation.

17. In Ghulam Muhammad-Vs-The State (reported in PLD-1971-Lahore-580) it was inter-alia observed that when warning administered by the Magistrate did not conform to the one prescribed in sub-section 3 of Section 364 Cr.P.C., such failure was enough to vitiate confessions. Reference was also made to Jehangiri Lal and others-Vs-The State(AIR-1934-Lahore-230) wherein it was observed that half an hour's time should be allowed to a prisoner to compose himself and to consider whether he would like to make a confession or not. In Talib Hussain and another-Vs-

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The State (reported in PLD-1958(W.P.)Karachi-383) it was held that time for reflection given to a confessing accused should succeed the warning and not precede it and further that it was necessary to question the accused as to why he was confessing. Similar observations with regard to requisite warning to be given by the Magistrate were made in the State-Vs-Allah Yar (reported in PLD-1959-W.P.Lahore.11).

18. From the above discussion it is quite apparent that the A.C. and Magistrate 1st Class, Lora Lai did not fulfil the essential legal formalities requisite for recording of confessions and therefore, the same are rendered in-admissible.

19. The position under the law of Shariah with regard to cases of zina in which there is no evidence which could be considered as proof but where there is confession of the accused, is that it requires more strict conditions for considering a statement as a confession. In this respect the nature of the confession that is considered sufficient has been stated in Tafhimul Quran by Maulana Maudoodi at page 335, Vol.III while explaining the quranic verse of Surah Noor:-

(20) " شہادت کے سوا دوسری چیز جس سے جرم زنا ثابت ہو سکتا ہے وہ

جرم کا اپنا اقرار ہے۔ یہ اقرار صاف اور صریح الفاظ میں فعل زنا کے ارتکاب کا ہونا چاہیے، یعنی اسے یہ اعتراف کرنا چاہیے کہ اس نے ایک ایسی عورت سے جو اس کے لیے حرام تھی کالمیل فی المکحلہ یہ فعل کیا ہے۔ اور عدالت کو پوری طرح یہ اطمینان کر لینا چاہیے کہ مجرم کسی خارجی دباؤ کے بغیر بطور خود بحالت ہوش و حواس یہ اقرار کر رہا ہے بعض فقہاء کہتے ہیں کہ ایک اقرار کافی نہیں ہے بلکہ مجرم کو چار مرتبہ الگ الگ اقرار کرنا چاہیے (یہ امام ابوحنیفہ، امام احمد، ابن ابی لیلی، اسحاق بن

راہویہ اور حسن بن صالح کا مسلک ہے) اور بعض کہتے ہیں کہ ایک ہی اقرار کافی ہے۔ (امام مالک، امام شافعی، عثمان البتی اور حسن بصری وغیرہ اس کے قائل ہیں) پھر ایسی صورت میں جبکہ کسی دوسرے تائیدی ثبوت کے بغیر صرف مجرم کے اپنے ہی اقرار پر فیصلہ کیا گیا ہو اگر عین سزا دے دوران میں بھی

ہجرت اپنے اقرار سے پھر جائے تو سزا کو روک دینا چاہیے ، خواہ یہ بات صریحاً ہی دیوں نہ ظاہر ہو رہی ہو کہ وہ مار کی تکلیف سے بچنے کے لیے اقرار سے رجوع کر رہا ہے۔ اس پورے قانون کا ماخذ وہ نظائر ہیں جو زنا کے مقدمات کے متعلق احادیث میں پائے جاتے ہیں سب سے بڑا مقدمہ ماعز بن مالک اسلمی کا ہے جسے متعدد صحابہ سے بکثرت راویوں نے نقل کیا ہے اور قریب قریب تمام کتب حدیث میں اس کی روایات موجود ہیں یہ شخص قبیلہ اسلم کا ایک یتیم لڑکا تھا جس نے حضرت ہزال بن عمیر کے ہاں پرورش پائی تھی۔ یہاں وہ ایک آزاد کردہ لونڈی سے زنا کر بیٹھا۔ حضرت ہزال نے کہا کہ جا کر نبی صلی اللہ علیہ وسلم کو اپنے اس گناہ کی خبر دے ، شاید کہ آپ تیرے لیے دعائے مغفرت فرما دیں۔ اس نے جا کر مسجد نبوی میں حضور سے کہا یا رسول اللہ ، مجھے پاک کر دیجئے میں نے زنا کی ہے۔ آپ نے منہ پھیر لیا اور فرمایا ویحک ارجع فاستغفر اللہ وتب الیہ۔ ارے چلا جا اور اللہ سے توبہ و استغفار کر، مگر اس نے پھر سنا منے آکر وہی بات کہی اور آپ نے پھر منہ پھیر لیا۔ اس نے تیسری بار وہی بات کہی اور آپ نے منہ پھیر لیا۔ حضرت ابو بکر رض نے اس کو متنبہ کیا کہ دیکھ اب چوتھی بار اگر تو نے اقرار کیا تو رسول اللہ تجھے رجم کرا دیں گے۔ مگر وہ نہ سنا اور پھر اس نے اپنی بات دہرائی۔ اب حضور اس کی طرف متوجہ ہوئے اور اس سے فرمایا لعلک قبلت او غمزت او نظرت " شاید تو نے بوس و کنار کیا ہوگا یا چھیڑ چھاڑ کی ہوگی ، (اور تو سمجھ بیٹھا ہوگا کہ یہ زنا کا ارتکاب ہے) اس نے کہا نہیں آپ نے پوچھا کیا تو اس سے ہم بستر ہوا ؟ اس نے کہا ہاں۔ پھر پوچھا کیا تو نے اس سے مباشرت کی ؟ اس نے کہا ہاں۔ پھر پوچھا کیا تو نے اس سے مجامعت کی ؟ اس نے کہا ہاں۔ پھر آپ نے وہ لفظ استعمال کیا جو عربی زبان میں صریحاً فعل مباشرت کے لیے بولا جاتا ہے اور فحش سمجھا جاتا ہے ایسا لفظ حضور کی زبان سے نہ پہلے کبھی سنا گیا نہ اس کے بعد کسی نے سنا۔ اگر ایک شخص کی جان کا معاملہ نہ ہوتا تو زبان مبارک سے کبھی ایسا لفظ نہ نکل سکتا تھا۔ مگر اس نے اس کے جواب میں بھی ہاں کہہ دیا۔ آپ نے پوچھا حتی غلب ذلک منکفی ذلک منها (کیا اس حد تک کہ تیری وہ چیز اس کی اس چیز میں غائب ہوگئی ؟) اس نے کہا ہاں۔ پھر پوچھا کما یغیب الميل فی المخلخ والرشاء فی الثبر (کیا اس طرح غائب ہوگئی جیسے سرمہ دانی میں سلائی اور کونین میں رسی ؟) اس نے کہا ہاں۔ پوچھا کیا تو جانتا ہے کہ زنا کسے کہتے ہیں ؟ اس نے کہا جی ہاں میں نے اس کے ساتھ حرام طریقے سے وہ کلم کیا جو سوہر حلال طریقے سے اپنی بیوی کے ساتھ کرتا ہے۔

آپ نے پوچھا کیا تیری شادی ہو چکی ہے؟ اس نے کہا جی ہاں آپ نے پوچھا تو نے شراب تو نہیں پی لی ہے؟ اس نے کہا نہیں۔ ایک شخص نے اٹھ کر اس کا منہ سونگھا اور تصدیق کی۔ پھر آپ نے اس کے محلہ والوں سے دریافت کیا یہ دیوانہ تو نہیں ہے۔ انہوں نے کہا ہم نے اس کی عقل میں کوئی خرابی نہیں دیکھی۔ آپ نے ہزال سے فرمایا لوسترہ بشوبک کان خیرالک ، کاش تم نے اس کا پردہ ڈھانک دیا ہوتا تو تمہارے لیے اچھا تھا۔ پھر آپ نے باعز کو رجم کرنے کا فیصلہ صادر فرمادیا اور اسے شہر کے باہر لے جا کر سنگسار کر دیا گیا جب پتھر پڑنے شروع ہوئے تو باعز بھاگا اور اس نے کہا لوگو مجھے رسول اللہ کے پاس واپس لے چلو ، میرے قبیلے کے لوگوں نے مجھے مروا دیا۔ انہوں نے مجھے دھوکا دیا کہ رسول اللہ مجھے قتل نہیں کرائیں گے ، مگر مارنے والوں نے اسے مار ڈالا بعد میں جب حضور صلیع کو اس کی اطلاع دی گئی تو آپ نے فرمایا تم لوگوں نے اسے چھوڑ کیوں نہیں دیا ، میرے پاس لے آئے ہوتے ، شاید وہ توبہ کرتا اور اللہ اس کی توبہ قبول کر لیتا۔"

20. It is, therefore, apparent that the conditions for accepting confessions as admissible evidence against the persons making it are much more severe and strict according to the Shariah. The two statements recorded by the learned A.C., Lora Lai cannot be considered as confessions to prove the offence of zina. It is also apparent that there is no evidence recorded whatsoever which could be considered to be sufficient for proving the offence under Section 16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 as against the appellant Ghulam Hassan.

21. Before I conclude this judgment I feel it is my duty to observe that in matters of imputing adultery to a woman the enormity of the allegation should be realised and there should be strict proof or knowledge about the accusation before it is made. Presumptions and conjectures must invariably be avoided. The Islamic view about the matter is expressed in Surah Noor (XXIV, Verse 23) which as translated in English by A. Yusuf Ali read as under:-

"Those who slander chaste women,
Indiscreet but believing,
Are cursed in this life
And in the Hereafter:
For them is a grievous penalty,"

hawi

(96)

(7)

22. In view of the reasons given above, the convictions recorded by the Additional Sessions Judge, Leiah cannot be sustained and, therefore, the appeal of the two appellants is allowed and their convictions and sentences set aside and they are acquitted. They are hereby ordered to be released forthwith if they are not required in any other case.

R.S.K. D.S.
Judge-II.

Islamabad, the 29th of June, 1983.
M. Khalil, J.W.

Approved for reporting
R.S.
29/6

J. Amin
29/6/83