IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

(19)

PRESENT

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

HON. MR. JUSTICE SYED MUFTI SHUJAAT ALI QADRI

CRIMINAL APPEAL NO.87/I OF 1983

Mst. Nehmat Bibi	...	Appellant
	Versus	
The State	...	Respondent
For the Appellant	...	Mr. Muhammad Ilyas Siddiqui, Advocate.
For the State	...	Mr. Muhammad Aslam Uns, Advocate.
Date of hearing and decision	...	29th August, 1983.

B.G.N.KAZI, J.

JUDGMENT

Mst. Nehmat Bibi wife of Shamim Akhtar Janjua Rajput who was tried by the Additional Sessions Judge, Rawalpindi on a charge of committing zina, punishable under section 5(2)(a) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, (here-in-after referred to as the Ordinance), was convicted under section 10(2) of the Ordinance and sentenced to 5 years' R.I. and also to whipping numbering 10 stripes and to pay a fine of Rs.1000/- or in default to suffer further R.I. for one year, has filed instant appeal against the aforesaid conviction and sentence. The case of the prosecution briefly stated is as under:-

Muhammad Akhtar, brother of Shamim Akhtar, the husband of the appellant had sent by post an application addressed to SHO Police Station Murree alleging that

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his borther Shamim Akhtar had gone to Iran since about four years and was consequently living separately from his wife and, therefore, since his wife had conceived and was pregnant and was trying to abort the child, she should be prevented from doing so and should be brought to book. On receipt of the application SI Murree handed it over to Muhammad Akram who was then posted as ASI. Muhammad Akram started investigation and sent the application to the Police Station through Foot Constable Muhammad Ashraf for formal registration of the FIR. On 11-4-1982 i.e. ~~the~~ very next day after the application was passed on to him for action he arrested the appellant and got her medically examined by Dr. Ghazala Naqvi, Registrar, Holy Family Hospital, Rawalpindi, who was then posted as WMO in that Hospital. Dr. Ghazala Naqvi on medical examination of the appellant was of the opinion that she was about 24 years old and she was having pregnancy of about five months. It may be observed here that there were no names of witnesses mentioned in the application and, therefore, it is ~~to~~ presumed that the S.I made a roving enquiry in the case. The Police Officer states in his deposition that he got the case registered at the Police Station without making preliminary inquiry although the application had been received by post and did not bear any signature or any thumb impression thereon. He then recorded the statement of Muhammad Akhtar who was supposed to have sent the application 6 or 8 days after the registration of the case and the aforesaid witness Muhammad Akhtar totally denied having submitted the application. He however, continued to investigate the case till 28-5-1982 and the Police Officer in his cross-examination has admitted that during the investigation he had come to know that husband of the accused appellant was in prison in Iran. The Police Officer has not further explained as to which of the witnesses examined by him

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during the investigation had told him that the husband of the appellant was in prison in Iran.

2. At the very outset it is observed that under Section 17 of the Ordinance, unless expressly provided in the Ordinance, the provisions of the Code of Criminal Procedure 1898 apply mutatis mutandis in respect of cases under the Ordinance. The provisions of Section 154 of the Code of Criminal Procedure, 1908 (Act No 5 of 1898), therefore, apply to the case with regard to information in cognizance cases , and therefore, the information whether reduced to writing or given orally to an officer in charge of Police Station, had to be signed by the person giving it and then alone the substance thereof had to be entered in the book required to be kept under that Section. It is therefore, apparent that the investigation was started and action taken without compliance with the mandatory provisions of Section 154 aforesaid.

3. All these observations are being made at this stage as there was no material with the prosecution which could have been considered as sufficient for sending up the accused appellant for trial. It may here be further observed that the only prosecution witnesses on the point of absence of Shamim Akhtar, husband of the appellant are Shama Roshan (PW-4), Said Muhammad (PW-5), Syed Hakam Shah (PW-6) and Muhammad Azad (PW-7). All the four witnesses did not belong to the village Bun, where the appellant resides. Shama Roshan belongs to village Dhal, Said Muhammad is the resident of village Bhamrot, Syed Hakam Shah also is the resident of village Bhamrot and Muhammad Azad belongs to village Bhandi. All these witnesses, as it appears from the evidence given by them, ~~they~~ did not know any dates of coming and going of Shamim Akhtar from village Bun, and there was no documentary proof at all about whether he had actually gone to Iran or had been incarcerated there. The

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learned Additional Sessions Judge in para 15 of his judgment, while discussing the evidence of these witnesses, observed that SI Muhammad Akram had admitted that there was no documentary evidence, which had been dispensed with because he was convinced during the investigation of the fact of the absence abroad of Shamim Akhtar. Needless to say that no other effort was made to secure the passport of Shamim Akhtar or any evidence which could be considered authentic and as already ob-served there is nothing in the testimony of the four witnesses named above who besides are not the residents of village Bun, which could be considered reliable for coming to conclusion that Shamim Akhtar could not have visited village Bun where his wife was staying or co-habited with her. Shamim Akhtar who was examined as witness has definitely stated that he had not gone to Iran but he had gone to Baluchistan for employment and after every 4/5 months he visited his wife in village Bun where she used to reside with her father.

4. The appellant in her statement before the Court denied the allegation about commission of zina and clearly stated that the boy was born to her from co-habitation with her husband. In view of the specific and forth-right assertion by the wife and husband that the child was born because of their co-habitation as husband and wife, there was no reason for the learned Additional Sessions Judge to consider that evidence recorded was sufficient for sustaining conviction of the appellant.

5. The legal provisions with regard to the presumption of legitimacy as given in Section 112 of the Evidence Act, 1872, were totally over -looked under which birth during marriage is considered as conclusive proof of legitimacy and specially since in the instant case there was no definite assertion regarding any specific person with whom the appellant had committed zina and it had not been

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proved that during the time the child was conceived the father could not have cohabitated with the mother.

6. The vary fact that application made to the SHO Murree was annonymous and not signed by PW-2 Muhammad Akhtar should have been sufficient warning to the investigating authority not to proceed with the investigation. It is further observed that the conclusions arrived by the learned Additional Sessions Judge about guilt of the appellant are based on the certain conjectures as to why the husband who had been examined as Court witness, did not go to the Jail, did not make application for bail etc. which to say the least should not have been made specially in view of the explanation made by Shamim Akhtar husband of the appe-llant who clearly stated that he was informed about the arrest of his wife through a letter 8 days after the arrest and that when he actually came back to Bun his wife had already been released on bail.

7. Under the circumstances stated above, the conviction by the learned Additional Sessions Judge of appellant cannot be sustained. The appeal is accordingly accepted and the conviction and sentence of the appellant is set aside and the appellant is acquitted for want of evidence on the charge for the reasons already given. She is on bail and her bail bond shall stand cancelled.

8. Before concluding this judgment we feel it our duty to point out that imputation of zina is considered as a very serious matter as it harms the reputation and hurts the feelings of the person affected as also the honour of the family. Such false imputation is made punishable under the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979. The starting of investigation without authentic and signed allegation of such imputation is therefore,

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not only against the law of Procedure as already stated but amounts of circumvention of the provisions of the aforesaid Ordinance.

JUDGE - II

JUDGE - VI

Islamabad, the
29th August, 1983.
M.Faridun