

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

(15)

PRESENT

Hon:Mr. Justice Muhammad Siddique

Criminal Appeal No.97/I of 1983.

Mst. Zainab Jan	..	Appellant
Versus		
The State	..	Respondent
Counsel for the appellant	..	Mr.Asghar Hussain Sabazwari, Advocate.
Counsel for the State	..	Mian Muhammad Ajmal, Advocate.
Date of hearing	..	9.10.1983.

JUDGMENT:

Muhammad Siddiq, Judge:- Haji Atta Muhammad complainant, on 18.9.1981 lodged the F.I.R Ex.PA with Police Station, Donga Gali alleging therein that his son Nazik Khan was married to Mst. Zainab Jan accused about 4 years earlier but there was no issue out of this wedlock. His said son Nazik Khan was employed in Saudi Arabia and about one year earlier had gone back to that country after spending his leave in Pakistan. One day earlier Mst.Zainab Jan, accused told his mother in law Mst. Shah Jehan (P.W) that the former was pregnant by six months as acquitted co-accused Chan Zeb had committed zina with her twice six months earlier in a jungle. The complainant to further verify this fact, convened a jirga consisting of Khushhal, Ramzan, Painsa Khan and Sultan etc. Mst. Zainab Jan accused is alleged to have confessed her guilt. From the side of acquitted co-accused

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Chan Zeb a jirga of male and female persons came and asked for pardon. S.H.O Muhammad Nazir Khan (PW.4) after recording the FIR proceeded to the spot, prepared the site plan Ex.P.B and got Mst.Zainab Jan accused medically examined. The Police Officer produced the accused Mst.Zainab Jan before the Magistrate where her confessiona~~l~~ statement was recorded. After the completion of the investigation the Police challaned Mst.Zainab Jan accused alongwith Chan Zeb co-accused. They were tried by the Sessions Judge, Abbottabad, who vide impugned judgment dated 18-6-1983 acquitted Chan Zeb ^{Co-}accused but convicted and sentenced Mst.Zainab Jan under Section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (herein-after referred to as the Ordinance) to undergo R.I. for 3 years, plus 10 stripes and a fine of Rs.1000/-, or in default of payment of fine further R.I. for 2 months.

2. Hence this appeal.

3. In support of its case the prosecution produced 9 witnesses. Muhammad Nasim Khan MIC (PW.1) on 19th of September, 1981 recorded her confessiona~~l~~ statement Ex.PW.1/I. Doctor Sardar Saeed (PW.2) medically examined Chan Zeb co-accused and found him capable of performing sexual act. Haji Atta Muhammad complainant appeared as P.W.3. He has deposed that Mst.Zainab Jan accused was married to his son Nazik Khan about 4 years prior to the occurrence and his son had gone to Saudi Arabia about one year prior to this occurrence and Mst.Zainab Jan was living with him. On 18-9-1981 he was informed by his wife Mst.Shah Jehan (PW) that Mst.Zainab Jan had become pregnant on account of zina committed by co-accused Chan Zeb with her. He convened a Jirga consisting of Khushhak, Ramzan, Painsa Khan

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and Suleman besides others. Chan Zeb co-accused was summoned by the jirga where he confessed his guilt and requested that he should be excused. The witness then lodged the report Ex.P.A with the Police. Muhammad Nazir Khan (P.W.4) partly investigated this case. He after recording the F.I.R Ex.P.A went to the spot where he prepared the site plan Ex.P.B. On 19.9.1981 he got Mst.Zainab Jan accused medically examined vide his application Ex.P.W.4/1. He also produced her before a Magistrate vide his application Ex.P.W.4/2 for recording her confessional statement. He also got Chan Zeb co-accused medically examined. He recorded the statements of the witnesses under section 161 Cr.P.C. He then was transferred and the challan was submitted by his successor Muhammad Arif Khan, S.I. Painsa Khan (P.W.5) has stated that the complainant Haji Atta Muhammad had summoned a jirga including Ramzan, Khushhal, Muhammad Suleman and himself in order to find out as to who was responsible for the pregnancy of Mst.Zainab Jan, accused. According to this witness on enquiry Mst.Zainab Jan told them that the conception was from her husband. He was neither declared hostile nor cross-examined by P.P. Muhammad Suleman (P.W.6) was also one of the members of the said jirga which was called by the complainant to decide as to who was responsible for pregnancy of Mst.Zainab Jan, accused. He has deposed that on enquiry and on their investigation it was revealed that Mst.Zainab Jan had conceived from her husband. This witness was also not cross-examined by P.P. Mst. Shah Jehan (P.W.7) is the wife of the complainant Haji Atta Muhammad and mother-in-law of Mst. Zainab Jan, accused. According to her Mst. Zainab Jan, accused was married to her son four years ago. He had left for Saudi Arabia one year prior to the occurrence. She found

Mst.Zainab Jan pregnant in her husband's absence and got suspicious. On her enquiry Mst.Zainab Jan accused charged Chan Zeb for having committed zina with her in a Jungle. Then a Jirga was convened but nothing could be achieved out of it. Sadiq Hussain I.H.C (PW.8) on 19-9-1981 took Mst.Zainab Jan to D.H.Q.Hospital, Abbottabad for medical examination. Later on he accompanied her to the Court of S.D.M, Abbottabad for recording her statement under Section 164 Cr.P.C. Lady doctor Rifat Nasim Qazi (PW.9) on 19-9-1981 at 12.20 P.M examined Mst.Zainab Jan and found that she was pregnant for about 20/22 weeks.

4. In her statement recorded under Section 342 Cr.P.C Mst.Zainab Jan accused denied the prosecution allegations and stated that pregnancy was from her husband. She further stated that she was charged by the PWs on account of suspicion. When asked why she was charged she stated that initially she was added as a witness in the challan and was sent not as an accused to the Court by the Magistrate. co-accused Chan Zeb in his statement also denied the prosecution allegations. When asked why the PWs had deposed against him he stated as under:-

"P.W Haji Atta Muhammad and P.W.Mst. Shah Jehan are husband and wife inter se. P.W.Haji Atta Muhammad was asking for the hand of Mst.Razia (now my wife) for his nephew Muhammad Anwar. On account of these strained relations both of them have falsely deposed against me."

The accused persons, ^{however,} produced no evidence in defence.

5. The trial Court acquitted Chan Zeb co-accused but convicted and sentenced Mst.Zainab Jan as mentioned above.

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6. I have heard at length the learned counsel for the parties and have also gone through the entire material available on the record.

7. The learned state counsel admits that there is no direct evidence of zina available on the record but according to him the conviction of the appellant can be maintained on -

(i) her confessional statement (Ex.P.W.1/1) recorded under section 164 Cr.P.C by Mr. Nasim Khan, MIC (P.W.1) on 19.9.1981;

(ii) Medical evidence showing pregnancy for about four months; and

(iii) conduct of the appellant.

8. As regards the alleged confessional statement Ex.P.W.1/1, it is contended by the learned defence counsel that the said statement contains self-exculpatory matter and therefore cannot be treated as a confession under the Evidence Act. It is an admitted fact that in the said confessional statement Mst.Zainab Jan accused has nowhere stated that she was a willing party to the act of sexual intercourse resulting in her pregnancy — rather she has placed the entire burdon upon co-accused Chan Zeb that he forcibly committed zina with her. She has specifically stated in the following words, that the co-accused Chan Zeb committed zina with her forcibly (زبردستی) :-

” آج سے تقریباً چھ ماہ قبل ایک دن جبکہ میں جنگل میں لکڑیاں کاٹ رہی تھی - کہ مسمیٰ چن زیب ولد عراب خان آیا اس نے مجھے پکڑا اور میرے ساتھ زبردستی دو دفعہ زنا کیا میں شرم کے مارے خاموش رہی نہ تو شور کیا اور نہ اس کے بعد کسی کو اس کا حال بتایا -“



If the Court accepts her alleged confessional statement that she was subjected to zina by force, she will not be liable for an offence under section 10(2) of the Ordinance. In such circumstances, it can be held that a confessional statement of an accused person which contains self exculpatory matter, cannot legally amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. It is not denied that the charge against the appellant is under section 10(2) of the Ordinance and if it is believed that acquitted co-accused Chan Zeb committed zina with the present appellant forcibly resulting in her conception, it would exonerate the appellant of the offence charged. She can be held liable only if it is proved that she was a consenting party to the offence charged resulting in her pregnancy. The result is that the alleged confessional statement Ex.P.W.1/1 being exculpatory in nature, cannot amount to confession and cannot be used against the appellant for the purpose that she willingly committed sexual intercourse with acquitted co-accused Chan Zeb resulting in her pregnancy. This piece of evidence is, therefore inadmissible in evidence and has to be kept out of consideration for this limited purpose. Reliance in this behalf can safely be placed upon AIR 1939 P.C 47 (Narayana Swami vs. Emperor). Moreover it is well settled that a confessional statement of an accused person is to be accepted or rejected in toto. The prosecution cannot rely upon one portion of such statement and ignore the other. It is not denied even by the learned state counsel that if the

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said confessional statement is accepted in its entirety, it will not establish the charge under section 10(2) of the Ordinance against the appellant.

9. As regards the medical evidence showing four months pregnancy, it is no doubt a strong incriminating circumstance which goes against the defence but as mentioned above the basic question for determination is whether such pregnancy was the result of zina-bil-jabr or the appellant was a consenting party to such sexual intercourse which resulted in her conception. It is not denied that pregnancy can be the result of:-

- (a) sexual intercourse with consent of the female;
- (b) sexual intercourse against her will;
- (c) sexual intercourse committed after making her unconscious through some intoxicant or otherwise;
- (d) sexual intercourse committed during her sleep; and
- (e) insemination i.e., introduction of semen into the vagina or cervix by artificial means without any sexual intercourse by a male, can also cause pregnancy.

10. It is contended by the learned state counsel that the conviction of the appellant can be maintained on the basis of medical evidence alone as the lady doctor Rifat Nasim Qazi (P.W.9) who medically examined the appellant on 19.9.1981, found the appellant pregnant (about 20/22 weeks) and at that time her husband Nazik Khan had no access to her being out of the country (Saudi Arabia). According to the state counsel mere illegitimate pregnancy of an un-married girl of a married woman like the appellant whose husband had no access to her during the required period, is sufficient to presume that such a woman had illicit intercourse

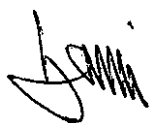
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with some one without being legally married to him and therefore liable to conviction under section 10(2) of the Ordinance. Thus the question which arises for consideration is whether the mere pregnancy of an un-married girl or a married woman whose husband had no physical contact with her during the required period, is sufficient to hold that such a woman had illicit intercourse with some man with her free consent and therefore guilty under sub-section (2) of section 10 of the Ordinance. No doubt pregnancy in such circumstances is considered highly objectionable in our society which goes against the defence and it can be presumed that she had illicit intercourse with some one. Such intercourse however can be committed with her consent or against her will. It is only when she is a consenting party that she can be held guilty under sub-section (2) of section 10 of the Ordinance and if somebody has forcibly committed sexual intercourse against her will resulting in pregnancy then she will not be held guilty under said sub-section (2) of section 10 of the Ordinance. Same will be the result if the pregnancy is caused under clauses (c) to (e) referred to above in paragraph 9. Thus mere illegitimate pregnancy alone will not automatically further prove that it was an a result of zina with the consent of the female accused. In such circumstances the prosecution in addition to pregnancy is further to prove that the pregnancy was the result of sexual intercourse committed with her consent. When both these ingredients are established then the prosecution can succeed in securing the conviction of the female accused under section 10(2) of the Ordinance. In the instant case the first ingredient i.e., the pregnancy of the appellant can be presumed in favour of the prosecution but the second ingredient namely

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that such pregnancy took place as a result of sexual intercourse committed with the consent of the appellant is a pure question of fact which has to be established by producing evidence - direct or circumstantial. As mentioned above the prosecution produced no direct evidence to show that the appellant became pregnant as a result of sexual intercourse committed with her consent by acquitted co-accused - rather the reliance of the prosecution upon her confessional statement Ex.P.W.1/1 shows to the contrary that the appellant was forcibly subjected to zina by Chan Zeb acquitted co-accused. Even Mst. Shah Jahan (P.W.7) has stated that on her enquiry Mst. Zainab Jan, accused charged acquitted co-accused Chan Zeb for having committed zina with her in a jungal. This also indicates, especially the use of the word 'zina' that the appellant was subjected to zina by acquitted co-accused against her will. The circumstantial evidence which is separately discussed below is also not free from doubt. Reliance in this behalf can also be placed upon the following commentary from Tafheemul Quran, Vol.3, page 33 by Abul Aala Moududi:-

" (18) اس امر میں اختلاف ہے کہ آیا محض حمل کا پایا جانا جبکہ عورت کا کوئی شوہر، یا لونڈی کا کوئی آقا معلوم و معروف نہ ہو ثبوت زنا کیلئے کافی شہادت بالقریٰ نہ ہے یا نہیں۔ حضرت عمر رض کی رائے یہ ہے کہ یہ کافی شہادت ہے اور اسی کو مالکیہ نے اختیار کیا ہے مگر جمہور فقہاء کا مسلک یہ ہے کہ محض حمل اتنا مضبوط قریٰ نہ ہے کہ اس کی بنیاد پر کسی کورجم کر دیا جائے یا کسی کی پیٹھ پر سو کوڑے برسادیئے جائیں۔ اتنی بڑی سزا کیلئے ناگزیر ہے کہ یا تو شہادت موجود ہو، یا پھر اقرار۔ اسلامی قانون کے بنیادی اصولوں میں سے ایک یہ ہے کہ شبہ سزا دینے کیلئے نہیں بلکہ معاف کرنے کیلئے محرک ہونا چاہیئے نبی صلی




اللہ علیہ وسلم کا ارشاد ہے کہ ادفعوا الحدود ما وجدتم لها مدفعا ، " سزاؤں کو دفع کرو جہاں تک بھی ان کو دفع کرنے کی گنجائش پاؤ " (ابن ماجہ) - ایک دوسری حدیث میں ہے ادروا الحدود عن المسلمین ما استطعتم فان كان له مخرج فخلوا سبيله فان الامام ان يخطئ في العفو خير من ان يخطئ في العقوبة " مسلمانوں سے سزاؤں کو دور رکھو جہاں تک بھی ممکن ہو۔ اگر کسی ملزم کیلئے سزا سے بچنے کا کوئی راستہ نکلتا ہے تو اسے چھوڑ دو۔ کیونکہ حاکم کا عاف کر دینے میں غلطی کر جانا اس سے بہتر ہے کہ وہ سزا دینے میں غلطی کر جائے " (ترمذی) اس قاعدے کے لحاظ سے حمل کی موجودگی ، چاہے شبہ کیلئے کئی ہی قوی بنیاد ہو زنا کا یقینی ثبوت بہر حال نہیں ہے ، اس لیے کہ لاکھوں میں ایک درجے کی حد تک اس امر کا بھی امکان ہے کہ مباشرت کیلئے بغیر کسی عورت کے رحم میں کسی مرد کے نطفے کا کوئی جز پہنچ جائے اور وہ حاملہ ہو جائے۔ اتنے خفیف شبہ کا امکان بھی اس کیلئے کافی ہونا چاہیئے کہ ملزمہ کو زنا کی ہولناک سزا سے عاف رکھا جائے۔ "

The following passage from Kitabul Fiha Vol.5, page 166

by Abdul Rehman Al-Jajiri is also relevant for determining this issue:-

" حنفیہ کہتے ہیں کہ اگر کسی آزاد عورت کو جس کا خاوند نہ ہو یا کوئی لونڈی ہو جس کا نہ کوئی خاوند ہو اور نہ اس کا آقا ہو حمل ہو جائے تو اس کی بابت اس پر بوجھا جائے اگر وہ عورت کہے کہ مجھے بدکاری پر مجبور کیا گیا یا (کسی اور کے) شبہ میں میرے ساتھ مباشرت ہوگئی تو اس کا یہ عذر مان لیا جائے گا اور اس پر حد ، نافذ نہ ہوگی۔ کیونکہ یہ صورت حال بھی ایسی ہی ہے جیسے کوئی اقرار زنا کرنے کے بعد یہ بیان دے کہ یہ فعل جبراً اس کے ساتھ کیا گیا ، اس کی بابت حنفیہ کی دلیل و نسمات شراہ والی حدیث ہے کہ (اس کے اقرار زنا پر) حضرت علی کرم اللہ وجہہ نے اس سے کہا کہ " ممکن ہے تیرے ساتھ جبر کیا گیا ہو لیکن عورت نے کہا کہ نہیں (مجھ پر جبر نہیں کیا گیا) پھر فرمایا کہ " شاید تیرے سوتے میں کسی نے آکر تیرے ساتھ یہ زیادتی کی ہو یہ تنقیح اس لیے ہے کہ شریعت اسلامیہ میں سزاؤں کی تشہیر



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کو ناپسند کیا گیا ہے۔

روایت ہے کہ حضرت عمر رض سے کسی نے بیان کیا کہ ایک عورت نے بیان کیا کہ اسے بڑی غفلت کی نیند آتی ہے (اسی حالت میں ایک شخص نے اس کے ساتھ زبردستی بے جا حرکت کی اور اس کے بعد اسے چھوڑ کر چلا گیا وہ یہ بھی نہیں جانتی کہ وہ شخص کون تھا۔ حضرت عمر رضی اللہ عنہ نے اس پر حد نافذ نہیں فرمائی۔ اور اس بیان کو اس کے ارتکاب جرم میں شبہہ قرار دیکر اس کا عذر قبول کر لیا۔

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شافعیہ کہتے ہیں کہ (ناجائز حمل کے بارے میں) ان کے دو اقوال ہیں اور دونوں میں سے زیادہ قوی یہ ہے کہ زنا بالجبر کی صورت میں عورت پر " نافعہ نہ ہوگی اگرچہ وہ اپنی مجبوری کے ثبوت میں ایسے واقعات نہ بیان کر سکے جو اس کے دعوے کی تصدیق کرتے ہوں اور نہ اس شخص کی بیوی ہونے کے ثبوت میں گواہ لاسکیں کیونکہ نفاذ حد گواہوں کی گواہی یا اقرار جرم کے بغیر نہیں ہو سکتا اور اس صورت میں ان دونوں میں سے کوئی بات موجود نہیں ہے (یعنی نہ جرم کے گواہ ہیں اور نہ عورت کا اقرار ہے لہذا ارتکاب جرم میں شبہہ ہے) اور شبہات پیش آنے پر سزا ساقط ہو جاتی ہے غرض محض حمل ہو جانے سے نفاذ حد واجب نہ رہے گی۔ اس کیلئے اقرار جرم یا گواہی زنا ضروری ہے۔"

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11. Thus in the circumstances the mere pregnancy of the appellant would not be sufficient to convict her under sub-section (2) of section 10 of the Ordinance unless it is further established that such pregnancy was the result of sexual intercourse committed with her consent by the acquitted co-accused.

12. The third piece of evidence relied upon by the prosecution is the conduct of the appellant. According to the learned State counsel she did not raise any hue and cry at the time of the commission of the offence and then she kept mum unless her pregnancy became visible and could not be concealed. Her explanation in the alleged confessional statement Ex.P.W.1/1 is that due to shame she did not disclose this fact to anyone. According to the material brought on the record Mst.Zainabi Jan, appellant was subjected to zina only once but sexual inter-course was committed twice at that time. It is however not denied that it is possible that even one forcible intercourse could cause the pregnancy of the appellant. If the appellant had been carrying on with the co-accused for a considerable aperiod during which she had numerous sexual intercourses at different occasions then her consent in such a situation, could be presumed. The Muslim Law allows the benefit of doubt to a woman who alleges that she has been subjected to forcible intercourse where there are no circumstances or evidence that she was speaking a lie. The explanation offered by her in our society can be true. In any case such circumstantial evidence alone cannot be made basis of conviction under section 10(2) of the Ordinance. Moreover these pieces of circumstantial evidence regarding her conduct were not put to her in her statement

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recorded under section 342 Cr.P.C and therefore the prosecution cannot use the same against her. On this short ground alone these pieces of circumstantial evidence cannot be relied upon by the prosecution against the appellant and will have to be kept out of consideration.

13. Another circumstance which goes against the prosecution is that initially Mst. Zainab Jan, appellant was included in the calander of prosecution witnesses at serial No.16 in the challan form but it was subsequently that her name from the list of P.Ws. was struck off and instead included under column No.3 as an accused person. The learned state counsel has not been able to explain the conduct of the investigating agency why first her name was shown as prosecution witness and then treated as an accused person. It is suggested by the defence counsel that this circumstance also shows that Mst.Zainab Jan, appellant was subjected to zina by force by the acquitted co-accused and that is why the prosecution initially wanted to produce her as a prosecution witness against co-accused Chan Zeb. In any case this circumstance creates an element of doubt in the prosecution case.

14. As mentioned earlier Painda Khan (P.W.5) and Muhammad Suleman (P.W.6) who according to the prosecution version, were members of the Jirga have also not supported the prosecution and have deposed that Mst. Zainab Jan had conceived from her husband. It is surprising that although these two witnesses did not support the prosecution yet they were neither declared hostile nor permission sought by the PP to cross examine them. These witnesses have also created doubt in the prosecution case.

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15. After taking into consideration the relevant facts and circumstances of the case in the light of the principles of Sharia quoted above, I have reached the conclusion that the version of Mst. Zainab Jan appellant that zina was committed with her by force by co-accused Chan Zeb may be true. In any case the prosecution has failed to establish beyond reasonable doubt that the appellant was a consenting party to the sexual intercourse resulting in her pregnancy. In such a situation mere pregnancy in the absence of her husband is not sufficient to convict her under subsection (2) of section 40 of the Ordinance. It is well-settled principle of Islamic jurisprudence that whenever there is any element of doubt, the benefit of it must go to the accused. Accordingly, giving benefit of doubt to the appellant I accept this appeal set aside the conviction and sentences awarded to her by the trial Court and acquit her of the charge. She is already on bail and her bail bond stands discharged.

16. It may be mentioned here that this court has already taken a similar view in criminal appeal NO.121/1 of 1981 AND Criminal Appeal No.51/I of 1983.

Approved for reporting
 M. Siddiq

M. Siddiq
 Judge - III

Announced by Hon. J. VI
 Dated Islamabad the 18th of Nov. 1983

Dated: 1st November 1983
 Islamabad.

Judge - VI

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 22/12/83