

**Mst. Safia Bibi  
VS  
The State**

**PLD 1985 FSC 120**

This is an unfortunate case which received considerable publicity in the national and International Press. In view of the circumstances and facts which were apparent from the reporting it was considered reasonable to issue a notice to the State in exercise of the Revisional Jurisdiction of this Court to show cause why the judgment be not set aside. Thereafter Criminal Appeal No, 123/1 of 1983 was filed on behalf of Mst. Safia Bibi, through Mr. Muhammad Akram Sheikh, who out of sympathy offered to act gratis as her counsel, a gesture, which ought to be appreciated. The matter evoked such emotional compassion and pity that one counsel from Karachi, namely Mr. Hasan Rizvi, and another from Lahore namely Miss Hina Jilani have come to appear as amicus curiae.

2. Mst. Safia Bibi, aged 20 years, who suffered from acute myopia, and is now said to be blind, was convicted by Ch. Muhammad Aslam, Additional Sessions Judge II, Sahiwal, on the 24th of July, 1983, under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to 3 years' rigorous imprisonment, whipping numbering 15 stripes and a fine of Rs, 1,000, in default of payment of which she was directed to undergo further rigorous imprisonment for a period of 6 months. Her co-accused Maqsood Ahmad, was however, acquitted for want of evidence.

3. On the 15th of July, 1982, Dilawar Khan father of the appelland, gave a first information report in Police Station Chak Bedi, complaining that his daughter Mst. Safia Bibi who worked in the house of Maqsood Ahmad was subjected by him to Zina-bil-Jabr (rape) as a result of which she gave birth to a child.

4. The Police arrested Maqsood Ahmad and got him medically examined by Doctor Sajid Latif, who was of the opinion that there was nothing to show that he was not able to perform sexual intercourse. Mst. Safia Bibi, appelland was also got medically examined from Lady Doctor Zubaida Khatoon, P. W. 2, on the 19th of July, 1982. She found that the appelland had given birth to a child about 15 or 20 days before her examination. Thereafter the Police arrested her also and challaned both the accused persons.

5. The prosecution examined on facts Dilawar Khan, complainant, P. W. 3, Abdul Wahid, P. W. 4, Siraj, P. W. 5 and Muhammad Ibrahim, P. W.

6. Ghulam Farid, S. I. Appeared as Investigating Officer.

6. Dilawar Khan reiterated his statement which had been made in the first information report and also stated that after the commission of Zina-bil-Jabr by Maqsood Ahmad about which information had been given by Mst. Safia Bibi to her mother, she refused to go to his house. However, she agreed when subsequently Mst. Rashida Bibi, wife of Muhammad Ali (mother of Maqsood Ahmad) came to his house and took her away in the absence of her parents.

7. The other three witnesses (P. Ws. 4, 5 and 6) did not support the prosecution case and were declared hostile.

8. Mst. Safia Bibi, in her own statement under section 342, Cr. P. C. Stated that she was taken by the grandmother of Maqsood Ahmad to her house for domestic work and there Maqsood Ahmad committed Zina-bil-Jabr with her. After about 10 days, Mst. Rashida Bibi, mother of Maqsood Ahmad again took her to her house for some domestic work and at that time Muhammad Ali, father of Maqsood Ahmad, committed the same offence with her. She conceived from this Zina and gave birth to an illegitimate child, who died in the D. H. Q., Hospital, Sahiwal.

9. She produced three defence witnesses namely, Muhammad Din, D. W. 1, Dulla D. W. 2, and Dina, D. W. 3, but their evidence is not at all helpful since they did not throw any light on the occurrence.

10. It is clear from this evidence that no offence was proved against Maqsood Ahmad as the bare statement of his co-accused was not sufficient for his conviction. Moreover, the statement was clearly self-exculpatory in nature and did not fall under the provisions of section 30 of the Evidence Act.

11. There is also no evidence against Mst. Safia Bibi. It is unfortunate that though a victim of Zina-bil-Jabr, the natural phenomena of her pregnancy and motherhood betrayed her and she had to suffer the humiliation of a trial, conviction and sentence in addition to the disgrace and dishonour suffered by her at the hands of her fellow human beings in the society.

12. The trial Court took her pregnancy as evidence of culpability. He held that her statement was self-exculpatory and could not be called a confession. Despite this, he entered the realm of conjecture, and convicted her simply on the ground that there was no evidence that she had ever complained about the commission of the offence by Maqsood Ahmad, and had kept quiet for almost 10 months.

13. This is a clear departure from the well-known principles of criminal law that it is the duty of the prosecution to establish by evidence the offence of an accused person beyond any shadow of doubt. It is settled law that a confession should be read as a whole and the self-exculpatory portions therein cannot be excluded from consideration unless there be evidence on record to prove those portions to be incorrect. The learned Additional Sessions Judge could not hold Mst. Safia Bibi guilty of Zina by consent under section 10(2) of the Ordinance, in the absence of any evidence to establish that she and Maqsood Ahmad had any sentimental attachment for and were on intimate terms with one another. No such evidence is forthcoming on the record.

14. I may, however, take note of some comments that it was strange that the person who had committed the offence of Zina was acquitted, but the girl was convicted. I do not think

that this comment is at all reasonable. There may be cases in which only the girl, who has given birth to a child may be convicted and the co-accused who is blamed for committing Zina with her, be acquitted. If there is no evidence of eye-witnesses and the only evidence is for example, a confessional statement made by the girl involving the male accused, then in the absence of any other evidence against the male accused, he cannot be convicted but the girl can be convicted on her confession.

15. Section 30, Evidence Act allows the Court to take into consideration a confession of one accused made in the Court in a joint trial of more persons than one, against a co-accused. But it is settled law that conviction of the co-accused cannot be based on such confession unless it is corroborated by independent evidence. State v. Zulfiqar Ali Bhutto (1). This may be one category of cases in which the girl may be convicted while the male may be acquitted.

16. Another category may be, in which a self-exculpatory statement is made by the girl, as in this case, putting the entire blame for committing rape with her on the male accused. If there is evidence on the record showing that both of them had been seen in amorous position off and on, and that their relationship was of close and intimate lovers negating the possibility of rape, it may be sufficient to hold that the statement of the girl to the extent of self-exculpation, is not correct. In such a case she may be convicted. But her statement would not be evidence against her paramour under section 30 and in the absence of any other evidence, he may be acquitted.

17. In the present case, it is clear that except for the self-exculpatory statement of the girl and the statement of her father, who also maintained that she had been subjected to Zina-bil-Jabr, there is no other evidence. The learned Additional Sessions Judge has obviously ignored, for technical reasons that portion of the evidence of Dilawar Khan, complainant, P. W. 3, in which he stated that Mst. Safia Bibi soon after the first occurrence, had informed her mother of the commission of Zina-bil-Jabr with her by Maqsood Ahmad, and also that thereafter she refused to visit

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the house of Maqsood Ahmad for many a day till Mst. Rashida Bibi came to fetch her. This is sufficient evidence to confirm her statement under section 342, Cr. P. C.

18. Even under Shariah if a girl makes such a statement as made in the present case, she cannot be convicted of Zina. The principle of Fiqh is that she will be asked about the cause of pregnancy, if she says that she was forced to commit adultery or someone had committed sexual intercourse with her under suspicion about her identity, her statement will be accepted and she will not be convicted. This is based on the tradition of Hazrat Ali that when Shuraha came to him and said, "I have committed adultery", Hazrat Ali said to her, "You might have been forced or someone might have committed sexual intercourse with you while you were sleeping". (Kitabul Fiqh al-Mazahibil Arabaa (Urdu translation), Vol. V, pp. 166, 167.

19. If an unmarried woman delivering a child pleads that the birth was the result of commission of the offence of rape on her, she cannot be punished. This is the view of the Hanafis and the Shafis. But Imam Malik said she shall be subjected to Hadd punishment unless she manifested the want of consent on her part by raising alarm or by complaining

against it later. (Ela ul Sunnan, Vol. XI, p. 666, Bidayat ul Mujtahid, Vol. II, p. 329, Fathul Qadeer, Vol. V, p. 52, Al Mughni by Ibri:e-Qudama, Vol. VIII, p. 186, Badaius Sanai by Kashani, Vol. VII, page 62, Mabahis fil Tashri ii Janaiyyil Islami by Dr. Muhammad Farooq Nabhan, pp. 225, 226. Altashri-ilJanaiyyal Islami by Abdul Qadir Auda, Vol. II, p.364, Al-Tashriul Janaiyyul Islami, Vol. II, pp. 434, 435, Tabyinul Haqaiq by Zailai, Vol. III, p. 184). Ibne Qudama said that it is generally held that there is no Hadd on one who is raped. This view was held by Omar, Alzahri, Qatada, Shafei and the people of opinion (inter alia Hanafis). He did not know of any contrary view. This (view) is based upon the Hadith from the Holy Prophet who said 1Y (31f, )1-9 1")1 t-s" Lii` ("my people are excused for mistakes, forgetfulness and for anything done under compulsion"). It is reported from Abdul Jabbar on the authority of his father that a woman was raped and the Prophet (S.

A. W.) acquitted her of the charge punishable with Hadd (Al Mughni, Vol. VIII, p. 186).

20. There is little difference between the view of Imam Malik and others on the point of law that rape with a woman absolves her of criminal liability. The only difference is on the point of the evidentiary value of the self-exculpatory statement. Imam Malik places the burden of proving the self-exculpatory evidence on the woman, and this burden can be discharged by her by proving that she raised alarm or complained against it. She can discharge her burden by production of circumstantial evidence.

21. The others, however, consider her statement including the self-exculpatory portion thereof as sufficient for absolving her of the charge.

22. These views, however, do not deal with a matter in which there is evidence negating the possibility of rape. In that case the woman obviously cannot be let off on the basis of her self-exculpatory statement.

23. The question whether the confession of one accused is sufficient for conviction of the co-accused is determinable on the basis of the traditions of the Holy Prophet,

24. Abu Daud reported on the authority of Saad ul Saaidi that a man came to the Prophet (S. A. W.) and confessed that he had committed adultery with such woman. He named the woman. The Prophet (S. A. W.) sent for the woman and enquired from her about it. She denied the allegation. The Prophet (S. A. W.) punished the male but acquitted the female (Al Mughni by Ibn-e-Qudama, Vol. VIII, p. 193).

25. Another tradition is of Aseef. A rustic came with another person to the Prophet (S. A. W.) and said that his son had committed adultery with the wife of the person accompanying him. It is unnecessary to reproduce the full tradition. But it is important to note that the Prophet (S. A. W.) announced the sentence for the male culprit and ordered Onaid to go to the woman and punish her if she confessed. (Muslim, English Translation, Vol. IV, pp. 917, 918. Obviously the punishment of the woman was dependent on her confession.

26. There are other cases also in which a female and at another time a male confessed the offence of adultery but the other person was not punished.

27. The view of Imam Abu Hanifa was that in a case where one party confesses and the other party denies the charge, both of them should be acquitted since the confession of one is disproved by the denial, of the other. According to one version Abu Yousaf was also of the same view. Muhammad Al Shaibani held that the person confessing should be

punished. According to another version Abu Yousaf agreed with Muhammad. However, others did not agree with the view of Imam Abu Hanifa including Imam Shafei because the person confessing is to be punished on the basis of his own confession. The person denying is let off on account of absence of proof of his/her own confession. He/she is not absolved because of mere denial by the other. The confession is conclusive evidence against the confessor only and the denial of the other cannot throw any doubt on the confession of the confessor. Al Tashriil Janai ul Islami by Abdul Qadir Audah, Vol. II, pp.434, 435. See also Al Mughni, Vol. VIII, p. 193, Badai-us-Sanai, Vol. Vii, pp. 61, 62 and Mabahis flu Tashriil Islami by Dr. Muhammad Farooq Nabhan, p.

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28. It has also been related from Hazrat Umar that once a woman came to him and said that a man committed sexual intercourse with her while she was sleeping. He then ran away and she could not identify him. Hazrat Umar accepted her excuse and acquitted her. (Ela-usSunnan by Maulana Zafar Ahmad Usmani, Vol. XI, pp. 666-667).

29. It would be clear that even in Shariah the confession of one accused against the co- accused is not sufficient or the conviction of the fi latter. Views differ only on the point whether only the person denying should be acquitted or the person confessing should also be absolved of the charge. There is no difference on the main:point between Fiqh, the Common Law of England or the Law in Pakistan, that the appellant also / cannot be convicted on the evidence on record.

30. Even if the view of Imam Malik be treated to be preferable the appellant cannot be punished since there is evidence of litir complaining to her mother. However, the opinion of other Jurists on the point of burden of proof is preferable, and is in conformity with the modern law.

31. This being a case of no evidence, the appeal is accepted and the appellant is acquitted. Her bail bond is discharged. The notice for exercise of revisional jurisdiction has been rendered infructuous by the filing of appeal and is discharge