Shakeel & Others

VS

State

PLJ 2011 SC 1

JUDGMENT

Javed Iqbal, J. This appeal with leave of the Court is directed against judgment dated 13.05.2002 passed by the learned Division Bench of Lahore High Court, Lahore whereby the criminal appeal preferred on behalf of appellants has been dismissed and the judgment dated 8.12.2000 passed by learned Judge Special Court, Sargodha constituted under the Anti-Terrorism Act, 1997 whereby Israr Ahmed, Shakeel, Arshad and Ali Asghar, appellants were convicted under Section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (herein after referred to as the said Ordinance) 'and sentenced to imprisonment for life and to pay. Rs,20,000/- each as fine and in default to suffer further SI for two years each with benefit of Section 382-B Cr.P.C. whereas Shakeel, Arshad, Muhammad Ramzan, Ali Asghar and Javed, appellants were also sentenced to death under Section 10(4) of the said Ordinance, has been kept intact. However; on appeal, learned High Court acquitted Tariq Mehmood (co-accused) by giving him the benefit of doubt.

2. Leave to appeal was granted by this Court vide order dated 12.11.2002 which is reproduced herein below to appreciate the legal and factual aspects of the controversy: "This petition has been filed for leave to appeal against the judgment dated 13th May 2002 passed by Lahore High Court, in Criminal Appeals No, 1986, 1988-1989 and Murder Reference No, 4-T/2002.

3. Precisely stating the facts of the case are that PW-Mst. Asia Bibi daughter of Muhammad Khan lodged FIR at Police Station Put-11, District Sargodha on 18th February 2000 at 2.30 pm. In respect of an incident allegedly took place, falling with the mischief of Sections 10(4) and 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 on 15th February 2000. It was mentioned in the FIR that she went to Adda Chak No, 46 alongwith another lady Nasim Akhtar where Shakeel Ahmad who was known to her earlier to incident alongwith other co-accused boarded her in his car on the pretext that she will be taken to her village. But they took her to `Baithak' of petitioner Muhammad Ramzan where accused Shakeel, Arshad, Muhammad Ramzan, Javed, Ali Asghar and Israr Ahmed committed Zina-bil-Jabr against her consent. As far as accused Tariq Mehmood, who has been acquitted by the High Court, is concerned, it was said that he injected her and provided tea to her in which some intoxicant was mixed, in order to make her unconscious. After registration of the case, investigation of

the case commenced, during course whereof all the accused named hereinabove were arrested. Police recovered a camera film on the pointation of complainant Mst. Asia Bibi on 6th April 2000 from the Courtyard of Muhammad Ramzan. Similarly, prior to it on 6th March 2000, a video cassette (Exb. P-13 & P-14) were also recovered. The accused persons were challaned in the Court of law to face trial charged against them in FIR. On completion of charge learned trial Court found them guilty for the commission of offence, awarded following sentences:

{{TABLE}}

(i)	Shakeel, Arshad, Ali Asghar, Israr Ahmad	u/S. 11 of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 sentenced to imprisonment for life each with fine of Rs,20,000/- each, or in default whereof to further undergo two years R.I. each.
(ii)	Shakeel, Arshad, Javed, Muhammad and Ramzan and Ali Asghar	u/S. 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 sentenced to death.
(iii)	Tariq Mehmood	Life imprisonment u/S. 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and 7 years R.I. u/S. 337-J, PPC.

{{TABLE}}

4. On appeal, learned High Court acquitted Tariq Mehmood. However, sentenced awarded to rest of the accused were maintained.

5. Learned counsel for the petitioners contended that prosecution's case is based upon the statement of complainant Mst. Asia Bibi, photographs (Ex.P-1 to P-12), video cassette (Exb.P-13 & P-14) as well as statement of PW-Ansar Ali and Asif Ali (not produced). As far as her own statement is concerned, it suffers from material contradiction, improbabilities and untrustworthy. No independent evidence has been produced to corroborate her version because as far as the photographs (Exb.P-1, P-6 and P-10 to P-12) are concerned they indicate presence of one of the petitioner Shakeel with the prosecutrix. But the scene shown therein is also not sufficient to prove the

offence of Zina-bil-Jabr according to law. As far as video cassette is concerned, so far other petitioners are concerned they have not been shown in the photographs engaged in any indecent act except that they are sitting separately without the company of the prosecutrix. The complainant lodged report after three days from the happening of alleged incident for which no explanation has been offered. Inasmuch as Mst. Nasim Akhtar with whom she had gone to Adda Chak No, 46 was not produced to substantiate that she was picked up by Shakeel and others with the pretext to take her to her village. As far as PW-Ansar Ali is concerned his statement is also not trustworthy, firstly for the reason that he is cousin of the prosecutrix and secondly he is resident of Sialkot and he has failed to explain his presence in the village where the incident took place, therefore, he had no occasion to witness that after the commission of offence prosecutrix was being taken by Shakeel and others in their vehicle. Learned counsel also contended that ocular testimony and medical evidence furnished by the Doctor suffers from contradiction. 6. Notice was issued to State on the last date of hearing through Advocate General but no one has appeared. After hearing learned counsel for the petitioners and having gone through the material available on record in the file of the trial Court, we are of the opinion that for safe administration of criminal justice, reappraisal of total evidence available on record is called for, therefore, leave to appeal is granted."

3. Mr. Munir Ahmad Bhatti, learned ASC entered appearance on behalf of appellants and contended vehemently that the prosecution has failed miserably to establish the guilt to the hilt as no reliable evidence could be produced. It is next contended that the evidence which has come on record has not been appreciated in its true perspective by the learned Special Court and learned Division Bench which resulted in serious miscarriage of justice. In order to substantiate the said version it is argued firmly that on the basis of vague, sketchy and contradictory evidence furnished by Mst. Asia Bibi (P.W.1/prosecutrix), no sentence could have been awarded and various glaring contradictions, dishonest omissions and exaggerations apparently floating on the statement of Mst. Asia Bibi (P.W.1/prosecutrix) have been ignored without any rhyme and reason causing serious prejudice, against the appellants. It is urged that the statement of Mst. Asia Bibi (P.W. 1/prosecutrix) has not been believed by the learned Division Bench regarding Tariq Mehmood (co-accused) who was acquitted and by no stretch of imagination conviction and sentence could have been awarded to the appellants on the solitary evidence of Mst. Asia Bibi (PW-1 prosecutrix). It is contended that the appellants have been sentenced to death under Section 10(4) of the said Ordinance without having any genetic test and on this score alone the judgment impugned is liable to be set aside. It is argued strenuously that five appellants have been awarded death which should not have been confirmed merely on the statement of Mst. Asia Bibi (P.W. 1/prosecutrix) being a woman of easy virtue as is indicative from the medical reports and besides that no injury whatsoever was found on her body which is not believable as allegedly she was subjected to zina-bil-jabr by five persons. It is also pointed out that FIR was got lodged with delay of about three days which speaks a volumes about concoction and deliberation which aspect of the matter has been ignored

by the learned High Court. The delay of 72 hours cannot be without any reason which is obvious but it went unnoticed. It is contended that FIR was got lodged by Mst. Asia Bibi (P.W. 1/prosecutrix) herself meaning thereby that her version was not supported by any member of her family. In the same wake of events it is argued that Mst. Asia Bibi (P.W. 1/prosecutrix) had mentioned the name of one Mst. Naseem Akhtar who was alongwith her but she could not be produced hence the story as concocted by Mst. Asia Bibi (P.W. 1/prosecutrix) could not be substantiated and being illogical and unreliable it should have been discarded. It is also pointed out that video film and photographs cannot be taken into consideration as the same were not got exhibited and proved in accordance with law and besides that the copy of video film was never handed 108 over to the appellants. It is contended that keeping in view the over-all scenario and backdrop of the case the sentence of death should be set aside on the basis of extenuating and mitigating circumstances and specially the fact that Shakeel (appellant) was also having sexual relations with Mst. Asia Bibi (P.W. 1/prosecutrix) prior to the alleged occurrence and for the sake of argument even if it is admitted that any offence had been committed, the factor of consent and willingness cannot be ignored. The learned ASC has also raised the question of jurisdiction as according to him learned Special Court had no jurisdiction on the date when the alleged offence was committed hence the entire proceedings being unlawful may be declared as null and void. In order to substantiate his version reference has been made to the following authorities: Muhammad Arshad alias Achhi v. State (PLJ 1996 SC 453), Abdul Khaliq v. State (PLJ 1996 SC 464), Ensan Begum v. State (PLD 1983 FSC 204), Habibullah v. State (PLD 1983 FSC 251), Muhammad Zafar u. Zahoor (PLD 1983 FSC 480), Sohail Iqbal v. State (PLD 1983 FSC 514) and Mst. Nargas v. Rustam Ali (2001 PSC [al.] 568).

4. Mian Asif Mumtaz, learned Deputy Prosecutor General entered appearance on behalf of the State and vehemently controverted the view point as canvassed at bar by Mr. Munir Ahmad Bhatti, learned ASC for the appellants and supported the judgment impugned for the reasons enumerated therein with the further submission that the statement of Mst. Asia Bibi (P.W. l/prosecutrix) has rightly been taken into consideration by the learned trial and appellate Courts who stood firm to the test of cross-examination and in spite of various searching questions nothing beneficial could be extracted rendering any help to the case of appellants. It is also pointed out that conviction and sentence could have been awarded on the solitary statement of Mst. Asia Bibi (P.W. l/prosecutrix) which by now has become a well entrenched admitted proposition of law. It is also pointed out that minor contradictions do creep in with the passage of time and the slightest exaggeration if any can be ignored and on this score alone the statement of Mst. Asia Bibi (P.W. 1/prosecutrix) cannot be discarded especially when it was fully corroborated by the medical evidence, video-film and naked photographs, The learned Deputy Prosecution General is of the view that in view of the naked photographs and video film coupled with the medical evidence and statement of Mst. Asia Bibi (P.W. 1/prosecutrix), no other evidence was required to substantiate the accusation which has been proved to the hilt. It is also mentioned that the factum of delay has been explained in a plausible manner and no adverse inference could be drawn merely on the basis of

delay which do occur in such like cases as usually efforts are made to negotiate and compromise the issue.

5. We have carefully examined the respective contentions as agitated on behalf of the appellants and for the State. We have given our anxious consideration to the arguments propounded by the learned counsel for the parties and have also examined the record. The pivotal question which needs determination is as to whether the prosecution has established the guilt to the hilt? To answer the said question, we propose to examine the prosecution evidence by keeping the defence version in juxtaposition, A careful scrutiny of the statement of Mst. Asia Bibi (P.W. l/prosecutrix) would reveal that zina-bil-jabr was committed by the appellants. It reveals from her statement that she was accompanying Mst. Naseem Akhtar when Shakeel Ahmad who was earlier known to her being co-villager asked her to sit in their car and she would be dropped to her house. The car was being driven by Israr Ahmad while Arshad, Ali Asghar and Shakeel were sitting in the same car. Mst. Asia Bibi (P.W. l/prosecutrix) was never brought to her house but on the contrary they drove her to the house of Muhammad Ramzan where Tariq Mehmood and Javed were present. It is further stated by Mst. Asia (PW-1/Prosecutrix) that Shakeel caught hold of her and Tariq Mehmood injected some intoxication and also gave some sedative pills in tea which made her semi unconscious. By taking advantage of the situation, Shakeel, Arshad, Ali Asghar, Muhammad Ramzan, Tariq Mehmood and Javed committed zina-bil-jabr with her. It is further stated that a video film was also made and on the next morning when she was being driven to her house, on reaching the vicinity, she made hue and cry on seeing Ansar Ali and Asif Ali, (prosecution witnesses), the appellants pushed her out from the car and managed their escape good. It further reveals from her statement that she was in precarious condition and remained confined in the house. She has also mentioned in her statement that the appellants especially Shakeel had been requesting Qaiser Abbas (brother of Mst. Asia Bibi) and Muhammad Khan (father of Mst. Asia Bibi) for a compromise and therefore, matter could not be reported to the police but subsequently got reported by means of FIR. Insofar as the statement of Mst. Asia Bibi (P.W.1/prosecutrix) is concerned that has rightly been taken into consideration by the learned trial and appellate Courts being free from any serious contradiction or dishonest exaggeration. It is worth mentioning that she was subjected to a lengthy cross examination but in spite of various searching questions nothing beneficial could be extracted. There is no reason to disbelieve Mst. Asia (PW-1/Prosecutrix) and conviction could have awarded on her solitary statement. In this regard we are fortified by the dictum laid down in Shahzad alias Shaddu and others v. State 2002 SCMR 1009; Ramzan Ali v. State PLD 1967 SC 545; Ashraf v. Crown PLD 1956 FC 86; Ghulam Sarwar u. State PLD 1984 SC 218; Haji Ahmed v. State 1975 SCMR 69; Shahid Malik v. State 1984 SCMR 908; Ehsan Begum v. State PLD 1983 FSC 204 and M. Akram v. State PLD 1989 SC 742.

6. It reveals from the scrutiny of record that she was medically examined on 18.2.2000 by lady Doctor namely Musarrat Parveen (P.W.2) and the swabs were found stained with semen as per the report of Serologist (Ex.PW). We have not been persuaded to

agree with the prime contention of learned ASC that since the vagina of Mst. Asia Bibi (P.W. 1/prosecutrix) admitted two fingers easily hence being a lady of an easy virtue her statement should have been discarded for the simple reason that even if it is admitted that she was a girl of an easy virtue, no blanket authority can be given to rape her by any-one who wishes to do so. The only question which needs determination on the basis of medical evidence would be as to whether she was subjected to zina-bil-jabr The answer would be in affirmative in view of the statement of Dr. Musarrat Parveen (P.W.2) as well as the report of Serologist (Ex.PW). It is worth mentioning that the swabs were found stained with semen which is a solid proof that she was subjected to rape. The argument of Mr. Munir Ahmad Bhatti, learned ASC for the appellants that no corroboration is available to the statement of Mst. Asia Bibi (P.W. 1/prosecutrix) seems to be devoid of merits for the reason that "corroboration is not a rule of law but that of prudence, There is no denying the fact that acid test of the veracity of the prosecutrix's statement is the inherent merit of her statement because corroborative evidence alone could not be made a base to award conviction. It is well settled by now that 'the extent and the nature of corroboration required may, no doubt, vary from witness to witness and from case to case, but as a rule it is not necessary that there show be corroboration in every particular, all that is necessary is that the corroboration must be such as to effect the accused by connecting or tending to connect him with the crime. The corroborative evidence should tend to show that the witness or witnesses' evidence that the accused took part in the crime is true. To say that certain witnesses required corroboration and then to lay down that the corroborative evidence must show that the accused did not do the precise act attributed to him by the witnesses is tantamount to doing away with the evidence of those witnesses. And the same would be the result of the corroborative evidence required as such is incompatible with the innocence of the accused. The true rule governing such situation is that the corroborative evidence should at least tend to show that the evidence of the witnesses when they name the accused as taking part in the crime is true. Corroboration of the interested testimony should be such as would remove the doubt that the accused have been falsely implicated." (Ramzan Ali v. State PLD 1967 SC 545, Ashraf v. Crown PLD 1956 FC 86, Shahzad v. State 2002 SCMR 1009).

7. The appeal has been examined on the touchstone of the criterion as mentioned herein above. By now it has been well settled that if the statement of prosecutrix is considered trustworthy, no corroboration would be needed and such need would only arise in the circumstances indicating the possibility of her being consenting party to sexual intercourse which is a rare phenomenon in cases of zina-bil-jabr. In such like cases the corroboration of evidence needs not be the direct evidence but it may be independent evidence of such a character which could connect the accused directly or indirectly with the alleged offence. Be as it may the statement of Mst. Asia Bibi (P.W. 1/prosecutrix) has been corroborated by medical evidence, Chemical Examiner's report and the recovery of naked photographs, video film and movie camera which was got recovered at the pointation of Arshad. The naked photographs and video film were watched by the trial Court and hence we have no hesitation in our mind to hold that the

recovery of naked photographs and video film and medical evidence lends full corroboration to the statement of Mst. Asia Eibi (P.W.1/prosecutrix). The contention of learned ASC that in the absence of visible marks of violence it cannot be inferred that the prosecutrix was subjected to zina-bil-jabr is devoid of merit for the simple reason that medical evidence has confirmed it that sexual intercourse had taken place and even otherwise the marks of violence were not necessary to prove the factum of zina-bil-jabr. In this regard we are fortified by the dictum laid down by this Court in case titled Ghulam Sarwar v. State (PLD 1984 SC 218) and Haji Ahmad v. State (1975 SCMR 69).

8. We have also examined the defence plea that the appellants have been falsely involved at the behest of some ex-MNA which seems to be absurd and has rightly been discarded as Mst. Asia Bibi (P.W. 1/prosecutrix) has no concern whatsoever with the political rivalry and enmity and no such suggestion was ever made that she had got some links with ex MNA.

9. We have also adverted to the question that no semen grouping was made and therefore, it is difficult to prove that by whom zina-bil-jabr was committed. It is worth mentioning that semen grouping is not essential in such like cases and at the best it can be considered as lapse on the part of Investigating Officer and the prosecutrix cannot be held responsible for it. It is well established by now that "omission of scientific test of semen status and grouping of sperms is neglect on the part of prosecution which cannot materially affect the other evidence," In this regard we are fortified by the dictum as laid down in case titled Haji Ahmad v. State (1975 SCMR 69) and Shahid Malik v. State (1984 SCMR 908).

10. In. the light of what has been discussed herein above, we have no hesitation in our mind that zina-bil-jabr has been committed.

11. We have also adverted to the question of jurisdiction as according to Mr. Munir Ahmed Bhatti, learned ASC for appellants, the alleged offences were not incorporated in the schedule of Anti-Terrorism Act, 1997 on the date of occurrence i.e 12.02.2002, as such, the learned Special Court constituted under Anti-Terrorism Act, 1997 had no jurisdiction to proceed with the matter and this trial was abinito void and illegal. It is an admitted feature of the case that this objection was never raised-at opportune moment before the learned trial Court. The objection qua jurisdiction was also not raised before the learned High Court and even this point was never incorporated in criminal petition for leave to appeal preferred under Article 185(2) of the Constitution of Islamic Republic of Pakistan nor argued at the time when leave was granted by this Court on 12.11.2002. After lapse of about 6 years on 11.02.2008 an application under Order V, Rule 1(19) of Supreme Court Rules, 1980 was moved with the following prayer: "It is, therefore, respectfully prayed that this Hon'ble Court may graciously allow to place on record the appended chart of Anti-Terrorism Act, 1997/schedule upto date". No prejudice whatsoever was caused and every fair opportunity was afforded to the appellants except that the trial was somewhat expeditious which by no stretch of imagination can be equated to that of "prejudice". We are conscious of the fact that leave to appeal, may

be H granted on a question of jurisdiction even where the point have not been raised during trial (1985 SCMR 1054 PLD 1965 SC 179) but in this case leave was not granted to consider the question of jurisdiction, hence, we are not going to address the issue qua jurisdiction, being an exercise in futility.

12. In the light of what has been discussed hereinabove in our view Zina-bil-Jabr has been committed as provided under Section 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. It has, however, been observed after having gone through entire evidence and an in-depth scrutiny of statement of Mst. Asia (PW-1/prosecutrix) and keeping in view the over-all scenario of the case that the provisions as enumerated in Section 10(4) of the said Ordinance cannot be made applicable for the simple reason that no evidence whatsoever has come on record that Zina-bil-Jabr was committed in furtherance of common intention of all. It is worth mentioning that "To have some intention independently of each other is not to have common intention. Common intention requires a pre-arranged plan. There must be a prior meeting of minds. (Emphasis provided). Several persons can simultaneougy attack a man and may have the same intention, namely the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention as there was no prior meeting of mind to form a pre-arranged plan. In a case like that each would be individually liable for whatever injury he caused but none could be convicted for the act of the other vicariously. (PLD 1956 SC (Ind.) 176)." It may not be out of place to mention here that a line of distinction is to be drawn between "Same or similar intention and common intention, care must be taken not to confuse same or similar intention with common intention; the partition which divides their bounds is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice. (Emphasis provided). In their Lordship's view, the inference of common intention within the meaning of the term in Section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case. It must be shown that the criminal act was done by one of the accused persons in furtherance of the common intention of all. "Common intention" within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the prearranged plan (ILR (1945) 26 (Lah.) 267(PC)." There is no cavil to the proposition that inference of common intention should not be reached unless it is necessary inference deducible from the circumstances of the case (PLD 2001 SC 378).

13. A careful perusal of entire evidence would reveal that factum of common intention is lacking as Zina-bil-Jabr was not committed by all. Israr Ahmed has not committed Zina bil-Jabr and had performed the duties of a driver by whom Mst. Asia (PW-1/prosecutrix) was taken to the house of Ramzan where Zina-bil-Jabr was committed and later on dropped her near her house. The second feature of the case is that Mst. Asia (PW 1/prosecutrix) was known to appellant Shakeel and had shown no reluctance or hesitation while boarding the car. No evidence has come on record showing that there was a prior concert of mind or common object or intention of committing Zina-bil-

Jabr by all. It is to be noted at this juncture that Zina-bil-Jabr was not committed by Israr Ahmed and more so besides the acquittal of Tariq (co-accused) by the High Court it was also admitted by Mst. Asia (PW-1/prosecutrix) that no Zina was committed, by Tariq. It is also an admitted feature of the case that Shakeel had pointed out in his statement as got recorded under Section 342 Cr.P.0 that he was having sexual relation with Mst. Asia (PW-1/prosecutrix) prior to the occurrence, which fact must have been disclosed or known to co-accused namely Shakeel, Arshad, Javed, Muhammad Ramzan and Ali Asghar, which prompted them to commit Zina, presuming that being a girl of an easy virtue haying committed sex with Shakeel Mst. Asia (PW-1/prosecutrix) would have no objection, which subsequently proved "a conjectural presumption" and incident was reported to police which indicates that she was not a consenting party. It is worth mentioning that naked photograph and in the video all the appellants were not together meaning thereby that they had no common intention on all points.

14. In the light of what has been discussed hereinabove the conviction and sentence of death awarded to Shakeel, Arshad, Javed, Muhammad Ramzan and Ali Asghar vide judgment impugned is altered and they are convicted under Section 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to 25 years Rigorous Imprisonment. The conviction and sentence awarded to appellants Shakeel, Arshad, Ali Asghar and Israr Ahmed for life imprisonment under Section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 each with fine of Rs,20,000/- each is reduced to that of 10 years R.I each with fine of Rs,10,000/- each and in case of default to further undergo one year R.I each. All the sentences shall run concurrently. It hardly needs any elaboration that Zina with a woman in our society is a stigma which remains forever and have drastic impact being a deathless shame on the honour and dignity of the generations and as such no more leniency can be shown as pressed time and again by Mr. Munir Ahmad Bhatti, learned ASC on behalf of appellants.

15. The appeal is disposed of accordingly.