IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

Cr.A. No.384-P/2014

Date of hearing: _____

Appellant (s) : _____

Respondent (s) : _____

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.- This appeal is directed against the judgment dated 11.06.2014, rendered by learned Trial Court/ Additional Sessions Judge-V, Charsadda, whereby appellant Mst. Zainab has been convicted under section 496-B PPC for committing fornication and sentenced to undergo 02 years imprisonment and to pay a fine of Rs.5,000/- or in default thereof to undergo 02 months S.I. Benefit of S.382-B Cr.P.C. has been extended to her.

2. The prosecution case as unfolded in First Information Report is that on 13.06.2012, complainant Rahim Dad Khan (PW.5) in company of his mother Mst. Gul Shan (PW.4), reported in Police Station Charsadda that he contracted marriage with Mst. Zainab (appellant convict herein) four years back and from their wedlock a daughter was born; that due to strained relations Mst. Zainab left his

house and went to the house of her parents and after nine months, on the request of her parents, he brought her back to his house and came to know qua her pregnancy which was further confirmed by lady doctor on examination of the appellant; that on query, the appellant disclosed that during the period of her stay in the house of her parents, she developed relations with one Sarir (co-accused), as a result, she has become pregnant. On the report of complainant FIR No.752 dated 13.06.2012 under sections 496-A and 496-B PPC, was registered against the appellant and co-accused Sarir.

3. On arrest of the appellant she was examined through Lady Doctors Nargis Mushaq (PW.1) and Somia Afzal (PW.2). As per report of PW.2, on examination she found the appellant pregnant of 21 weeks in light of ultrasound examination report furnished by PW.1. On completion of investigation challan was submitted against both the accused before the learned Trial Court, where they were formally charge sheeted to which they pleaded not guilty and claimed Trial. In order to prove the guilt of the accused, prosecution examined as many as nine witnesses. After closure of the prosecution evidence statements of the accused were recorded under section 342 Cr.P.C., wherein they denied the prosecution allegations and professed their

innocence. Appellant in reply to first question of her statement stated that the allegations against her were totally incorrect; that there was a dispute over dower between her and her husband, therefore, he alongwith his mother implicated her in this false case. Both the accused did not opt to produce evidence in defence or to be examined on oath under section 340 (2) Cr.P.C. on conclusion of trial, the learned Trial Court, after hearing both the sides convicted and sentenced the appellant and co-accused as mentioned above, hence, this appeal by the appellant.

4. Learned counsel for the appellant without advancing his arguments on the evidence, contended the entire proceedings initiated against the appellant being against the mandate of the provisions of S.203-C Cr.P.C., which provides a specific mechanism for the offence of fornication under section 496-B PPC, are not tenable in the eye of law; that police was not competent to register FIR directly under section 496-B PPC, rather in such like cases proper course was filing of a complaint but no such complaint has been filed by the complainant; that keeping in view the nature of allegations levelled against the appellant by her husband, it was a case of S.496-B PPC to be proceeded on the basis of complaint, but since S.496-B was a non-cognizable offence and FIR could not be

registered directly, therefore, the police with mala fide intention and for justification of their illegal act, inserted cognizable offence S.496-A PPC, for taking the shelter of the same for a non-cognizable offence. He further contended that the learned Trial Court at the time of framing charge, deleted section 496-A PPC, but squarely over sighting the mandatory provisions of S.203-C Cr.P.C., charge sheeted the appellant under section 496-B PPC, and proceeded on ward with the trial, which exercise was against the law, therefore, the impugned judgment being not tenable in the eye of law is liable to be set aside.

5. Learned AAG for the State assisted by learned counsel for complainant admitted that the relevant procedure to be adopted was under section 203-C Cr.P.C. in offence of fornication, they, however added that since initially the FIR was registered under two sections of law i.e. 496-A and 496-B PPC, therefore, S. 496-A PPC being a cognizable offence the police was competent to register FIR directly alongwith a non-cognizable offence under section 496-B PPC; that the voluntary confession of the appellant supported by medical evidence is sufficient proof of her guilt, therefore, the learned Trial Court has rightly convicted and sentenced her. They while supporting the impugned judgment sought dismissal of the appeal.

6. I have heard the exhaustive submissions advanced at the bar from both the sides and gone through the record and the law on the subject.

7. It appears from the FIR that there is no allegation of complainant qua enticing or taking away or detaining with criminal intent her wife Mst. Zainab (appellant) by co-accused Sarir. Rather, according to his version when his wife/ appellant due to strained relations left his house and went to the house of her parents, she developed sexual relations with co-accused Sarir, as a consequence whereof, she became pregnant from her and according to him this episode was narrated to him by the appellant. The ingredients to constitute the offence under section 496-A PPC, found no where mention in the initial report of the complainant because he has alleged about the willful sexual relations of the appellant with co-accused, sufficient only to constitute the offence under section 496-B PPC. Section 496-B PPC defines fornication as well as provides its punishment. For convenience, I would like to reproduce the same as under:-

> **"S.496-B. Fornication:- (1) A man and a woman not married to each other are said to commit fornication if they willfully have sexual intercourse with one another.**

(2) Whoever commits fornication shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine not exceeding ten thousands rupees".

Keeping in view the definition of fornication provided under section 496-B PPC, the allegations against the appellant were sufficient only to attract the provisions of S.496-B PPC and not section 496-A PPC. Section 496-A PPC, provides punishments for the offence of enticing or taking away or detaining with criminal intent a woman. Since, there was no allegation of enticing or taking away or detaining with criminal intent the appellant by co-accused, therefore, insertion of S.496-A PPC, is beyond my comprehension rather it clearly indicates towards the mala fide intention of the police to insert the same just for direct registration of the FIR taking shelter of the same for the purpose of a non-cognizable offence under S.496-B PPC. Section 203-C Cr.P.C. provides a proper mechanism for the offence of fornication. For ready reference S.203-C Cr.P.C. is reproduced below:-

> "S.203-C. Complaint in case of fornication:- (1) No Court shall take cognizance of an offence under section

496-B of the Pakistan Penal Code, except on a complaint lodged in a Court of competent jurisdiction.

(2) The Presiding Officer of a Court taking cognizance of an offence shall at once examine on oath the complainant and at least two eyewitnesses to the act of fornication.

(3) The substance of the examination of the complainant and the eyewitness shall be reduced to writing and shall be signed by the complainant and the witnesses, as the case may be, and also by the Presiding Officer of the Court.

(4) If in the opinion of the Presiding Officer of a Court, there is sufficient ground for proceeding, the Court shall issue summons for the personal attendance of the accused.

Provided that the Presiding Officer of a Court, shall not require the accused to furnish any security except a personal bond, without sureties, to ensure

attendance before the Court in further proceedings.

(5) The Presiding Officer of a Court before whom a complainant is made or to whom it has been transferred may dismiss the complainant, if, after considering the statements on oath of the complainant and the witnesses there is, in his judgment, no sufficient ground for proceeding and in such case he shall record his reasons for so doing.

(6) Notwithstanding the foregoing provisions or anything contained in any other law for the time being in force no complaint under this section shall be entertained against any person who is accused of Zina under section 5 of the Offences of Zina (Enforcement of Hudood) Ordinance, and against whom a complaint under section 203-A of this Code is pending or has been dismissed or who has been acquitted or against any person who is a complainant or a victim

in a case of rape, under any circumstances whatsoever".

The procedure contemplated in S.203-C Cr.P.C. has not been adopted in the instant case from the very inception. It also seems very strange that the learned Trial Court when deleted S.496-A PPC, charge sheeted the appellant under section 496-B PPC specifically using the words in charge sheet **"You have therefore, committed the crime of fornication which is punishable under section 496-B PPC",** squarely over looked the mandatory provisions of S.203-C Cr.P.C., wherein the words **"No court shall take cognizance of an offence under Section 496-B PPC, except on a complaint lodged in Court of competent jurisdiction"** were sufficient to realize the learned Trial Court the lack of its jurisdiction to take cognizance of the offence in absence of any complainant within the meaning of S.203-C Cr.P.C. as neither any complaint had been filed before it nor the mandatory procedure as envisaged under subsections 2 and 3 of S.203-C Cr.P.C. were complied with but the learned Trial Court illegally proceeded with the trial and ultimately convicted and sentenced the appellant.

8. For what has been discussed above, the entire proceedings in the case being against the law, cannot

sustain conviction of the appellant. The conviction and sentence of the appellant recorded by the learned Trial Court is illegal and against the law, therefore, by allowing this appeal, I hereby set aside the conviction and sentence of the appellant vide impugned judgment are hereby acquit her of the charge. She is on bail, her bail bonds stand cancelled and sureties are discharged from the liability of bail bonds.

Announced
18.01.2016

J U D G E

*M.Siraj Afridi P.S. D