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Court
FEDERAL SHARIAT COURT

Date
1992-04-01

Appeal No.
CRIMINAL APPEAL NO. 22/K OF 1992

Judge
TANZIL-UR-RALIMAN, CJ. AND MIR HAZAR KHAN KHOSO

Parties
MST. RABLA SULTANA (APPELLANT) VERSUS RIAZ AHMAD AND ANOTHER (RESPONDENTS)

Lawyers
A. RASHEED FOR APPELLANT. KANWAR RIAZ AHMAD FOR RESPONDENTS.SH. AZIZUR RAHMAN FOR THE STATE.

Statutes
OFFENCE OF QAZF (ENFORCEMENT OF HADD) ORDINANCE (VIII OF 1979) - SS.3, 4, 5 AND 6 OFFENCE OF QUZF (ENFORCEMENT OF HADD) ORDINANCE (VIII OF 1979) OFFENCE OF QAZF (ENFORCEMENT OF HADD) ORDINANCE (VIII OF 1979) - S.6 OFTENCE OF QAZF (ENFORCEMENT OF HADD) ORDINANCE (VIII OF 1979) - S.6

Judgment

TANZIL-UR-RAHMAN, CJ.-This appeal arises out of judgment, dated 27-1-1992 in complaint case No.23 of 1989 passed by the learned Additional Sessions Judge-V (Hudood Court) Karachi (South), whereby he acquitted the respondents/accused.

2. This case has a chequered history of litigation. The appellant was married to respondent No.l on 11-5-1984. Rukhsati did also take place the same day. Appellant and respondent No.l lived together as husband and wife in the house of respondent No.2, where besides respondent No.2, other family members of respondent No.2 were also residing. On 5-9-1985, as alleged by the appellant, at about mid-night respondent No.l took the appellant and left her in her parents house in a miserable condition. On the subsequent day respondent No.l reached the appellant's sister's house at about 10.00 p.m. and pronounced oral divorce to the appellant which fact was, however, denied by him. On such denial, the appellant sent legal notice, dated 5-11-1985 and subsequently filed Family Suit No.527 of 1985 on 30- 11-1985 in the Family Court No.XIII, Karachi (South), against respondent No.l, for dissolution of marriage. On 2-3-1986 respondent No. 1 filed his written statement. On 18-3-1987 respondent No.l was examined as defendant in the said suit wherein he levelled allegation of Zina against the appellant stating, inter alia, that the appellant at the time of marriage with him was pregnant for the last five months, as a result of Zina committed by her with a person, namely, 'Sarsa'. Respondent No.2, the father of respondent No.l also appeared on 22-3-1988 as a witness for the defendant (respondent No.l) and made same allegation of Zina against the appellant and supported the statement of respondent No.l regarding illicit intercourse of the appellant with 'Sarsa' as a result whereof she was pregnant at the time of marriage with respondent No.l for about five months.

The Family Court decreed the said family suit on the basis of Khul'a by its judgment, dated 31-5-1988. The said judgment was challenged by a Constitution Petition bearing No.72 of 1988 in the High Court of Sindh. The said petition was, however, dismissed by the High Court of Sindh by its judgment 13-1-1990, with the result that the judgment and decree passed by the Family Court remained intact. This completes the first round of civil litigation culminating in the dissolution of marriage.

3. The above civil or to be exact, matrimonial litigation, led to criminal litigation which started with the filing of a complaint bearing No.159 of 1988 by respondent No.l in the Court of Session under sections 10 and 19 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the 'said Ordinance') read with section 315/34, P.P.C. against the appellant, her father, Muhammad Aslam, her mother, Mst. Rasool Bibi and Dr. Almas of Almas Clinic alleging, inter alia, that in the night of the consummation of marriage of respondent No. 1 with the appellant on 11-5-1984, he found the appellant pregnant for five months as a result of Zina committed by her with one person, namely, 'Sarsa'. Her father and mother were called by him and were informed of it. Her father took "her from house and got carried out her abortion in the Clinic of Dr. Almas and after abortion a second Nikah was recited between the spouses (appellant and respondent No.l) on 29-6-1984. In the said complaint case he produced a writing, dated 16-6-1984 alleging it to be the statement of the appellant confessing the guilt by her. He also produced the second Nikahnama. The learned Additional Sessions Judge-II Karachi (South) framed the charge against the appellant in that complaint case under sections

10(2) and 19 of the said Ordinance read with section 315/34, P.P.C. Respondent No.l examined himself in that case being complainant as P.W.l as (Exh.13), his father (respondent No.2) as (Exh.27) and after examining the Nikah Khawan closed his side. Respondent No.l produced the following documents in the said complaint case:- (1) Written consent of abortion allegedly given by Muhammad Aslam, the father of appellant, to Dr. Almas, as Exh.14.

(2) Nikahnama dated 11-5-1984 of appellant and respondent No.l as Exh.15.

(3) Second Nikahnama, dated 29-6-1984 as Exh.16 (both Nikahnamas were also previously produced in F.S. No.527/85).

(4) Letter, dated 16-6-1984 written by appellant (as alleged by the respondent No.l) confessing her guilt of Zina with Sarsa and her pregnancy as Exh.17. (This was also previously produced by him in F.S. No.527/85)." The appellant denied the solemnization of the second Nikah and execution of the second Nikahnama, dated 29-6-1984 and other writing in that complaint case as well as in Family Suit No.527 of 1985. On conclusion of trial of Complaint Case No.159 of 1988, the appellant and other three accused, namely, her father, mother and Dr. Almas were all acquitted by the IInd Additional Sessions Judge, Karachi (South) by his judgment dated 14-4-1991. The relevant portion of the said judgment reads as under:- "In such circumstances the story put forward by the complainant is totally unbelievable and highly ridiculous. In such circumstances the complainant has failed to prove its case against the accused.

I, therefore, hold the accused not guilty to the charge and acquit all the accused under section 265-H, Cr.P.C. All the accused are present in Court on bail. Their bail bonds and sureties are discharged." 4. Respondent No.l being dissatisfied with the above judgment, filed a Revision Petition bearing No. 14/K of 1991 in this Court which was dismissed in limine by a Division Bench of this Court by its order, dated 11-7-1991. This completes the first round of the criminal litigation between the parties.

5. Now another round of criminal litigation started on 12-1-1989 by the appellant. She filed a complaint case bearing No.23 of 1989 in the Sessions Court under section 7 of the Offence of Qazf (Enforcement of Hadd) Ordinance (VIII of 1979) (hereinafter referred to as 'Qazf Ordinance'). The Vth Court of learned Additional Sessions Judge, Karachi, South framed the charge in the said case against the respondents. The appellant, then examined herself, as complainant (Exh.ll) and produced the following documents:- Certified copy of statement of respondent No.l made in F.S. No.527/85 as Exh.4-B.

(2) Certified copy of statemept of respondent No.2 made in F.S. No,527/85 as Exh.4-A.

(On the basis of these statements the appellant has field the complaint under section 7 of Qazf Ordinance 1979).

(3) Certified copy of judgment of Family Court passed in F.S. No.527/85 as Exh.4-C.

(4) Photo copy of Nikahnama dated 11-5-1984 as Exh.4-D.

(5) Complaint as Exh.ll." 6. Both the rcspondents/the accused made their statements

under section 342, Cr.P.C. (Exhs.20 and 21) and also examined themselves on oath under section 340(2), Cr.P.C., in which both of them reiterated the same allegation of Zina against the appellant. None of them controverted, denied, resiled or departed from their earlier statements made before the Family Court.

Both or them admitted the contents of their said statements (Exh.4-A and Exh.4-B). In fact, they corroborated their contents in their statements under section 340(2), Cr.P,C..

7 Respondent No. 1 produced certified copy of the writing, dated 16-6-1984 of the appellant (Exh.20-A), photo copy of the Complaint No.159/88 (Exh 70-B) acquittal judgment dated 14-4-1991 in that case (Exh.20-C), his written statement in Family Suit No.527/85 as (Exh. 20-D). Respondent No.2 also examined himself as (Exh.21) and produced photo copy of writing dated 19-5-1984 on the letter head of Almas Clinic as (Exh.21-A) alleged to have been executed by the appellant's father Muhammad Aslam in connection with abortion. Furthermore, they produced D.Ws. Syed Zahir Hussain (Exh.16) and Qazi Aziz.ur Rahman (Exh.17) the Nikah Khuan. Qazi Azizur Rahman the Nikah Khawan, also produced photo copy of Nikahnama dated 11-5-1984 (Exh 17-A) and Nikahnama dated 29-6-1984 (Exh.l7-B) and photo copy of his statement made by him in the Family Suit (Exh.l7-C).

The D.W. Syed Zahir Hussain also produced his previous statement given by him in Complaint Case No.159 of 1988 (Exh.l5-A). On conclusion of the trial, the learned Vth Additional Sessions Judge dismissed the Complaint Case No.23 of 1989 and acquitted both the respondents by his judgment dated 27-1-1991. By this appeal, the said judgment has been challenged before us.

8 It now seems pertinent to quote below the various statements made in relation to alleged unchastity of the appellant in Courts proceedings at various occasions in point of time, the first such statement made by respondents Nos.l and 2 appears to have been made on 18th March, 1987 and 20th March, 1988 respectively while deposing before the Court during their examination in Family Suit No.527 of 1985 which was recorded by the learned Family Judge. The relevant portion from the deposition of respondent No. 1,before the Family Court in Family Suit No.527 of 1985 reads as under:- "1 was married with the plaintiff on 11-5-1984 at Karachi. On the first night of my marriage I became doubtful about virginity of the plaintiff. 1 had doubt that my wife was pregnant but the plaintiff refused about her pregnancy. Her aunt Khatija Bibi used to come and gi%e her medicines. When I asked about the medicines she replied that these tablets and medicines were only for gastric pain and she (Khatija) gave these medicines to my wife. After about one month after our marriage the plaintiff herself admitted that she was pregnant from one 'Sarsa'." 9. Respondent No.2 (D.W.4) deposed in the said Family Court as ' under:- "At the time of first Nikah the plaintiff was pregnant so we called the father of the plaintiff after two weeks of marriage and I informed him about the pregnancy of the plaintiff. Father of the plaintiff admitted the fact." In cross-examination, he deposed as under:- "It is incorrect to suggest that at the time of first Nikah the plaintiff was not pregnant. The plaintiff was pregnant due to illicit relations with one 'Sirsa' who was residing near the house of the plaintiffs father and he had visiting terms with them." 10. In his complaint (Criminal Case No.159 of 1988) respondent No.l stated as under:- "That on the very first night the complainant became doubtful about the virginity of the accused No.l and questioned her, but she salcvely (sic) declared herself to be a virgin, but within

two or three days marriage, it was lound that the accused No.1 is already pregnant of more than 5 months.

That the accused No.I categorically admitted her illicit intercourse \e itH one person namely 'Sarsa', who was residing as neighbour of her house now who had left for Punjab since long." 48 Complaint Case No.159 of 1988. The relevant portion of the deposition in Court of respondent No.f reads as under:- "On 11-5-1984 I was married with accused Mst. Rabia Sultana. Accused Muhammad Aslam is father of accused Mst. Rabia Sultana while accused Rasool Bibi is mother of accused Mst. Rabia Sultana. After the Nikah I took her to my house. At night time she told'me that she has been changed her clothes. On that I suspected her and doubted that there is some thing wrong with her character. For the full night we continued talking to each other on this issue but she did not accept that she had any illicit terms with some one. In the morning Mst. Khadija Bibi wife of maternal uncle of my wife came over there, she brought some medicines and gave the same to my wife. I then went out of my house, when at noon time I came to my house I saw then my wife not present in the house. I went upstairs on the roof of my house and saw that my wife was cooking something which was just like (Kawa). I enquired her about this preparation, she told me that she has a gastric trouble and that the wife of her uncle had brought some medicine for her. After some discussion she confessed before me that she has illicit terms with one boy by name Sarsa. I narrated this fact to my father Abdul Majid who called the father of Mst. Rabia Sultana and narrated the incident to him. On that the accused Muhammad Aslam and his wife Rasool Bibi requested me on Holy Qur'an to pardon them and that they had no male issue and that they are father of five daughters. I then pardoned her and again another Nikah was performed on 29-6-1984. My wife on 16-6-1984 gave in writing that she had illicit terms with any Sarsa and she also gave me the photographs Annexure C. When Mst. Rabia Sultana was married to me she was pregnant of about 5 months." 12. Respondent No.2 deposed before the Court in the said complaint case that:- "Complainant Riaz is my son. He was married to Mst. Rabia Sultana on 11-5-1984. 1 was present in the said Nikah. The Rukhsati took place. On the next day morning my son Riaz informed me that Rabia was pregnant. On 13-5-1984 marriage of my daughter was fixed. After the marriage of my daughter my son Riaz Ahmad went to the roof of his house and saw his wife Rabia Sultana preparing some medicine which confirmed that doubt of complainant Riaz Ahmad that his wife Rabia Sultana was pregnant. I sent my son Riaz to call father and mother of the girl. My son brought Muhammad Aslam father of the girl and Mst. Rasool Bibi mother of Rabia Sultana. I and my son Riaz informed them about the entire, happening. On that father, mother of the girl and girl repeatedly requested us and asked us to excuse them." He further deposed in cross-examination that:- "Rabia was pregnant at the time of marriage.....it was for the first time on 22-3-19X8 that I deposed before the Family Judge that Mst. Rabia was pregnant at the time of marriage. It is a fact that on the basis of my statement before Family Judge that Mst. Rabia was pregnant at the lime of her marriage with Riaz Mst.

Rabia Sultana has filed criminal case under Qazf Ordinance in which I and Riaz are accused which is pending trial in the Court of Vth A.D.J., Karachi South." 13. In Complaint Case No.23 of 1989 filed by the appellant against the respondents respondent No.l, made the following statement under section 342, Cr.P.C.

"I had deposed before Family Court that Rabiya Sultana having illicit connections with Sarsa and in the result of the connections and sexual performance she had become

pregnant. She was pregnant of about five months at the time of her marriage with me on 11-5-1984. During very first night of the Nikah I found the complainant to be pregnant and made enquiries from her. She did not admit during that night and I did not perform any sexual obligation with her. During next night she admitted with me saying that she had illicit connections with Sarsa and performed sexual acts with him in the result thereof she became pregnant. On 16- 6-1984 the complainant wrote a letter to me admitting therein her fault of having connections with Sarsa and pregnancy from him. She requested me to forgive so that lives of her sisters are not spoiled. On 19-6-1984 the parents of complainant took her from my house in my absence and got the miscarriage of child done there. This was done in Almas Clinic of Lines area where the father of complainant had given undertaking in writing about the pregnancy of Rabia Sultana." 14. Respondent No.I appeared as witness in the said complaint case under section 340(2), Cr.P.C. and stated as under:- "On 19-6-1984 I was married with complainant Mst. Rabiya Sultana. On the day when we came to our home alongwith bride (Dulhan) (Mst. Rabiya Sultana), I set her in the room and I also went there in the room. After some time complainant Mst. Rabia Sultana told me that she is coming after changing her dress. I suspected something wrong to the fact that generally their (sic) Dulhan on the very first day keep herself reserve in new atmosphere. On my inquiry complainant Rabia Sultana told me that she has some relations with one Sarsa to whom her father used to call his son. I did not do any thing with the bride. On the next morning I narrated about the talk to my father who called the father of the complainant. After informing my father I went outside for some work and when came back I asked about Rabiya Sultana on which 1 was told that she is on the roof of the house. I went to the roof and saw that Mst. Rabia Sultana my wife (complainant) putting something on the burner alongwith her aunt Mst. Khadija Begum. On my enquiry complainant told me that she is suffering from stomach problem therefore her aunt has brought for her herb and sherbs. On the second day of marriage complainant's father and other has discussed with me, they had requested me not to Hare up the matter because they are parents of 5 daughters and let the curtain be remained on the issue in order to save the future of other sisters of the complainant. On 16-6-1984 complainant Mst. Rabiya Sultana has admitted in writing about her illicit terms with one Sarsa. I produce certified true copy of the said statement as Exh. 20-A the original of which was filed in the Court of XIII Civil and Family Court in Suit No.527/85 titled as Mst. Rabiya Sultana v. Riyaz Ahmed. On 17/18 June, 1984 parents of complainant came to my house and they took away Mst. Rabiya Sultana to their house. Without..... After few days complainant’s father came to me and informed me that he has already got DNC of her daughter. Therefore now you should accept her as your wife. Complainant’s father also informed me that he has arranged not to get the first Nikah registered and now they have also obtained Fatwa to get solemnized of 2nd Nikah. Thereafter 2nd Nikah was solemnized on 29-6-1984 and I accepted complainant as my legally w'cdded wife. I had filed the direct complaint before Sessions Judge, Karachi South which was subsequently transferred to learned II Additional Sessions Judge No.159/88. Learned Additional Sessions Judge has acquitted present complainant. I produced photo copy of the complaint as Exh.20-B." 15. It is further noticeable that the appellant was left, as alleged by her and went away on her own as alleged by the respondents, to the house of her parents on 5-9-1985 when she was on her family way. It has come on record that she gave birth to a baby named Sobia. Respondents have gone so far that they denied parentage and legitimacy of the said baby though the conception took place and the baby was born during a valid wedlock between the appellant and respondent No.l. In this respect reference may be made to the deposition dated 18-3-1987 of respondent No.l

before the Family Court wherein he appears to have admitted by saying that "it is correct that the plaintiff has mentioned in her legal notice as Exh. 1/B that she had five months pregnancy at the time of leaving her at her parent's house by the defendant. It is correct that I mentioned in my reply of that notice that when she left my house at that time she was not pregnant. It is a fact that a woman knows about her own pregnancy. It is fact that the present female child is not from me".

16. Respondent No.2 in his deposition dated 22-3-1988 before the Family Court deposed that "it is incorrect to suggest that when the plaintiff lastly went to her parents' house she was pregnant of 5 months. It is incorrect to suggest that any baby namely Sobia Kanwal was born out of this wedlock. Fact is that I have heard this name of baby first time in the Court today. No child was born out of this marriage. If any child was born, that was illegitimate.' 17. Now, the question before us is whether the various statements/depositions made by the two respondents at various occasions in the Court proceedings in the family/criminal litigation do constitute Qazf and if so, whether it is liable to Hadd or Ta'zir.

18. The provisions of law relevant to the above question are contained in sections 3, 4, 5 and 6 of the Qazf Ordinance, which are reproduced as under:- "3. Qazf.-Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes an imputation of Zina concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation, or hurt the feelings, of such person, is said, except in the cases hereinafter excepted, to commit Qazf.

Explanation 1.-It may amount to Qazf to impute Zina to a deceased person, if the imputation would harm the reputation or hurt the feelings, of that person if living, and is hurtful to the feelings of his family or other near relatives.

Explanation 2.-An imputation in the form of an alternative or expressed ironically, may amount to Qazf.

First Exception. Imputation of truth which public good requires to be made or published.-It is not Qazf to impute Zina to any person if the imputation be true and made or published for the public good. Whether or not it is for the public good, is a question of fact.

Second Exception. Accusation preferred in good faith to authorised person.-Save in the cases hereinafter mentioned, it is not Qazf to prefer in good faith an accusation of Zina against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation: s (a) A complainant makes an accusation of Zina against another person in a Court, but fails to produce four witnesses in support thereof before the Court.

(b) According to the finding of the Court, a witness has given false evidence of the commission of Zina or Zina-bil-Jabr.

(c) According to the finding of the Court, complainant has made a false accusation of Zina-bil-Jabr.

4. Two kinds of Qazf.-Qazf may either be Qazf liable to Hadd or Qazf liable to Tazir.

5. Qazf liable to Hadd.-Whoever, being an adult, intentionally and without ambiguity, commits Qazf of Zina liable to Hadd against a particular person who is a Muhsan and capable of performing sexual intercourse is, subject to the provisi ms of this Ordinance said to commit Qazf liable to Hadd.

Explanation 1.-In this section, "Munsan" means a sane and adult Muslim who either has had no sexuai intercourse or has had such intercourse only with his or her lawfully wedded spouse.

Explanation 2.-If a person makes in respect of another person the imputation that such other person is an illegitimate child, or refuses to recognise such person to be a legitimate child, he shall be deemed to have committed Qazf liable to Hadd in respect of the mother of that person.

6. Proof of Qazf liable to Hadd.-Proof of Qazf liable to Hadd shall be in one of the following forms namely:- (a) the accused makes before Court of competent jurisdiction a confession of the commission of the offence.; (b) the accused commits Qazf in the presence of the Court; and (c) at least two Muslim adult male witnesses, other than the victim of the Qazf, about whom the Court is satisfied, having regard to the requirements of Tazkiyah al-Shuhood, that they arc truthful persons and abstain from major sins (Kabair), give direct evidence of the commission of Qazf: Provided further that the statement of the complainant or the person authoised by him shall be recorded before the statements of the witnesses are recorded." 19. On going through the relevant portions of the statements/depositioris made by respondents Nos.l and 2, as quoted above, it appears that respondent No.l has levelled allegation of Zina, in explicit and unequivocal terms, against the appellant that she was pregnant on the night of her marriage with respondent No.l for five months as a result of illicit fornication with her paramour "Sarsa". The imputation of Zina concerning the appellant was first A made by respondent No.2 and then it was published by him through an oral statement of both of them to the parents of the appellant and then the same was published intending to harm and knowing or having reasons to believe that such imputation will harm, the reputation, or hurt the feelings of the appellant.

We have, therefore, no doubt in our mind that on the basis of the above statements both the respondents have committed the offence of_ Qa/f as provided in section 3 of the Qazf Ordinance. The exceptions provided m the aforesaid provisions of law have neither been pleaded at any stage nor, m lact are available to them.

Learned counsel for the appellant has tried to impr s upon us that the appellant has confessed about her gu.lt of fornication w h "Sarsa" as per the writing executed by her and so the letter m connection with abortion on the letter-head or Almas Clinic said to have been written by he father of the appellant. But the judgment of the learned trial Courts in tho Family as well as the two criminal complaint cases, have not given any we.g to the above two documents. The learned Family Judge has made the following observation about the writing (Exh.l/D) as under:- "The plaintiff has denied the execution of letter Exh.l/D. The defendant has not confronted the plaintiff with the signature on this

letter nor put any question about the hand in which the said letter is written. He has also not made any attempt to send the same to handwriting expert. Since the defendant has failed to prove this letter by anv convincing evidence I am of the view that this letter Exh.I/D is a bogus letter and has been manoeuvred by him and as such no weight can be attached to it.

20. The learned llnd Additional Sessions Judge, Karachi (South) m his judgment dated 14-4-1991 in private Complaint Case No.159 of 1988 observes as under:- "His plea is that his wife confessed before him and gave him in writing that she was having pregnancy of five months from one Sarsa. This writing is Exh.17 on record. Accused Rabia Sultana has specifically denied that this document is in her handwriting and bears her signature. There is no evidence of handwriting expert or any other person to prove prima facie that this is in the handwriting of accused Rabia Sultana. In that case mere statement ol complainant Ria Ahmad and his father P.W. Abdul Majid that Mst. Rabia Sultana gave it in writing that she was pregnant at the time of her marriage and has illicit terms with one Sarsa is not sulficient to prove that the same document is in the handwriting of accused Mst. Rabia Sultana and she has confessed before the complainant and her father.

Next niece of evidence relied upon by complainant in this regard is Exh 14 whereby accused Muhammad Aslam is said to have given his consent in writing to accused Dr. Almas to carry out the abortion of Mst Rabia Sultana but there is also no evidence on record that th document is actual in the handwriting of accused Muhammad Aslam and that pad on which this writing is of clinic of accused Dr. Almas when both the accused Muhammad Aslam and Dr. Almas ha, specifically denied this fact." (Tanzil-ur-Rahman, C J) 21. It may he added that the suggestion was given to the respondents during cross-examination in the Family suit that one Qamaraun Nisa the sister of respondent No.l employed in the Almas Clinic was instrumental taking out the letter-head. Further about the writing on the said letter-head respondent was not sure if it was in the handwriting of Muhammad Aslam, the father of the appellant.

22. The law of Qazf is a new chapter on the administration of criminal law and justice which has been introduced by the enforcement of Qazf Ordinance in 1979. There are only few cases reported so far.

Knowledge of the subordinate Courts, therefore, seems to be shallow and sketchy in this behalf. It, therefore, seems apt to add something on the Islamic aspect of the said law. Besides what has earlier been stated by one of us (Dr. Tanzii-ur-Rahman, C.J.), in Naheed Mahmood v. Mahmood-Khan (P L D 1991 F S C 131), we may quote from the book " " bv Justice Dr. Tanzil- ur-Rahman, published by Hurmat Publication, Rawalpindi. September, 1982, pp. 134-138, which arc reproduced as under:- i I

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! i j j 23. It may further be stated that the Injunctions as stated in Surah Al-Noor (XXIV) of the Holy Qur'an relate to the social and environmental purity of the society. We know it full well that no other vice wrecks our spiritual purity and ideals as that the misuse of sex, in the form of unsocial behaviour and scandals specially of false charges and breach of

family tranquillity and privacy. The reprobation of false slandrers about women have been clearly unfolded in the several verses of the said Surah.

Islam is against the washing in dirty linen in public and admonishes in Verse 19 of Surah Al-Noor that those who love (to see) scandal published broadcast among the believers, will have a grievous penalty in this life and Hereafter, With that objective, the law of marriage and divorce is easy in Islam so that there may be less temptation for sexual intimacy outside the marriage bond.

In case the husband witnesses his wife indulging in the illicit intercourse with a stranger or doubts about her chastity and there is no evidence available with him, the Holy Qur'an provides the procedure of Lian (OVa-i) whereby the husband takes oath for four times making imputation of unchastity against his wife and the wife takes oath for five times in denial of the same and then the Court dissolves the marriage and releases the couple from the marriage-tie. In case there are four witnesses in proof of the allegation against the chastity of the wife or for that matter any Q woman, the person making such imputation is called upon to produce four witnesses and in case he does not have the witnesses in proof of the charge against the chaste woman, the Qur'anic law commands to flog the accuser with eighty stripes for the unsupported slander against a chaste woman.

Not only that, such a person will be treated as a wicked transgressor of the limits of Allah and would be deprived of the citizen's right of giving evidence in all matters all his life, unless he repents and reforms. In the instant case, it has been noticed that when for the first time the respondents made imputation of Zina against the appellant while deposing before Family Court in suit for dissolution of marriage, if was most appropriate, rather required of the Family Court to have taken its notice. In fact, he should have immediately adopted the procedure of Li'an as provided under section 14 of the Qazf Ordinance. Our Courts, for some reasons, are less conscious or knowledgeable, perhaps, in the matter of Islamic Law when it comes to them for its enforcement. On our enquiry, the learned counsel for the appellant stated at the bar that he had moved an application to the learned Family Judge for conducting the proceedings of Li'an but he did not proceed with it or, perhaps, the counsel did not press it further. Had the procedure of Li'an as provided in the Islamic Law of Marriage and Divorce and codified under section 14 of the Qazf Ordinance, been adopted by the learned Family Judge the parties would have been saved from the agony of facing further proceedings of family litigation and facing new criminal litigations started as long back as 1985.

24. We have gone through the judgment impugned before us. The learned trial Judge has failed to correctly interpret the law and appreciate the evidence on record. He has dismissed the complaint on the ground that the complainant has failed to produce two witnesses as required by the law in support of the . imputation of Zina made by the respondents against the appellant. Section 6 of the Qazf Ordinance prescribes three modes of proof of Qazf liable to Hadd. Qazf liable to Hadd may be proved if:- (i) the accused makes a confession of the commission of the offence i.e. the Qazf before a Court of competent jurisdiction; (ii) the accused commited Qazf in the presence of the Court; and (iii) at least two Muslim adult male witnesses other than the victim of the Qazf.

25. The opening sentence of section 6 of the Ordinance leaves no room for doubt or ambiguity that if any one of the three modes of the proof is available the offence shall be held to have been proved liable to Hadd. In the D instant case, the respondents have made imputation of Zina in presence of the three Courts, namely, the Court of learned Family Judge, who was trying the suit for dissolution of marriage, the Court of learned IInd Additional Sessions Judge who was trying the second criminal Complaint Case No.159 of 1988 filed by the respondent No.I and the Vth Court of learned Additional Sessions Judge who was trying criminal Complaint Case No.23 of 1989. Directly or indirectly that the respondents made statements by producing certified copies of the statements made by them earlier in Family Court and lastly while examining themselves under section 340(2), Cr.P.C., on oath repeated persistently the imputation of illicit intercourse committed by the appellant with one "Sarsa". It was open to the respondents to prove the imputation of Zina by producing four witnesses as required by Qur'anic Injunctions laid E down in Surah Al-Noor, Verses 4 and 5 which they have failed to produce and substantiate their allegation vide judgment dated 14-4-1991 passed by the learned IInd Additional Sessions Judge in Criminal Complaint Case No.159 of 1988 filed by the respondent.

Therefore, the offence of Qazf stands proved under clauses (a) and (b) of section 6 as the same has been committed in the presence of the Court, not only in one Court but three, as detailed above. It does not require any further proof by producing evidence. The learned trial Judge has failed to correctly interpret the law. The case reported as Naheed Mahmood v. Mahmood Khan (PLD 1991 FSC 131) is distinguishable and not applicable to the facts of the present case. On the other hand, reliance has been placed rightly by the counsel for the appellant on the case of Muhammad Masood v. Abdullah etc. (1992 SCMR 638).

26. For the aforesaid discussion, we are clear in our mind that the offence of Qazf liable to Hadd is proved against the respondents beyond any shadow of doubt. We would, therefore, convict them under section 7 of the Qazf - Ordinance liable to Hadd and award punishment of whipping numbering eighty stripes. The respondents who are present in Court are ordered to be taken into custody and be sent to Central Prison Karachi for execution of the sentence of eighty stripes and are ordered to be released thereafter immediately. We may further direct the authorities concerned that while executing the sentence of stripes full regard shall be paid by them to the provisions of sections 4 and 5 of the Execution of the Punishment of Whipping Ordinance, 1979, which for the sake of guidance are reproduced as jinder:- "4. Specifications of whin.-The whip, excluding its handle, shall be of one single piece only and preferably be made of leather, or a cane or a branch of a tree, having no knob or joint on it and its length and thickness shall not exceed 1.22 metres and 1.25 c.m. respectively." "5. The conditions and mode of execution of punishment of whipping.- The following provisions shall apply to the execution of the punishment of whipping, namely: ~ (a) before the execution of the punishment commences, the convict shall be medically examined by the authorised medical officer so as to ensure that the execution of the punishment will not cause the death of the convict; (b) if the convict is too old or too weak, having regard to the sentence of whipping awarded, the number of stripes shall be applied in such manner and with such intervals that the execution of the punishment does not cause his death; (c) if the convict is ill, the execution of the punishment shall be postponed until the convict is certified by the authorised medical officer to be physically fit to undergo the

punishment; (d) if the convict is a woman who is pregnant, the execution of the punishment shall be postponed until the expiration of a period of two months after the birth of the child or miscarriage, as the case may be; (e) if, at the time of the execution of the punishment, the weather is too cold or too hot, the execution shall be postponed until the weather has v become normal; (1) the punishment shall be executed in the presence of the authorised medical officer at such public place as (omitted by Ordinance I of 1984, section 2) the Provincial Government may appoint for the purpose; (g) the person appointed to execute the punishment shall be impartial and of mature understanding; (h) he shall apply the whip with moderate force without raising his hand above his head s» as not to lacerate the skin of the convict; (Tanzil-ur-Rahman, C J) (i) after he has applied a stripe, he shall raise the whip aloft and shall not pull it off; (j) the stripes shall be spread over the body of the convict, so, however, that the stripes shall not be applied on the head, face, stomach or chest or the delicate parts of the body of the convict; (k) such clothes of the convict shall be left on the body of the cpnvict as are required by the Injunctions of Islam to be put on; (l) the stripes shall be applied in th? case of a male, while he is standing and, in the case of a female, while she is sitting; and (m) if, after the execution of the punishment has commenced, the authorised medical officer is of the opinion that there is apprehension of the death of the convict, the execution of the punishment shall be postponed until the authorised medical officer certifies him physically fit to undergo the remainder of the punishment." 27. In result, the appeal stands accepted.

M.B.A./687/FSC Appeal accepted.