

Zina (Adultery/Fornication) and Rape

CASE NAME	<i>Safia Bibi v. State</i>
CITATION	PLD 1985 FSC 120
COURT	Pakistan Level of Court: Federal Shariat Court, Criminal Appeal Name of Judges: Aftab Hussain
SUMMARY OF FACTS	<ul style="list-style-type: none"> The father of Safia Bibi lodged a complaint on behalf of his daughter, an unmarried twenty-year-old suffering from acute myopia, who had been subjected to Zina-bil- Jabr by Maqsood Ahmed whilst working for his family. Under shock she told her mother about the incident and refused to continue working for this family. Nonetheless, she reluctantly agreed to go back when Mst Rashida Bibi, Maqsood’s mother, “took her away in the absence of her parents.” (Hussain, 122: 6). On this instance the father of Maqsood Ahmad, Muhammad Ali, committed the same offence. From this zina Safia Bibi gave birth to a child who later died in hospital. A case was registered by the police against both Safia and Maqsood —Safia for fornication and Maqsood for rape. Chaudry Muhammed Aslam, the Additional Sessions Judge ruled that there was insufficient evidence linking Maqsood with the charge of rape, and that Safia’s testimony was self-exculpatory and accordingly inadmissible. “He sentenced her under section 10(2) of the Zina Ordinance to 3 years imprisonment, 15 stripes, and imposed fine of Rs. 100.” (Kennedy, 1998: 41) The case attracted publicity and press intervention which subsequently resulted in the FSC calling for the case to be reheard.
LEGAL REASONING	<ul style="list-style-type: none"> Whether it is possible to convict someone of zina using his/ her own self-exculpatory statement alleging rape as grounds of evidence? <p>“There is also no evidence against Mst Safia Bibi.” (Hussain, 122: 11) She was merely convicted ‘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’ (Aftab Hussain, 123: 12). This is a clear departure from the well-known principles of criminal law that it</p>

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 record” (Hussain, 123:13).

Moreover, **as per the classical Islamic Schools rape absolved the woman of any liability thus her admission that she was raped was sufficient to absolve her.**

- **Whether a confession of one accused is sufficient evidence to convict the other of his charge?**

Safia “produced three defence witnesses... but their evidence is not at all helpful since they did not throw any light on the occurrence” (Aftab Hussain, p. 122). Therefore “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” (Aftab Hussain, p. 122).

“It would be clear that even in Shariah the confession of one accused against the co-accused is not sufficient for the conviction of the latter. Views differ only on the point whether 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.” (Hussain, 125: 29).

The learned judge lingered on the improbability of a judgement in which only one party was convicted, while the other namely the male, was acquitted. The judge refers to this as “strange” (Hussain, 123: 14).

He then enumerates the circumstances in which only one party was convicted might be understandable:

1. *‘If there is no evidence of eye-witnesses and the only evidence is for example, a confessional statement (as opposed to a self-exculpatory 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’* (Hussain, 123: 14).
2. *‘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’.*

(It is important to note: **This does not mean that parties who share a close relationship as lovers, (prima facie) concludes that the possibility**

	<p>of rape is negated, as rape can take place even between intimate partners who have previously consented to intercourse (as prior consent does not mean consent for all time): what the judge is stating here is that, proof of prior sexual intimacy can challenge the truth of her self-exculpation). <i>“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”</i> (Hussain, 123: 16).</p> <ul style="list-style-type: none"> • Whether the burden of proof lies with the woman accusing a man of rape? <p><i>“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.”</i></p> <p>Thus, applying these views Safia Bibi would be absolved of criminal liability as <i>“information had been given by Mst Safia Bibi to her mother”</i> of the incident (Hussain, 122: 6). Although the judge did not specifically mention whether the decision would have been the same had she not told her mother, following the fact that he had given the view of Imam Malik less prominence in his judgement, it is possible to infer she may still have been acquitted.</p> <p>This highlights that the burden of proof does not lie with the woman on accusation of rape.</p>
<p>CONCLUSION</p>	<p>In the absence of any other evidence other than the statement of Safi Bibi, Maqsood Ahmad was not convicted in respect of Zina- bil- Jabr, but the court also came to the conclusion that Safi Bibi could not be convicted for Zina when she pleaded the pregnancy to be the result of rape. Thus <i>“this being a case of no evidence, the appeal is accepted and she is acquitted”</i> (Hussain, 126: 31).</p>
<p>REFERENCES</p>	<ul style="list-style-type: none"> • Reference to the Quran and Sunna <p>Sunna- <i>‘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 women. 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 (SA.W) punished the male but acquitted the female (Al Mughni by Ibn- e- Qudama, Vol. VIII, p. 193)’</i> (Hussain, 125: 24)</p> <p>This tradition was cited throughout the case as indicative of the Prophet’s view that the confession of one accused is not a valid ground to convict the other of zina.</p> <p><i>‘My people are excused from mistakes, forgetfulness and for anything done under compulsion. It is reported from Abdul Jabbar in the authority of his father that a woman was raped and the Prophet (S.A.W) acquitted her of the charge punishable with Hadd.’</i> (Hussain, 124: 19)</p> <p>This demonstrates that <i>‘there is no Hadd on one who is raped’</i> (Hussain, 124: 19) as contented by Ibne Qudama and other Hanafi scholars, which is</p>

	<p>further verified by the Shaafis and Malikis.</p> <p>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... 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) (Hussain, 125: 25)</p> <p>This sunna demonstrates “<i>obviously the punishment of the woman was dependent on her confession</i>” (Hussain, 123: 25), highlighting the importance of considering and accepting the testimony of the woman before charging her- she is innocent until proven guilty. It is not sufficient to charge someone on the basis of the claim given by another.</p> <ul style="list-style-type: none"> • Reference to statute- <ul style="list-style-type: none"> ◦ Section 10 (2) Offence of Zina (Enforcement of Hudood) Ordinance <p>Allegation of zina- confession—procedure— Court should record her statement four times at intervals and each time accused should be asked to go out of the view of the court—confession should be independent and made without any pressure, undue influence or coercion. Falling under this offence carries a lesser sentence in the form of a tazir (discretionary) conviction.</p> <ul style="list-style-type: none"> • Section 30 Evidence Act <p>When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.</p> <p>The FSC stood firmly against the trial judge’s judgement that Safia’s testimony was self exculpatory and so could not be called a confession under the provisions of this Act. Aftab Hussain stated “a confession should be read as a whole and the self exculpatory portions therein cannot be excluded from consideration unless there is evidence on record to prove these portions incorrect” (Hussain, 123: 13).</p> <p>Judge Aftab Hussain explains this section of the Act: it “<i>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 co-accused. But it is settled law that that conviction of the co-accused cannot be based on such confession unless it is corroborated by independent evidence</i>” (Hussain, 123: 15).</p>
<p>LANDMARK PRECEDENTS</p>	<p>State v Zulfiqar Ali Bhutto PLD 1978 Lah 523</p> <p>Alongside a confession, the need for “independent evidence” as highlighted in the Zulfiqar Ali Bhutto case allowed the FSC to take a different approach in comparison to the trial judge who had charged Safia Bibi. It was not enough for the judges to use confession alone as a basis of conviction as supported by the Sunna of Aseef (above).</p>

**ISLAMIC
EXPERTS/
AUTHORS
CITED**

- **Hazrat Ali (p.124)**

'When Shahura came to him and said, "I have committed adultery", Hazrat Ali said to her, "You might have been forced to, someone might have committed sexual intercourse with you while you were sleeping."(Kitabul Fiqh alal Mazahibil Arabaa (Urdu Translation), Vol. V, pp166, 167.)'

This demonstrates that *"even under Shariah if a girl makes such a statement as made in the present case (accusation of rape upon Ahmad), she cannot be (automatically) convicted of zina"* (Hussain, 124: 18).

"The principle of Fiqh is that she will be asked about the cause of her pregnancy, is he 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 (above) tradition of Hazrat Ali" (Hussain, 124).

It will still be necessary to enquire into her confession and decide upon relevant factors before convicting someone of zina. This will include looking into questions of whether she had been *"forced to commit adultery or someone had committed sexual intercourse with her under suspicion about her identity"* (Hussain, 124: 18). In these circumstances, she will not be convicted.

- **Imam Malik (p.124)**

Even *"if an unmarried woman delivering a child pleads that the birth was the result of commission of the offence of rape on her she should still 'be subjected to Hadd punishment unless she manifested the want of consent on her part by raising an alarm or by complaining against it later"* (Hussain, 124: 19).

"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" (Hussain, 124: 20). Whilst the schools agree a woman's statement is sufficient for absolving her of the charge, Imam Malik places the burden on her by requiring circumstantial evidence through raising an alarm or complaining against the incident.

Judge Hussain pointed out that *"the opinion of the other Jurists on the point of burden of proof is preferable (than the view of Imam Malik), and is in conformity with the modern law"* (Hussain, 125). However, he noted that even if the case was to proceed upon the view of Imam Malik, Mst Safia Bibi could not be punished since there is evidence of her complaining to her mother.

- **Imam Abu Hanifa (p.125)**

"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" (Hussain, 125: 27).

His students- Abu Yousaf and Al Shaibani (p.125)

According to one version Abu Yousaf was also of the same view. Muhammad Al Shaibani held that the person confession should be punished. According to another version Abu Yousaf agreed with Muhammad.

	<p>Following Abu Hanifa’s view this case would thus be closed as both litigants would be acquitted.</p> <p>However Judge Hussain rejected this view and made sure to assert that <i>“others did not agree with the view of Imam Abu Hanifa including Imam Shafei because the person confessing should be punished on the basis of his own confession”</i> (Hussain, 125). On the other hand, the person denying would be absolved of guilt on account of absence of proof of his confession, not because of <i>“mere denial of the other”</i>(Hussain, 125). Thus going against the view of Abu Hanifa, Safia’s claim would not have been sufficient to acquit or hold Maqsood Ahmad liable.</p> <ul style="list-style-type: none"> • Hazrat Umar (p. 125) <p><i>“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.”</i> (Hussain, 125: 28)</p> <p>Using this statement, a generally favourable approach towards women can be justified as it demonstrates acceptance of the woman’s testimony. Although the word excuse was used in the hadith, it was not an excuse, rather it was an unquestionable (acceptance of her) testimony.</p> <p>Following the stance of Hazrat Umar and despite the ambiguities towards the truth, Safia Bibi’s claim was accepted, allowing her the benefit of doubt and absolving her of any offence.</p> <p><i>“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.... her statement will be accepted and she will not be convicted”</i> (Hussain, 124: 18).</p>
<p>COMMENTARY</p>	<p>One of the main reasons this case had an influential outcome was due to the public outcry in which citizens and human rights activists petitioned and appealed on Safia Bibi’s behalf. This is promising for women and groups who wish to pursue a case. In taking a stand against the lower courts and upholding public wishes this case shows how the FSC plays an important role in upholding the rights of women. However this positive stance is also doubtful as it is unclear whether the court had fallen to the demands of the public due to the case receiving <i>“considerable publicity in the national and International Press”</i> (Hussain, 121) and thus had given the above judgement or whether their concern was genuinely for the best interests of women.</p> <p>In spite of this uncertainty, the judges did appreciate the possibility that <i>“if pregnancy alone constitutes sufficient evidence of zina, the result seems to forget that the very purpose of the zina verses is to protect women’s honor.... a pregnant adulteress will be convicted without any testimonial proof, while her adulterous partner escapes punishment with his reputation intact”</i> (Quraishi, 2003). Subsequently, whilst many have viewed this case as an important step in granting and upholding women’s rights Kennedy argues that this decision merely reiterated a well-established precedent of the FSC’s interpretation of the Zina ordinance. Namely, in the case of birth or the pregnancy of an unmarried woman and in the absence of circumstantial or corroborative evidence proving wilful zina doubt should go with the claimant. (Kennedy: 1991; 49).</p>

Despite this lukewarm view of the case he highlights how this case alongside others shows a favourable approach towards women. *“If the implementation of section 10(2) was discriminatory to women one would expect that there would be more women convicted under this provision than men. The opposite is the case. Of those convicted under the terms of 10(2) in district courts and in the FSC, 56% and 70% respectively are men. Therefore, to the extent that gender bias is present in the implementation of this provision of law, it favours women”* (Kennedy, ‘Islamization in Pakistan . . . ’ (1988), 313; see Table in Kennedy, 1991: 49).

Menski, on the other hand, although acknowledging the success of this case recognises that Pakistani judges took some time to control these kinds of abuses and blatant excesses (Menski: 2006; 374) as Quraishi also confirms *“there have been numerous reports of such custodial rapes in Pakistan. Police action and inaction in rape cases in Pakistan are widely reported as an instrumental element to the injustice”* (Quraishi:1997 ;106).

The extent to which these mixed judgements will end and the courts will fully support women in their struggles remains to be seen. If they follow their latest judgement in 2003 of Zafran Bibi, where it was declared a rape victim should not be considered to have committed a sexual offense and should not be punished then women stand a firm chance in succeeding against their wrongdoer. However, the recent case of Mukhtar Mai (Five of six men charged over a village council-sanctioned gang rape were acquitted by the Supreme Court) places doubts on the judicial stance taken towards women. It was unfortunate the international strength of the media was not victorious in swaying the opinions of the FSC judges. Thus leaving a feeling of apprehension and uncertainty as to the attitudes and concerns of the highest court in Pakistan.

In his judgement, Judge Hussain suggests evidence implying a close and intimate relationship may be sufficient to hold a statement of the girl to the extent of self-exculpation, is not correct, which would mean she may be convicted. However, this conclusion does not sit very well for women. If the burden of proof lies on prosecution to prove the commission of zina, then the refutation of her self-exculpation — should not be absolute evidence that zina had indeed occurred. It merely should release her statement from being taken as evidence/allegation of rape against her partner, but only in so far as there are no other evidences against him weighing stronger to the contrary.

But in relation to her, confession to zina cannot not be expressed in the negative. Refuting her self-exculpation (on the elusive reason that they were intimate: as rape can and usually takes place between partners that have been intimate before) cannot and should not be taken as automatic positive confession. One does not derive automatic and unequivocal confession of zina by “negativi-tising” or refuting the defence of rape. Moreover proof that they were intimate partners does not equate to proof of zina. People can be intimate without having sex. This goes against islamic injunctions which clearly lay out that the Proof of zina, as clearly laid out in the Quran is satisfied with 4 witnesses testifying to the same act of zina. Otherwise if other lesser evidences are permitted by law, then those evidences must be so indicative that zina did take place that there is no space for reasonably doubting the fact of zina. Only then can she be charged with a conviction. But this certainty cannot possibly be achieved through showing a close relationship.

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