

Punishment for the Offence of Gang Rape

Report No. 47

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Mr. Justice Muneer A. Sheikh, Senior Judge, Supreme Court of Pakistan, while hearing an appeal in a rape case observed that the legislature while providing for the sole punishment of death in an offence of rape, committed by two or more persons under Sub-section (4) of Section 10 of the Offence of Zina (Enforcement of Huddud Ordinance, 1979) created difficulties for courts as no alternative or lesser punishment is prescribed. Thus, if death cannot be awarded due to inadequate evidence, the accused has to be acquitted. The learned Judge stated (as reported in the daily Nawa-i-Waqt dated 8.5.2002) that the courts have no alternative except to acquit the accused by giving him the benefit of any lapse or weakness of the prosecution case, in the absence of any lesser penalty prescribed. He went on to clarify that a person cannot be deprived of life without availability of strong evidence and its deep appreciation by the court, therefore, there should have been provided an alternative punishment alongwith the extreme penalty of death under the said law, thereby enabling the court to award any lesser penalty to an accused when the capital punishment cannot be imposed. Giving background of the amendment, the learned Judge also observed that during the period of Nawaz Sharif Government, Zina-bil-Jabr/rape was committed by a number of persons with a girl and the Prime Minister reached on place of incident and announced for providing death sentence to the offenders in the case of gang rape and that the offence would be tried by the Anti-Terrorist Courts. Consequently, on his direction, the law was amended. Justice Qazi Farooq, Judge, Supreme Court, sitting on the same bench also observed that courts have to exercise extreme care and caution and duly evaluate the contents of the FIR's and evidence, before awarding capital punishment.

Sub-section 4 of Section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance 1979

reads as below:-

- (4) "When Zina-bil-Jabr liable to Tazir is committed by two or more persons in furtherance of common intention of all, each of such person shall be punished with death."

Before the promulgation of Zina Ordinance the punishment of rape was prescribed in Section 376 of Pakistan Penal Code 1860 as follows:

376. "Punishment for rape. Whoever commits rape shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, unless the woman raped is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

After promulgation of The Offence of Zina (Enforcement of Hudood Ordinance) 1979, the punishment of rape was bifurcated in the two categories:-

- i. Offence of Zina-bil-Jabr liable to Hadd and
- ii. Offence of Zina-bil-Jabr liable to Tazir.

The provisions of Zina-bil-Jabr in are as mentioned in the aforesaid Ordinance reproduced as follows:-

Section 6. Zina-bil-Jabr sub-section (2) and (3) ibid provides:

(2) Zina-bil-jabr is liable to "hadd" if it is committed in circumstances specified in sub-section (1) of Section 5

(3) Whoever is guilty of "zina-bil-jabr" liable to "hadd" shall, subject to the provisions of this Ordinance"

(a) if he or she is a "muhsan" be stoned to death at a public place; or

(b) if he or she is not a "muhsan" be punished with whipping numbering one hundred strips, at a public place, and with such other punishment, including the sentence of death, as the Court may deem fit having regard to the circumstances of the case.

(4) No punishment under sub-section (3) shall be executed until it has been confirmed by the Court to which an appeal from the order of conviction lies; and if the punishment be of whipping until it is confirmed and executed, the convict shall be dealt

with in the same manner as if sentenced to simple imprisonment.

Section 10. Zina or Zina-bil-Jabr liable to Tazir.

- (1) Subject to the provisions of Sec. 7, whoever commits zina or zina-bil-jabr which is not liable to hadd, or for which proof in either of the forms mentioned in section 8 is not available and the punishment of “qazf” liable to hadd has not been awarded to the complainant, or for which hadd may not be enforced under this Ordinance, shall be liable to tazir.
- (2) Whoever commits zina liable to tazir shall be punished with rigorous imprisonment for a term, which may extend to ten years and with whipping numbering thirty stripes, and shall also be liable to fine.
- (3) Whoever commits zina-bil-jabr liable to tazir shall be punished with imprisonment for a term which shall not be less than four years nor more than twenty five years and, if the punishment be one of imprisonment, shall also be awarded the punishment of whipping numbering thirty stripes.
- (4) When Zina-bil-Jabr liable to Tazir is committed by two or more persons in furtherance of common intention of all, each of such person shall be punished with death.

Accordingly section 6 (C) Terrorist Act, 1997 as amended from time to time by Ordinance IX of 1998, Ordinance IV of 1999 and Ordinance XIII of 1999 was provided to define a Terrorist Act as follows:-

Section 6

A person is said to commit a terrorist act if he,

“(C) Commits an act of gang rape, child molestation, or robbery coupled with rape as specified in the schedule to this Act.”

Section 7(ii) of the said Act described that the punishment of Terrorist Act of gang rape, will be as provided under the relevant law i.e. sub-section (4) of Section 10 of the Offence of Zina Ordinance 1979.

Under Section 10(4) of Offence of Zina Ordinance, 1979 for the offence of Zina-bil-Jabr liable to Tazir, the death penalty have been provided as Tazir with no other lesser punishment as provided under sub-section (3) of Section 10 of the Offence of Zina Ordinance 1979. In criminal cases, courts exercise due care and make deep appreciation of the evidence produced by the

prosecution before ordering for taking the life of the accused and may have to acquit him if the evidence provided proves to be inadequate or any doubt is created. The benefit of doubt passes on to the accused.

Distinguish Between Hadd and Tazir

Hadd

“Hadd means the punishment which is fixed and enjoined as the right of Allah by the Quran, Sunnah or Ijma.” (Raddul Mukhtar by Ibn-e-Aabdin Shami Volume III, page154, Al-Hedaya by Sheikh-ul-Islam Ali Bin Abi Bakar Al Margdinani, page 506.) Hadd punishment is fixed by Allah or Allah’s Messenger and hence cannot be reduced or waived or enhanced by the Imam or the Qadi. However, if the crime is not proved according to the standard of Islamic Shariah (which is very strict and foolproof), then the judge would award Tazir or discretionary punishment according to the nature and extent of the crime.

Tazir

The word “Taazir” is derived from the word ‘azar’ which means prevent; to respect, to reform. It is a discretionary punishment to be inflicted for transgression against Allah, or against an individual. The punishment of Tazir is not fixed by the law-giver but is left to the discretion of the Head of the State or Qazi and is based on the principles laid down by the Qur’an and Sunnah. In “Hedaya” translated by Charles Hamilton, Taazir is defined as under:-

“TAZEER, in its primitive sense, means prohibition, and also instruction; in law it signifies an infliction undetermined in its degree by the law, on account of the right either of God, or of the individual; and the occasion of it is any offence for which Hadd (or stated punishment) has not been appointed; whether that offence consist in word or deed.”

The Term “Taazir” as defined in Section 2(e) of the Zina Ordinance VII of 1979 means “any punishment other than Hadd”.

Punishment of Zina According to Islamic Penal Law.

Zina (adultery and fornication) is the most abominable act and has been expressly made unlawful by the Islamic Penal Code. It is one of the gravest sins and one of the greatest crimes. The Holy Quran strictly prohibits its followers from going near it because it is an abomination and evil way. It is one of the crimes liable for Hadd, the punishment for which has been prescribed in the Holy Qur’an and the Sunnah of the Prophet (PBUH). If person involved in Zina is unmarried, he or she is to be punished by one hundred lashes. But if a person guilty of this offence is married, he or

she will be awarded punishment of stoning to death (rajm).

Procedure for Establishment of Offence of Zina

For establishing the offence of Zina, the Qur'an stipulates (see Verse 15 of Chapter 4, and Verse 4 and 13 of Chapter 24 of the Holy Quran) the direct evidence of four competent witnesses instead of the two required in all other judicial cases. The confession of a person four times is sufficient evidence for his conviction provided the confession is being made without any external pressure, coercion or duress, and also, provided the person making confession is not mad nor he is in the state of intoxication. Pregnancy of an unmarried woman is also considered as proof of the act of fornication on her part. However, according to many jurists, pregnancy alone is not sufficient for holding an unmarried woman liable for Hadd unless it is corroborated by any other direct evidence or confession, because Islam gives full benefit of doubt to the culprit in Hudood cases.

The standard of proof for the offence liable to Hadd is very high and very strict. Many other conditions have been attached by the jurists with the nature and circumstances of the act of crime such as the motive, age, sanctity, mental state, etc. of the accused. Such conditions or requirements have to be fulfilled before awarding Hadd punishment to the offenders. If there is even a slight doubt regarding evidence, confession of the accused or proof of the guilt, no Hadd would be awarded. The witnesses should be honest, trustworthy, adult, sane, of good moral character and having no enmity with the offenders. The confession of the accused should be sincere, in plain words and without any external pressure. The accused should be sane and at the time of confession he should not be under any intoxication. The Islamic State shall not take action against anybody for zina unless it is fully proved. If the guilt is not proved, the authorities cannot pass orders for punishment even if they have the knowledge of the crime through many other sources.

Proposal

Insertion of Sub-section 4 in Section 10 is unrealistic, that only punishment of death is provided in this Section, which is the higher punishment as provided under Hadd Punishment of Zina. While the punishment of Zina liable to Hadd has been fixed as one hundred stripes if committed by unmarried persons, rajm (stoning to death) has been sanctioned for commission of this offence by married persons. But the above punishments of Zina in case of fornication or adultery will be awarded only if the offence is established through four truthful and reliable eye witnesses or through four time confessional statement of offender otherwise that punishments cannot be awarded.

Under offences liable to Tazir the Taziri punishment can be flexible and the judge is competent to award the punishment, which can be minimum or maximum according to the nature of the offence or circumstances of the case.

It is, therefore, suggested that the Sub-section (4) may be amended so as to provide for

punishment of imprisonment for upto 25 years but not less than 10 years and fine for upto one hundred thousand rupees as follow:-

Amendment of Section 10, Ordinance VII of 1979.—In the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, in Sub-section (4) of Section 10, after the word “death” the following words shall be added:-

“or imprisonment for a term which may extend to twenty five years but shall not be less than ten years and shall also be liable to fine to the extent of one hundred thousand rupees to be paid to the victim.”

Consequently, the amended Sub-section (4) of Section 10 shall read: -

“(4) When zina bil-jabr liable to tazir is committed by two or more persons in furtherance of common intention of all, each of such persons shall be punished with death or imprisonment for a term which may extend to twenty five years but shall not be less than ten years and shall also be liable to fine to the extent of one hundred thousand rupees to be paid to the victim.”

Commission’s deliberations

The Commission considered the above draft, prepared by the Secretariat and noted the anomaly in law wherein for the offence of Zina-bil-Jabr (rape) by 2 or more persons, the punishment prescribed is death and no alternative punishment is prescribed. The Commission observed that death sentence is awarded in cases where complete and foolproof evidence is produced, which is generally rare in rape cases, and as such the benefit of doubt goes to the accused, by acquitting him of the charge, therefore, there is a need to amend the law to prescribe alternative punishments. Accordingly, the Commission approved draft amendment Bill at Appendix.

Appendix

A

BILL

further to amend the Offence of Zina (Enforcement of Hudood) Ordinance 1979

WHEREAS it is expedient further to amend the Offence of Zina (Enforcement of Hudood) Ordinance 1979 for the purposes mentioned hereinafter;

It is hereby enacted as follows:

1. Short title and commencement. --(1) This Act may be called the Offence of Zina (Enforcement

of Hudood) (Amendment) Act 2002.

(2) It shall come into force at once.

Amendment of section 10, Ordinance VII of 1979.—In the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, in section 10, in sub-section (4), after the word “death” the following words shall be added, namely:-

“or imprisonment for a term which may extend to twenty five years but shall not be less than ten years and shall also be liable to fine to the extent of one hundred thousand rupees to be paid to the victim.”

