Proceedings and judgment in the Sharia Court of Appeal of Sokoto State

(a)-(c) translated from the Hausa by Aliyu M. Yawuri

(d) translated by Ahmed S. Garba

(a) Notice of appeal filed 26th October 2001

IN THE SHARIA COURT OF APPEAL OF SOKOTO STATE
HOLDEN AT SOKOTO

APPEAL NO. _____

BETWEEN:

SAFIYATU HUSSAINI T/TUDU …… APPELLANT
and
THE STATE …… RESPONDENT

NOTICE AND GROUNDS OF APPEAL

I, Safiyatu Hussaini T/Tudu do hereby appeal against the decision of the Upper Sharia Court Gwadabawa in case No. USC/GW/CR/TR/010/001 dated 9/10/01 wherein the court sentenced me to *rajm* for committing *zina*.

The following are my grounds of appeal:

1. The Upper Sharia Court Gwadabawa erred when it convicted me of the offence of *zina* on the grounds that I confessed to the offence when indeed I did not make such confession.

2. The Upper Sharia Court Gwadabawa erred in law when it convicted and sentenced me to *rajm* on the grounds that I delivered a child when I am not married. This is wrong since delivering a child by a divorced woman is not a conclusive proof of *zina* against her.

Particulars:

i. I am a divorcee.
ii. It is not up to five years since I was divorced.
iii. My pregnancy and the child I delivered are affiliated to my former husband in accordance with Islamic law.

3. The Upper Sharia Court Gwadabawa erred in law when without first explaining the meaning of the offence of *zina* it convicted me of that offence. The decision is contrary to Islamic law and the Constitution. It is null and void and liable to be set aside.

Particulars:

i. The trial court judge never interpreted the word *zina* to me.
ii. The trial court judge never explained the offence of *zina* to me.
iii. I did not understand the meaning of the offence for which I was charged.

4. The Upper Sharia Court Gwadabawa erred when it failed to explain to me my right to defend myself in person or by a lawyer of my own choice. This resulted in breach of my right to fair hearing.

Particulars:

i. I was never informed of my right to be defended by a lawyer of my choice.
ii. I did not understand the meaning of the offence I was charged with. I was therefore unable to defend myself.
iii. The failure to explain to me the right to engage the services of a lawyer to defend me prejudiced me seriously.

5. I will present my additional grounds upon receipt of the records of proceedings.

On notice to	Safiyatu Hussaini T/Tudu
Attorney-General	c/o A.M. Yawuri
of Sokoto State.	(Her Solicitor)

(b) Proceedings 14th January 2002[35]

Before:

Honourable Grand Kadi	Alhaji Muhammad Bello Silame
Honourable Kadi	Alhaji Bello Muhammad Rabah
Honourable Kadi	Alhaji Abdulkadir Saidu Tambuwal
Honourable Kadi	Alhaji Muhammad Tambari Usman

Court: Counsel to appellant: would you proceed to argue your appeal or do you wish to present additional grounds of appeal?

Appellant's Counsel (Abdulkadir Imam Ibrahim): I have additional grounds of appeal:

1. The Upper Sharia Court (USC) Gwadabawa had no jurisdiction to hear the case.
2. The USC Gwadabawa erred when it relied on the statement of the appellant only and without hearing defence witnesses.
3. The charge drafted by the court did not define *zina.*
4. The court did not hear evidence that the appellant is a *muhsinat* and that she had sexual intercourse.
5. The court did not allow for *i'izar* before it sentenced the appellant.
6. The court did not realise that pregnancy is not in itself a conclusive proof of *zina*.

1. Going through the record of the lower court, the police said they received information that the appellant was pregnant and they received this information on 23/12/2000. It is not indicated when the appellant committed the *zina.* Assuming she committed the *zina* before this date, then there was no law that prescribed the punishment of *rajm*. The Sharia Penal Code and the Sharia Criminal Procedure Code commenced operation on 25/1/2001 that is the day the State Governor signed them into law. Under Islamic law a person cannot be punished for an offence that is not

[35] Caption omitted.

provided for by a law. It was section 277(1) [sic: 4(7)] of the Nigerian Constitution that empowers State Houses of Assembly to enact laws. Section 4(9)[36] also refers.

2. On the issue of *i'izar*, from the beginning of the proceedings to the last the USC Gwadabawa did not observe *i'izar*. The failure to observe *i'izar* nullifies the judgment. See *Ihkamul Ahkam* p. 14 where he said "Before judgment, mitigating considerations, supported by two unimpeachable witnesses, can be accepted." In *Bahjah* pp. 64-65 of vol. 1 it states that a judgment is nullified where the judge fails to observe *i'izar*.

3. The lower court did not prove that the appellant was a *muhsinat* before the court sentenced her to *rajm*. There was no evidence that she had previously married. See *Bidayatul Mujtahid* vol. 2 p. 326, where it is stated that before a person is convicted of *zina* evidence must prove that she is *muhsinat*. Imam Malik enumerated the conditions to include adult, Muslim, free-born and having had sexual intercourse during a valid marriage.

4. The USC Gwadabawa at p. 13 lines 18-23 of the record[37] relied on the fact that the appellant was pregnant when she is not married. A woman can carry a pregnancy for up to seven years after her divorce, that is a sleeping embryo. The appellant was divorced about three years ago. See *Sharhin Sahihul Muslim* by An-Nawawi, vol. 2 p. 192.

5. It was not the appellant who submitted herself to the court. But a perusal of the various authorities will show that during the time of the Holy Prophet it was those who committed *zina* who voluntarily submitted themselves to the Holy Prophet and confessed that they committed *zina*. In this case it was the people who suspected that she had become pregnant without a husband who reported Safiyatu. Therefore her prosecution was illegal. See *Suratul Hujurat* verse 12.

6. On behalf of the appellant we hereby retract her statement that it was one Yakubu Abubakar who impregnated her. See *Mukhtasar* vol. 2 p. 285: "A person who confesses to the offence of *zina* shall receive the prescribed punishment save where he retracts; in that case his retraction shall be accepted and he will not receive the punishment." See also *Sahihul Bukhari* vol. 2 p. 193. I urge this court to accept this retraction. The child is that of her former husband Alhaji Yusufu Sabon Birni Kware.

Therefore I urge this court to set aside this punishment of stoning to death. See *Fiqhus Sunnah* vol. 2 p. 241. We urge the court to allow the appeal and discharge the appellant.

Court: State Counsel will you reply to the submissions of counsel?

State Counsel (Muhammadu Barau Kamarawa): I will reply. However since he has just filed additional grounds of appeal I need some time to enable me prepare for my reply.

Court: The appeal is adjourned to 18/03/2002 at the instance of State Counsel.

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[36] Prohibiting, in relation to any criminal offence, the making of "any law which shall have retrospective effect".

[37] References to pages and lines of the lower court records: we have not inserted the page and line numbers from the original records in the translations given here; we trust that the reader will be able to locate the relevant passages without them.

(c) Proceedings 18th March 2002

Court: State Counsel are you ready with your reply?

State Counsel: I am ready.

1. It is not correct to say that the lower court did not explain *zina* to the appellant. See p. 1 lines 15-20 and line 31, p. 2 lines 1-7. I urge this court to discountenance this argument.

2. On the issue of jurisdiction: sections 4(6) and (7) of the 1999 Constitution empower the State Houses of Assembly to enact laws for the security and good governance of their States. The Sokoto State House of Assembly has enacted Law No. 2 which established the Sharia Courts with the jurisdiction to hear this case.[38] The Governor has signed this law. Anyone who violates this law will be punished. The courts have jurisdiction over Muslims.

3. Section 38 of the 1999 Constitution guarantees freedom of expression and religion. The Constitution recognises the Sharia that is why the State House of Assembly enacted the Sharia Criminal Procedure Code and the Sharia Penal Code.[39] Section 36(12) of the Constitution provides that a person shall only be punished for an offence that is defined by a written law. The offence of *zina* is provided by sections 128-129 Sharia Penal Code Law 2000. This offence is also provided for in section 12(1)-(3) of the Sharia Criminal Procedure Code. See also Appendix A of the code. Therefore the lower court has jurisdiction to hear this case and I urge the court to reject the submission on this ground.

4. On the issue of *i'izar*, we note that the lower court did observe it. After it heard the prosecution's evidence the court asked the appellant to open her defence, see p. 8 of the records at line 24 to the end of that page. See also p. 9 lines 5-15. For example: "Court to the 2nd accused: you heard the evidence of Joseph: do you agree with it or do you wish to impeach it?" Answer "I heard and I accept the evidence against me but he did not tell the truth with respect to Yakubu". Therefore I urge this court to dismiss this ground of appeal.

5. On the issue of the failure of the lower court to satisfy itself that the appellant is a *muhsinat*. The appellant told the court that she was divorced two years ago, see p. 9 lines 8-15. This ground of appeal is therefore baseless. The lower court gave the appellant all the opportunities usually given to an accused person. The court investigated the matter fully before it delivered its judgment as required by Sharia. See Al-Adawi's commentary on *Risala* [*Adawi*] vol. 1 p. 280; see also *Sahihul Bukhari* vol. 1 p. 528, hadith no. 806. Therefore the lower court had evidence before it that the appellant was a *muhsinat*.

6. Counsel for the appellant submitted that a woman may carry a pregnancy for upward of seven years. Minimum period for pregnancy is six months and the maximum is five years. Muslim jurists agree on this; you will find this authority in *Qawaninul*

[38] Referring to Sokoto State's Sharia Courts Law, No. 2 of 2000, assented to by the Governor on 22nd February 2000.

[39] Both assented to by the Governor on 25th January 2001.

Fiqhiyyah p. 204. The author said a woman can carry a sleeping embryo for five years. Decisions of courts are based on this opinion.

7. Appellant's counsel submitted that the appellant did not voluntarily submit herself to the court and accuse herself of *zina*, while during the period of the Prophet it was the accused persons who submitted themselves voluntarily to the court. Counsel argued that there is therefore no basis in law for arraigning the accused as the police did. On the contrary: we submit that a court can take cognizance of an offence, even if the accused does not submit himself. See *Suratul Nahli* verse 90. Therefore the authorities must warn people against transgression and where transgression is committed the law must punish the transgressor. See *Arba'una Hadith*, no. 34.

8. Appellant's counsel submitted that the charge drafted by the lower court is meaningless. Counsel did not show to the court in what way the charge was meaningless. We refer to section 170 of Sharia Criminal Procedure Code subsections (1)-(3). See also sections 171 and 172 of the same code. See also p. 11 lines 3-27 and p. 12 lines 1-4 of the lower court record. We urge the court to dismiss this ground.

9. We submit that the appellant cannot withdraw or retract her confession. Her pregnancy is sufficient evidence of *zina* against her. In that case she cannot retract her confession. If she were not pregnant she could retract her confession. We refer to section 153 of Sharia Criminal Procedure Code (SCPC) where it is provided that the appellant shall make the retraction, not her lawyer. Therefore the retraction made on her behalf by her lawyer is not valid. See *Jawahirul Iklili* vol. 2 p. 284.

10. We concede that the prescribed punishment (*hadd*) should not be inflicted in cases of a doubt. However, this is applicable in cases of *qisas* (retaliation). It is not applied in a case of this nature. I refer to sections 166 and 188(1) and (2) of SCPC. There are three conditions to be fulfilled before the punishment of *zina* is inflicted. See also *Qawaninul Fiqhiyyah* pp. 305-306. The conditions are:

1. Confession by the accused provided he is sane, adult and free-born.
2. Four male witnesses who must be just and they must have witnessed the offence clearly.
3. A free-born unmarried woman who becomes pregnant will receive the punishment even if she claims she was raped save if she has a possible defence like she is seen crying.

Out of these conditions, if one of them is proved against an accused, the punishment will be inflicted. See *Risala* p. 592. The lower court convicted the appellant on two of these requirements, that is (i) her confession and (2) pregnancy. See also *Bidayatul Mujtahid* vol. 2 p. 328.

Finally, I submit that *rajm* as punishment for *zina* is provided for in the Qur'an, the prophetic traditions and the practices of the rightly guided companions. See *Bulughul Marami* p. 257 hadith no. 1235 where Umar ibn Khattab said while delivering Friday sermon that the punishment of stoning to death is there in the Qur'an; though the text has been abrogated, the punishment is preserved. Therefore nobody should claim that the punishment is not supported by the Qur'an. Indeed the punishment will be inflicted on a Muslim who has married and who commits *zina*. The punishment awarded by the

lower court ought to be affirmed, see *Sahihul Bukhari* vol. 8 p. 536. We urge the court to affirm the decision.

Court: State Counsel, the appellant's counsel contended that the lower court had no jurisdiction over the case because as at the time the offence was alleged to have been committed the Sharia Penal Code Law 2000 had not commenced. Do you wish to reply to this?

State Counsel: Islamic law has been in existence. However, the punishment of *rajm* was not being inflicted. At any time the opportunity arose Islamic law would be applied. Such opportunity arose now, the State Governor signed the bill into law on 25-1-2001 and the commencement date of the law is 31-1-2001.

Court: Counsel for the appellant, do you wish to say anything before the court adjourns for judgment?

Appellant's Counsel: The lower court failed to explain the meaning of *zina* to the accused. The word is Arabic and the accused is a villager and she is not an Arab. The lower court ought to have explained the term to her as is explained or defined in the Sharia Penal Code Law section 128. We will recall that in *Hadith Ma'iz*, the Prophet ignored Ma'iz four times and Ma'iz was asked if he knew the meaning of *zina* and its punishment. This is a serious error. Section 36(6)(a) of the 1999 Constitution requires that the court should explain the offence and its punishment to the accused.[40] Based on this ground alone this appeal should be allowed. See p. 10 lines 21-22: the court charged the appellant under section 128 Sharia Penal Code. That section does not explain the offence. Therefore based on our submissions we urge this court to allow this appeal and discountenance the arguments of the State Counsel which are misconceived.

Court: State Counsel, do you wish to say anything before the court adjourns for judgment?

State Counsel: In the event this court holds that at the time the offence took place this Sharia Penal Code did not commence operation we shall urge the court to find the appellant guilty of defaming the co-accused Yakubu Abubakar. We note that the lower court did not charge the appellant with this offence however this court has the power to convict her of the offence. We rely on section 183 of the Sharia Criminal Procedure Code.[41]

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[40] Section 36(6)(a) of the 1999 constitution provides: "Every person who is charged with a criminal offence shall be entitled to—(a) be informed promptly in the language that he understands and in detail of the nature of the offence."

[41] Section 183 of Sokoto State's Sharia Criminal Procedure Code allows conviction of a lesser offence where a greater offence is charged, if (1) a combination of some only of the elements of the greater offence constitute a complete lesser offence, and such combination is proved, or (2) the facts proved reduce the greater to the lesser offence. The offence of *qadhf* is defined and the punishment prescribed in §§141 and 142 of Sokoto State's Sharia Penal Code, as follows: "**141**. Whoever by words either spoken or reproduced by mechanical means or intended to be read or by signs or by visible representations makes or publishes any false imputation of *zina* or sodomy concerning a chaste person (*muhsin*), or contests the paternity of such person even where such person is dead, is said to commit the offence of *qadhf*. Provided that a person is deemed to be chaste (*muhsin*) who has not been convicted of the offence of *zina* or sodomy. **142**. Whoever

Court: Case adjourned for judgment.

(d) Judgment of the Sharia Court of Appeal of Sokoto State[42]

25th March 2002

Court: Appellant, her counsel and counsel to the respondent are all in court for the reading of the judgment.

JUDGMENT

This matter comes from the Upper Sharia Court (USC) Gwadabawa, in Suit No. USC/GW/CR/F1/10/2001, filed on 3/7/2001 and decided on 9/10/2001. The judgment was appealed to this court on 26/10/2001.

[Summary of proceedings below]

[The Sharia Court of Appeal here rehearses in considerable detail the proceedings and judgment in the Gwadabawa court, following the record reproduced above very closely.]

[Summary of grounds of appeal]

Safiyatu Hussaini, not being satisfied with the judgment of USC Gwadabawa, appealed against it to this court. Her Notice of Appeal stated four grounds of appeal:

[The four grounds of appeal stated in the Notice of Appeal reproduced above, including the particulars supporting grounds 2, 3, and 4 are quoted verbatim.]

[The matter came on for hearing before this court on 14/1/2002.] The appellant, Safiyatu Hussaini Tungar Tudu, and State Counsel representing the Attorney-General, both appeared before us. We read to the appellant her grounds of appeal and asked if she was satisfied with them or whether she had any additional grounds to state. She answered by saying that her lawyer, Abdulkadir Imam Ibrahim, was present with her in court. Barrister Ibrahim confirmed that he had agreed to represent Safiyatu in the matter, and stated that several co-counsel were appearing with him, whom he asked the court to recognise, as follows:[43]

1. Malam Aliyu Musa Yawuri
2. Malam Sadiq Abubakar
3. Malama Ladidi Abubakar
4. Malam Mohammed Saidu Sifawa

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commits the offence of *qadhf* shall be punished with eighty lashes of the cane; and his testimony shall not be accepted thereafter unless he repents before the court."

[42] Caption omitted. The style of the case is *Safiyatu Hussaini Tungar Tudu vs. Attorney-General Sokoto State*, Appeal No. SCA/GW/28/2001.

[43] The co-counsel listed were associated respectively with the following organisations which together were supporting Safiyatu Hussaini's appeal: 1. Women's Rights Advancement and Protection Alternative (WRAPA). 2. National Human Rights Commission. 3. Office of the Federal Attorney-General. 4. National Human Rights Commission. 5. Federal Ministry of Women Affairs. 6. Nigerian Bar Association. 7 and 8. Baobab for Women's Human Rights. 9. ??. 10. ??. Lead counsel, Abdulkadir Imam Ibrahim, was brought in by Baobab. The involvement of these various groups is discussed further in Aliyu Musa Yawuri's essay in part VII of this chapter.

5. Mrs. O. Omo-Osagie
6. Mr. Bola Odugbesan
7. Malama Hauwa Ibrahim
8. Malama Ndidi Ekekwe
9. Malam Isa Muhammed
10. Mr. Victor Dadieng

After recognising these co-counsel, we repeated to Barr. A.I. Ibrahim, as lead counsel for the appellant, our question whether appellant had additional grounds of appeal or any further particulars to state. He answered that they did have additional grounds of appeal, and stated them as follows:

1. The USC Gwadabawa had no jurisdiction to hear the case or to convict the appellant on the charge.
2. The USC Gwadabawa erred in law when it relied solely on the statements of the appellant without hearing her defence witnesses.
3. The charge drafted by the court did not disclose the meaning of *zina*.
4. The court did not call for evidence to establish that the appellant is a *muhsinat* and that [during her marriage] she had coitus complete with penetration.[44]
5. The court did not give the appellant opportunity for *i'izar* before it sentenced her.
6. The court did not consider the fact that pregnancy is not a conclusive proof of *zina*.

[Summary of the arguments of appellant's counsel]

Appellant's counsel continued with the following further submissions in support of appellant's grounds of appeal:

1. According to the record of proceedings of the trial court, the police stated that they got the information that the appellant had become pregnant on 23/12/2000. But the date she allegedly committed *zina* was not indicated. Assuming she committed *zina* before 23/12/2000, then there was at the time the offence was committed no law that prescribed the punishment of stoning to death for this offence. The Sokoto State Sharia Penal and Sharia Criminal Procedural Code Laws 2000 both came into effect on 25/1/2001, as it was on that day they were signed into law by the Governor.

Appellant's counsel submitted that under Islamic law a person is not punished for an act he committed at a time when there was no law prohibiting that act. Furthermore, the Sharia laws of Sokoto State were established under the Nigerian Constitution 1999, particularly section 277(1) [sic: 4(7)] which empowers the State Houses of Assembly to make laws which they think appropriate in their States. It was based on this that the Sharia laws were passed in Sokoto State in 2000. But section 4(9) of the Constitution provides that no one shall be punished for an offence he committed before the coming into operation of the law that punishes that offence.

[44] "Kotu bata nemi shedun cewa mai apil muhsina ceba, anyi ingantaccen dukhuli da wada'i da itaba."

2. Appellant's counsel next submitted that if one reviews the record of proceedings in the USC Gwadabawa, one will see that at no time did the trial court observe *i'izar* with respect to the accused. Relying on *Ihkamul Ahkam* p. 41, he argued that failure to observe *i'izar* is fatal to the proceeding in its entirety. The authority cited provides that:

> Before judgment, mitigating considerations, supported by two unimpeachable witnesses, can be accepted. This is the preferred opinion.

Counsel also cited *Bahjah*, vol. 1 pp. 64-65:

> Before judgment, legitimate excuses supported by two unimpeachable witnesses, can be accepted.

3. Appellant's counsel submitted that the trial court did not establish that the appellant was a *muhsinat* before it passed judgment of *rajm* on her. It was nowhere shown in the proceedings that Safiyatu Hussaini had once been married. But, according to counsel, before a person is convicted of the offence of *zina*, it must be established that she is a *muhsinat*. Counsel based his submission on the authority of *Bidayatul Mujtahid* vol. II p. 326:

> Previous marriage is one of the conditions for imposition of a sentence of *rajm*.

Counsel also cited Imam Malik's enumeration of the conditions that must be established before a person can be sentenced to *rajm* for the offence of *zina*: the person must be proved to be an adult free-born Muslim who has had sexual intercourse during a valid marriage.

4. The USC Gwadabawa at p. 13 lines 19-23 of the record based its decision on the fact that Safiyatu was found to be pregnant when she was not married. Appellant's counsel submitted that this alone cannot be evidence that Safiyatu committed *zina*, because a woman can carry a pregnancy, that is a sleeping embryo, for up to seven years without delivery; but Safiyatu was divorced only about two years ago. The lawyer relied on the authority of *Sharhin Sahihul Muslim,* An-Nawawi's commentary on *Sahihul Muslim*, vol. 2 p.192:

> Imam Shafi'i, Abu Hanifa and the vast majority of *ulama*s are of the view that a woman should not be given *hadd* punishment merely because she is found pregnant when she has no husband or is a spinster or a divorcee. Equally, if she is found pregnant and claims compulsion, or even if she just keeps quiet, there should never be *hadd* on her.

Counsel submitted that in view of this it was improper for the lower court to base its judgment on the fact of Safiyatu's pregnancy.

5.[45] Counsel next submitted that Safiyatu never confessed or was shown to have confessed to *zina* either before the trial court or elsewhere.

On this point, counsel first argued that a perusal of the authorities will show that during the time of the Prophet (SAW) and his Companions, in all the cases in which the

[45] This is the last number given in the judgment to the points of appellant's counsel's argument. The numbering restarts subsequently with the points of State Counsel's argument.

hadd punishment for *zina* was imposed, it was the offenders who voluntarily submitted themselves to the authority. But Safiyatu did not do so. Rather, others suspected her of becoming pregnant when she was not married, and they brought her involuntarily before the authorities. Her subsequent arraignment and prosecution was therefore illegal, her counsel submitted, relying on the authority of this passage of Qur'an *Suratul Hujurat* verse 12:

> O you who believe! Avoid much suspicion; indeed some suspicion is sin. And spy not, neither backbite one another….[46]

As to appellant's statement that it was her co-accused Yakubu Abubakar who impregnated her, counsel withdrew it on behalf of the appellant. As authority for the right of a person to withdraw a confession he relied on *Mukhtasar* vol. 2 p. 285:

> A person who confesses to committing *zina* should be punished with *hadd*, unless he retracts his confession, in which case the retraction should be accepted and he should not be punished with *hadd*.

Counsel also relied on *Sahihul Bukhari* vol. 2 p. 193 where it is stated that:

> The confessor should be given the opportunity to retract his confession. If he retracts it, the retraction should be accepted. There is no dissent on this opinion.

In view of this, appellant's counsel said, "her statement regarding Yakubu is hereby retracted, and we urge this court to accept this retraction." Counsel submitted that Safiyatu's pregnancy was not attributable to Yakubu but was a sleeping embryo attributable to her former husband, by name Alhaji Yusufu Sabon Birni Kware. At least, since there is doubt, counsel urged the court to set aside the judgment of *rajm* passed on the appellant. He cited *Fiqhus Sunnah* vol. 2 p. 241:

> Narrated by Aishat (may Allah the exalted be pleased with her). She said that the Prophet (SAW) said: Defend Muslims against *hadd* punishment whenever you can do it. If there is a way out, it should be followed, for it is better for the Imam to err on the side of caution than to err on the side of punishment.

Counsel further cited *Fiqhus Sunnah* at the same place where it says:

> Abu Huraira said: Defend against *hudud* if you can ever find any defence whatsoever.

Counsel therefore urged the court to allow the appeal and discharge and acquit the appellant.

[Summary of the arguments of State Counsel]

After these submissions, State Counsel, representing the Attorney-General of Sokoto State, made his own submissions as follows:

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[46] The English as per *Ibn Kathir*. A less ambiguous interpretation might be: "O you who believe! Avoid too much suspicion. Indeed sometimes suspicion is sinful. Spy not on one another…." See M.M. Ahsan, "The Islamic Attitude to Social Relations in the Light of Sura Al-Hujrat verses 10-12", *Seminar Papers 3* (Leicester, UK: The Islamic Foundation, 1979).

1. State Counsel submitted that in the record of proceedings of the lower court, p. 1 lines 15-20 and line 31, the USC Gwadabawa explained to the appellant the meaning of *zina*. In view of that, State Counsel urged the court to discountenance the submission of appellant's counsel that throughout the proceedings, the meaning the offence the was charged with was not explained to her.

2. State Counsel further submitted that the Gwadabawa court had jurisdiction to entertain the matter. Under Section 4(6) of the Constitution 1999, the State Houses of Assembly have power to make laws for the peace, order and good governance of their State based on democratic principles. When they enact any bill, the Governor is to sign it; this gives it the efficacy of law so that anybody who violates it will be punished. It is based on this that the Sokoto State House of Assembly passed a law called the Sokoto State Law No. 2 of 2000 which provides for the establishment of Sharia Courts.[47] Part 3 section 5(1) of that law confers jurisdiction on Sharia Courts to try this type of case and to convict violators of the law provided they are Muslims.

3. Section 38(1) of the 1999 Constitution guarantees freedom of thought and religion. The Constitution itself recognises Sharia and that is why the Sokoto State House of Assembly, after passing a law establishing Sharia Courts in the State, went further to pass into law the Sharia Penal Code and Sharia Criminal Procedure Code Laws 2000, which define offences, provide for their punishment, and define the procedure to be followed in criminal prosecutions based on section 36(12) of the Constitution, which provides that no one shall be punished for an offence unless that offence is defined under a written law. The offence for which the appellant is being charged is contrary to sections 128 and 129 of the Sharia Penal Code Law 2000 of Sokoto State. State Counsel added that the offence is also provided for under section 12(1)-(3) of the Sharia Criminal Procedure Code and Appendix A thereof. He submitted that in view of that, the lower court had jurisdiction to try the matter. He urged this court to discountenance this ground of appeal of the appellant.

4. State Counsel submitted that the USC Gwadabawa did in fact observe *i'izar* after hearing the prosecution witnesses, and gave the appellant opportunity to put in any defence that would prevent the court from convicting her. Counsel referred to p. 8 of the record of proceedings of the lower court. He further submitted that at p. 9 the appellant made it clear that she agreed with the evidence of the fourth prosecution witness as it related to her, but disagreed with his evidence as it related to Yakubu. He therefore urge this court to dismiss this ground of appeal.

5. State Counsel contested appellant's claim that the trial court did not establish that the appellant was a *muhsinat*. The court inquired into this and appellant herself testified that she was once married and that she had been divorced for two years. She stated this at p. 9 lines 8-15 of the record of proceedings of the lower court. Counsel submitted that the appellant had been given all opportunities required under Islamic law with respect to this type of offence. He cited Al-Adawi's commentary on *Risala* vol. 2 p. 280:

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[47] The reference is to the Sokoto State Sharia Courts Law 2000, signed into law on 22nd February 2000.

> Any married free-born Muslim, male or female, who commits *zina*, should be stoned to death with medium size stones.

State Counsel further submitted that this type of punishment is provided for in *Sahihul Bukhari* vol. 8 p. 528, hadith no. 806.

> Narrated Abu Huraira: A man came to Allah's Apostle while he was in the mosque, and he called him, saying, "O Allah's Apostle! I have committed illegal sexual intercourse." The Prophet turned his face to the other side, but that man repeated his statement four times, and after he bore witness against himself four times, the Prophet called him, saying, "Are you mad?" The man said, "No." The Prophet said, "Are you married?" The man said, "Yes." Then the Prophet said, "Take him away and stone him to death." Jabir bin Abdullah said: "I was among the ones who participated in stoning him, and we stoned him at the Mussala. When the stones troubled him, he fled, but we overtook him at Al-Harra and stoned him to death."

Counsel submitted that the lower court investigated the matter fully and had evidence before it that the appellant was a *muhsinat*. Therefore, she deserves this type of conviction and sentence.

6. Responding to the submission of appellant's counsel that a woman may carry a pregnancy for a period of up to seven years without delivery, State Counsel said that this position is not correct; that Muslim jurists unanimously agree that the maximum period of gestation is five years without delivery. He said that authority for this can be found in *Tuhfa* p. 134 and *Qawaninul Fiqhiyyah* p. 204. Many *fatawa* are based on these authorities and they should be followed.

7. On the argument of appellant's counsel that the appellant did not submit herself to the authorities but was brought before them by others, contrary to the practice during the time of the Prophet (SAW) and his Companions, when all those who were punished for *zina* submitted themselves to the Prophet: State Counsel argued that under Islamic law, it is not necessary that an offender must first submit himself to the authorities before he is punished. He cited verse 90 of *Suratul Nahli*, which says:

> Verily, Allah orders justice and kindness, and giving (help) to the relatives, and He forbids immoral sins, and evil and tyranny….

He further cited a hadith of the Prophet (SAW), namely hadith no. 34 of *Arba'una Hadith*:

> Abu Sa'id Al-Khudry (may Allah be pleased with him) said: "I heard the Prophet (peace be upon him) saying, 'Whosoever of you sees an evil action, he must change it with his hand. If he is not able to do so, then (he must change it) with his tongue. If he is not able to do so then (he must change it) with his heart and this is the weakest (manifestation) of faith."

8. On the submission of appellant's counsel that the charge drafted against the appellant by the lower court is meaningless, State Counsel submitted that appellant's counsel did not show in what way the charge was meaningless. He drew the attention of this court to sections 170, 171 and 172 of the Sharia Criminal Procedure Code, which

deal with what charges should contain and the effect of defective charges. He further drew the attention of the court to the record of proceedings of the lower court p. 11, lines 3-27 and p. 12 lines 1-4, where, he said, the nature of the offence charged was explained to the appellant. Based on these authorities, State Counsel urged the court to dismiss this ground of appeal.

9. State Counsel submitted that the attempted retraction of appellant's confession by her counsel is not appropriate under Islamic law. He also submitted that where a pregnancy is physically evident, retraction of a confession to the offence of *zina* is not acceptable, because the pregnancy itself is a conclusive proof of the offence. Only in the absence of pregnancy would the court allow retraction of the confession. Counsel drew the attention of the court to section 153 of the Sharia Criminal Procedure Code which provides that the appellant can retract her confession anytime before judgment. But according to State Counsel, only the appellant herself, not her counsel, is competent to retract her confession. He cited *Jawahirul Iklili* vol. II pp. 284-285:

> A confession can be retracted before judgment, and if it is, punishment for *zina* cannot be imposed.

10. On the submission of appellant's counsel that *hadd* punishments should be waived in cases of doubt, State Counsel submitted that this principle is only applied in *qisas* cases. He cited *Suratul Baqarah* verses 178 and 179:

> Oh you who believe! *Al-Qisas* (the Law of equality) is prescribed for you in cases of murder: the free for the free, the slave for the slave, and the female for the female. But if the killer is forgiven by the brother (or the relatives) of the killed (against blood money), then it should be sought in a good manner….
>
> And there is (a saving of) life for you in *Al-Qisas* (the Law of equality in punishment)….

According to State Counsel, these verses show that no mercy is allowed in the application of the prescribed punishment (*hadd*) for *zina*. He drew the attention of the court to sections 166 and 188(1)-(2) of the Sharia Criminal Procedure Code which he said are in concordance with the above quoted verses of the Qur'an. He further asked the court to consider the three circumstances in which the *hadd* punishment for *zina* is imposed, according to *Qawaninul Fiqhiyyah* pp. 305-306: where the accused confesses; where there are four just male witnesses; or where the woman becomes pregnant out of wedlock, even if she says she was raped, unless she brings witnesses to that effect. Where *zina* is established by any of the above, *rajm* can be inflicted. Counsel referred us to *Thamaruddani* p. 592. He submitted that the lower court based its judgment against the appellant on two of the relevant circumstances: the appellant's confession and her pregnancy. He also cited *Bidayatul Mujtahid* vol. 2 p. 328:

> Malik and Shafi'i both said that *hadd* must be imposed on the person who confesses once.

Based on this, State Counsel submitted that even if a person confesses once, it is sufficient, based on the Maliki school of jurisprudence, which we practise here. He reiterated that the punishment of *zina* is *hadd*. He said that it is contained in the Qur'an and that the Prophet (SAW) and his Companions all practised that type of punishment.

He cited *Bulughul Marami* p. 357 hadith no. 1230. He further submitted that although the Qur'anic verse on stoning to death has been abrogated, the punishment is nevertheless preserved. He supported this with the saying of Umar ibn Khaddab while delivering his Friday Sermon:

> Stoning is established in the Qur'an once there is status of being married and there is evidence of pregnancy.

He submitted that in view of this, the conviction and sentencing of the appellant is valid.

State Counsel argued that it is not necessary for the offender to submit himself to the court before he is punished. He cited a hadith in *Sahihul Bukhari*, at vol. 8 p. 536 of the English translation:

> Narrated by Abu Huraira and Zaid bin Khalid. While we were with the Prophet (SAW) a man stood up and said (to the Prophet (SAW)) "I beseech you by Allah, that you should judge us according to Allah's Laws." Then the man's opponent who was wiser than him, got up, saying, (to Allah's Apostle (SAW)) "Judge us according to Allah's Law and kindly allow me (to speak)." The Prophet (SAW) said, "Speak." He said "My son was a labourer working for this man and he committed an illegal sexual intercourse with his wife, and I gave one hundred sheep and a slave as a ransom for my son's sin. Then I asked a learned man about this case and he informed me that my son should receive one hundred lashes and be exiled for one year, and the man's wife should be stoned to death." The Prophet (SAW) said, "By Him in Whose Hand my soul is, I will judge you according to the Laws of Allah (SWT). Your one hundred sheep and the slave are to be returned to you and your son has to receive one hundred lashes and be exiled for one year. O Unais! Go to the wife of this man and if she confesses, then stone her to death." Unais went to her and she confessed. He then stoned her to death.

In this hadith, State Counsel said, the matter was taken before the Prophet by others, not by the offenders, and the Prophet gave judgment. This shows that it was not necessary that the appellant in this case should have brought herself before the authorities. It is permitted for the authorities to go to her. He urged the court to affirm the judgment of the lower court.

[Summary of final arguments]

We asked State Counsel to comment on the submission of appellant's counsel that the lower court had no jurisdiction to entertain the matter at all, even assuming that Safiyatu committed the offence of *zina*, because the Sharia Penal Code Law 2000 had not come into operation at the time the offence was committed. We noted that State Counsel had not said anything on this aspect of the case. State Counsel responded that Sharia has long been in existence. But for some time infliction of the *hadd* punishment of *rajm* had not been permitted. Whenever it is permitted, it can be applied. Counsel conceded however that the Governor signed the Sharia Penal Code into law on 25/1/2001 and it came into operation that same day.

We next called on appellant's counsel to address further the question whether the trial court had adequately explained the meaning of *zina* to the appellant. He said that

the word *zina* is an Arabic word and the appellant is Hausa and not an Arab; furthermore she is a villager. The lower court ought to have explained to her the term *zina* and other things related to *zina*, including how it is defined in section 128 of the Sharia Penal Code Law of Sokoto State. He asked us to recall the hadith of Ma'iz, who went to the Prophet (SAW) and said that he had committed *zina*. The Prophet (SAW) ignored him four times. When Ma'iz persisted, the Prophet asked him – even though he was an Arab – whether he understood the meaning of *zina*, and whether he knew the punishment for it. Counsel said that Safiyatu does not even understand Arabic. She did not know the meaning of *zina*. He further pointed out that section 36(6)(a) of the 1999 Constitution provides that every person charged with a criminal offence is entitled to be informed in the language he understands and in detail of the nature of the offence. Counsel said this was not done in this case, and on this ground alone, the appellant should be discharged and acquitted.

[The court's rulings on the various grounds of appeal]

1. Appellant's first ground of appeal is that the USC Gwadabawa erred in law when it convicted and sentenced her on the ground that she had confessed to committing *zina*, when in fact she did not confess. Appellant's second additional ground of appeal[48] is that the USC Gwadabawa erred in law when it based its decision on her confession, without listening to her defence. In our view these two grounds of appeal are the same.

We hold that the confession which the USC Gwadabawa believed the appellant made and upon which it convicted and sentenced her is speculative and is invalid. A confession warranting conviction must be to a clear and valid complaint which states as mandatory requirements the date, the time and the place the alleged offence was committed. But the complaint in this case, upon which the Gwadabawa court based its decision, is lacking in these aspects. The only thing contained in the complaint as shown in p. 1 of the record of proceedings of the trial court is that on 23/12/2000 at about 2 p.m. the police got information that one Safiyatu Hussaini committed *zina* with one Yakubu Abubakar and as a result, she became pregnant. This complaint only states the date and time the police got their information. It says nothing about the date, time and place Safiyatu Hussaini allegedly committed the offence. These are mandatory requirements in a complaint. Therefore, there was not a proper case before the court to which the appellant Safiyatu Hussaini could have made a valid confession warranting her conviction and sentencing.

The trial court, we observe, did not satisfactorily explain to the appellant that she was being accused of committing *zina*. It is mandatory that this is contained in the record of proceedings. Furthermore, it is mandatory that a court satisfactorily explain to the accused person the nature of the offence he is being accused of committing. See *Subulus Salam* vol. 5 p. 1676, where it is stated that:

> It is mandatory on a judge to explain satisfactorily to a person accused of committing an offence the punishment of which is *hadd*, the meaning and nature of that offence.

[48] "First ground of appeal": as stated in the Notice and Grounds of Appeal filed on 26th October 2001. "Second additional ground of appeal": as stated orally by appellant's counsel at the beginning of the hearing held on 14th January 2002. This distinction between grounds of appeal and additional grounds of appeal continues subsequently.

In addition see *Al-Tashri'u al-Jina'i* vol. 2 p. 434, where it is stated thus:

> Based on the foregoing, a confession by a person accused of *zina* is not accepted as a matter of course as a basis for sentencing him to *rajm*. The judge must ascertain the validity of the confession so as to find out whether the person confessing is sane, as the Prophet (SAW) did when dealing with Ma'iz. Where the judge finds out that the accused is sane, he should go further to ask him of what *zina* is, how it is done, to whom it is done, with whom the accused committed *zina* and at what time he committed it. Where all these are manifest by way of questioning the accused person, the judge again should ask the accused who confesses, "are you a *muhsin*? or not?" If the accused says he is a *muhsin*, then the judge should ask him, "what is *ihsan* in Sharia?"

In the record of proceedings and the findings of the trial court in this case, we find none of those things which a court ought to do in such an instance. We have not seen where the court asked the appellant whether she was sane or not. We have also not seen where the court asked the appellant the date, the place and the time she committed *zina*. It is mandatory that a court establish these ingredients before it convicts an accused based on his confession. Failure to do so is contrary to Sharia as shown above. In this case there was no proper complaint before the court, to talk less of concluding that the appellant confessed. The confession upon which the trial court based its conviction and sentencing of the appellant Safiyatu Hussaini did not satisfy the necessary conditions.

Furthermore, as a matter of pride under Islamic law, even if a person accused of committing *zina* validly confesses, he can retract his confession at any time before judgment and if he does his retraction will be accepted. See *Jawahirul Iklili* vol. 2 p. 283 where it is stated that:

> He who confesses to the commission of *zina* is to be punished by *hadd* unless he retracts his confession. If he retracts his confession, the retraction should be accepted unconditionally and he is not to be punished based on his confession.

To the same effect, section 153 of the Sharia Criminal Procedure Code of Sokoto State provides that before a court convicts a person charged before it, based on his confession, it is mandatory that the court inform the accused that he has a right to retract his confession before judgment. But in this case, throughout the record of proceedings in the trial court, we find no place where the court informed the appellant that she had a right to retract her confession. Failure in this regard is fatal to the case under Islamic law.

For these reasons, we do not accept this confession. But even if Safiyatu Hussaini had validly confessed before the trial court, when she appealed her conviction and sentence, and stated as her first ground of appeal that she had not in fact confessed to the commission of the offence before the trial court, this in our opinion would count as a retraction of her confession. Furthermore appellant's counsel, Abdulkadir Imam Ibrahim, stated before us that on behalf of the appellant he retracted her confession, and they have this right as shown above. We do not agree with the submission of State Counsel that Safiyatu did not retract her confession and that her counsel could not do so on her behalf. Her counsel is her representative (*wakili majauwali*) and as such has the right to do so. See *As'halul Madarik* vol. 2 p. 381, where it is stated that:

> A representative with unlimited power to represent can confirm on behalf of the person he is representing.

Therefore, he has the right to confess and also the right to retract a confession.

2. Appellant's third ground of appeal is that "the USC Gwadabawa erred in law when it convicted me of *zina* and sentenced me to *rajm* without first explaining to me the meaning of the offence of *zina*. The conviction and sentence are contrary to Islamic law and the Constitution and should be set aside."

We agreed with this argument also. Looking through the record of proceedings of the trial court, we do not see any place where the court explained to the appellant the meaning of the word *zina*. We are satisfied that the court never did explain it. We are also satisfied that the appellant did not understand the nature of the offence for which she was standing trial. The trial court never explained it to her and nothing in the record convinces us that she understood it – particularly when we consider the lengths to which the Prophet (SAW) went with Ma'iz. See *Al-Tashri'u al-Jina'i* vol. 2 p. 434, which states thus:

> The Prophet (SAW) continued to question Ma'iz about *zina* and Ma'iz continued to answer, until the Prophet asked Ma'iz: "Did you put what you have into what she has?" He answered "Yes." "Just like a bucket enters a well?" Ma'iz answered "Yes." The Prophet (SAW) still asked him again "Do you know the meaning of *zina*?" Ma'iz answered, "I went to her with *haram* just like a husband goes to his wife with *halal*."

Taking the meaning of this hadith into consideration, we conclude that the trial court did not explain satisfactorily to the appellant the meaning of the offence for which she was standing trial. But it is mandatory that a court explain fully to an accused person the offence he is charged with. See *Subulus Salam* vol. 1 p. 1676:

> All that has been mentioned indicates that it is mandatory to seek details and clarification.

The USC Gwadabawa did not do that. This is contrary to Islamic law. It also contravenes section 36(6)(a) of the 1999 Constitution of Nigeria.

3. Appellant's fourth ground of appeal is that throughout the proceedings the trial court never informed appellant of her right to engage the services of a lawyer. It is not the responsibility of the court to inform the accused to engage the services of a lawyer on a matter before the court. Therefore, we will not say anything further about this ground of appeal.[49]

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[49] Section 186 of the Criminal Procedure Code (CPC) that from 1960 governed all criminal trials in the northern states provides that: "Where a person is accused of an offence punishable with death if the accused is not defended by a legal practitioner the court shall assign a legal practitioner for his defence." This is one of the sections of the CPC omitted from the Sharia Criminal Procedure Codes enacted in the Sharia States in 2000-2001, see Chapter 5. It is an open question whether Supreme Court caselaw makes representation of the accused by a legal practitioner mandatory in all capital cases; this point is discussed further in the introduction to this chapter.

4. Appellant's third additional ground of appeal is that the charge preferred against the appellant did not define the meaning of *zina*. We hold that this ground of appeal also succeeds. Examining the charge preferred by the USC Gwadabawa against the appellant, we see that it does not contain any explanation of the meaning of *zina*, nor does it indicate the date, time and place where Safiyatu Hussaini allegedly committed the offence. This is insufficient, particularly if what happened in the hadith of Abu Huraira, between the Prophet (SAW) and Ma'iz, is anything to go by. See *Subulus Salam* vol. 4 pp. 1211 and 1213, where it states as follows:

> In the hadith of Abu Huraira the accused person Ma'iz was asked whether he and the woman with whom he said he had committed *zina* had engaged in foreplay. He answered yes. The Prophet (SAW) asked him again whether he had put what he had into what she has, as a *maciyi* enters into *tandun kwalli*[50] and as a bucket enters into a well? Ma'iz answered yes. The Prophet (SAW) asked him again whether he knew the meaning of *zina*. He said "Yes: I went to her with *haram* like a husband goes to his wife with *halal*." The Prophet (SAW) continued to question him, asking what he wanted out of this discussion. Ma'iz said, "I want you to purify me." Upon this, the Prophet of Mercy instructed that he be stoned to death.

Al-Tashri'u al-Jina'i vol. 2 p. 434 is to similar effect:

> After the judge has determined that the accused is sane, he should go further to ask him the meaning of *zina,* how it is done, to whom it is done, with whom did he do it and at what time, etc.

Based on the foregoing we see that in a charge against a person accused of committing *zina*, it is mandatory that full explanation of the offence he is charged with be made to the accused, such that any sane person, after hearing the explanation, will unquestionably understand what the charge means. If this is done, Islamic law will be seen to be judicious, giving the accused person every possible opportunity to defend himself.

The charge preferred against Safiyatu Hussaini by the USC Gwadabawa did not contain the full explanation required. In addition, the charge is contrary to Section 170 of the Sharia Criminal Procedure Code, which provides that every charge must contain sufficient explanation of the offence charged with the date, time and place of commission of the offence. But we have seen that the charge preferred by the court in this case does not contain these things.

Furthermore, sections 128 and 129 of the Sharia Criminal Procedure Code, under which the court said it charged the appellant, does not define the meaning of *zina* let alone prescribe its punishment. However, section 128 of Sharia *Penal* Code does define the offence of *zina*, and section 129 lays down its punishment. In any case, we are satisfied with the appellants ground of appeal that the charge preferred by USC Gwadabawa against the appellant did not explain the meaning of *zina*.

5. Appellant's fourth additional ground of appeal is that the trial court did not inquire whether the appellant was *ihsan*. Having reviewed the record of proceedings in

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[50] *Tandun kwalli*; *maciyi*: a small jar (*tandu*) of eye-shadow (*kwalli*: antimony), with its brush (*maciyi*) projecting into the *tandu*. Compare a jar of fingernail polish with its brush projecting into it.

the trial court, we indeed find no place where the court established whether the appellant was a *muhsinat*. But before a person charged with committing *zina* is convicted and sentence to *rajm*, it is mandatory that the court make an enquiry as regards *ihsan* and its conditions. See *Fiqhu ala Madhahibil Arba'a* [vol. 5 p. 45]:

> There is consensus among the *ulama*s that *ihsan* has the following conditions:
>
> 1. the person must be a free-born and not a slave;
> 2. the person must be a *mukallaf*,[51] not a small boy;
> 3. the person must be sane, not insane;
> 4. the person must be married to a *muhsinat* like himself and the marriage must be one that is valid in every respect;
> 5. the person must seclude himself with his wife and have sexual intercourse with her at a time when this is appropriate. Husband and wife must both be *muhsinai*.
>
> The Hanafi and Maliki schools of jurisprudence add that the person must be a Muslim. According to them, Islam is one of the conditions of *ihsan*, because *ihsan* is a kind of attribute and where there is no Islam there is no such attribute.

It is apparent from the record of proceedings in the trial court that the court did not investigate whether the appellant satisfied any of these conditions. But before a sentence of *rajm* is passed on a person, it is mandatory to establish that all the conditions are met, whether the accused is a man or a woman. Islamic jurists agree that a person accused of *zina* must be shown to meet all the conditions, whether the person is a man or a woman. In sum, when it comes to passing a sentence of *rajm* on a person accused of *zina*, there is no difference between a man and a woman: both must be shown to meet the above conditions of *ihsan* before the sentence can be passed. See *Fiqhu ala Madhahibil Arba'a* vol. 5 p. 59:

> The jurists agree that whether the person accused of *zina* is a man or a woman, it is mandatory that he or she fulfil the condition of *ihsan* before *rajm* can be imposed.

Accordingly this ground of appeal is also acceptable to us. We are satisfied that the trial court did not make proper enquiry as regards the issue of *ihsan* and its conditions. This is despite State Counsel's assertion that Safiyatu Hussaini stated before the court that she was a divorcee. A woman can be a divorcee and not necessarily a *muhsinat*. Her marriage might have been invalid, so that even if it was consummated, when she divorced she would not be a *muhsinat*.

6. Appellant's fifth additional ground of appeal is that the trial court did not observe *i'izar* before convicting and sentencing her. This ground of appeal is worth looking into.

As shown at p. 8 of the record of proceedings, the trial court did in fact observe *i'izar* with respect to the appellant. However, after that, the court continued with the hearing of the matter. There is a rule that whenever *i'izar* is observed in a contested case,

[51] The Hausa word *baligi* is used in the text; this is Hausa for the Arabic *mukallaf*, defined in the Sharia Penal Codes as "a person possessed of full legal and religious capacity."

and hearing of the matter continues after that, the first *i'izar* becomes invalid, and a new one must be done. If the court convicts the accused without observing another *i'izar*, the conviction is null and void even before the court imposes sentence. See *Bahjah* vol. 1 p. 64:

> Conviction without *i'izar* is invalid before judgment.

Again at p. 65 of the same authority it is stated that:

> Any conviction by a judge without *i'izar* is invalid.

Therefore, we agree with the contention of appellant's counsel that *i'izar* was not observed with respect to the appellant. Any conviction passed without *i'izar* is null and void, and this conviction was passed without it. Accordingly, we do not agree with the submission of State Counsel on the issue of *i'izar*.

8.[52] Appellant's second ground of appeal with the particulars stated in support of it, and her sixth additional ground of appeal as argued before us by appellant's counsel, both rely on the claims that Safiyatu's pregnancy and the child delivered of it were for her former husband, from whom Safiyatu says she was divorced not more than two years ago. This is why they are claiming that the pregnancy was for her former husband.

The question of when the appellant was divorced from her former husband was not inquired into by the trial court, nor was the question whether Safiyatu's child was for her former husband. These are new claims that were not raised in the trial court and upon which there is no evidence in the record. Accordingly we are unable to determine whether the claims are true or not. It is not proper for us, as an appellate court, to determine new factual issues that would require us to call for fresh evidence. The claim that Safiyatu's child was for her former husband because she left his house with the pregnancy is a fresh matter. The trial court is the proper court to call for evidence on it and it has not done so.

What we can say is that under Islamic law, it is possible for a woman to marry, get pregnant and deliver her baby within six months. It is also possible for a woman, after divorce, to spend up to five years carrying a pregnancy before delivering. See *Tuhfa* p. 47, where it states that:

> Five years is the maximum period of gestation of a woman. And the minimum period of gestation of a woman is six months.

But as we have said, whether the child delivered by Safiyatu was for her former husband or not is an issue raised for the first time before us, and we are not the proper court to call for evidence to establish the truth about it.

Nevertheless, we believe that Safiyatu Hussaini's claims that she was divorced only two years ago, and that the child to which she gave birth was for her former husband, raise a *shubha* – a doubt – which provides sufficient ground upon which the *hadd* punishment to which she was sentenced may be remitted. See *Mugni*, vol. 9 p. 52:

> Ad-Daru Qudni reported this hadith with *isnad* from Abdullahi bin Mas'ud and Mu'azu bin Jabal and Uqbatu bin Amir. The Prophet (SAW) said: Where a *hadd*

[52] Sic: the number seven is skipped.

> matter becomes doubtful to you, do your best to avoid the *hadd*. There is no dissent on this opinion.

For this reason, Safiyatu Hussaini's conviction of *zina* and sentence to *rajm* must be set aside.

As to the child, Safiyatu can if she wishes file a paternity action against her former husband, who she claims is the child's father, in a competent court of law.

9. In arguing that Safiyatu's conviction and sentence should be set aside because of the doubt raised by the possibility that her former husband was responsible for her pregnancy, appellant's counsel cited the authority of *Fiqhus Sunnah* vol. II p. 241, which provides:

> Narrated by Aishat (may Allah the exalted be pleased with her). She said, the Prophet (SAW) said: Defend Muslims against *hadd* punishment whenever you can do it. If there is a way out, it should be followed, for it is better for the Imam to err on the side of caution than to err on the side of punishment.

The same source again states:

> Defend against *hudud* if you can ever find any defence whatsoever.

In his response to this part of appellant's argument, State Counsel Muhammadu Barau Kamarawa submitted that authorities just quoted are inapplicable to *hadd* matters such as the *zina* case that is before us, but apply in *qisas* cases only. In support of this submission State Counsel cited the provision of the Qur'an in *Suratul Baqarah*, verses 178-179:

> Oh you who believe! *Al-Qisas* (the Law of equality) is prescribed for you in cases of murder: the free for the free, the slave for the slave, and the female for the female. But if the killer is forgiven by the brother (or the relatives) of the killed (against blood money), then it should be sought in a good manner….
>
> And there is (a saving of) life for you in *Al-Qisas* (the Law of equality in punishment)….

The verses quoted by State Counsel are not applicable to the type of case that is before us and do not have any relation to the provisions of *Fiqhus Sunnah* cited by appellant's counsel. The verses deal with cases in which a person is killed, the person responsible is found guilty, and the decedent's relatives are then given the following options:

1. To kill the person who killed their relation; or
2. To forego killing him and accept *diyah* from him instead; or
3. To forgive the killer wholeheartedly, foregoing both killing him and taking *diyah* from him.

This is the meaning of *Suratul Baqarah* verses 178-179.

On the other hand, the hadith of Aishat in *Fiqhus Sunnah*, cited by appellant's counsel, deals with offences, like *zina*, in which a *hadd* punishment is prescribed. If an accused person is found guilty of such an offence, then the *hadd* punishment must be

imposed, and no person is competent to withdraw or forgive it: it is Allah's sole right. See *As'halul Madarik* vol. 3 p. 188, which provides thus:

> It is not permissible for any person to ask for forgiveness on behalf of a person accused of committing an offence that relates to theft or *zina*. It is mandatory to inflict *hadd* on them if they are found guilty, even if they repent and validate their repentance and become good people.

This is why in *hadd* cases the only way out is before the accused is found guilty, and why any doubt about his guilt must be entertained. As the hadith indicates, if there is a way out, it should be followed; it is better to err on the side of caution than to err on the side of punishment. But in a *hadd* case, once the Imam has found the accused guilty, then the matter becomes the sole right of Allah, and it is not permissible for any person to ask for forgiveness on behalf of the accused or to remit the prescribed *hadd* punishment. *Qisas* cases are not like that. Even after a person accused of murder has been found guilty of committing the offence, the relations of the deceased can still forgive the killer to the extent of accepting *diyah* in place of the *qisas* punishment of killing him in return, or they can even forgive him completely and wholeheartedly, waiving even *diyah*. This is impossible in *hadd* cases.

In sum, State Counsel misconceived the authorities cited by counsel for the appellant, and he also misconceived the application of the verses he quoted.

10. State Counsel quoted the hadith of Abu Huraira from the English translation of *Sahihul Bukhari*, vol. 8 p. 536, citing it as authority for the proposition that a person can be convicted of *zina* even if he does not submit himself for punishment but is brought before the court by the authorities.

According to the hadith in question, the Prophet instructed Unais to go to a woman who had been accused of *zina* and ask her if she had committed the offence, saying that if she answered in the affirmative, she should be stoned to death. The Prophet (SAW) sent Unais to the woman because someone had accused her, and the Prophet wanted to give her the opportunity to deny the allegation and maintain an action against the accuser for *qadhf* if she wished. See *Subulus Salam*, the commentary on *Bulughul Marami*, vol. 4 p. 1671, which states:

> Know that the Prophet (SAW) was not sent by Allah for the reason of imposing *hadd* punishments on people. The Prophet commanded that vile deeds should not be exposed and he prohibited spying. Instead, when a woman was accused of committing *zina*, he invited her to deny it and to demand the *hadd* punishment for *qadhf* against her accuser. But should she confess to committing *zina* she would be subjected to the *hadd* punishment. She chose to confess, and therefore brought upon herself the punishment of *rajm*.

Therefore, it is far from the meaning of this hadith that the Prophet (SAW) sent Unais to the woman in order to impose the *hadd* punishment for *zina* on her. He sent him to give the woman an opportunity to deny the accusation and have her accuser punished for *qadhf*. But if she admitted the accusation, then the accuser would be exonerated and her own confession would warrant subjecting her to the *hadd* for *zina*. The Prophet (SAW) commanded that we should not spy on each other. So contrary to the misconception of

State Counsel, the hadith he cited does not permit spying out offenders for the purpose of bringing them before the courts for prosecution.

As to the case at hand, we agree with the submission of appellant's counsel that it was other people who spied on Safiyatu Hussaini and reported to the authorities that she had committed *zina*. Counsel submitted that this sort of spying on people to establish offences against them is *haram*, citing *Suratul Hujurat* verse 12, which says:

> O you who believe! Avoid much suspicion; indeed some suspicion is sin. And spy not, neither backbite one another. Would one of you like to eat the flesh of his dead brother? You would hate it….

We agree with appellant's counsel that based on this verse, it is *haram* to initiate an action against a person for *zina* based on other people's reports. Imam Shafi'i said that a leader does not even have the right to summon a person accused of *zina* for the purpose of investigating the accusation; he supported this position with reference to the same verse of the Qur'an quoted above. See *Fiqhu ala Madhahibil Arba'a* vol. 5 p. 233:

> Indeed Imam Shafi'i said it is not permissible for a leader to initiate investigation upon a person simply because he receives information that that person has committed *zina*.

Based on these authorities, we agree with the submission of appellant's counsel that the procedure followed in initiating the action against Safiyatu is *haram*. It is not permissible for a leader to order somebody's arrest, in order to investigate him for allegedly committing *zina*, based simply on what other people report. The way the police went to Safiyatu's house just because they heard that she had committed *zina* is contrary to Islamic law.

We disagree with State Counsel's argument to the contrary. State Counsel based his argument on *Suratul Nahli* verse 90, which states:

> Verily, Allah orders justice and kindness, and giving (help) to the relatives, and He forbids immoral sins [*al-fasha*], and evil and tyranny [*al-munkar*] ….

This verse does not command that a person who commits *zina* be investigated and prosecuted. Rather, the verse, besides saying that we should do justice and be kind and helpful, forbids people to commit *zina* [or do other things that are *fasha* or *munkar*]. But this does not mean that anybody who commits *zina* [or does other things that are *fasha* or *munkar*] should be arrested and prosecuted. See *Tafsirin Qurtabi* vol. 10 p. 167, where it states that:

> The phrase 'prohibition from *alfasha*' covers any immoral act, including for example using abusive language or any other wrongful act. Ibn Abbas interpreted *alfasha* to cover *zina*. The word *munkar* covers any thing unacceptable under Sharia, that is any action that is contrary and degrading to Sharia. Other scholars have said that *al-munkar* means associating Allah with another thing in the area of worship.

In sum, *Suratul Nahli* verse 90 does not sanction bringing persons suspected of committing *zina* involuntarily before the courts for investigation and prosecution. The

submission of State Counsel to the contrary is rejected. We agree rather with the submission of appellant's counsel on this issue.

11. State Counsel submitted that if this court should find itself unable to affirm Safiyatu's conviction of *zina*, we should still convict and punish her for *qadhf*, under section 183 of the Sharia Criminal Procedure Code Law 2000, for the accusation of *zina* she levelled against Yakubu Abubakar. This application by State Counsel is not acceptable to us. Yakubu, against whom State Counsel says the appellant committed *qadhf*, has not sought to prosecute her for it. It is he that has the right to do so; if *qadhf* was committed against him, he also has the right to forgive. See *As'halul Madarik*, commentary on *Irshadus Salik*, vol. 3 p. 174, which states that:

> An action for *qadhf* belongs to the person against whom the offence was committed, who must pursue it or let it go. When he dies the action dies with him, and his heirs cannot pursue it. This is what Malik said according to a famous opinion.

Since the person against whom State Counsel says *qadhf* was committed has not appeared before us to prosecute any such claim, we cannot proceed on it. Therefore, we do not accept this submission by State Counsel and it is hereby dismissed.

12. We come to the question of the jurisdiction of the USC Gwadabawa to sentence the appellant to *rajm* for the offence of *zina*. Appellant's counsel argues that even if the trial court properly convicted Safiyatu of *zina*, it did not have the authority to sentence her to *rajm*. This is because the Sokoto State Sharia Penal Code Law, which, as part of the implementation of Sharia in the state, prescribes the punishment of *rajm* for the offence of *zina*, and under which the USC Gwadabawa sentenced Safiyatu, was not in operation at the time Safiyatu must have committed the offence. But the Sharia Penal Code Law was enacted under powers granted to the Sokoto State House of Assembly by section 4 of the 1999 Constitution, subsection (9) of which provides that:

> … the National Assembly or a House of Assembly shall not, in relation to any criminal offence whatsoever, have power to make any law which shall have retrospective effect.

Based on this, appellant's counsel argues that the punishment of *rajm* cannot be applied retrospectively to acts of *zina* that may have been committed before the Sharia Penal Code Law came into operation, as is the case with Safiyatu. Therefore the USC had no authority to sentence Safiyatu to *rajm*. We have carefully considered these arguments as well as the submissions of State Counsel on this issue

We have examined the Sharia Penal Code Law 2000 and the Sharia Criminal Procedure Code Law 2000, both enacted by the Sokoto State House of Assembly. Both were signed into law by the Executive Governor of Sokoto State on 25/1/2001. Pages 1 of both laws indicate that they both commenced operation on 31/1/2001. Section 7 of the enacting provisions of the Sharia Penal Code Law, at p. 3, provides as follows:

> No act or omission committed by a person shall be an offence under the provisions of this law unless such act or omission was committed on or after the commencement date of this law.

In short, the law specifically provides that only offences committed on or after its commencement date can come under it. Therefore, any person who may have done anything contrary to the provisions of this law before its commencement date cannot be punished under it even if his action is an offence as defined by the law.

According to the record of proceedings of the USC Gwadabawa in this case, it was on 3/7/2001 that the police arraigned the appellant Safiyatu Hussaini Tungar Tudu, along with Yakubu Abubakar Tungar Tudu, of Gwadabawa Local Government Area of Sokoto State, for the offence of *zina* contrary to Section 128 of Sokoto State Sharia Penal Code Law 2000. The police stated the reason for initiating the action as follows:

> [O]n 23/12/2000, at around 2:00 p.m., the Gwadabawa police under the office of the Area Commander received a complaint that you, Safiyatu Hussaini, committed *zina* with you, Yakubu Abubakar, as a result of which you, Safiyatu Hussaini, became pregnant when each of you is known to have once married. That the police arrested you and interrogated you and were satisfied with the allegation levelled against you. I therefore arraign you before this court so that you will be judged accordingly.

It can be seen that this statement by the police contains only the date the police were informed about the commission of the alleged offence. It does not state the time or the date the offence was allegedly committed. But even the date the police were informed about the commission of the alleged offence – 23/12/2000 – came before the date the Sharia Penal Code Law, under which the USC Gwadabawa sentenced Safiyatu Hussaini to *rajm*, commenced operation. The date the offence was committed must have come even earlier.

Based on the section of the Sharia Penal Code Law quoted above, which is guided by the principles of Sharia, we must therefore agree with the submission of appellant's counsel that the USC Gwadabawa did not have jurisdiction to sentence Safiyatu to *rajm*. This is because even if Safiyatu did commit the offence of *zina* as charged, she did not do so on or after the day the Sharia Penal Code Law came into operation, but before; but no one can be punished under a law that was not in force when the offence was committed. This principle of Sharia is also embodied in section 36(8) of the 1999 Constitution, which provides that:

> No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.

Section 36(12) of the 1999 Constitution provides that:

> … [A] person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.

The Sharia Penal Code Law was enacted by the Sokoto State House of Assembly, under the powers given to it by section 4 of the 1999 Constitution, in compliance with section 36(12).

[State Counsel submitted that the USC Gwadabawa had jurisdiction to hear this case under section 12 of the Sokoto State Sharia Criminal Procedure Code Law.] Like the Sharia Penal Code, the Sharia Criminal Procedure Code came into effect on 31/1/2001. Section 12 gives Upper Sharia Courts exclusive jurisdiction to try the offences listed in Appendix A; Appendix A in turn refers to offences defined by specified sections of the Sharia Penal Code. Nothing in this changes the principle that a person may not be punished under a law that was not in effect when the offence was committed. Section 14 of the Sharia Criminal Procedure Code further provides that an Upper Sharia Court "may pass any sentence authorised by law." The sentence passed by the USC Gwadabawa in this case was not authorised by a law in effect at the time the alleged offence was committed. For this reason we agree with appellant's counsel that the court did not have the jurisdiction to pass the sentence of *rajm* on the appellant. Nothing in sections 12 or 14 of the Sharia Criminal Procedure Code changes this result.

[Judgment]

For the reasons stated and based on the authorities cited above, we the Sharia Court of Appeal, Sokoto State, under section 187(2) of the Sokoto State Sharia Criminal Procedure Code Law 2000,[53] hereby quash the conviction of Safiyatu Hussaini for the offence of *zina* and her sentence to *rajm*. We do not agree with that judgment. We hereby quash it. The appellant Safiyatu Hussaini Tungar Tudu is hereby discharged and acquitted.

The appeal is allowed.

Signed: HON. ALH. MUHAMMAD BELLO SILAME – G/KADI

Signed: HON. ALH. BELLO MUHAMMAD RABAH – KADI

Signed: HON. ALH. ABDULKADIR SAIDU TAMBUWAL – KADI

Signed: HON. ALH. MUH'D TAMBARI USMAN – KADI

[53] Section 187(2) provides: "If [an appellate court] is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts it shall quash the conviction."