IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

(15)

PRESENT

Mr. Justice Aftab Hussain	Chairman
Mr. Justice Karimullah Durrani	Member
Mr. Justice Mohammad Siddiq	Member
Mr. Justice Zahoorul Haq	Member
Mr. Justice Pir Karam Shah	Member
Mr. Justice Malik Ghulam Ali	Member
Mr. Justice Mohammad Taqi Usmani	Member

CRIMINAL APPEAL NO.12/I OF 1981

Mohammad Imtiaz & One other — Appellants

Vs

The State ..... Respondent

For the appellants ..... Syed Ijaz Ahmad Shah, Advocate.

For the respondent ..... Hafiz S.A. Rahman, Advocate.

Date of hearing 10.6.1981

JUDGMENT

AFTAB HUSSAIN, CHAIRMAN:

The learned Additional Sessions Judge, Attock, by his order, dated 22.1.1981, convicted the two appellants under Section 10(2) of the Zina (Enforcement of Hudood) Ordinance, 1979, and sentenced Mohammad Imtiaz appellant to seven years' rigorous imprisonment, thirty stripes and a fine of Rs 5,000/- or in default to undergo further rigorous imprisonment for two years, and sentenced Mst.Mohammadjan to five years' rigorous imprisonment, 30 stripes and a fine of Rs 2,000/- or in default of payment to undergo further rigorous imprisonment for a period of one year. Hence this appeal.

2. The F.I.R. of the abduction of Mst.Mohammadjan was given by her father at Police Station Talagang at about 10.15 a.m. on the 18th of July, 1979, stating that Mst.Mohammadjan, her 18 years old virgin daughter, had been abducted by Mohammad Imtiaz during the night of 17-18th of July, 1979 and that Mohammadjan had taken away with her a sum of Rs 50,000/- in currency notes, two wrist watches, and some gold ornaments.

Cont'd P/2

3. The Police arrested the two appellants and got Mst.Mohammadjan medically examined by Lady Doctor Hamida Khatoon W.M.O. (P.W.1), who found that she had been subjected to sexual intercourse and that she was about 17/18 years old. Though she did not make any statement about taking her vaginal swabs, however the prosecution produced Mohammad Anwar P.W.5 to prove that he had kept the same in malkhana in his custody and handed them over intact to Foot Constable Mohammad Iqbal P.W.4 who stated that he carried them intact to the office of the Chemical Examiner, Lahore. The report of the Chemical Examiner (Ex.P.E.) is positive and he found the above swabs stained with semen.

4. The prosecution examined Amir Khan (P.W.2) and Magul (P.W.3) in support of the prosecution case. Amir Khan claimed to be a refugee from Afghanistan and to have come over from there about two years ago. He made astounding improvements in the story, in so far as in the FIR he had stated that Mst.Mohammadjan was un-married (Kanwari), in his statement before the Court he took up the plea that she was already married to his nephew Hakim Noor, in Afghanistan, through that Nikah was not reduced to writing. He submitted that the sum of Rs 50,000/- was brought by his son from Saudi Arabia and he had kept it in a box from which it was removed. Contrary to the assertion in the FIR that Mohammadjan was 18 years' old, he pleaded in his statement that she was about 14/15 years old. It was in view of these improvements that he did not own the FIR before the Court, and stated that his thumb impression was obtained on a blank paper by the Police.

5. P.W.3, Magul, who claimed to be a refugee from Afghanistan, stated that the earlier Nikah of Mst.Mohammadjan had been performed about 2-3 months

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(17)

prior to his migration to Pakistan. He further stated that there was no Act, and Law for the registration of Nikah in that country.

6. It appears from the statement of the Investigating Officer, Kifayat Hussain, A.S.I. (P.W.8) that at the time of arrest he had sealed the Nikah Nama Forms, one of those forms, Ex..D.A, proves that Mohammadjan appellant was married to Mohammad Imtiaz appellant.

7. The defence case is that Amir Khan had not migrated from Afghanistan. On the other hand, he had been living in Attock where an identity card and a Ration Card was issued to him much before the exodus of the Afghans to Pakistan on account of Soviet military occupation of that country. The story of Mst.Mohammadjan having gone with a sum of Rs 50,000/-, wrist watches, and gold ornaments was denied, but it was stated that Mst.Mohammadjan herself went to the women folk of the house of Imtiaz, because Amir Khan was proposing to sell her to an old man in lieu of Rs 50,000/-

8. The learned Counsel for the State tried to attack the Nikah Nama as a forgery, but in the absence of any evidence or even suggestion to that effect, we find ourselves unable to agree with him. The document was recovered by the Police from the house of the appellant. It is properly recorded and registered as required by the Muslim Family Laws Ordinance. Section 23 of the Family Court Act provides that character of such a document cannot even be challenged before a Family Court. We, therefore, hold that the two appellants are married to each other.

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(18)

9. The alleged earlier marriage between Mst.Mohammadjan and Hakim Noor is not established, and even the learned Sessions Judge did not give a finding on that point in favour of the prosecution. The story of earlier marriage is unbelievable for several reasons. Firstly the version of marriage is contrary to what was reported in the F.I.R. where Mst. Mohammadjan was shown to be unmarried. Secondly the story about recent migration from Afghanistan is also doubtful in view of the defence furnished by the two defence witnesses. Zafar Iqbal Statistical Assistant, District Registration Office, Attock (D.W.1) proved that Amir Khan applied for issuance of an Identity Card on the 12th of August, 1975. The Photostat of this Form was admitted in evidence as Ex.D.A. and its original was shown to the Court. Mohammad Afzal D.W.2 proved the Ration Cards issued in the name of Amir Khan in 1976 and 1978.

10. It appears from the evidence of Kifayat Hussain A.S.I.(P.W.8) that he had recovered a bag from the house of the appellant, which inter alia consisted some ornaments, Bank Pass Book P.8, Cheque Book P.9, Deposit Book P.10 and Identity Card P.11 belonging to Salim Khan S/O Amir Khan. The Identity Card of Salim Khan is dated 2.5.1974, while the Bank Account was opened by him in the Habib Bank on 5.6.1975

11. This evidence is sufficient to prove that Amir Khan was living in Pakistan, though in order to gain benefit, which accrued to the Afghan refugees, he might have posed as a refugee and obtained an identity card in that capacity, from Peshawar. The story of earlier marriage of Mst.Mohammadjan is proved to be incorrect for this reason too. It appears clear that this false version was added for the first time in Court with a view to throw doubt on the validity of the

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marriage of the two appellants with each other.

12. It has already been stated that the learned Sessions Judge also did not agree with the story about previous Nikah of Mst. Mohammadjan with Hakim Noor. Despite this, the learned Sessions Judge convicted and sentenced the two appellants. On the ground that the Nikah Nama Ex.D.A. appeared to be a forged one. He further found that assuming that the Nikah Nama was genuine the Nikah was invalid since it was performed without the consent of Mohammadjan's wali. He has relied upon certain traditions. This Court has already held in an earlier case that according to the Hanafi Law the Nikah of an adult girl is not invalid in the absence of any permission from the wali. We may elucidate the point in order to end the controversy. The sufficiency of the consent of a woman to her Nikah is evident from the word حتى تنكح زوجاً غيره in verse 230 of Surah Al Baqarah (2:231). The verse is about the result of divorce that "And if he hath divorced her (the third time), then she is not lawful unto him thereafter until she marries another husband." The word تنكح denotes marriage by the woman herself. Similarly in verse 232 of the same verse is the order "not to place difficulties on the way of their marrying their husbands" (فلا تعضلوهن ان ينكحن ازواجهن) The word ينكحن also refers to their sweet will in matters of marriage. This is also clear from verse 229 of the same Chapter (2:229) which is translated below:

> "And if he hath divorced her (the third time) then is not lawful unto him thereafter until she hath wedded another husband. Then if he (the other husband) divorce her it is no sin for both of them that they come together again ...."

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(20)

13. In Mishkat there are several traditions which show that the consent of an adult virgin for her Nikah validates the marriage and that such consent may be given by a girl remaining silent. These traditions are as follows:-

> 33. "Abu Hurairah reported that the Messenger of Allah said : A previously married woman shall not be married till she gives consent, nor a virgin be married till her consent is sought. They asked : How shall be her permission ? He said :"if she remains silent" (agreed).
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> 34. Ibn Abbas reported that the Messenger of Allah said : A previously married woman is more a guardian for herself than her guardian, and a virgin should be asked permission about herself; and her permission is her silence. In a narration; he said : "A previously married woman having consummation has got greater right to herself than her guardian, and a virgin shall be asked of her consent; and her permission is her silence." (Muslim)
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> 35. Abu Hurairah reported that the Prophet said: A grown up girl shall be asked permission about herself. If she is silent, it is her permission and it she declines there shall be no compulsion on her. (Tirmizi, Abu Daud Nisai)

The difference of view and particularly the Hanafi view on the subject will be clear from the following translation of the relevant passage from P.117 of Vol-II of Tabeenul Haqaiq commentary of Kanzul Daqaiq by Az zailai.

> "The Nikah of an adult free woman is effective and permitted. This is according to Abu Hanifa and according to one version Abu Yusuf also. He (Abu Yusuf) first said that the Nikah of a woman wihtout wali is not permitted when there is her wali, then he retracted this opinion and said if that Nikah be with a person of equal status (Kafu) it is permitted; then he reviewed this also and said that the Nikah of woman is permitted .... And according to Mohammad it is permitted on condition of the

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permission of the wali. And according to Malik and Shafi the Nikah of the woman with their own words (acceptance) is not permitted. They argue first that God says in verse 2:232 فلا تعضلوهن ان ينكحن ازواجهن (Do not prevent them from marrying their former husbands). This verse proves that they had not been ordinarily empowered to marry on their own - otherwise why it should be said that they should not be prevented from marrying. And Imam Shafi says that it is a clear verse of the Holy Quran regarding the wali in Nikah. In addition to this the Prophet said "No Nikah is permitted until there be wali and two just witnesses." And many ahadis have been narrated in the books in this connection but none of them is authentic according to (our) Scholars, Imam Bukhari and Ibn-e-Muiem said that there is no authentic hadis in this regard.

The arguments of Abu Hanifa and others are first that the verse فلا جناح عليكم فيما فعلن فى انفسهن (There is no blame on you on what you did about yourselves) and the verse فلا تعضلوهن ان ينكحن ازواجهن (Do not prevent them from marrying their(former husbands) and the verse حتى تنكح زوجاً غيره (After she has married another husband) and the verse فلا جناح عليهما ان يتراجعا ان ظناأن يقيما حدود الله (No blame on either of them if they re-unite, provided they feel that they can keep the limits ordained by God) (2:226:230), are clear about (permissibility of) the Nikah by the women themselves. In all of them the Nikah has been referred to the woman which shows that women are competent to marry themselves and those who deny this refuse the order of Quran. In addition to this the Prophet said "Women are better entitled for themselves than their wali". This is an authentic hadis. Moreover when a woman is adult and free, she has authority on herself as (on her) slave and has the authority to purchase and sell"

14. Two traditions are noted in Tirmize Vol-1, PP.508 and 509 under the heading 'No Nikah without Wali'. One is the Hadis of Abu Muse that then

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Holy Prophet observed 'there is no marriage without wali'. It is stated by the Compiler that similar traditions are related from Hazrat Aisha and others. The other tradition is from Hazrat Aisha that the Holy Prophet said "Whoever among women marries without permission of wali, her marriage is void; her marriage is void; her marriage is void." If the male cohabits with that female, he is bound to pay her dower because he was benefitted from her private parts. In case of dispute regarding marriage, the King will be considered to be her wali."

15. According to Tirmizi this Hadis is Hassan. Similar traditions have been related by others including Shaaba & Suri but according to Tirmizi the tradition from these are preferable than those related by the above named persons. A Hadis of Similar type is also ascribed to Zohri but it is stated that some learned persons in Hadis literature have doubted it, authenticity because Ibn-e-Juraij said that he had met Zohri but the latter had refused to accept it. For this reason the learned called the Hadis as zaeef (weak).

16. From the quotation from Tabeen ul Haqaiq it is clear that traditions similar to those mentioned above are not considered authentic by our Scholars. Several other citations may be given in support of this opinion.

17. In الدرایۃ الداریہ by Ibn Hajar Usqallani Vol-2 P.60 it is stated that Zohri replied on an enquiry from Ibn Juraig.

> "I am afraid that it may be the misunderstanding of Salman"

According to Ahmad, Zohri is stated to have said that he did not know about it. Similarly according to Trimizi, Yahya bin Moeen had also called the traditions from Ismail to be weak. As far as the traditions from

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Hazrat Aisha are concerned, Ibn Hajar discusses the view of Ahmad and Ibne Moeen in rejecting that tradition on the ground that Hazrat Aisha had herself married Hifsa, daughter of Abdul Rehman her brother to Munzar Ibne Zubair, during the absence of the bride's father, Abdul Rehman. On his return he was angry but later was reconciled. This according to Ibne Hajar is stated by Malik as Sahih. Although Baihaqi thinks that in this Hadis the words زوّجت (married) may mean to prepare for marriage not that she gave her actually in marriage. At page 61 Ibne Hajar reporduces the Hadis of Ibne Abbas that there is no marriage without the consent of the Wali and in the absence of any wali the Sultan is the Wali of a woman. However after relating the sources of this Hadis he states اسانيدها واهية

18. In Al-Mabsoot by Sarakhsi Vol-III at P.10 is given a partinent example of the validity of the Nikah of an adult woman without the intervention of wali. It is stated that it has been reported to us on the authority of Ali Ibne Abi Talib (God be pleased with him) that a woman married with her consent. Her walis went to Hazrat Ali to dispute the correctness of the Nikah but he decided in favour of its validity and this is an argument that the marriage of a woman with her own consent and without the permission of the wali, her marriage by a person solemnised on her order that he marry her, is valid. Imam Abu Hanifa has deduced from this that if a woman whether virgin or already married marries with her free will, her Nikah is valid irrespective of the fact whether the husband was of equal status or not. The marriage is correct except in case it is with a male of unequal status when the walis have right of objection. According to a tradition related from Hassan(Allah be pleased with him) her marriage with a man of equal status is valid but with

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one of unequal status is invalid. Imam Abu Yusuf first said that such a wedding whether with a person of equal status or not is not correct. He then changed his view and said that in case of marriage with a person of equal status, the Nikah is valid. He again reviewed this view and stated that the Nikah would be correct whether it be with a man of equal status or not. Attahawi has mentioned the opinion of Imam Abu Yusuf that when the marriage be with a man of u unequal status, the Qazi should order the wali to approve it and if he refuses to approve he cannot dissolve it only the Qazi has a right to dissolve it.

19. Badruddin Aini in his commentary on Sahih Bukhari named Umdatul Qari Volume XXIX page 120 & 121 has stated that Imam Bukhari has not related the traditions of Nikah without wali on the ground that these are not according to his standard. But as he himself is of the opinion that Nikah must be with the consent of wali, he has related the verse فلا تعضلوهن ان ينكحن ازواجهن, which as he argues, has forbidden the walis not to prevent the woman from marrying. This verse was revealed in the case of Maaqil who was prevented his sister from marrying. But Badruddin Aini says that this hadith has been related from different sources in which case a different reason for revelation of this verse has been stated. According to some the order of prevention in this verse is to the walis, but according to others this is to the husbands who have divorced them while other say that it is to all persons. It would not be correct to base any argument on this Hadis. It may also be possible that Maaqil might have persuaded his sister and might have done this on account of his piety but this cannot be made basis for generalisation. Abu Bakar Jassas after relating the hadith of Maaqil Bin Yasir has stated that this hadith is not authentic according to Ahl-e-Naqal due to the fact

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the marriage is stressed by repetition of the word Baatil thrice) The view of Imam Malik and Imam Shafei is that want of permission by the wali negates the Nikah but this tradition is not acceptable because H.Aisha ..... has herself acted contrary to it and this would make it doubtful. After this hadith was related by her she married the daughter of her brother Abdul Rehman when Abdul Rehman was in Syria. When he returned and came to know about the marriage he was displeased. This proves that this tradition is not worthy of being acted upon because the action of H.Aisha to the contrary proves that she must have come to know that this hadith is either abrogated or weak. It cannot be said that she acted carelessly or in ignorance ... Same comment shall apply to other traditions related from H.Aisha that marriage without wali is not valid and one who has no wali,has the king as his wali. Similarly, the tradition related from other to the same effect on which reliance is placed by Shafei are also not free from weakness. Apart from this .....there is a hadith Sahih from Imam Ibn Abbas which is related by Muslim that the Holy Prophet said الايم احق بنفسها من وليها which means that a woman who has already once married is to be preferred in regard to her person over her wali and permission (to marry) shall be obtained from an un-married woman and her permission is when she keeps quite ..... This hadith is preferable and this finds support from the verse of the Holy Quran already referred to above .....

The hadith about the requirements of the wali for Nikah is acted upon only in those cases where the marriage is not with the socially equal ..... (But) Imam Abu Hanifa and Imam Shafei have differed on this point too. Thus if any adult woman marries without

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permission of wali, according to Imam Abu Hanifa her husband has a right to cohabit with her and he will be liable to pay her dower and maintenance. The husband can also divorce her and divorce given by him would be complete. According to Imam Shafei the husband cannot even cohabit since the Nikah is not valid in the absence of permission of the wali nor will the husband be liable to dower or maintenance.

23. It appears that Imam Abu Hanifa did not rely upon these traditions when he opined that the marriage of a woman is subjected to her personal consent. This is clear from P.233 of the same book "Tuhfatul Ahawazi".

> "the ulema have differed in making Nikah of a woman subject to the consent of the wali. So most of them say that a woman will not marry herself and their arguments are based upon the above traditions. But Abu Hanifa does not make the consent of wali a pre-condition of a woman's marriage. He is of the opinion that it is permitted that she can marry herself without wali. This opinion is based on the analogy of Nikah with sale (بيع) in which she is competent (as an adult) and he (Imam Abu Hanifa) confines the operation of these traditions on non adult girls and thus by using analogical reasoning he limits the general sense of the traditionss".

24. This opinion of Imam Abu Hanifa is to be found in all other books too. See.

1. Fathul Bari Sharh Sahih Bukhari by Ibn-e-Hajar Asqalani, Volume IX, Page 182, printed by Darul Fikar, Beirut.
2. Nailul Autar by Shokani, Volume V, Page 136, printed by Mustafa Albaby & Sons, Cario.
3. Fiqhussumah by Syed Sabiq Volume II, Page 113, printed by Darul Fikar, Beirut.
4. Mirqatul Maftih Sharh Mishkatul Masabih by Mulla Ali Qari, Volume VI, Page 204, printed by Maktaba Imdadiyya, Multan.

Cont'd P/14

28

5. Subulussalam by Kahlani Al-amir, Volume III, Page 117, printed by Darul Fikar, Beirut.

6. Badayatul Mujtahid by Ibn-e-Rushad, Volume II, Pages 6 & 7, printed by Maktabatul Ilmiyya, Lahore.

7. Al-Mughni by Ibn-e-Qudama, Volume VI, Page 487, printed by Maktaba Jumburiyya, Cario.

8. Sharh Sahib Muslim by Imam Nawawi, Volume IX, Page 203, printed by Darul Fikar Beirut.

9. Ahkamul Quran by Abu Bakar Jassas, Volume I, Page 401, printed by Darul Fikar, Beirut.

10. Kitabul Fiqh Alal Mazahibil Arbaa (Urdu) by Allama Jaziri, Volume IV, Page 97, printed by Auqaf Deptt. Punjab, Lahore.

Also see Mst Sughran Mai V. The State, PLD 1980 Lah 386

25. It may be pointed out that the Hadith of Hazrat Aisha which is the main plank of the Shafies does not go to that extent since in case of cohabitation, the parties to cohabitation are not to be charged with Zina; on the other hand the male has to pay the dower of the female which is paid in case of valid marriage.

26. Now I may produce the passages from Hidaya and Mullas Mohammadan Laws. In Hidaya the principle of Hanafi Law is thus stated:-

> " An adult female may engage in the contract without her guardian's consent—— A Woman who is an adult, and of sound mind, may be married by virtue of her own consent although the contract may not have been made or acceded to by her guardians".

27. In Mulla's Mohammadan Law 1980 addition P.250 the difference of view of the Shafei and Malki school on the one hand and of Hanafi school of thought on the other hand is pointed out in these words:

> " Shafei School: The consent at marriage

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should be of the wife. The wali only communicates the wish of the bride. Muhammad Ibrahim V.Ghulam Ahmad (1862) Bom.H.C.R. 236 dissented from.

An adult virgin of the Shafei school can give herself in marriage through a wali and the marriage is not invalid because the father's consent was not obtained. The wali's powers emanate from the authority of the woman. She may choose a remote relative as wali in preference to a nearer one who is inimical to her interests.

A marriage is not valid unless consented to by an adult girl. Shafei and Maliki schools hold that the consent must be given through a wali.

Under Hanafi Law, the woman can give consent with or without a wali".

28. This citation lays down the correct law since according to the view of Imam Abu Hanifa, the marriage of a woman is like the sale of her property. Just as after achieving adulthood she has a right to part with her own property without seeking the permission of any one else, so she has the right to give over her person in marriage also without the consent of any wali. The principle of law relied upon by the learned Sessions Judge is not correct.

29. The learned Sessions Judge has also ignored the principle that assuming that the nikah of a woman without wali is invalid, despite this, if a man and woman marry in good faith and believes themselves so married, the benefit of doubt should go to them. It is established that in such a case

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they cannot be subjected to Hadd(vide Section 5 of the Ordinance). There is no reason why the principle of benefit of doubt which is the prevailing principle of Criminal Law in Islam should not be extended in case of tazir.

30. The result is that this appeal is allowed and the appellants are acqu-itted. They shall be released forthwith if not required in any other case.

AFTAB HUSSAIN
CHAIRMAN

KARIMULLAH DURRANI
MEMBER

MOHAMMAD SIDDIQ
MEMBER

ZAHOORUL HAQ
MEMBER

PIR KARAM SHAH
MEMBER

MALIK GHULAM ALI
MEMBER

MOHAMMAD TAQI USMANI
MEMBER