

IN THE FEDERAL SHARIAT COURT

( Appellate Jurisdiction )

PRESENT

MR. JUSTICE MUHAMMAD ZAFAR YASIN

MR. JUSTICE SYED AFZAL HAIDER

Criminal Appeal No. 309/I of 2006

1. Khalil Ahmed
2. Abdul Razzaq sons of Allah Ditta,  
Residents of Chah Kanjoon Wala  
Mouza Jahan pur Tehsil and District  
Rajanpur .... Appellants

Versus

The State .... Respondent

Counsel for appellant .... Mr. Tariq Mehmood,  
Advocate

Counsel for State .... Mr. Asjad Javaid Ghural,,  
Deputy Prosecutor General

FIR. No. Date & .... 3/03, 3.1.2003  
Police Station Qureshi, Mazaffargarh

Date of judgment of .... 17.11.2006  
trial court

Dates of Institution .... 23.12.2006

Date of hearing .... 07.5.2008

Date of decision .... 22.5.2008

JUDGMENT

SYED AFZAL HAIDER, Judge.- Khalil Ahmad and Abdul

Razzaq appellants have through this appeal challenged the judgment dated 17.11.2006 passed by learned Additional Sessions Judge, Muzaffargarh in Hadood Case No. 55-2 of 2005 and Hudood Trial No.6 of 2006 whereby both the appellants have been convicted under section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to life imprisonment each. They were also convicted under section 10(3) of the said Ordinance and sentenced to 10 years R.I. each. Both the sentences have been ordered to run concurrently. Benefit of section 382-B of Code of Criminal Procedure has also been granted to each of the accused.

2. This case arises out of F.I.R. No.3/2003 Ex.PA/1, registered at Police Station Qureshi, District Muzaffargarh on 03.01.2003 at 8.15 p.m. by Muhammad Hussain Head Constable PW 8 on the basis of an application dated 28.12.2003 submitted by Muhammad Nawaz complainant, PW 4, to the District Police Officer on 30.12.2003 which was marked to S.H.O. of police station Qureshi. The F.I.R. related to an incident which took place

allegedly on 23.12.2002 at 700 hours in the house of complainant situate Ferozeabad Colony of Mouza Bait Uttra.

3. Brief facts of the case as given by complainant Muhammad Nawaz, P.W.4 in the FIR are that on 23.12.2002 at about 7.00. a.m. he alongwith his family members and Nabi Bux, son in law, were present in their house when all of a sudden Khalil Ahmad and Abdul Razzad accused alongwith six other unknown persons armed with deadly weapons trespassed into his house. Two unknown accused aimed their rifles and caught hold of Nabi Bux and the remaining four unknown accused caught hold of the complainant and threatened dire consequences if he dared offer resistance. Accused Khalil Ahmad and Abdul Razzaq then forcibly abducted Mst. Kaniz Mai daughter of the complainant, and her minor son Tanveer aged three years. The accused boarded the abductees in a car bearing registered No.7065/LZ. While the accused were taking away Mst. Kaniz Mai, the complainant and his son-in-law raised hue and cry because of which Rab Nawaz, Muhammad Amin and others were attracted to the spot who saw the occurrence. Due to non availability of transport the complainant could not pursue the accused. The complainant further stated that the accused had

abducted his daughter in order to commit zina with her. Motive behind the occurrence, according to the complainant, was that accused Khalil Ahmad wanted to marry Mst. Kaniz Mai and on his refusal the accused took this extreme step. He therefore came forward to initiate criminal proceedings against the culprits and also for recovery of abductees.

4. The case was investigated initially by Riaz Hussain, SI, P.W.1 who arrested accused Khalil Ahmad on 05.10.2005 and on 6.10.2005 the accused was got medically examined by Dr. Muhammad Inamul Haq Khilji, P.W.3 to ascertain his masculine potency. Then the case was transferred to Imam Bakhsh, S.I. P.W.2 for investigation. On 13.5.2005 he recorded statements of 03 witnesses under section 161 of Code of Criminal Procedure. On 28.10.2003 he recovered Mst. Kaniz Mai who was then produced before the Illaqa Magistrate on 29.10.2003 for recording her statement. On the same day she was produced before the lady doctor but the victim refused to get herself medically examined. The charge report was then submitted to court on 26.05.2004 for trial of the appellants.

5. Trial court framed formal charge against the accused Khalil Ahmad on 28.01.2006 for the first time under section 16 of Offence of Zina



(Enforcement of Hudood) Ordinance, 1979 to which the accused did not plead guilty and then on 02.03.2006 an amended charge under sections 11 and 10(3) of the said Ordinance was framed against appellant Khalil Ahmad. Finally on 12.04.2006 the learned trial court framed another charge against both the accused i.e. Khalil Ahmad and Abdul Razzaq under sections 11 and 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 to which both the accused did not plead guilty and claimed trial.

6. Riaz Hussain, S.I. appeared as P.W.1. He stated that he had partially investigated the case. Imam Bakhsh, S.I. appeared as PW 2. He also partially investigated the case ( the details have already been given). Dr. Muhammad Inamul Haq Khilji appeared as P.W.3. He examined the accused Khalil Ahmad to ascertain his masculine fitness and gave a positive report. Muhammad Nawaz, complainant appeared as P.W.4 who by and large deposed in line with the contents of his complaint Ex.PA. Nabi Bakhsh, P.W.5 and Muhammad Amin P.W.6 supported the version narrated by complainant P.W.4. Mst. Kaniz Mai P.W.7 the victim also made statement in line with the statement of complainant P.W.4 her father Muhammad

Nawaz,. Muhammad Ayub S.I. appeared as P.W.9 and gave the details of the partial investigation undertaken by him.

7. The trial court after examining the prosecution evidence recorded statements of accused under section 342 of Code of Criminal Procedure on 07.06.2006. Appellant Khalil Ahmad in response to question No.10, " why this case against you"? gave a detailed reply which is being reproduced below :-

"Mst. Kaniz Mai was married with Nabi Bakhsh who is age fellow of her father. She was not happy upon her marriage. Muhammad Nawaz father of Kaneez is a greedy person who get money from Nabi Bakhsh in lieu of Mst. Kaniz Mai. After her marriage, he compelled her to file the suit for dissolution of marriage against Nabi Bakhsh. Upon the asking of Muhammad Nawaz she filed a suit for dissolution of marriage in the court of Judge Family Court Rajanpur. After taking money from Nabi Bakhsh, Muhammad Nawaz compelled Kaniz to enter into compromise with Nabi Bakhsh, hence the suit was withdrawn on 02.12.2000. Mst. Kaniz filed a suit for dissolution of marriage against Nabi Bakhsh in the court of Judge Family Court, Rahim Yar Khan, Muhammad Nawaz, complainant himself appeared as P.W. in that suit. That suit was decreed on 01.03.2002. After the period of Iddat, Muhammad Nawaz wanted to sell Mst. Kaniz against her wishes. She approached

to the court of learned Special Judicial Magistrate, Rajanpur, and filed a complaint under section 107/150 Cr.P.C. against Muhammad Nawaz. She herself appeared in the court and got recorded her statement in the complaint on 8.6.2002. Mst. Kaniz Mai contracted marriage with me with her free will and her own accord. Muhammad Nawaz tried to interfere in our matrimonial life due to which Mst. Kaniz Mai with her free will filed a W.P. No.4892/2002 before the Honourable High Court, Multan Bench, Multan. Meanwhile Muhammad Nawaz complainant contacted Nabi Bakhsh and get money from him on the asking of Nabi Bakhsh Muhammad Nawaz, being father of Mst. Kaniz started to visit my house. During his visits, he induced Mst. Kaniz Mai. Then with the connivance of Nabi Bakhsh he filed a Crl. Misc. No.566-H/2002. By the order of Honourable High Court, Mst. Kaniz was produced in the Honourable High Court. Her statement was recorded in which she admitted acknowledged me as her husband. On her statement she was allowed to accompany her father Muhammad Nawaz and Nabi Bakhsh compelled me to divorce Mst. Kaniz. I was also dragged at the deras of feudals of the area but I refused to do so. Muhammad Nawaz and Nabi Bakhsh succeeded to get the registration of this false case with the connivance of police of P.S. Qureshi and feudals of the area ( Dareshak Sardar). According to law and Shariah Mst. Kaniz Mai was my wife at the time of alleged occurrence, hence no offence has been committed by me. It is also pertinent to mention here that Muhammad Nawaz, Nabi Bakhsh and Mst. Kaniz never resided

in the area of P.S. Qureshi. No occurrence as alleged in the FIR and in the evidence took place. My whole the family has been dragged in this false case due to aforesaid reasons”.

8. Mst. Kaniz Mai the alleged abductee P.W.7 filed a suit for dissolution of her nikah with Nabi Bakhsh in the Family Court of Rahim Yar Khan on 26.06.2001. The plaint is available on the file as Ex.D/D wherein she stated that she was married to Nabi Bakhsh about 5 or 6 years earlier and two sons aged 03 years and 01 year were born out of this wedlock. Her husband is already married having 12 children. He is suspicious by nature and keeps on attributing immoral things and also gives her beatings. She also stated that she had developed aversion against her husband and hence this suit for dissolution of marriage. In support of her suit she appeared as P.W.1 on 18.02.2002 in the court. On the same date her father Muhammad Nawaz who is complainant in this criminal case also appeared and supported the statement of his daughter and prayed for dissolution of the marriage. As a consequence thereof an ex-parte decree was passed by the Civil Judge acting as the Judge Family Court Rahim Yar Khan on 01.03.2002. The statement of Mst. Kaniz Mai and her father and the ex-parte decree are available on the file as Annex DE, Annex DF and Annex DG respectively. Then we find that



Mst. Kaniz Mai P.W.7 lodged a complaint against her father and brothers under sections 107/150 of the Code of Criminal Procedure on 08.06.2002 which is available on record. In this complaint she stated that she was married to an old person by her father against a heavy price and she has sought annulment of Nikah through a court of law and now her avaricious father wants to sell her again to some old person though he had already taken a substantial amount from Khalil Ahmad son of Allah Ditta caste Lashari (an appellant in this case) and engaged her to him with whom she now wants to marry. She has been threatened with dire consequences by her father and brothers if she does not agree to their wishes and lastly on 07.06.2002 at 10.00.a.m. she was beaten by them and the police did not register her complaint. She, therefore, sought protection from the court. She gave a detailed statement before the learned Special Judicial Magistrate, Rajanpur on the same date. Both these documents are available on record. Available also on the file is a Nikahnama showing that Khalil Ahmad appellant married Mst. Kaniz Mai P.W.7 on 10.06.2002 in which it was clearly stated that the bride is a divorcee who has obtained divorce from the court of Mr. Jehangir Ashraf, Civil Judge, Rahim Yar Khan. It was further

stated that permission has been sought from the court of Malik Ahmad Hassan, Special Judicial Magistrate, Rajanpur. Nikah was performed by one Abdul Karim Sulehria son of Molvi Noor Ahmad of Rajanpur. A copy of constitutional petition filed by Mst. Kaniz Mai against SHO Police Station, Saddar Rajanpur, SHO Police Station City, Rajanpur and Muhammad Nawaz, her father, is also placed on record of this case. This constitutional petition was registered as W.P.No.4892/2002 by the Multan Registry of Lahore High Court, Multan Bench. In this petition Mst.Kaniz Mai referred to her nikah with her former husband from whom she had sought a judicial divorce and also mentioned the fact of her second marriage with Khalil Ahmad. Her complaint was that her father was not pleased with this marriage and now with the help of police officers he wants to disgrace her and her husband. Through this harassment petition she wanted protection. The Honourable Single Judge on 20.06.2002 was pleased to pass the following order:-

“ This constitutional petition is duly supported with the copy of decree for dissolution of marriage as well as Nikah Nama.

The SHO respondent No.1 is hereby directed not to cause illegal harassment to the petitioner and further not to interfere in

the matrimonial life of the petitioner provided the marriage of the petitioner is lawful and she is neither accused or any criminal case nor required for the purpose of investigation of any criminal case”.

9. Available on the file is yet another constitutional Habeas Corpus petition filed under section 491 of the Code of Criminal Procedure moved in the Multan Bench of the Lahore High Court by Muhammad Nawaz P.W.4. This time this petition was against SHO P.S. Saddar Rajanpur and appellant Khalil Ahmad the husband of Mst. Kaniz Mai. In this petition Muhammad Nawaz urged that his daughter was married to Nabi Bakhsh in the year 1996 and now on account of bad relations between spouses some two months back Mst. Kaniz Mai came alongwith her two minor sons in his house. Mst. Kaniz Mai started working in the house of Khalil Ahmad. A week back Khalil Ahmad did not permit Mst. Kaniz Mai and her minor sons Tariq and Tanveer to come back to her father's house and wanted to marry her forcibly and on her refusal she was confined in the house. It is further stated that she sent a message to her father for her release but Khalil Ahmad did not agree and hence the petition for her release. In this connection. Mst. Kaniz Mai appeared before the Honourable Single Judge of the Lahore

High Court, Multan Bench Multan on 22.08.2002 and stated that she wished to accompany her father. The Honourable Judge was pleased to observe that “un-disputedly Mst. Kaniz Mai is major and has right to lead a life of her own choice. She is allowed to accompany her father Muhammad Nawaz petitioner alongwith her children namely Tariq and Tanveer”. There is still another document Ex.P/D which is a statement of Mst. Kaniz Mai defendant in an application filed by Nabi Bakhsh for cancellation of ex-party decree dated 01.03.2002. In her statement she stated that she had no objection if the ex-party decree were set aside, whereupon the learned Civil Judge, Rahim Yar Khan passed an order annulling the ex-party decree dated 13.01.2003 which means that the decree for dissolution of marriage of Kaniz Mai with Nabi Bukhsh was annulled approximately nine months after its issuance. It is significant to mention that the ex-party decree of the annulment of marriage of Mst. Kaniz Mai with Nabi Bukhsh was obtained on 01.03.2002 and 100 days thereafter she was married on 10.06.2002 with appellant Khalil Ahmad and then after about seven month on 13.01.2003 the ex-party decree dated 01.03.2002 was annulled by the civil court whereas the date of alleged occurrence of abduction as recorded in FIR No: 3/2003 is 23.12.2002.



However, we also find on the record Ex.D/H, another complaint filed by Mst. Kaniz Mai on 24.12.2002, against her father and two brothers under sections 452, 148 and 149 of the Pakistan Penal Code. In her statement dated 24.12.2002 she categorically stated that she was previously married to one Nabi Bakhsh which nikah was judicially annulled whereafter she contracted second marriage with Khalil Ahmad appellant and she is living happily with him. She further stated on 23.12.2002 at 11.00.a.m. she was present in her house when her father Muhammad Nawaz ( P.W.4 in the present criminal case) alongwith her two brothers Bilal and Abid entered the house and gave a beating and wanted to forcibly take her away. On her hue and cry she was rescued. However her complaint was not registered by local police and hence she has filed this complaint for the initiation of action against her father and brothers. It is also in the evidence of Imam Bakhsh, S.I. P.W.2 that on 28.10.2003 he recovered Mst. Kaniz Mai abductee from the roadside when she was going alongwith Khalil Ahmad appellant.

10. After going through the entire record and perusing the statements of various witnesses we asked the learned counsel for the appellants to put across the points that he wished to be considered in support

of his contentions. The first point canvassed by learned counsel for the appellant is that the incident took place on 23.12.2002, whereas FIR No.3 Ex.PA/1 was lodged on 03.01.2003 at 8.15.p.m. The inordinate delay has not been explained at all. In the facts and circumstances of this case such a delay is fatal to the prosecution case. It was next argued that on the facts and circumstances of the case the conviction recorded by learned trial court cannot be sustained. Thirdly it was urged that the very basis of the case stands demolished because the incident complained of by complainant P.W.4 did not take place at all. Then it was argued that the conduct of the complainant P.W.4, father of Mst. Kaniz Mai P.W.7, is a clear pointer to the fact that he has been exploiting his daughter for the sake of money. The fifth submission was that appellant Khalil Ahmad had validly entered into marriage with Mst. Kaniz Mai and has a son from that marriage and has in fact made a detailed statement under section 342 of the Code of Criminal Procedure. It was further stated that on 19.07.2006 appellant Khalil Ahmad made an application for the DNA Test of their minor son Nadir born out of wedlock with Mst. Kaniz Mai and that he also made an application to re-examine Mst. Kaniz Mai P.W.7 so that she could be confronted with all the

documents which have been produced by the appellant before the trial court in his defence. However this application was rejected on 19.07.2006 in which the learned trial judge found that the application was moved without any cogent reason and was mis-conceived, hence it was dismissed.

11. Learned counsel appearing on behalf of the State on the other hand strongly urged that i) Conviction recorded against the appellants was based upon evidence and being well reasoned should be maintained. ii) He also stated that the complainant had in fact lodged a complaint before the District Police Officer and having received a direction from him he got the case registered which means that the delay complained of by the learned defence counsel has been fully explained. iii) It was further submitted that the version placed before the learned trial Court by complainant P.W.4 has been supported by P.W.7 herself. iv) It was also urged that the ex-parte decree of the dissolution of marriage was annulled and therefore from the date of annulment of the marriage the appellant was not a lawfully married husband and was therefore living in sin with Mst. Kaniz Mai. The learned counsel for the State was however confronted with the proposition that the date of the annulment of the decree for dissolution of marriage is later in

time to the registration of FIR No.3/2003. It clearly means that on 23.12.2002 i.e. the date of her abduction by appellant Khalil Ahmed she was his legally wedded wife. Under these circumstances the very basis of the FIR that Mst. Kaniz Mai was abducted from the house of her father by appellant is shattered also because of the fact that on 24.12.2002 Mst. Kaniz Mai P.W.7 herself had lodged a complaint against her father P.W.4 and her two brothers stating that on 23.12.2002 her father with the help of his two sons had come to forcibly take her from the house of her husband Khalil Ahmad appellant. The learned counsel was also confronted with this fact that if it is conceded that the marriage came to an end when the ex-parte decree dated 01.03.2002 was set aside on 13.01.2003 and appellant Khalil Ahmad started living in sin with Mst. Kaniz Mai thereafter the prosecution proposition is not strengthened because the instant case was registered on 03.01.2003. No second complaint after 30.01.2003 was lodged against the appellant alleging that he was living in sin or was indulging in adultery.

12.           Thereafter learned counsel for the State relied upon section 21 of the West Pakistan Family Court Act 1964 to state that the very basis of nikah dated 10.6.2002 between Khalil Ahmad appellant and Mst. Kaniz Mai



P.W.7 has no legal existence because court decree dissolving the marriage has not passed through the process of the Family Court Act. In order to appreciate this point the section 21 is reproduced below:-

**21. "Provisions of Muslim Family Laws Ordinance to be applicable** (1) Nothing in this Act shall be deemed to affect any of the provisions of the Muslim Family Laws Ordinance, 1961, or the rules framed thereunder and the provisions of sections 7,8, 9 and 10 of the said Ordinance shall be applicable to any decree for the dissolution of marriage solemnized under the Muslim Law, maintenance or dower, by a Family court.

(2) Where a Family Court passes decree for the dissolution of a marriage solemnized under the Muslim Law, the Court shall by registered post within seven days of passing such decree a certified copy of the same to the appropriate Chairman referred to in section 7 of the Muslim Family Laws Ordinance, 1961 and upon receipt of such copy, the Chairman shall proceed as if he had received an intimation of Talaq required to be given under the said Ordinance.

(3) Notwithstanding anything to the contrary contained in any other law, a decree for dissolution of a marriage solemnized under the Muslim Law shall—

- (a) Not be effective until the expiration of ninety days from the day on which a copy thereof has been sent under subsection (2) to the Chairman; and
- (b) Be of no effect if within the period specified in clause (a) a reconciliation has been effected between the parties in accordance with the provisions of the Muslim Family Laws Ordinance, 1961.

**PUNJAB AMENDMENT.** For Section 21, the following section shall be substituted;

21. Provisions of Muslim Family laws Ordinance, 1961 not affected (1) Nothing in this Act shall be deemed to affect any of the provisions of Muslim Family Laws Ordinance, 1961 or the rules made thereunder.

Punjab Ord.24 of 1971 enforced on 23.6.1971".

13. It is the requirement of law that the court is under an obligation to send a copy of the decree for the dissolution of marriage within 07 days of the passage of the decree to the Chairman for necessary action. There being no evidence on record to show that the learned Civil Judge had failed to send a copy of the decree to the Chairman it shall be presumed that all the acts required to be done under the law have been done faithfully as stipulated by law. Furthermore it is stated in clause (a) of sub-section 3 of section 21 of the Family Court Act, 1964 that a decree shall be effective only after the expiration of 90 days from the day on which a copy thereof has been sent under sub-section 3 to the Chairman and shall be of no effect if within the period specified in clause (a) a reconciliation has been effected between the parties. It is therefore clear that appellant Khalil Ahmad was competent to enter into contract of marriage with Mst. Kaniz Mai after 90 days of the receipt of the copy of the decree. Looking at the record we find that the decree for the dissolution of marriage was passed on 01.03.2002 and by 8<sup>th</sup> of March, 2002 the copy of the decree was sent to the Chairman and the nikah took place on 10.06.2002 i.e. after 100 days whereas the legal requirement as stipulated in section 21 sub-section 3 clause (a) is 90 days.

14. We have given full consideration to the facts and circumstances of the case. We have also read the evidence and perused the record with the assistance of learned counsel for the parties. We have also assessed the reasoning adopted by the learned trial court. However we are unable to agree with the conclusion arrived at by the learned trial court. The documentary evidence placed on record of the file destroys the foundation of the prosecution case. It is not possible to sustain conviction under section 11 of Ordinance VII of 1979 against the appellants. Section 11 deals with abduction with intent that a woman be compelled to marry any person against her will but here on the day when the alleged occurrence took place Mst. Kaniz Mai was the lawfully wedded wife of appellant Khalil Ahmad. She had on the other hand lodged a complaint on 24.12.2002 against her father and her two brothers that she was on the verge of being removed from the house of her husband Khalil Ahmad. Therefore in view of this fundamental hurdle the very basis of F.I.R. 03 of 2003 is knocked out with the result that conviction recorded under section 11 of Ordinance VII of 1979 is liable to be set aside and we hereby set aside the conviction and the sentence recorded under section 11 of Ordinance VII of 1979.

15. Now we come to the conviction recorded against the appellant by the learned trial court under section 10(3) of Ordinance VII of 1979. On the same reasoning we are unable to uphold the same for the simple reason that the learned trial court did not appreciate the basic fact that the appellant Khalil Ahmad claims to be husband of Mst. Kaniz Mai and ample evidence has also been placed on record to that effect. Then how could his real brother, i.e. appellant Abdul Razzaq be involved in committing zina-bil-jabr with his own sister-in-law and that too within the knowledge of appellant Khalil Ahmad for whom a complex and protracted legal battle had been fought. Furthermore the question of zina-bil-jabr does not arise in the facts and circumstances of the case where Mst. Kaniz Mai repeatedly admitted herself to be wife of appellant Khalil Ahmad. Even at the time when Mst. Kaniz Mai made a statement before the Hon'ble Single Judge of the Lahore High Court, Multan Bench Multan that she wants to accompany her father on 22.8.2002 she never stated that she was not the lawfully wedded wife of appellant Khalil Ahmad. She only stated that she wanted to accompany her father and the Honouable Judge passed an order to that effect that she being a sui-juris was entitled to live the life she wanted.





16. As a result of what has been stated above it is not possible for us to maintain the conviction recorded by the learned trial Court. In arriving at this conclusion we have been reinforced by a proposition, which has by now acquired complete judicial consensus, that the prosecution version, in the entire trial acquires a focal status and has therefore not only to be plausible but coherent as well. It is not safe to rely upon built-in improbabilities. The narration of facts should be natural and appealing to prudent persons. It is well nigh impossible to base conviction on questionable, unconvincing or a dubious story.

17. In this view of the matter the conviction recorded under section 10(3) and the sentence passed there-under by the learned trial court vide his judgment dated 17.11.2006 in Hudood Case No.55-2 of 2005 and Hudood Trial No.6 of 2006 is also being set aside. The conviction and sentences under both counts having been set aside the instant Criminal Appeal No.309/I of 2006 succeed and both the appellants shall be released forthwith unless they are required in any other case.

  
  
JUSTICE SYED AFZAL HAIDERE

  
  
JUSTICE MUHAMMAD ZAFAR YASIN

  
  
**Announced in open Court  
on 22.5.2008 at Islamabad**  
UMAR DRAZ/

  
  
Fit for reporting.