

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

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PRESENT

MR.JUSTICE MIR HAZAR KHAN KNOSO, CHIEF JUSTICE
MR.JUSTICE DR. FIDA MUHAMMAD KHAN
MR.JUSTICE NAZIR AHMAD BHATTI.

CRIMINAL APPEAL NO: 52/I OF 1993

1. Jafar Hussain Shah son of
Mullazam Hussain Shah, R/o
Chah Nad Ali Shah, Tehsil
and District D.I.KHAN.
2. Mst.Nasreen Bibi, D/o Hussain
Bakhsh, Resident of Chah Nad
Ali Shah, Tehsil and District
D.I.KHAN.

... APPELLANTS.

VERSUS

The State

... RESPONDENT

Counsel for the
appellants.

... Dr.Mohammad Aslam Khaki,
Advocate

Counsel for the
complainant.

... Mr.Abdul Latif Khan Baloch
Advocate

Counsel for the
State

... Mr.Roshan Khan,
Advocate

No.Date of FIR and
police station.

... 399, dated 8.11.1989 P.S.
Cantt.D.I.Khan.

Date of decision of the
trial Court.

... 6.2.1993

Date of Institution of
appeal.

... 14.2.1993

Date of Hearing

... 4.7.1993

Date of decision

... 4.7.1993

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JUDGMENT

DR.FIDA MUHAMMAD KHAN,J.- This appeal jointly filed by (1) Jafar Hussain Shah son of Mullazam Hussain Shah and (2) Mst. Nasreen Bibi, daughter of Hussain Bakhsh, both residents of Chah Nad Ali Shah, Tehsil and District D.I.Khan is directed against the judgment dated 6.2.1993 passed by the learned Sessions Judge,D.I.Khan whereby they have been convicted and sentenced as under:-

Jafar Hussain Shah: Under Section 5(2)(b) of the Offence of Zina (Enforcement of Hudood) Ordinance,1979,whipping numbering 100 stripes.
He has been acquitted under section 494 PPC.

Mst.Nasreen Bibi: Under Section 5(2)(a) of the Offence of Zina (Enforcement of Hudood) Ordinance,1979 Stoning to death.
U/Section 494 PPC five years R.I.

2. Briefly stated the case of prosecution according to complaint Ex.PW-7/1 lodged by Imdad Hussain son of Nazar Hussain Shah on 8.11.1989 is to the effect that he was married to Mst.Nasreen in 1976 and had five children from the said wedlock. He came to know that his wife had developed illicit relations with Jafar Hussain Shah son of Mullazam Hussain Shah,therefore,on 22.10.1989 he took her to her father's house and,without divorcing,handed over to her parents where she kept on residing. On 3.11.1989 he was informed by his father-in-law that Mst.Nasreen Bibi had left the house. He started search for her. On 4.11.1989, the aforementioned Jafar Hussain Shah asked his cousin Bashir Hussain as to why Imdad Hussain did not divorce Mst.Nasreen

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whom he wanted to marry. Later on he came to know that Mullazam Hussain Shah, Mst.Ghulam Fatima, her parents and brothers had kept Mst.Nasreen in the house with the common intention to get her married to Jafar Hussain Shah and on the night between 6/7th November their nikah ceremony had taken place and both the appellants Jafar and Nasreen had been committing zina with each other. The complaint was incorporated in formal FIR, the accused were arrested and, after completion of necessary formalities challaned to face the trial.

3. At the trial prosecution examined ten witnesses. P.W.1 is Abdul Sattar Shah in whose presence the Investigating Officer took into possession one photostate copy of nikahnama dated 5.11.1989 produced by Jafar Hussain Shah. P.W.2 is Lady Dr.Naeema who examined Mst.Nasreen on 11.11.1989 and observed as under:-

- "1. Hymen not intact.
2. No blood or semen stains found on the clothes.
3. Pelvic examination is not in favour of any recent coitus. Vaginal swabs taken for recent intercourse.
4. Final result withheld untill the result of urine for pregnancy test and laboratory report of the vaginal swabs.

Pregnancy test: Positive."

P.W.3 Anayatullah Khan, Appeal Writer, brought the appeal register wherein at serial No.1409 nikah of the complainant and Mst.Nasreen had been entered on 29.10.1976. The said nikah was performed in accordance with the injunctions of Ahl-e-Sunnat. P.W.4 is Dr.Shahjahan. He examined Jafar Hussain Shah on 11.11.1989 and found him potent.

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P.W.5 is Nasrullah Khan, Inspector who found the accused Mullazam Hussain, Zafar and Mst. Shado innocent and therefore, He discharged them under section 169 Cr.P.C. and thereafter submitted challan against the present appellants P.W.6 is Kalam Rais Khan. He partly investigated the case and submitted challan. P.W.7 is Imdad Hussain. He is the complainant who reiterated his statement as mentioned above. P.W.8 is Hussain Bakhsh. He is father of Mst. Nasreen Bibi. He deposed that the complainant to whom his daughter Mst. Nasreen was married brought her to his house with the allegation that he was going to divorce because she had illicit relation with Jafar Hussain Shah. He asked him to leave Mst. Nasreen in his house so that he may make her understand. A few days later he learned that she contracted marriage with Jafar Hussain Shah accused and thereafter the complainant lodged case against the accused. P.W.9 is Bashir Hussain. He deposed that Jafar Hussain had come to his shop and had inquired from him as to whether the complainant had divorced her or not to which he had replied that he did not know anything about that. P.W.10 is Mohammad Ramzan, ASI. He registered FIR on the basis of written report/application Ex.PW.7/1. He arrested the appellants, prepared site plan, got the appellants medically examined and recorded the statements of PWs. He also took into possession photostates copies of two nikahnamas produced by the parties. After completion of investigation he placed the record before SHO for submission of complete challan.





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4. Both the appellants made statements under section 342

Cr.P.C wherein they denied the allegation and pleaded innocent.

Replying to question "why are you charged"? the appellant Jafar Hussain made a statement in the following words:

"I am innocent and have falsely been charged. I came to know much before I had contracted a legal marriage with my co-accused in accordance with the Islamic injunctions that Imdad Hussain complainant had divorced my co-accused. I also verified this fact from different quarters and then my co-accused had also assured me that she was divorced. In this respect, she sworn an affidavit the copy of which has been placed on record as Ex.DX/1. The complainant was in the knowledge that we were contracting marriage but she did not bather because he had divorced my co-accused. I and my co-accused had entered in an agreement openly in the public, the copy of which is Ex.DX/2. Then our Nikah was performed by a Nikah Khawan and was entered in the Nikah Register in the gathering, the copy of which is Ex.DX. Nothing was concealed on our behalf, nor our marriage was performed secretly or dishonestly. I was told by my co-accused that she was divorced by the complainant in his house when no one was present at that time whereafter she was left in the house of her father by the complainant but her father too joined hands with the complainant and did not console. I have committed no offence, nor have indulged in any zina or relation. I have solemnized valid marriage with my co-accused and we are residing with each other as husband and wife. The complainant did not want that his divorce was to reinstate herself by contracting an other marriage or that he should enjoy the fruits of her life after having been turned out by him and she contracted marriage with me. The complainant being a police officer brought a false case against me with the connivance of his colleagues!"

The appellant/accused Mst. Nasreen Bibi stated that she was married to Imdad Hussain, complainant and had given birth to five issues but the complainant then had divorced and turned her out of his own house. Denying the allegation of elopement and contracting illegal second nikah during life time of her husband Imdad Hussain, she made a statement as under:-

"I am no more wife of Imdad Hussain and as stated by me above, I have been divorced by the complainant. I had never been eloped with my co-accused, nor is there is iota of evidence against me in this respect. I had contracted a valid marriage with my co-accused after having passed the iddat period in accordance with shariah and had committed no offence. I produce the original Nikah Nama, the copy of which in Ex.DX. I also produce

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the original affidavit sworn by me, the copy of which is Ex.DX/1. I also produce the agreement deed in original executed by me and my co-accused, the copy of which is Ex.DX/2."

In reply to a question put to her about the positive pregnancy

report she stated as under:-

"As per statement of the lady doctor, the alleged test has not been proved in accordance with the legal requirements. The swabs on the other hand were taken from me which resulted in negative as per Chemical Examiner's report Ex.DB.

Replying to other questions she further made statements in the

following words:-

"PWs being interested have falsely deposed against me. PW Hussain Bakhsh, my father, was under the influence of the complainant due to his police official. Moreover, my father Hussain Bakhsh was interested to give my hand to some other person against my choice in lieu of money. Moreover, he has stated nothing in favour of the prosecution. His statement amounts here because nothing has happened in his presence, nor he is an eye witness of any alleged elopement or zina. The police officials being colleagues of the complainant are also interested in the success of the case if they were prompted up against me.

I am innocent and have falsely been charged. The complainant has divorced me and wanted that no one should accept me as his wife and that I should remain throughout my coming life isolated and since I contracted a legal marriage after having observed all the legal formalities with my co-accused, the complainant got annoyed and brought a false case against me with the help of the police because he himself is a police officer and now wants to ruin my life."

Both the appellants/accused also produced four DWs in their defence.

D.W.1 Mohammad Ramzan Tauqeer, Nikah Khawan who after satisfaction

that Mst. Nasreen Bibi was divorced by her former husband performed

her nikah with Jafar Hussain Shah and signed nikahnama Ex.DX.

D.W.2 is Ghulam Abbas Shah. He is the nikah Registrar who registered

nikah of the appellants/accused. He also scribed the affidavit given

by Mst. Nasreen Bibi which was subsequently attested by the then

Oath Commissioner Jehanzeb Khan, Advocate. He deposed that he had

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registered her nikah after having personal satisfaction that she was a divorced woman. D.W.3 is Jehanzeb Khan, Advocate the then Oath Commissioner who attested the original affidavit sworn by Mst.Nasreen Bibi. D.W.4 is Mohammad Nazir son of Kauru Khan. He identified Mst.Nasreen Bibi. He signed the aforementioned affidavit.

5. We have heard the learned counsel for the parties and have perused the record with their assistance. It transpired from the record that admittedly Mst.Nasreen Bibi was married to the complainant Imdad Hussain in 1976, in accordance with the Injunctions of Ahle Sunnah. Similarly nikah of Mst.Nasreen with the appellant/accused Jafar Hussain, performed on 5.11.1989, is also an admitted fact. This nikah was performed according to the teachings of Fiqh-e-Jaferia. Statements of the appellants/accused show that their nikah was performed after the pronouncement of divorce and passing of the "iddat" period in consonance with the requirement of Shariah. The circumstances show that the complainant was annoyed with Mst. Nasreen and had taken her to the house of her father. P.W.8 Hussain Bakhsh, father of Mst.Nasreen Bibi, has stated that the complainant had brought her to his house and had stated that he was going to divorce her because she was having illicit relations with Jafar Hussain Shah. He has not elaborated whether he had actually divorced her, however, he has admitted in the cross-examination that the complainant was enraged at that time and had asked him to take the dower amount

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of Mst.Nasreen Bibi from him as he was going to divorce her because he could no longer pull on with her. He has nowhere given the date when Mst.Nasreen was brought to his house but has admitted that she had left the house 7/8 days thereafter and he had informed the complainant on the same day. He is also not definite about the date of the second marriage of Mst.Nasreen with Jafar Hussain. The complainant was suggested in respect of divorce to which he replied that he had also told PW Hussain Bakhsh that he should take over the dower amount from him as he had divorced her. On a second thought however he said that he had not divorced her but was intending to divorce her. It was also suggested to him that he had divorced Mst. Nasreen Bibi on 28.7.1989.

6. It appears even from the evidence of P.W.9 that the appellant/accused had gone to his shop and had inquired from him as to whether or not the complainant had divorced Mst.Nasreen. It shows that before entering into nikah with his co-accused the appellant Jafar Hussain had been making inquiries in this respect and he seems to be truthful in his statement that he had verified the factum of divorce from different quarters. It may also be mentioned that the affidavit sworn by the lady appellant/accused and properly proved by the evidence of DWs also shows that the second nikah between the appellants was performed after the pronouncement of talaq and expiry of period of iddat. The said affidavit is dated 5.11.1989 i.e. before the registration of the case by the complainant on 8.11.1989.

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7. The above circumstances show that both the appellants have pleaded to have been married to one another after divorce of the lady appellant and passing of iddat period and have produced nikahnama in support. This nikah is an admitted fact and there is nothing to falsify it. It is to be noted that Hadd punishment is awarded only when there is absolutely no doubt whatsoever of the accused having committed sexual intercourse and they are neither married nor suspect themselves to be married. For an easy reference relevant portion of section 5 of the Ordinance is reproduced as under:-

"Section 5: ZINA LIABLE TO HADD: (1) Zina is zina liable to Hadd if: (a) it is committed by a man who is an adult and is not insane with a woman to whom he is not, and does not suspect himself to be, married; or

(b) it is committed by a woman who is an adult and is not insane with a man to whom she is not and does not suspect herself to be, married."

The words appearing in paragraph (a) and (b) of sub-section(1), which have been underlined, are most important and are based on the doctrine of doubt (شبهة) which has been elaborately dealt with by the Muslim jurists. In fact this doctrine was evolved and developed in connection with the marriages about the legality of which there was some difference of opinion among the Muslim jurists. This doctrine is in fact based on the following Ahadith of the Holy Prophet (ﷺ) which intend to save as many persons as possible from the terrible punishment of hadd, if the circumstances

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indicate any doubt:-

"ادفعوا الحدود ما وجدتم له مدفعا ، (سنن
ابن ماجه ، كتاب الحدود)

"Ward off Hadd punishment as far as
you find any room for it."

"ادروا الحدود عن المسلمين ما استطعتم فان
كان له مخرج فخلوا سبيله فان الامام ان يخطئ
في العفو خير من ان يخطئ في العقوبة ، (جامع
ترمذي ، كتاب الحدود حديث نمبر ١٤٢٤)

"Remove hadd punishment from the Muslims
as far as possible. If you find any room to
save the accused from hadd punishment,
leave him. It is far better for an Imam to
commit a mistake in acquitting (the accused)
than to convict (an innocent)!"

On the basis of these Ahadith it has, therefore, been laid down

in the Islamic law of Hudood that the execution of Hadd punishment

shall not be imposed when a doubt is created either in the proof

regarding the commission of the offence or, according to Hanafis,

in the form of contract of marriage, in the cases of allegation of

zina. According to Imam Abdu Hanifa a contract of marriage is a

sufficient ground for doubt in such like cases even if the illegality

of such a marriage be universally admitted. In case the accused are

aware of its illegality, he/she may be awarded 'tazir' or a lighter

punishment at the discretion of the Judge but not the Hadd punish-

ment. It follows that if accused male and female acknowledge to have

been wedded and this fact is not rebutted, it is sufficient in 'shariah'

to absolve them of the criminal liability under 'hadd' punishment. It



appears that due to this reason the legislature has deliberately not added the word "validly" before the word "married" in sub-sections (a) and (b) to Section 5(1) of the Ordinance.

8. It is also note worthy that Hadd punishment is to be awarded only when "tazkiya-tush-shuhud" has been made. Section 8 of this Ordinance lays down that proof of zina laible to hadd as required is either a confession of the accused of the commission of the offence of zina before a court of competent jurisdiction or at least four Muslim adult male witnesses, about whom the court is satisfied having regard to the requirements of "tazkiya-tush-shuhud" that they are truthful persons and abstain from major sins, come forward and give evidence as eye witnesses of the act of penetration necessary to the offence.

9. It is pertinent to mention that the conduct of complainant in the circumstances is not natural and confidence-arising and it is not known on which specific date he had taken Mst.Nasreen Bibi to the house of her father. According to P.W.8 the day when Mst. Nasreen Bibi had left his house he had informed him accordingly on the same day but inspite of the fact that the complainant was an experienced police officer he did not make any report in the police station and reported the matter only on 8.11.1989 when the nikah of Mst.Nasreen Bibi was performed with the appellant Jafar Hussain Shah on the night between 6/7th November,1989. This creates doubt about the veracity of prosecution case regarding the exact date of her

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return to the house of her father. Besides this as borne out from the record, the instant prosecution case is lacking proof of the offence of zina as required under section 8 of the Ordinance referred to above. The process of tazkiya-tush-shuhud has not been adopted. Another fact worth-consideration is the existence of nikah between the appellants/accused—a fact which has not only been proved by the defence but is admitted by the complainant as well. These grounds are sufficient to save the appellants from the punishment of hadd which is not at all warranted in the circumstances. The learned counsel appearing on behalf of complainant, after some discussion, also conceded that the evidence required for conviction under section 5 of the Ordinance is not forthcoming in the instant case.

10. So far as the commission of offence of 'zina' liable to 'tazir' is concerned, no evidence has been produced by the prosecution which could make the appellants liable to 'tazir' punishment. The period of pregnancy has not been determined and as such it cannot be decided as to who has caused the same. There is no proof about the factum of their living together or committing carnal intercourse. Even the medical report has negated fresh sexual intercourse. There is also no direct evidence about the commission of the sexual intercourse by the appellants. As far as the statements of appellants/accused in this respect are concerned, it is sufficient to mention that it is a settled principle of law that they are either to be accepted or rejected as a

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whole when there is no evidence produced by prosecution to prove the charge.

11. In this context it is also mentioned that the learned Sessions Judge had charged the appellants under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 but in his judgment has converted the same and convicted and sentenced the appellants under section 5 of the Ordinance. Besides this the learned Sessions Judge has not made any reference to the appellate court for confirmation of the Hadd punishment.

12. In this view of the matter it is evident from the above that the prosecution has not been able to establish its case against the appellants beyond any shadow of reasonable doubt. Therefore, we extend the benefit of doubt to both the appellants Jafar Hussain Shah son of Mullazam Hussain Shah and Mst.Nasreen Bibi, daughter of Hussain Bakhsh, set aside their conviction and sentences as passed against them by the learned Sessions Judge, Dera Ismail Khan on 6.2.1993 and accept their appeal. They are acquitted of the charge and they shall be set at liberty forthwith if not required in any other case.

13. Before parting with the case it is however pertinent to point out that as far as the factum of divorce of appellant Mst. Nasreen Bibi and legality of her subsequent marriage with appellant

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Jafar Hussain Shah is concerned, the observations made in this judgment are not^{to} be construed as final verdict. The parties may contest the same at the appropriate forum if advised to do so.



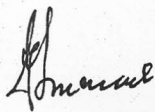
(Dr. Fida Muhammad Khan)
Judge

M. A. K. Khoso
(Mir Hazar Khan Khoso)
Chief Justice

Nazir Ahmad Bhatti
(Nazir Ahmad Bhatti)
Judge

Peshawar, 4th July, 1993
/M. Arshad Khan/

Fit for reporting


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