

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT:

Mr. Justice Aftab Hussain	Chairman
Mr. Justice Ch. Mohammad Siddiq	Member
Mr. Justice Mawlaana Muhammed Taqi Usmani	Member

CRIMINAL APPEAL NO.72/I OF 1981.

Mohammad Ashraf <i>and</i> <i>another</i>	.....	Appellant
	Versus	
The State	.....	Respondent
For the Appellant	.....	Mr. Mohammad Ahmad Raza Qasuri, Advocate.
For the Respondent	.....	Hafiz S.A. Rehman
Date of hearing and decision.	.....	25.7.1981

JUDGMENT

AFTAB HUSSAIN, CHAIRMAN: This is an appeal filed by Mohammad Ashraf and Mst. Ghulam Fatima appellants against the order of Mian Habib-ur-Rehman, Additional Sessions Judge, Gujrat dated 27.4.1981 by which he found both of them guilty under Section 10 of the Offence of Zina (Enforcement of Hadood), Ordinance, 1979 and sentenced each of them to 7 years R.I., 10 stripes and Rs.1,000/-, as fine in default of payment of which the defaulter was directed to suffer one year's R.I. more.

2. On the 25th of March, 1980, a First Information Report of the abduction of Mst. Ghulam Fatima by Mohammad Ashraf and of the commission of Zina by them was recorded at Police Station Dinga at the instance of Bahadur Khan, P.W.1 husband of Ghulam Fatima appellant. According to this report Ghulam Fatima was abducted about a month ago.

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Mr. Amjad Hussain Shah, Sub Inspector, P.W.4, who was posted as Assistant Sub Inspector at Police Station Dinga at the relevant time recovered Mst. Ghulam Fatima appellant from the house of Mohammad Ashraf appellant situated in village Auchalli, Tehsil Khoshab. Both these appellants admittedly produced some papers before the Assistant Superintendent Police who verified the investigation. These documents have been proved on record as Ex.D.A. and D.B. Ex.D.A. is the exparte decree for dissolution of marriage passed in favour of Mst. Ghulam Fatima on the 27th of October, 1979 about 5 months before the registration of the Criminal Case. Ex.D.B. is a statement dated 27.2.1980 made by Mst. Ghulam Fatima before the Magistrate Choorkana from which it appears that at that time i.e. one month and 8 days before the registration of this case, she claimed that she had obtained divorce from Bahadur Khan appellant and she wanted to marry Mohammad Ashraf.

3. The prosecution examined Bahadur Khan, husband of Mst. Ghulam Fatima as P.W.1, Mst. Aisha Bibi, mother of Bahadur Khan as P.W.2, Mohammad Hussain, a neighbour of Bahadur Khan as P.W.3, and Mr. Amjad Hussain Shah, Investigating Officer, as P.W.4. Bahadur Khan stated that about 11 months before his statement which was recorded on 14.1.1981, Mohammad Ashraf had taken away his wife Mst. Ghulam Fatima during his absence on the pretext that her father was ill. He himself came to his house on receipt of a letter from his brother-in-law Mohammad Zubair Khalid informing him of this event and lodged the report Ex.P.A. with the Police. He further stated that when the Police arrested her wife she filed a suit against him for the dissolution of marriage in the Family Court at Joharabad which was decreed exparte but on receiving information about the decree he filed an application (Ex.P.B.) for setting it aside on the 12th of April, 1980

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which was allowed on the 7th of May, 1980(vide Ex.P.C.). Mst.Ghulam Fatima filed an appeal against it which was dismissed by order, Ex.P.D., dated 27.11.1980.

4. Mst.Aisha Bibi, P.W.2, supported P.W.1 and claimed to be a witness of Mohammad Ashraf having taken away Mst.Ghulam Fatima 11 months before. She was supported by Mohammad Hussain P.W.3 who stated that he had seen Mohammad Ashraf taking away Mst.Ghulam Fatima and on his inquiry from Mst.Aisha Bibi was told that she was being taken away to the house of her father because the latter was ill.

5. In their statement under Section 342 Code of Criminal Procedure, the appellants claimed to have married after divorce was obtained by Mst.Ghulam Fatima from the Family Court. Mst.Ghulam Fatima however, stated that she had not yet gone to the house of Mohammad Ashraf inspite of her marriage.

6. The appellant produced Mohammad Muzaffar, Secretary Union Council as D.W.1. He stated that the judgment of the Family Court dated 27.10.1979 was received by the Union Council on the 1st of January, 1980 and he had made an entry about its receipt in the Dak Register. He proved the copy of entry as Ex.D.C.

7. The prosecution version about the abduction is absolutely false and it is clear from the record that the decree for dissolution of marriage had been obtained by Mst.Ghulam Fatima appellant about 5 months before, the registration of the case against her. The prosecution version that she had been abducted about a month before the recording of the First Information Report is therefore, falsified. It is further falsified by the statement, Ex.D.B., made by Mst.Ghulam Fatima before a Magistrate claiming that she had obtained the divorce. The learned Additional Sessions Judge, was therefore,

right in acquitting Mohammad Ashraf appellant of the charge of abduction.

8. There is absolutely no evidence on record about the commission of Zina or sexual intercourse by Mohammad Ashraf with Mst. Ghulam Fatima. The inference about the Zina has been drawn by the learned Additional Sessions Judge from the fact of recovery of both the appellants from the same house but that by itself would not prove Zina.

9. It is in the evidence of D.W.1, Mohammad Muzaffar, that the information about the dissolution of marriage was received in the Office of the Union Council on the 1st of January, 1980. Even if it is held that the Talaq could be effective only after the expiry of 90 days period from this date, as provided by Section 7 of the Family Laws Ordinance and the marriage dated 29.2.1980 between the two appellants was not legally valid, the benefit of doubt shall have to be given to the appellant since there is nothing on the record to show that they had any information about the illegality of the said marriage on that ground. They cannot be held guilty of offence of Zina if they believed themselves to be married. It may be clarified that the application for setting aside the exparte decree was submitted on the 12th of April, 1980 about 16 or 17 days after the arrest of the appellant. In view of this the latter event of the decree being set aside could not benefit the prosecution. There was a fit case for acquittal of the appellant.

10. This case was heard on the 6th of July, 1981. Since it appears from the First Information Report that Bahadur Khan P.W.1, had ~~submitted~~ ~~been~~ ~~by~~ accused Ghulam Fatima of living in adultery with Mohammad Ashraf. We directed the female appellant as well as her

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husband to appear before us to enable us to take proceedings under Section 14 of the Offence of Qazaf (Enforcement of Hadd) Ordinance, 1979 which enjoins upon a Court in a case of ~~commission of zina~~ ^{such a case} before it to give oath to both the husband and wife. In case the wife takes the Oath as provided there her marriage should be dissolved. This Section is as follows:

SECTION:14

- (1) When a husband accuses before a Court his wife who is muhsan within the meaning of section 5, of zina and the wife does not accept the accusation as true, the following procedure of lian shall apply, namely:-
 - (a) the husband shall say upon oath before Court: "I swear by Allah the Almighty and say I am surely truthful in my accusation of zina against my wife (name of wife)" and, after he has said so four times, he shall say: "Allah's curse be upon me if I am a liar in my accusation of zina against my wife (name of wife)" ; and
 - (b) the wife shall, in reply to the husband's statement made in accordance with clause (a), say upon oath before the Court: "I swear by Allah the Almighty that my husband is truly a liar in his accusation of zina against me"; and, after she has said so four times, she shall say: "Allah's wrath be upon me if he is truthful in his accusation of zina against me."
- (2) When the procedure specified in sub-section (1) has been completed, the Court shall pass an order dissolving the marriage between the

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husband and wife, which shall operate as a decree for dissolution of marriage and no appeal shall lie against it.

- (3) Where the husband or the wife refuses to go through the procedure specified in sub-section (1), he or, as the case may be, she shall be imprisoned until-
- (a) in the case of the husband, he has agreed to go through the aforesaid procedure; or
- (b) in the case of the wife, she has either agreed to go through the aforesaid procedure or accepted the husband's accusation as true.
- (4) A wife who has accepted the husband's accusation as true shall be awarded the punishment for the offence of zina liable to hadd under the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

11. When the parties appeared before us on the 25th of July, 1981, Mian Sher Alam, the learned counsel for the complainant argued that action could be taken under Section 14 only by a Court before whom the husband accused the wife of Muhsan within the meaning of Section 5 of Zina, but in the present case no such accusation had been levelled by Bahadur Khan in his statement before the Additional Sessions Judge or in any statement before this Court. He further argued that in any case the Sessions Judge only had the jurisdiction to take proceedings under this Section and not this Court. In this connection he relied upon the provisions of Section 8 which provides that no proceedings under the offence of Qazaf (Enforcement of Hadd) Ordinance shall be initiated except on a report made to the

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Police or complaint lodged in a Court by the person in respect of whom the Qazaf has been committed or any person authorised by him. In case of death of such person the report or the complaint can be made only by any of the ascendent or descendant of the person.

12. Section 8 has no application to the proceeding under Section 14 since the latter Section enjoins upon the Court before which the accusation of offence of Zina is made by the husband to take proceedings suo moto. However it shall transfer the case ^{if the matter is one} Under Section 14(4) to a Sessions Court. The last argument of the learned counsel is not therefore, correct.

13. Similarly, the argument that the appellant was not proved to be a Muhsan within the meaning of Section 5 of the said Ordinance is also without merit. Explanation (1) of Section 5 defines Muhsan as meaning sane and adult Muslim who either has had no sexual intercourse or has held such intercourse only with his or her lawfully wedded spouse. Thus if a person is proved to have committed intercourse with a person other than the lawful spouse he is not Muhsan. We have already held that the offence of Zina is not proved against the appellant. It cannot be, therefore, doubted that she is a Muhsan within the meaning of Section 5.

14. The argument of the learned counsel about the exclusive jurisdiction of the Additional Sessions Judge to the exclusion of the jurisdiction of the Court, has not impressed us. Since this Court is seized of this appeal, it has the same powers to decide this case which are vested in the trial Court. Consequently, if a case for proceeding under Section 14

is made out before the Additional Sessions Judge, in case of his failure to take action this Court would be competent to proceed under Section 14.

15. The first argument of the learned counsel however, has force. It is only in the First Information Report that an accusation of Zina was made that the contents of that document cannot be read except to the extent of confronting the maker with the First Information Report so as to contradict him. It is not open to this Court to take into consideration the contents of the documents particularly when Bahadur Khan was not confronted with that portion as required by Section 145 Evidence Act. It cannot also be said to be a statement of accusation made by the husband before the Court of the Additional Sessions Judge about the appellant Ghulam Fatima committing Zina.

16. The only statement which is required to be taken into consideration for this purpose is the statement made before the Court but in that statement the complainant Bahadur Khan as P.W.1 did not accuse Mst. Ghulam Fatima of the offence of commission of Zina with Mohammad Ashraf. He only said that the appellants had illicit relations with one another. In cross-examination, he stated that he had not seen the appellants in a compromising position nor anybody had seen them in such position.

17. The learned counsel for the appellants contended that the illicit relations in the circumstances of the case would mean actual commission of sexual intercourse. We cannot agree to this because persons having illicit relations may not ~~not~~ stoop so low as to commit Zina and thus their action may fall short of that offence. In view of this there is nothing on record to suggest that

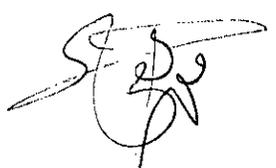
Bahadur Khan ever accused Mst.Ghulam Fatima of Zina before the Additional Sessions Judge. The proceedings under Section 14 cannot be taken and are consequently dropped.

18. The appeal is accepted and the appellants are acquitted. They shall be released forthwith if not required in any other case.



MEMBER - III


CHAIRMAN



MEMBER - VII

Dated, Islamabad the 25th of July, 1981.

APPROVED FOR REPORTING.