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IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT

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| 1. Mr. Justice Aftab Hussain | ... | Chairman |
| 2. Mr. Justice Ch. Muhammad Siddiq | ... | Member |
| 3. Mr. Justice Maulana Muhammad
Taqi Usmani | ... | Member |

CRIMINAL APPEAL NO. 10/L OF 1981.

Mst. Sakina etc.	...	Appellant
	Vs	
The State	...	Respondent
Counsel for the Appellant ..		Mr. M.M. Ashraf Advocate.
Counsel for the Respondent..		Advocate General Punjab.
Date of hearing ..		6.8.1981

JUDGMENT

AFTAB HUSSAIN, CHAIRMAN: Mst. Sakina and Wali Dad who are now married to each other since 6.6.1979 were convicted by the learned Sessions Judge, Toba Tek Singh, by order dated 25.3.1981 under Section 10(2) of the Offence of Zina (Enforcement of Haddood) Ordinance, 1979, and sentenced to 4 years RI and 30 stripes each. The convicts have filed the present appeal.

The prosecution version as stated in the F.I.R. is that Mst. Sakina Bibi was abducted by Mst. Khurshid Bibi and her husband Amir on 31st May, 1979, in the absence of the complainant, namely Muhammad Nawaz PW-2, elder brother of Mst. Sakina. Muhammad Nawaz alleged that Amir had an illicit liasion with Mst. Sakina.

The Police registered the case under Section 10(2) of the above Ordinance. The Police arrested Mst. Sakina on the 10th October, 1979 and Wali Dad on 4th November, 1979. Mst. Sakina

was medically examined on the date of her arrest. She was examined by Dr. Hussan Bano Jafari, WMO, Toba Tek Singh, who found her of 18 years of age and stated that she was pregnant for the last 32 weeks. Dr. Muhammad Iqbal, Medical Officer, Civil Hospital, Toba Tek Singh, examined Wali Dad on 4.11.1979 and found him potent.

Two prosecution witnesses were examined in support of the complaint. Muhammad Nawaz PW-2, complainant did not mention the name of Wali Dad, appellant in the F.I.R. but in his statement in Court added that Mst. Sakina had been carrying on with Wali Dad and that both of them were un-married. Muhammad Nawaz PW-3 who was a wajtaker witness stated in addition that he and Muhammad Nawaz PW-2 went to the house of Wali Dad for restoration of Mst. Sakina Bibi. In the evening Muhammad Nawaz PW-2 went back but he stayed at the house of Wali Dad. He slept outside in the open in the night. Wali Dad and Mst. Sakina also slept outside in the open and he saw Mst. Sakina cohabiting with Wali Dad in the night.

The question is whether the Offence of Zina was committed by the appellant with Mst. Sakina before they contracted the marriage or not. We shall first take up the case of Wali Dad, appellant. Muhammad Nawaz PW-2 stated that Wali Dad had illicit relations with Mst. Sakina. This statement was made before the Court but in the F.I.R. (Ex. PB) he had not made similar allegations against the appellant Wali Dad. The statement of Muhammad Nawaz PW-2 was an improvement which is unbelievable. Muhammad Nawaz PW-3 made an exaggerated statement about his visit alongwith Muhammad Nawaz PW-2 to the house of Wali Dad for the restoration of Mst. Sakina Bibi,

about the return of Muhammad Nawaz PW-2 from there in the evening and about his own stay at the house of Wali Dad. Such a statement was not made by Muhammad Nawaz PW-2. The statement being unsupported by PW-2 is unbelievable. Secondly it is impossible for a person who goes for the return of the abductee to stay with the abductor. Nor is it possible for the abductor to commit Zina with the abductee in his presence and in the open. The evidence of Muhammad Nawaz PW-3 is unbelievable. In these circumstances there is no evidence against Wali Dad to prove the commission of the Offence of Zina before his marriage with Mst. Sakina.

The next question is about the validity of marriage. The ^{Hanafi} rule is that the marriage between fornicators during pregnancy of the woman is valid. The marriage between a woman who became pregnant as a result of Zina by one person, with another is also valid during pregnancy though there is restraint against the spouses ^{in regard to} having sexual intercourse before delivery. (Fathul Qadeer, Vol. 3, page 145).

The varying views on this subject are summed up by Syed Amir Ali (Vide his Mahommedan Law, Vol. II, p. 253 to 255).

"According to the Hanafis, it is lawful for a man to contract a marriage with a woman who is pregnant by fornication with somebody else, though connubial intercourse is forbidden until she is delivered. This is the opinion of Abu Hanifa and Mohammad. Abu Yusuf differs from them and holds such an union to be invalid, but "the Fatwa is with Abu Hanifa and Mohammad".

The Shaf'ei, Malikis and Hanbalis hold the same doctrine as Abu Yusuf.

PRINCIPLE.

Where a woman is pregnant by fornication

with the same man who marries her, the marriage is lawful, and connubial intercourse is not forbidden between them. On this there is consensus. The Shaf'ei and Shiah agree with the Hanafis on this point, and Abu Yusuf holds the same opinion as Abu Hanifa and Mohammad.

"And the nasab of the child born of the womb of the woman would be established in the man if it is born at six months or more from the date of marriage". "But if born within six months its nasab would not be established, and it will not inherit to the husband or its mother, unless he says that it is his child and does not add that it is his by fornication. In that case, nasab will be established. This is according to the Khanieh (Fatawai Kazi Khan). If he says it is by Zina, nasab will not be established. But if he does not mention Zina distinctly, nasab will be established, for in this there is the possibility of the pregnancy having taken place from a previous marriage (between him and the woman) or from an invalid contract; and as the conduct of a Moslem should always be attributed to proper motives, so possibly there might have been a prior contract."

SHIAH RULE - MARRIAGE WITH A PREGNANT WOMAN.

Among the Shiah, there seems to be some difference of opinion regarding the validity of a marriage contracted by a man with a woman who is pregnant by adulterous intercourse with another. One writer (the Fazil-ul-Kashani), seems to think there ought to be no marriage, until the woman is delivered. The weight of authority, however, is in favour of the lawfulness of the union. The Jawahir-ul-Kalam says, "If a (married) woman became pregnant by fornication, after which her husband divorced her, in such a case her 'iddat would be according to the ordinary probation

as if she had not committed fornication and was not pregnant thereby. For what has been stated as to the 'iddat of a pregnant woman lasting until her delivery does not apply to pregnancy by fornication. In this case the ordinary probation should be calculated. And I have found no difference on this point. If such a woman were to marry another person after the (ordinary) 'iddat it would be lawful; and I have found no difference thereon, for the delivery is not the period of probation for a woman pregnant by fornication. Similarly, if a woman, who has no husband, is pregnant by Zina, there is no difference (i.e. all are agreed) as to the validity of her marriage (during such pregnancy) with a person (other than the adulterer)*.

PRINCIPLE.

"Similarly, it is stated in the Hadaik, that "if a woman is pregnant by Zina, there is no 'iddat for her, and she can lawfully intermarry with another before delivery".

"In the Mafatih also it is laid down that, "the accepted doctrine is there is no 'iddat for an adulteress whether she be pregnant or not by fornication. and if she be pregnant it is lawful for her to marry before delivery".

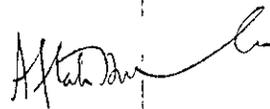
"At the same time, in order to keep the nasab pure it is recommended that a man should not marry a woman who is pregnant by fornication with another until she is delivered."

The Hanafi view is that in terms of validity of both types of marriages.

The next question is about the involvement of Mst. Sakina in the commission of Zina since she was found to have pregnancy of 32 weeks on 10.10.1979 and as such her pregnancy was earlier than the date of her elopement with Wali Dad. There is no other evidence to charge Mst. Sakina with the commission

of Zina. In the present case, however, she explained that the pregnancy might be the result of her having been compelled by her brother and parents to commit sexual intercourse with various visitors to their house. In cross-examination of Muhammad Nawaz PW-2 a question was put to him whether the persons named in the suggestion used to visit their house. His answer was in the affirmative. In these circumstances we have no material on record to enable us to hold that Mst. Sakina had been committing sexual intercourse with others willingly. In the absence of proof of her consent she cannot be held to have committed the offence of Zina.

We accept the appeal and acquit both the appellants. Mst. Sakina is on bail and her bail bond is discharged. Wali Dad who failed to furnish bail shall be released forthwith if not required in any other case.


CHAIRMAN


MEMBER-III


MEMBER-VII

Fit for reporting.