IN THE FEDERAL SHARIAT COURT.

(Appellate Jurisdiction)

PRESENT

JUSTICE ZAFAR PASHA CHAUDHRY, JUDGE
JUSTICE S. A. RABBANI, JUDGE

CRIMINAL APPEAL NO. 185/I OF 2001.

Muhammad Iqbal son of Allah Ditta
resident of Chak No.12/AH,
Tehsil and District Khanewal. ... Appellant.

Versus.

1. Mst.Siani D/O Muhammad Ramzan
2. Muhammad Afzal S/O Ghulam Farid,
both residents of Mohripur,
Tehsil Kabirwala, Distt; Khanewal ... Respondents.

Counsel for the Appellant.	...	Nemo.
Counsel for the Respondents.	...	Mr.Javed Saleem Shorish, Advocate.
Counsel for the State.	... ...	Mr.Muhamad Sharif Janjua, Advocate.
Case F.I.R. No. date	...	Private Complaint.
Date of Judgment of Trial Court.	...	29-06-2001.
Date of Institution	...	05-09-2001.
Date of Hearing	...	15-09-2003.
Date of decision	...	15-09-2003.

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JUDGMENT.

ZAFAR PASHA CHAUDHRY, J. – Muhammad Iqbal, appellant instituted a private complaint under sections 468/471 P.P.C read with section 10 (2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the said Ordinance) against respondent No.1 Mst. Siani and respondent No.2 Muhammad Afzal. According to the appellant he was married to respondent No.1 Mst. Siani about 26/27 years prior to filing of the complainant. Both the parties were minor and marriage was solemnized through their respective guardian. It was an exchange marriage (ونی سٹہ), meaning thereby that Muhammad Iqbal's sister was married to brother of Mst. Siani. Out of the wedlock of Muhammad Nawaz, who is brother of Mst. Siani and his wife who is sister of Muhammad Iqbal, two children were born. The appellant's sister (wife of Mst. Siani's brother) unfortunately died. According to the appellant father of Mst. Siani postponed the Rukhsati of Mst. Siani and resiled from the agreement and did not allow respondent Mst. Siani to join the appellant as her husband. Mst. Siani did not join the appellant and filed a suit seeking declaration that she had not been wedded to the appellant. The appellant also filed a suit for restitution of conjugal rights against her. Both the suits were consolidated. Suit of Mst. Siani was dismissed for default whereas the appellant's suit was decreed in his favour vide judgment-dated 9.4.1997.

2. Mst. Siani, respondent never joined the appellant as his wife nor she performed any marital obligation. Admittedly the marriage was not consumated. The appellant, as per his version, married another wife after obtaining permission from the concerned Union Council because Mst. Siani had refused to join him as his wife. The appellant had two children from that marriage at the time of filing the complaint. At present he stated in the court that he has six children. Mst. Siani, as she did not accept her marriage as alleged by the complainant, was married to Muhammad Afzal respondent No.2, which was solemnized with the blessing of her father and other elders. Her Nikah with Muhammad Afzal

respondent No.2 was duly registered under the provision of Muslim Family Laws Ordinance. Mst. Siani and Muhammad Afzal have given birth to two children, who are alive and quite grown up. It may be relevant to point out that Mst. Siani's marriage with Muhammad Afzal was also an exchange marriage because Muhammad Afzal gave the hand of his sister to a relation of Mst. Siani.

3. Muhammad Iqbal, appellant approached the SHO of Police Station Sarai Sidhu (Khanewal) to get a case registered against respondents No.1 and 2 as according to him Mst. Siani was appellant's wife and she could not contract a second marriage with Muhammad Afzal, respondent No.2, therefore, they were living in adultery. The case was not registered, the appellant filed Writ Petition in the Lahore High Court (Multan Bench) praying therein that although a cognizable offence had been committed yet the SHO had refused to register a case under section 154 Criminal Procedure Code. Direction was issued by the High Court to the SHO to register a case against the respondents, who complied with the Writ and embarked upon the investigation after registration of the case. In his investigation the appellant failed to produce any evidence to establish that he had been validly married to Mst. Siani. The case was consequently cancelled. Resultantly appellant instituted a private complaint which was tried by Malik Peer Muhammad, Additional Sessions Judge, Kabirwala, who on conclusion of the trial acquitted both the respondents, holding that the appellant failed to prove that he had been married to Mst. Siani; no documentary or any other reliable oral evidence was produced by him in support of his assertion.

4. The complainant examined three witnesses. He himself appeared as PW.1 and reiterated the facts already narrated by him in the complaint. Allah Ditta (PW.2) stated that about 29 years prior to the complaint Muhammad Iqbal, appellant and Mst. Siani, respondent No.1 were married as minors through their respective fathers. According to him Rukhsati did not take place and the marriage in between Muhammad Iqbal and Mst. Siani was never consummated. He further stated that her father gave Mst. Siani in marriage to Muhammad Afzal with whom

she is living till today as his wife; out of their wedlock two children had been born. Ghulam Fareed (PW.3) is another witness, who also came up with the similar statement. The respondents denied the allegations and did not accept her marriage with the appellant. Riaz Hussain was examined as DW.1 in their defence.

The learned trial judge on conclusion of the trial held that the factum of marriage in between the appellant and Mst. Siani could not be established; therefore, he failed to discharge the onus. Both the respondents were acquitted, vide his judgment dated 29.6.2001.

5. On the court's call the appellant has appeared in person; he has not produced his counsel. The learned counsel has neither intimated the court regarding his absence nor he has furnished any information as to why he failed to attend the court. Both the respondents No.1 and 2, i.e. Mst. Siani and Muhammad Afzal, are present with their learned counsel Javed Saleem Shorash. The learned counsel on behalf of the State Mr. Muhammad Sharif Janjua, is also in attendance.

6. According to the learned counsel respondents have been dragged into litigations for the last many years and they have been subjected to tremendous agony and hardship. According to him respondents have given birth to two children who are quite grown up. The appellant, as well, has six children from his wife. He, according to respondents, wants to prolong the ordeal and agony of respondents just out of mischief and ulterior motive. Be that as it may, the appellant was asked whether he could make his counsel available, he replied in negative and prayed for an adjournment. Keeping in view that the litigation has been dragging for many years and the learned counsel has absented himself without even furnishing any explanation, we feel that it would be unjust to adjourn the case.

7. The appellant submits that there is a decree of civil court in his favour and he has not divorced his wife, therefore, the respondents would not be legally married, as such they are committing sin. He further admits that he is leading his

married life and has six issues. He also admits that the respondents too are leading a married life and have two children from their so-called wedlock.

8. We have gone through the evidence, relevant record, the impugned judgment and especially the grounds urged in the appeal. We have heard both the parties, i.e. the appellant in person and the respondents as well as their learned counsel.

9. In order to determine the guilt of the respondents we find that a number of facts relevant for determination of the alleged offence are not disputed. There is no dispute in between the parties that at the time of alleged marriage in between the parties, both of them, i.e. the appellant and respondents No.1, were minors aged about 7 to 8 years respectively. The alleged marriage took place about 26/27 years ago; that the earlier marriage statedly performed by the respective guardians (fathers), has neither been registered nor there is any written proof available. The Muslim Family Laws Ordinance had been enforced where-under every marriage had to be compulsarily registered with the respective Union Council but non-registration is there. Both the parties, i.e. the appellant as well as respondents No.1 and 2 interse, have been married and they have grownup children from their respective marriages. The marriage of respondents No.1 and 2 interse had been duly solemnized and has been registered with the relevant Union Council whereas the alleged marriage in between the appellant and respondent No.1 was not registered. Neither Rukhsati took place nor the respondent No.1 joined the appellant as his wife. On attaining puberty, or majority, it is also a proved fact that, the respondent Mst. Siani filed a suit for declaration praying therein that she was not wife of the appellant nor she was ever wedded to him. Her intention not to accept the appellant as her husband is quite manifest. The fact that the suit for declaration was dismissed for default is however not disputed.

10. In view of the above facts, the core issue needs adjudication whether the marriage in between Muhammad Iqbal and Mst. Siani was ever performed and even if the elders had performed the marriage during their minority, what would

be its nature or legal status after Mst. Siani refused to accept appellant as her husband. Reference in this behalf is made to section 270 regarding marriage of minors as contained in Muhammadan Law by D.F Mullah (1996 Addition), which is reproduced hereunder:-

> "Marriage of minors; A boy or a girl who has not attained puberty (in this Part called a minor), is not competent to enter into a contract of marriage, but he or she may be contracted in marriage by his or her guardian"

As per this section a minor may be given in marriage under Islamic Law through his guardian. This section has to be read alongwith section 274 of the same book relating to option of puberty. The relevant excerpt is noted here under :-

> "Marriage brought about by other guardians: Option of puberty:- When a marriage is contracted for a minor by any guardian other than the father or father's father, the minor has the option to repudiate the marriage on attaining puberty. This is technically called the "option of puberty".

11. Perusal of section 270 reveals that the respective guardian should have performed the marriage. Obviously if the father is alive he would be natural guardian. In the present case the father of respondent No.1 was alive. Although under Islamic Law the marriage of a minor through his guardian is permissible yet the same cannot be inferred or accepted merely on assertion by one of the party. As in the present case, the appellant Muhammad Iqbal asserts that respondent No.1 was given in marriage by her father to him yet onus lies on the appellant to prove this fact through unimpeachable evidence that marriage did take place and the respective guardians for both the parties performed the required Nikah. The factum of performance of marriage is essentially a question of fact, which has to be determined by the trial court after assessing and weighing the evidence. The learned trial court after examining the appellant's evidence came to the conclusion that factum of marriage in between the parties through their guardians could not be proved. Similar opinion had been expressed by the investigating agency who consequently cancelled the case against the respondents.

12. The finding of acquittal is amply supported by cogent reasons and relevant circumstances. No reliable evidence was produced by the appellant in support of his contention. Examination of just one witness whose evidence is not even consistent or confidence inspiring, is not sufficient to discharge the onus laid on the appellant. No Nikah Khwan or any respectable person from the family has been produced. The claim for marriage was set up after an extremely long period. The malice on the part of the appellant is quite obvious and manifest from this circumstance as well, xxxx that the same was made after the appellant's and respondents got married and had settled in life. Ulterior motive is also quite apparent because even if the respondents No.1 & 2, i.e. Mst. Siani and Muhammad Afzal are convicted the marriage in between them will not automatically stand dissolved. The question of legitimacy of two children also crop up. Section 341 of Mullah's book unambiguously provides that question of legitimacy may be presumed from the circumstances from which a marriage itself between its parents may be presumed. The subject of the Islamic Law is to respect and safeguard the legitimacy of a child. It should not be disputed or made doubtful at the instance of a person who wants to satisfy his personal vendetta against the mother as in the instant case. In support of this view we are fortified with observation made in illuminating judgment of Hon'ble Supreme Court, Rehmat Khan and 3 others..Vs..Rehmat Khan and other reported in PLD 1991 S.C – 275.

13. Muslim Family Laws Ordinance came in force in 1961. Any marriage after its enforcement if not registered cannot be readily accepted as a valid marriage. The mere fact that the suit for dissolution of marriage on behalf of respondent No.1 was dismissed cannot in any manner confer any right on the appellant to claim himself to be husband of Mst. Siani, respondent No.1.

14. Examining the relationship of man and wife in between the parties by keeping in view the provision of section 274 of the Muslim Family Laws Ordinance, we find that the marriage even if had been performed through guardians stood repudiated on exercise of option of puberty by Mst. Siani. It is

admitted position that the marriage was never consumated. Mst. Siani neither admitted her marriage nor accepted or ratified the same. Under Islamic Law she has a right to exercise her option after attaining puberty or coming to the age of majority. The option can be exercised expressly or may even be inferred from her submitting to the husband. The principle of law unambiguously as gathered from the various provisions on the subject is that marriage of a minor girl is subject to her ratification. There is no express exercise of option in favour of marriage by Mst. Siani because she never joined the appellant as her husband. Neither the same has been exercised even impliedly because she never submitted herself for cohabitation, rather on the contrary she filed a suit seeking declaration that she was not wedded wife of the appellant. The very filing of a suit in a way is an exercise of option of puberty against the existence of marriage. In this behalf we are fortified by the dictum laid down in Muhammad Bakhsh...Vs...Crown and others, PLD 1950 Lahore page 203.

15. It is true that before enforcement of Muslim Family Law Ordinance it was permissible for the guardian to contract marriage of their minor children may be girl or boy. But in case such marriage is not owned or accepted by either party especially the wife, the law as well as equity should lean in favour of the wife. The validity of marriage will be accepted only if it is proved beyond doubt that the wife has accepted the marriage. In the present case what to speak of according consent, the wife expressly denied the factum of marriage and had even recourse to the court of law. Mere fact that the suit for dissolution of marriage of Mst. Siani was dismissed in default or exparte decree has been obtained, would not by itself confer any right on the appellant if it is proved that no such marriage ever took place.

16. The criminal court trying an offence when came to the conclusion on the basis of evidence that existence of a marriage performed during minority, has not been proved, the benefit will invariably accrue to the wife, she being accused. In criminal case the onus always lies on the prosecution to prove the facts in issue

and that never shifts to the accused. Mere fact that suit for declaration filed by the wife is dismissed in default or that an exparte decree for restitution of conjugal rights had been obtained, cannot be treated sufficient to record or warrant conviction under Hudood Laws. Islamic Law requires very strict proof for adultery, which is totally lacking in the present case. Convicting the respondent for adultery will amount to declare the two children as illegitimate.

17. Keeping in view the above discussion and the guideline as detailed above, the appellant. has miserably failed to prove the guilt of the respondents. Consequently the acquittal in favour of respondents No.1 and 2 is not only unexceptionable but is also just and equitable. The appeal fails and is hereby dismissed.

(Zafar Pasha Chaudhry)
Judge

(S. A. Rabbani)
Judge

Islamabad, the
September, 15, 2003.
F.Taj/*

Approved for reporting.