

BEFORE THE FEDERAL SHARIAT COURT
(Appellate/Revisional Jurisdiction)

PRESENT:

MR. JUSTICE SAEED-UR-REHMAN FARRUKH, JUDGE
MR. JUSTICE ZAFAR PASHA CHAUDHRY, JUDGE

CRIMINAL APPEAL NO. 244/I OF 2003

1. Ishfaq Hussain son of Ghulam Sadiq caste Mochi r/o Chak No.52 Luday Wala, District Sargodha.
2. Tasleem Akhtar daughter of Mian Muhammad, Caste Zargar, r/o Jhatla, Tehsil Talagang, District Chakwal.

APPELLANTS

Versus

The State

RESPONDENT

Counsel for the appellants:

Mr. Basharatullah Khan,
Advocate

Counsel for the complainant

...

Ch. Afrasiab Khan,
Advocate

Counsel for the State:

...

Mr. Shafuat Munir Malik, Assistant
Advocate General.
Mr. Aftab Ahmad Khan, Advocate.

FIR No. Dated
Police Station

...

4 dt. 17.01.2000
P.S. Sadar (Talagang)

Date of impugned judgment

...

15.03.2002

Date of receipt of Appeal

...

20.10.2003

Date of hearing

....

20-10-2004

Date of judgment

...

12-01-2005

(0)

JUDGMENT

SAEED-UR-REHMAN FARRUKH, J.-. By this judgment we propose to dispose of the following two matters as these arise out of the same judgment dated 15-3-2002 passed by the Sessions Judge, Chakwal:-

1. Criminal appeal No. 244-L of 2003
(Ishfaq Hussain etc. versus The State)
2. Cr. Revision No.17-I of 2002
(Mian Muhammad versus Ishfaq Hussain etc).

Vide impugned judgment, the learned Sessions Judge convicted Ishfaq Hussain and Mst. Taslim Akhtar appellants under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced them to four years R.I. each and a fine of Rs.10,000/- each or in default to further undergo three months S.I. each. Ishfaq Hussain appellant was further convicted under section 16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to four years R.I. with a fine of Rs.10,000/- or in default to further suffer three months S.I. Both the sentences awarded to Ishfaq Hussain appellant were directed to run concurrently. The benefit of section 382-B Cr.P.C. was extended to them.

Nazar Husain, Saifur Rehman, Ghulam Sadiq and Mst. Nasim Akhtar co-accused of the appellants were acquitted of the charge by giving them the benefit of doubt.

2. Relevant facts in brief are; on 17-1-2000 Mian Muhammad (petitioner in criminal revision No.17/I of 2002) submitted a written complaint (Ex-PA) leading to the registration of formal FIR Ex-PA/1 at police station Sadar Talagang in respect of the alleged occurrence. He contended that he was a Goldsmith by profession and Muhammad Asif was his son-in-law while Ishfaq Hussain was real brother of Muhammad Asif. He allegedly imparted training to Ishfaq Hussain as a goldsmith. Ishfaq Hussain was on visiting terms to his house due to relationship. By taking benefit of this facility he established illicit liaison with his daughter Mst. Taslim Akhtar whose nikah had already been performed with Ghulam Mujtaba son of Nazar Hussain. Allegedly, on 14-11-1999 Ishfaq Hussain appellant visited his house alongwith Mst. Nasim Akhtar wife of Saifur Rahman and stayed there over night. On the morning of 15-11-1999 Mst. Taslim Akhtar started for Talagang to appear in P.T.C. examination. When she reached an isolated place near Government Boys High School Jhatla she was confronted by Ghulam Sadiq, Saifur Rahman and Nazar

Hussain who were sitting in a white car. In the meantime, allegedly, Ishfaq Hussain appellant and Mst. Nasim Akhtar also reached there and all the accused forcibly boarded Mst. Taslim Akhtar into the car and drove towards Sargodha. This incident was witnessed by Zafar Iqbal son of Muhammad Khan, Ghella Khan son of Noor Muhammad, Fateh Khan son of Ghulam Habib and Faiz Bakhsh son of Muhammad Bakhsh who conveyed information about it to him. The complainant alleged that he alongwith his son Azhar Abbas went to the house of Ghulam Sadiq and demanded the return of Mst. Taslim Akhtar who held out a promise to oblige him but later on refused point blank to return her.

3. Investigation was initiated and, ultimately, Saifur Rehman, Ghulam Sadiq, Ishfaq Hussain, Mst. Taslim Akhtar, Nazar Hussain and Mst. Nasim Akhtar were challaned to court to face trial for offences under section 16 and 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

4. The trial court framed charge sheet against all the six accused. They pleaded not guilty and claimed to be tried.

5. The trial court directed the prosecution to lead its evidence on which as many as seven witnesses were produced, out of whom the statement of Muhammad Munir

constable PW-5 is of formal nature. It had no material bearing on the outcome of the case, hence not dilated upon.

6. Mian Muhammad complainant appeared as PW-1 and supported the prosecution story as divulged by him in his complaint/FIR, in all the material details.

He was subjected to searching cross-examination. He conceded that the dates mentioned by him in his examination-in-chief had been written by him on his left palm meaning thereby that he referred to the same while deposing in court. According to him the complaint Ex-PA was drafted by a petition writer /Munshi at Talagang court premises, on his dictation.

Mian Muhammad admitted that he was related to the appellant as Mst. Parveen Akhtar, his (Mian Muhammad) daughter was married with Muhammad Asif; brother of the appellant. He conceded that Mst. Taslim Akhtar was major / adult but was unaware as to whether or not she was produced before a Magistrate for recording her statement. He, however, alleged that he opposed her pre-arrest bail application which was dismissed. He expressed ignorance as to whether or not the stand of Mst. Tasleem Akhtar before the learned Additional Sessions Judge (in the bail matter) was that she had contracted valid marriage with Ishfaq Hussain appellant. He admitted that Mst.

Taslim Akhtar was residing with Ishfaq Hussain but did not know that Mst. Taslim Akhtar was living as his wife and that she had two kids from this wedlock.

He went on to state that it was not within his knowledge that during the course of investigation the joint stand of Ishfaq Hussain and Mst. Taslim Akhtar was that they had contracted nikah with each other. He admitted that Mst. Taslim Akhtar had instituted a suit for jactitation of marriage against Ghulam Mujtaba but volunteered that the said suit was dismissed.

He was confronted with his complaint Ex-PA and it was found that his allegation that on 15-11-1999 Mst. Taslim Akhtar and Ishfaq Hussain left his house was not mentioned there. He conceded that he had not seen Ishfaq and Nasim Akhtar or any other accused taking away Mst. Taslim Akhtar from near High School Jhatla.

He stated that Ghulam Mujtaba was his son-in-law and related to him being Chachazad. He deposed that nikah of Mst. Taslim Akhtar with Ghulam Mujtaba was performed by Maulvi Baz Khan. He did not know as to whether many criminal cases had been got registered against Maulvi Baz Khan relating to preparation of fake nikahs. He denied the suggestion that nikahnama of Taslim Akhtar with Ghulam

Mujtaba was fake and prepared subsequent to nikah of Mst. Taslim Akhtar with Ishfaq Hussain so as to "strike off the defence of the accused."

7. Faiz Bakhsh PW-2 deposed that all the six accused were known to him. On 15-11-1999 he alongwith Zafar Iqbal, Ghela Khan and Fateh Khan were present near Taxi stand Jhatla and they saw a white colour car parked there. Ghulam Sadiq alongwith driver was sitting in the vehicle. After about 15 minutes, Mst. Nasim Akhtar and Ishfaq Hussain came there and, within his view, Ishfaq Hussain and Mst. Nasim caught hold of Mst. Taslim Akhtar and forced her to sit in the car which was driven away towards Sargodha. He alongwith the above named witnesses went to Mian Muhammad and narrated the occurrence. He alleged that the driver of white colour car was Nazar Hussain.

In cross-examination he stated that he was a taxi driver by profession. Zafar Iqbal, Ghela Khan and Fateh Khan were not related to him and they were not his friends either. He alleged that these persons had booked his vehicle for Talagang. Though he had alleged, in his examination-in-chief, that his vehicle had developed fault forcing them to stop there but this assertion was found missing in his statement (Ex-DA), made before the police. The same was the position with regard

to his plea that he alongwith Zafar Iqbal, Ghela Khan and Fateh Khan were proceeding towards Talagang. He conceded that Mst. Taslim Akhtar made no noise while she was being thrown in the vehicle against her consent. No attempt was made by him or his companions to save her from the clutches of the accused. He was questioned as to whether he was on intimate terms with Mian Muhammad complainant. He denied this assertion. He was confronted with his statement Ex-DA where it was so mentioned.

8. Zafar Iqbal PW-3 deposed on the same line as that of Faiz Bakhsh. Incidentally, he too was a driver.

In cross-examination, he gave somewhat different version of his presence at the spot wherefrom Mst. Taslim Akhtar was allegedly picked up and thrown in the car. According to him he was driving vehicle from Bhilomar while Faiz Bakhsh was driving his vehicle from Jhatla. He conceded that he was running a joint business with Fateh Khan. Ghela Khan was maternal uncle of Fateh Khan. According to him Ghela Khan was to take Bhusa from Talagang but none was taken therefrom.

9. Mahboob Hussain Shah S.I. PW-4, then posted at police station Dhudial District Chakwal, PW-4, deposed about investigation of the case during the course whereof he made efforts to arrest the accused. He, ultimately, submitted challan in court.

10. Dr. Nisar Malik, Medical Officer Tehsil Headquarters Hospital, Talagang appeared as PW-6 and deposed about the medical examination of Ishfaq Hussain appellant. As per his report Ex-PB he found no organic cause for impotency in him.

11. Last witness produced by the prosecution was Muhammad Aslam, retired Sub Inspector (PW-7) who recorded the formal FIR Ex-PA/1 on the basis of the written complaint Ex-PA and carried out investigation.

He was cross-examined by the defence. According to him the stance of Mst.Taslim Akhtar before him was that on 18-11-1999 she had herself contracted nikah in Karachi with Ishfaq Hussain appellant and was living happily as his wife with him. She denied the factum of her marriage with Ghulam Mujtaba. Same plea was taken by Ishfaq Hussain during investigation. He denied the suggestion that both Mst. Taslim Akhtar and Ishfaq Hussain produced certified copy of their nikahnama but it was dishonestly suppressed by him.

He deposed that during the course of investigation nikahnama of Mst. Taslim Akhtar with Ghulam Mujtaba was produced before him. Mst. Taslim Akhtar disowned her alleged signatures thereon. He, however, did not procure her signature so as to get the same compared with signature available on the said nikahnama. He denied the suggestion that Mst. Taslim Akhtar pressed him to get her signature compared. He, however, conceded that he did not verify the contents of nikahnama of Mst. Taslim Akhtar and Ishfaq Hussain by proceeding to Karachi. Said nikahnama (Ex-DB) was shown to him, during cross-examination. He stated that he did not remember that it was produced before him during investigation. He also did not visit the place where nikah of Mst. Taslim Akhtar took place with Ghulam Mujtaba. He claimed that he associated Moulvi Baz Khan Nikah Khawan in the investigation but admitted that Moulvi Baz Khan did not claim to have carried out identification of Mst. Taslim Akhtar at the time of performing nikah (with Ghulam Mujtaba). He denied for lack of knowledge as to whether Baz Khan aforementioned was notorious for preparation of fictitious nikahs and that he was not enjoying good reputation and so many criminal cases were registered against him.

12. Inayat Ullah Khan Niazi D.D.A. produced certified copy of judgment dated 11-5-2000 as Ex-PH, certified copy of judgment dated 20-1-2001 as Ex-PJ and certified copy of order dated 20-8-2001 as Ex-PK and closed the prosecution evidence.

13. Statements of Ishfaq Hussain and Mst. Taslim Akhtar appellants, along with their co-accused, were recorded under section 342 Cr.P.C. by the learned trial Judge.

It is not necessary to refer to the statements of their co-accused as they were acquitted.

Ishfaq Hussain denied the prosecution story in toto. In reply to the question No.12 as to why the case against you and why the PWs deposed against you, he gave

the following reply:-

“True facts are that a sister of Mst. Taslim Akhtar is married with my brother. I was also ~~injured~~ engaged with Mst. Taslim Akhtar. Subsequently, Mian Muhammad, PW changed his mind and refused to give me the hand of Mst. Taslim Akhtar. Mian Muhammad was interested to give Mst. Taslim Akhtar to some body who was not liked by her. Taslim Akhtar left the house of her father of her own accord. Thereafter, she contracted marriage with me competently on 18-11-1999. Nikahnama is Ex-DB. Mst. Taslim Akhtar was then maiden. She was never married or given in nikah to Ghulam Mujtaba. Since my real brother stands already married with a sister of Mst. Taslim Akhtar so in case of nikah with Ghulam Mujtaba, it must have been within my knowledge. Nikahnama dated 30-9-1999 is a fake and fictitious document. Since I have contracted marriage with Mst. Taslim Akhtar against the wishes of her father, so I have been falsely involved in this case.”

He neither wished to lead defence evidence nor expressed his desire to appear as his own witness under section 340(2) Cr.P.C.

14. Mst. Taslim Akhtar while denying the prosecution story, in reply to question No.8 about the institution of suit for jactitation of marriage, dismissal of her appeal qua the said suit and also the writ petition in respect thereof, gave the following reply:-

“ My suit for jactitation of marriage was dismissed on account of non-providing proper legal assistance. Since I was under severe fear of my father and I have also been apprehending physical harm, so I was not able to properly instruct my counsel and make my evidence available to him, so suit was dismissed on account of inherent fact. Nikah Khawari was also not summoned from Karachi. My appeal and writ petition were also dismissed on technical grounds.”

She explained the real motive regarding registration of the case against her

as under:-

“Factually, I was engaged with Ishfaq Hussain. Subsequently, my father changed his mind and decided to marry me with another person who was not liked by me. I decided to contract marriage with Ishfaq Hussain of my own accord. I am educated one. I accordingly contracted nikah with Ishfaq Husain of my own accord vide Ex-DB. Now I am having two issues from this wedlock. Since I have contracted nikah against the wishes of my father, so by concocting and fabricating a nikahnama with Ghulam Mujtaba, case in hand has been got registered.

15. Arguments in this case were concluded on 20.10.2004 and the judgment was reserved. While dictating the judgment it came to our notice that in the

judgment passed by Judge Family Court, qua the jactitation suit, the date of registration of nikah of Mst. Taslim Akhtar with Ghulam Mujtaba was recorded as 15.01.2000 whereas the Nikahnama showed date of its registration as 30.09.1999. With a view to ascertain necessary facts we deemed it proper to examine the original Nikah Register. Consequently, vide order dated 26.10.2004 a direction was issued for summoning Nikah Register, Ward No.21, Town Committee, Baldia Talagang on 01.11.2004, alongwith the relevant register.

16. Naib Qasid, deputed for effecting service on the Nikah Registrar, submitted a report that both Nikah Khawan i.e. Haji Baz Khan and Nikah Registrar Qari Javed Akhtar refused to accept service. Consequently, bailable warrants were directed to be issued to ensure their presence in court for 03.11.2004.

17. The matter was taken up on 03.11.2004. Haji Baz Khan entered appearance. Qari Javed Akhtar Nikah Registrar was reported to be dead with the result that the original nikah register evidencing the alleged nikah of Mst. Taslim Akhtar with Ghulam Mujtaba could not be procured for perusal.

Accordingly, Tehsil Nazim Baldia Talagang was directed to arrange the production of the nikah register on 05.11.2004. Ultimately, nikah register was produced before us by Muhammad Ishfaq, Secretary, Union Council, Talagang on 08.12.2004. Photo copies of the pages containing entries from serial No.155 to 176, duly attested by the said officer, were retained on record and judgment was reserved. Perusal of the above pages showed that the nikah of Ghulam Mujtaba with Mst. Taslim Akhtar was entered in the register on 15.01.2000.

18. In this case the prosecution had succeeded in obtaining conviction of the appellants by leading evidence to show that Mst. Taslim Akhtar's marriage had been solemnized earlier with Ghulam Mujtaba and it was during the subsistence of the above marriage that she went away with Ishfaq Hussain and started living an adulterous life with him. On the other hand the consistent plea, taken at the earliest, by the two appellants was that Mst. Taslim Akhtar was never married to Ghulam Mujtaba. According to them, she being sui-juris left her house against the wishes of her father Mian Muhammad and accompanied Ishfaq Hussain to Karachi, where they entered into a lawful

marriage and were living as a married couple; two kids having been born in the meanwhile out of this wedlock.

19. In support of allegation of abduction of Mst. Taslim Akhtar the prosecution produced Faiz Bakhsh PW.2 and Zafar Iqbal PW.3. However, their testimony was not relied upon by the trial court with the result that the charge of abduction vide Section 16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 could not be proved against Nazar Hussain, Saif-ur-Rehman, Ghulam Sadiq and Mst. Nasim Akhtar, co-accused of the appellants. They were acquitted by the trial court by giving them the benefit of doubt. This fact struck a damaging blow to the prosecution case, to a great extent, as regards Ishfaq Hussain appellant qua charge under Section 16 of the "Ordinance". In the absence of positive evidence it could not be held that he enticed away Mst. Taslim Akhtar.

20. The sole question that thus remained to be determined was as to whether charge under Section 10(2) of the "Ordinance" stood established on record beyond reasonable doubt against the appellants.

21. In support of this charge the prosecution has produced Mian Muhammad complainant as PW.1, who claimed that Mst. Taslim Akhtar was married on 30.09.1999 to Ghulam Mujtaba, his chachazad but rukhti had yet to take place. He was proved to be a clever man as he had noted three dates, given in his statement i.e. 30.09.1999, 14.11.1999 and 15.11.1999 on his left palm, which were obviously consulted by him while deposing in court.

22. It is strange that though village Jhatla was Union Council and Nikah Khawans was available there yet nikah of Mst. Taslim Akhtar with Ghulam Mujtaba was not performed there. No explanation is forthcoming as to why the venue of niakah was shifted to Talagang, located at a distance of 13-Kilometers from Jhatla.

23. The prosecution did not produce any witness of alleged nikah of Mst. Taslim Akhtar with Ghulam Mujtaba i.e. Maulvi Baz Khan Nikah Khawan or the so called witnesses of nikah namely Nazar Hussain and Zafar Iqbal so much so that even the Wakeel of the bride groom namely Muhammad Asif was also not produced in court. Suppression of material evidence gave rise to strong adverse inference against the prosecution.

24. With a view to prove that Mst. Taslim Akhtar was married to Ghulam

Mujtaba the learned DDA produced certified copies of the following

documents:

- (i) Judgment dated 11.05.2000 Ex.PH i.e. suit for jactitation of marriage filed by Mst.Taslim Akhtar against Ghulam Mujtaba, which was dismissed on 11.05.2000;
- (ii) Copy of the judgment of Additional District Judge dated 20.01.2001 (Ex.PJ) dismissing the appeal of Mst. Taslim Akhtar against the judgment and decree of the Judge Family Court (Ex.PH).
- (iii) Copy of judgment on Writ Petition No.1001/2001 titled Mst. Taslim Akhtar Vs. Ghulam Mujtaba and other (Ex.PK)

It was argued by the learned counsel for Mian Muhammad that the prosecution had fully succeeded in proving the factum of prior nikah of Mst. Taslim Akhtar with Ghulam Mujtaba through the statement of Mian Muhammad, complainant and the above said three judgments, coupled with the copy of nikahnama (available at pages 117 and 118 of the paper book). In his submission, since the plea of both the appellants was that they were living as husband and wife in Karachi, therefore, the charge of adultery, as postulated by Section 10(2) of the Ordinance, stood established.

On the other hand, the plea taken by the learned counsel for the appellants was that no nikah had at all taken place between Mst. Taslim

Akhtar and Ghulam Mujtaba and the nikahnama referred to above was a fake document. It was prepared solely with a view to boost the prosecution case, which was motivated due to the rancour harboured by Mian Muhammad due to the marriage of Mst. Taslim Akhtar with Ishfaq Hussain, without his permission.

25. Taking up the testimony of Mian Muhammad, in the first instance, he was proved to be a liar in material details during the course of his examination as a witness in court. He concocted false story of forcible abduction of Mst. Taslim Akhtar by Ishfaq Hussain with the active connivance of his acquitted co-accused. He went to the extent of producing two false witnesses namely Faiz Bakhsh and Zafar Iqbal, who perjured themselves in court by deposing that it was within their view that Mst. Taslim Akhtar was forcibly lifted in a car by Ishfaq Hussain, physically with the help of the acquitted co-accused and driven away. While appearing in court he seemed to have been fully tutored as he admitted to have written three dates, given by him in his examination in chief about the alleged niakah of Mst. Taslim Akhtar with Ghulam Mujtaba; date of visit of Ishfaq Hussain to his house and the date of her alleged

abduction of Mst. Taslim Akhtar, on his left palm and the same were mentioned by him in his examination in chief. No reliance could, therefore, be placed on his statement regarding alleged nikah of Mst. Taslim Akhtar with Ghulam Mujtaba.

26. The leading judgment on the subject, in which all the possibilities arising out of two counter claims of nikah and commission of zina were authoritatively discussed, was delivered by the Shariat Appellate Bench of Supreme Court of Pakistan in "Muhammad Azam Vs. Muhammad Iqbal and others" (PLD 1984 SC 95). Plethora of case law was discussed and the principles for determination of such controversy were laid down, which are binding on all courts. Their lordships, in the authority supra, have ruled at page 145 of the report that validity of marriage registered under provisions of Muslim Family Law Ordinance, 1961 was to be decided on the touch stone of Section 23 of the West Pakistan Family Court Act, 1964. It was held that "Section 23 would not prevent a party from showing either that marriage had not taken place at all or that fraud had been committed in connection therewith or for that matter nikahnama was a forgery and/or that signatures therein were

forged---such marriage and its registration even if purported to be under Muslim Family Law Ordinance, 1961 could not truly in law be treated as in accordance with provisions thereof if same was result of fraud, misrepresentation, forgery and like infirmities.”

27. We have before us a judgment of this court in Yaqoob Muhammad' case reported as (NLR 1985 SD 169) wherein a DB has ruled that judgments of Family Courts which have attained finality and hold the field carried binding effect upon trial under Offence of Zina (Enforcement of Huddood) Ordinance, 1979. Almost to the same effect is the ratio of judgment of Lahore High Court in "Muhammad Hanif and others Vs. Mukarram Khan and others" (PLD 1996 Lahore 58).

With profound respect, we may state that the generalized observations/findings regarding the binding effect of judgments of Family Courts on a criminal trial under the Huddood Ordinance do not enunciate the correct legal principle on the subject. In some cases, like the present one, the complainant party with a view to secure conviction of the accused, with whom they are at dagger drawn, for one reason or the other, might obtain decrees

from Family Courts through fraudulent means by showing that a prosecutrix was a married woman and the accused enticed her away so as to live in adultery with her. Such a situation was taken due notice of by the apex court of the country in Muhammad Azam's case supra. It is well settled that nobody can be permitted to be benefited by his own fraud. To place reliance on such a fraudulent decree/fake nikahnama would amount to permit the prosecution to put premium on its own fraudulent conduct, which judged on the touch stone of norms of justice, cannot be sustained.

28. In the light of the above principles, documentary evidence produced by the prosecution in this case is to be evaluated. No doubt the matter went up to High Court in Writ jurisdiction but the findings recorded by the High Court in the Writ Petition, saying so with respect, could not be held to be of determinative nature for the simple reason that High Court could neither appraise evidence nor record findings on the disputed questions of facts. Writ jurisdiction empowered it only to set at naught a judgment given by a court of competent jurisdiction, which is found to be without lawful authority.

29. As regards the judgments of the Judge Family Court Ex.PH and the Additional District Judge Ex.PJ, suffice it to say that the same, in the context of the discussion as given in the sequel, cannot be treated to burden the appellants with criminal liability under Section 10(2) of the Ordinance.

30. As discussed above, we had serious doubt about the performance of nikah in the light of statement of Mian Muhammad complainant. It is rather unfortunate that the learned Judge Family Court did not exercise his powers to scrutinize the contents of the nikahnama so as to satisfy his judicial conscience that indeed nikah was performed. He should have got the signatures of Mst. Taslim Akhtar compared with those ascribed to her on the disputed document. He failed to do so.

31. It has to be kept in mind that the stance of both the accused /appellants, from the very beginning, was that Mst. Taslim Akhtar was never married to Ghulam Mujtaba and she left her house on her own accord and went away with Ishfaq Hussain to Karachi, where they contracted marriage, which was evidenced by nikahnama (Ex.DB). It is well settled that the statement of the accused at the earliest opportunity before the police during the course of investigation carries weight. See "Ashiq Hussain alias Muhammad Sharif Vs.

The State” (PLD 1994 SC 879 at Page:884), “Muhammad Yaqub Vs. The State” (PLD 1969 Lahore 548 at Page:551) and “Liaqat Ali and another Vs. The State: (1998 P.Cr.L.J 216 at Page:225).

Unfortunately, this principle of law was completely ignored by the trial court.

32. Investigation in the case was not carried out thoroughly and in our view rather dishonestly. It was the duty of the Investigating Officer to collect all the necessary material evidence pertaining to the alleged occurrence. It failed to do so. Muhammad Aslam retired Sub-Inspector PW.7, who carried out investigation, conceded that the stance of both Mst. Taslim Akhtar and Ishfaq Hussain before him was that they had married on 18.11.1999. Though he denied the suggestion that the certified copy of nikahnama was not produced but the fact remained that it was his duty that even though the same was not produced he should have taken steps to procure it. He had to concede, grudgingly, that during the course of investigation Mst. Taslim Akhtar disowned her signatures on her alleged nikahnama with Ghulam Mujtaba. It was his duty to get her signatures on it compared by some expert. He frankly conceded that

he did not do so. On his own showing, he associated Molvi Baz Khan the alleged Nikah Khawan in the investigation. Molvi Baz Khan did not ascertain the identification of Mst. Taslim Akhtar at the time of performing her nikah with Ghulam Mujtaba. What was the proof available with the prosecution that the lady, who allegedly signed the nikahnama with Ghulam Mujtaba was Mst. Taslim Akhtar? Merely on conjectures and surmises it could not be assumed that Mst. Taslim Akhtar had signed it.

We have compared signature ascribed to her in the Nikahnama with Ghulam Mujtaba and found that it was totally different from her signature on Nikahnama with Ishfaq Hussain (Ex.DB).

33. We are satisfied that a fake nikahnama was prepared by the prosecution showing the date of nikah as 30.09.1999. A forgerer, despite efforts to be perfectionist, some times makes inadvertent omissions/contradictions in the forged document, which are ultimately spotted and lead to his undoing. Perusal of column No.12 of alleged nikahnama with Ghulam Mujtaba showed the date of nikah as 30.09.1999 and the same date i.e. 30.09.1999 was shown to be the date of its registration (with the Nikah Registrar). Whereas, as per

register of Nikah Registrar (Para 17 ibid), it was registered on 15.01.2000:

We asked Mian Muhammad to explain this glaring discrepancy but he failed to do so. The only conclusion that could be drawn, in the circumstances, was that an anti-dated nikahnama (30.09.1999) was forged i.e. prior to the registration of the case on 17.01.2000, alleging that on 15.11.1999 Mst. Taslim Akhtar was abducted/enticed away to Karachi.

This was done to prop up false charge of adultery against the appellants.

It is rather sad that even the Additional District Judge, hearing the appeal, failed to exercise due care to ascertain the true facts. He, too, failed to compare the disputed signatures of Mst.Taslim Akhtar on the "Nikahnama" relied upon by the prosecution. It did not occur to him that it was a sensitive matter in which the legitimacy of two kids, born out of cohabitation/wedlock of Mst.Taslim Akhtar with Ishfaq Hussain was also at stake. He also remained oblivious of the fact that in those days she was living in Karachi and was obviously handicapped in duly pursuing her case before Family court.

34. It is well settled that fraud vitiated most solemn proceedings. Mian Muhammad almost succeeded in falsely prosecuting both the appellants, out

of sheer malice on the strength of nikahnama, which was forged. The judgments and decrees of Judge, Family Court and Additional District Judge, in the context of the evidence on record of this case, cannot be treated to be of binding nature for the purpose of adjudication of the present criminal case. Molvi Baz Khan appeared to have played reprehensible role. There is a suggestion on record that he was notorious for preparing false nikahnamas and he was involved in number of criminal cases. The Investigation Officer could not deny this suggestion. Be that as it may, the matter needed thorough probe.

35. In a criminal case proof of mense-rea of an accused is necessary before holding him guilty for a crime. Ishfaq Hussain has taken up the plea, right from the beginning, that he did not know that Mst. Taslim Akhtar was married to Ghulam Mujtaba. She herself was throughout claiming that she was never married to him.


36. For what has been stated above, we hold that the prosecution miserably failed to prove charge under Section 10(2) of the "Ordinance" against the appellants and they merit acquittal. Order accordingly. Mst. Taslim Akhtar has already come out from Jail after serving out the sentence imposed upon her.

Ishfaq Hussain shall be released from jail, forthwith, if not required in any other case.

37. We direct that Tehsil Nazim Baldia, Talagang shall get a case registered in respect of "Nikahnama" dated 30.09.1999 between Ghulam Mujtaba and Taslim Akhtar and a thorough investigation be carried out so as to bring the culprits to book.

38. The revision petition filed by Mian Muhammad (Cr. Rev. No.17/I/2002) seeking conviction of the respondents Mst. Taslim Akhtar and Ishfaq Hussain under Section 5 of the Ordinance and in the alternative enhancement of their sentences under Section 10(2) of the "Ordinance" is dismissed. It is pertinent to note that he did not challenge the acquittal of Ghulam Sadiq, Saif-ur-Rehman, Mst. Nasim Akhtar and Nazar Hussain, co-accused of these respondents.

39. The above are the reasons for the short order announced on 14.12.2004.


(Zafar Pasha Chaudhry)
Judge


(Saeed-ur-Rehman Farrukh)
Judge

Lahore the 12th January, 2004.
M. Imran Bhatti/*

Approved for reporting
