

IN THE FEDERAL SHARIAT COURT OF PAKISTAN

(Appellate/Revisional Jurisdiction)

PRESENT

MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH

MR. JUSTICE SHAUKAT ALI RAKHSHANI

Crl. Appeal No.20/P of 2007

Taj Ali Khan son of Zarghun Shah,
Resident of Village Masti Khan Banda, Tehsil Takht-e-Nasrati,
District Karak.

.....Appellant

Versus

1. The State
2. Abdul Hamid,
3. Sikandar Azam,
4. Rafiullah,
5. Muhammad Farid, all sons of Amir Nawab,
Resident of Village Masti Khan Banda, Tehsil Takht-e-Nasrati,
District Karak.

...Respondents

Counsel for the Appellant	---	Mr. Sahibzada Asadullah, Advocate
Counsel for respondents	---	Mr. Siffat Ali Khan Khattak, Advocate
Counsel for the State	---	Mr. Muhammad Sohail Khan, Assistant Advocate General, Khyber Pakhtunkhwa.
Case FIR No, date & Police Station	---	No. 73 dated 15.05.2002. P.S Takht-e-Nasrati, District Karak.
Date of impugned Judgment.	---	28.04.2007.
Date of institution	---	07.06.2007.
Date of hearing	---	09.04.2019.
Date of decision	---	09.04.2019.
Date of Judgment	---	15.04.2019.

JUDGMENT.

SYED MUHAMMAD FAROOQ SHAH, J.—On acquittal of respondents vide impugned judgment, pronounced on 28.04.2007, by the learned Additional Sessions Judge, Karak at Takht-e-Nasrati, the appellant being complainant of crime report No.73, dated 15.05.2002, registered at police station Takht-e-Nasrati, instituted the captioned criminal appeal under section 417 Cr.P.C, with a prayer to set aside

the impugned judgment and award conviction and sentences to the respondents in accordance with law.

2. Relevant facts necessary for disposal of this appeal are that on 15.05.2002, a case was registered at police station *Takht-e-Nasrati*, District *Karak*, under section 506/34 PPC, read with section 11 Offence of *Zina* (Enforcement Of Hudood) Ordinance, 1979, at the instance of the appellant against respondents No.2 to 5 that about 12:30 hours, they forcibly abducted his niece Mst. Khalida Nazia. It has further been alleged that the appellant had gone to attend the Court proceedings of suit for dissolution of marriage, filed by Mst. Khalida Nazia against Abdul Hamid/respondent No.2 and while they were on their way back to home, their car was overtaken by another vehicle and Mst. Khalida Nazia was forcibly abducted on gun point by accused/respondents No.2 to 5. It is the case of respondents that after registration of the case, Mst. Khalida Nazia at her own had appeared before learned judicial magistrate and got her statement recorded under section 164 Cr.P.C, claiming to be lawfully wedded wife of Abdul Hamid/respondent. On the other side, the appellant being real paternal uncle of Mst. Khalida Nazia had been controverting this stance as according to him Mst. Khalida Nazia never appeared before any magistrate and some impersonator was produced before the Court for this purpose. Accordingly, concerned police deleted section 11 Offence of *Zina* (E of H) Ordinance, 1979 from the charge, purportedly on the basis of above statement of Mst. Khalida Nazia. Feeling aggrieved with the above action of the police, Taj Ali Khan appellant filed writ petition No.699 of 2002 before the Peshawar High Court, Peshawar with a stance that dropping out the charge under section 11 Offence of *Zina* (Enforcement of Hudood) Ordinance, 1979 by the police was unwarranted. The said writ petition was ultimately disposed of on 28.08.2002 with observation that the identity and genuineness of Mst. Khalida Nazia was to be finally determined and adjudged by

the learned trial Judge at the first instance. In pursuance of directions of learned Peshawar High Court, Peshawar, Mst. Khalida Nazia appeared before the learned judicial magistrate on 05.10.2002 for recording her statement, wherein she gave a detailed account of the alleged occurrence wherein she was abducted on gun point and then forced to perform *Nikah* with Abdul Hamid/respondent. She further alleged that her signature was obtained on blank paper, neither she appeared before any magistrate nor recorded her statement under section 164 Cr.P.C. More particularly, she never consented cohabitation with Abdul Hamid/respondent. Consequently, the learned judicial magistrate had taken cognizance for an offence punishable under section 365/506/34 PPC and section 11 Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sent up the case papers to the learned Sessions Judge, Karak for trial. Subsequently, the learned Sessions Judge allowed petition filed by the respondents; the said order was impugned before the Federal Shariat Court of Pakistan by the appellant/Taj Ali Khan in Criminal Revision No.3-P-2003. By consenting order passed on 25.01.2005 by this Court, the learned trial Court was directed to record the statement of Mst. Khalida Nazia in presence of the respondents, after satisfying himself about her identity, by affording reasonable opportunity to the respondents to cross-examine her.

3. Order passed in writ petition No.699 of 2002 by learned Peshawar High Court, Peshawar reveals that on 16.07.2002, Mst. Khalida Nazia had appeared alongwith Abdul Hamid/respondent and in presence of counsel representing the complainant, she had stated before the learned Sessions Judge, Karak that she had not been abducted and that she was in the *Nikah* of Abdul Hamid/respondent with whom she was willfully residing. Penultimate paragraph 9 of the said order passed by the learned Peshawar High Court, Peshawar in the aforesaid petition is reproduced as under:-

“9. We intentionally avoid to make any comments regarding statement made by Mst. Khalida Nazia on 12.06.2002 or for that matter when she appeared before learned Sessions Judge on 16.07.2002 because the identity and genuineness of the deponent is to be finally determined and adjudged not by us but learned trial Judge at the first instance.”

4. On submission of challan by the concerned police, trial of the instant case commenced after framing of charge on 20.12.2005 for offences punishable under section 5/6/10/11 and 16 Offences of Zina (Enforcement of Hudood) Ordinance, 1979 as well as under section 506/365 PPC, to which the accused pleaded not guilty and claimed their trial. Prosecution, to substantiate its case examined as many as 10 prosecution witnesses and thereafter statement of accused/respondents under section 342 Cr.P.C were recorded. Trial culminated on acquittal of respondents; hence this appeal has been preferred on facts and grounds averred in it.

5. We have heard worthy submissions advanced by the learned counsel for the parties and carefully scanned the evidence, beside material brought on record. We have also evaluate impugned judgment to ascertain that as to whether it is in result of non-reading, misreading or mis-appreciation of evidence in light of persistent view of the Hon'ble Supreme Court of Pakistan as well as this Court that the scope to disturb a judgment of acquittal is most narrow and limited because after acquittal of the accused, the presumption of innocence is doubled; moreso, the appellate jurisdiction under section 417 Cr.P.C can be exercised by this Court if gross injustice has been done in the administration of criminal justice, more particularly, wherein findings given by the learned trial Court are perverse, illegal and based on misreading of evidence, or reasons of the trial Court are wholly artificial.

6. Learned counsel representing the appellant argued that in acquitting the respondents, the learned trial Judge primarily

relied on the statement recorded under section 164 Cr.P.C by a magistrate at *Banda Dawood Shah* and the learned trial Court totally went beyond its jurisdiction in overruling judgment of a family Court, therefore, impugned order is arbitrary, perverse, against law and facts.

7. Conversely, learned counsel representing the respondents as well as learned State Counsel supported the impugned judgment with vehemence and argued that the acquittal passed by the learned trial Court being balanced and well reasoned, hardly call for interference of this Court in appeal and similarly this Court shall refrain to disturb acquittal as the grounds on which the learned trial Court had based its acquittal order are reasonable and plausible and cannot be entirely and effectively dislodged or demolished.

8. A perusal of impugned judgment transpires that the learned trial Court had drawn 10 points for reasons for acquittal, discussed elaborately, needs not to be reproduced by this Court. *Insofar* as, point No.2 relating to suit for dissolution of marriage filed by Mst. Khalida Nazia on sole ground of repudiation of marriage is concerned, the learned trial Court being aware of the legal interpretation of Section 2 (VII) of The Dissolution of Muslim Marriages Act, 1939 observed that a women having been given in marriage by her father or other guardian before she attained the age of 16 years, can repudiate the marriage before attaining the age of 18 years; provided that the marriage has not been consummated. Anyhow, legal and academic discussion of the learned trial Court pertaining to repudiation of *Nikah* after attaining the age of puberty and before consummation of marriage and attaining age of 18 years is one of the ground of dissolution of marriage, certainly shall not affect upon other reasons of acquittal recorded by the learned trial Court.

9. Mst. Khalida Nazia had recorded her two versions before judicial Courts; her first statement after her alleged abduction was recorded on 12.06.2002, wherein she had denied the charge of abduction and exonerated the accused charged in the FIR and had claimed herself legally wedded wife of Abdul Hamid/respondent, her second statement was reduced in writing by the learned Sessions Judge, Karak on 16.07.2002, when she appeared alongwith Abdul Hamid/respondent, in presence of counsel for the complainant and stated that she was willfully residing with Abdul Hamid/respondent as his wife; her third statement under section 164 Cr.P.C was recorded on 05.10.2002, when she returned back to her parents house, in which she had supported FIR charges of her forcible abduction by the respondent/Abdul Hamid. In her deposition, she had also supported her second subsequent statement recorded under section 164 Cr.P.C, when she was residing in the house of her parents and uncle/complainant Taj Ali Khan.

10. It is trite law that each and every criminal case is to be decided on its peculiar facts and circumstances, because facts of two criminal cases are never alike. Before dilating upon merits or demerits of the case in hand, it shall be advantageous to re produce hereinbelow section 164 and 265-J of Code of Criminal Procedure 1898 :-

“164. Power to record statements and confessions. (1) any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the Provincial Government may, if he is not a police-officer, record any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial.

(1-A). Any such statement may be recorded by such Magistrate in the presence of the accused, and the accused given an opportunity of cross-examining the witness making the statement.”

265-J. Statement under section 164 admissible. The statement of a witness duly recorded under section 164, if it was made in the presence of the

accused and if he had notice of it and was given an opportunity of cross-examining the witness, may, in the discretion of the Court, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provision of the Evidence Act, 1872 (II of 1872)."

In the present case two different statements had been recorded under section 164 Cr.P.C of Mst. Khalida Nazia, in absence of the respondent, therefore, the respondents had not been afforded opportunity to cross-examine the said witness.

11. Prosecution case hinges on ocular account of complainant/PW-1/Taj Ali Khan and PW-2/Mst. Khalida Nazia; the evidence of remaining prosecution witnesses is of formal in nature. PW-2/Mst. Khalida Nazia being prosecutrix had given different version before judicial Courts, however, she was not owing her first statement recorded under section 164 Cr.P.C on 12.06.2002, wherein she had denied the charge of abduction and exonerated the accused/respondents charged in the FIR and had claimed that she is legally wedded wife of Abdul Hamid/respondent. Her second statement recorded by learned Sessions Judge on 16.07.2002 on her appearance alongwith Abdul Hamid/respondent and in presence of counsel for the complainant; she claimed herself to be legally wedded wife of Abdul Hamid/respondent, however, in her third statement recorded under section 164 Cr.P.C on 5.10.2002 as well as before the learned trial Court while recording her deposition she supported the version of complainant stated in the FIR as well a lengthy story of her abduction, forcible *Nikah* and *Zina* committed with her.

12. PW-1/Taj Ali Khan, being real paternal uncle of Mst. Khalida Nazia stated that all four (4) accused are real brother inter-se and the sister of Mst. Khalida Nazia is wife of Abdur Rashid, brother of Abdul Hamid/respondent, such fact had also admitted by Mst. Khalida Nazia while deposing that on 17.07.2002, husband of her sister alongwith accused Sikandar Azam and kids of her sister proceeded in a car towards D.I. Khan where accused took her in the house of her sister from where she succeeded to escape and went to police station D.I. Khan and on her written request she was produced before magistrate on the next day,

where her second statement under section 164 Cr.P.C was recorded by the learned magistrate on 05.10.2002. In her statement she had categorically denied her *Nikah* with Abdul Hamid/respondent and in cross-examination she had admitted that Mst. Zahida wife of Abdur Rashid is her real sister, she had also admitted:-

“ It is correct that I had been a regular student. It is true that I can follow/write/read simple English, Urdu and Pashtu. During my stay for the night in police station Takht-e-Nasrati, my mother, my uncle namely Taj Ali/complainant and my brother namely Nasrut had stayed for the night with me in P.S Takht-e-Nasrati, before my statement under section 164 Cr.P.C in the Court of learned judicial magistrate, Takht-e-Nasrati. It is correct that the police, standing guard on Kurram bridges Gandi Chowk Taja Zai up to D.I.Khan. The proceeding before the occurrence had remained for about one and half years in the family Court case. It is correct that my father, my brother and my uncle Taj Ali Khan are present with me today. I had remained in a joint family with my sister Zahida Begum and her kids in one in the same house after the alleged occurrence. Mst. Zahida Begum is my real sister, and her husband is Engineer. I am well educated lady and my date of birth is 12.09.1979 as per school certificate. It is correct that on the statement dated 12.06.2002 my signature in English is correct and I duly verify my signature dated 12.06.2002. the statement is EXPW2/D-1. Self stated that the accused got my signature on the blank papers and they might have used it against me. Again stated that not only on the blank papers but on those papers on which something was written but not read over to me my signature obtained. The statement EXPW2/D-1 perused and it is not in my hand writing. The witness volunteered that the statement EXPW2/D-1 is in my handwriting but I was forced to write the same and my signature was obtained on the statement. At this stage the witness volunteered that the statement and my signature was obtained and after that the signature of the presiding officer might have been made with the seal of the Court.”

13. Deposition of star witness of the prosecution, PW2 /Khalida Nazia, more particularly parts of her cross examination, reproduced above, cannot be considered trustworthy, inspiring confidence or consistent. Undeniably, the criminal justice is casting conclusive duty upon the prosecution to prove its case beyond

shadow of reasonable doubt. The law as laid down by the Hon'ble Supreme Court of Pakistan is that when two views are possible, view in favour of accused has to be given preference as held in the cases reported **PLD 1994 SC 31, (ii) 2010 SCMR 1592 and (iii) 2017 SCMR 633**. Suffice it to say that the evidence and material brought by the prosecution on record was not sufficient to convict the accused. Neither the impugned judgment suffers from misreading, non-appraisal of evidence nor based upon surmises, suppositions and conjectures. On the contrary, the acquittal is based upon sufficient reasons, which do appeal to a reasonable mind, being balanced and well reasoned, unexceptional, do not warrant interference by this Court.

14. Viewed from whichever angle, the order impugned herein is elaborate and speaking one. The learned trial Court after scanning the evidence, correctly reached at the conclusion that the prosecution has failed to bring home the charge against the respondents.

These are the reasons of short Order, announced on 09.04.2019, whereby the appeal against acquittal of the respondents No.2 to 5 was dismissed.

JUSTICE SHAUKAT ALI RAKHSHANI
JUDGE

JUSTICE SYED MUHAMMAD FAROOQ SHAH
JUDGE

Islamabad the
15th April of 2019
M.Ajmal/**.

Approved for reporting

Justice Syed Muhammad Farooq Shah