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IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

HON:MR.JUSTICE ABDUL WAHEED SIDDIQUI

Criminal Appeal No.218/I/of 1996.

Wajid Hussain s/o Muhammad Nawaz Caste Bafinda, r/o Ward No.15, Mohallah Islam Gunj, Khewra, Tehsil Pind Dadan Khan, Distt: Jehlum	.....	Appellant
	Versus	
The State	.....	Respondent
Counsel for the appellant	.....	Ch.Abdur Rashid Gondal Advocate
Counsel for the State	.....	Mr.Arshad Ali Advocate
FIR No. Date and Police Station	.....	8 dated 10-1-1993 P.S. Pind Dadan Khan
Date of the Judgment of the trial court	.....	27-11-1996
Date of Institution	8-12-1996
Date of hearing	15-05-1997
Date of decision	15-05-1997

Waheed

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JUDGMENT:

ABDUL WAHEED SIDDIQUI, J:- This Criminal Appeal assails the impugned judgment dated 27-11-1996 delivered by the Court of Additional Sessions, Judge Jhelum wherein the appellant is convicted under article 11 of Offence of zina and sentenced to undergo 7 years R.I. (Enforcement of Hudood) Ordinance, 1979/and to pay a fine of Rs:10,000/-or in default thereof one year R.I. and whipping numbering 30 stripes. The appellant has also been convicted by the same judgment under article 10 (3) of Offence of Zina (Enforcement of Hudood) Ordinance 1979 and sentenced to R.I. for 7 years, to pay fine of Rs:10,000/- or in default further R.I. for one year and whipping numbering 30 stripes. Both the sentenced to run concurrently. By the same judgment three other co-accused have been acquitted.

2. Story of prosecution in brief is that one Mohammad Lateef (PW-6) filed a written complaint (Ex.PA) on 10-1-1993 before Incharge Police chowki Khewra which became locus standi for FIR (Ex.PA/1) dated 10-1-1993 at police station Pind Dadan Khan. The allegation made therein was that the complainant above named was residing at Khewra ward No.15 alongwith his five sons and one daughter Mst.Kausar Parveen (PW-5) aged 14/15 years since about 8/9 years in a rented house. The girl was

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student of class VIII at Girls school Khewra. One Wajid Hussain (Appellant was on visiting terms with them as he was living in a house adjacent with their house. Due to suspicion, he had prohibited the appellant to come to his house. One day earlier/ to the complaint Mst.Kausar Parveen did not return from her school and on enquiry it transpired that she had not gone to the school and Nazar Muhammad (PW-7) intimated the complainant that he had seen appellant alongwith his missing daughter and three other acquitted co-accused ^a in/car proceeding towards Pind Dadan Khan. The complaint was about abduction of Mst.Kausar Parveen aged 14/15 years with an intention to commit zina with her.

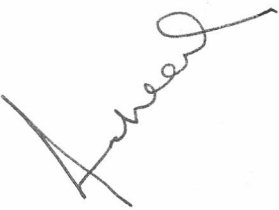
3. Appellant and 3 others were arrested, challaned and charged. All the accused did not plead guilty. Prosecution examined 9 PWs, accused gave their statements under section 342 Cr.P.C, and none of them examined himself on oath under section 340 (2) Cr.P.C. However appellant produced defence evidence in the form of documents which stand exhibited as Ex DB, Ex DC, Ex DD, Ex DE, photo copy of complaint under section 107/150/506/500/501/34 titled as Kausar Parveen versus Abdul Lateef & others Mark-A, photo copy of divorce deed by appellant in the name of Kausar Parveen Mark-B.

4. The only contention of the learned counsel for appellant

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is that in the presence of substantial and exhibited documents of the existence of a valid Nikah, the plea of the appellant that he had cohabited with Mst.Kausar Parveen as a legally married wife should not have been brushed aside so easily by the trial court. It should have given an abundant chance to the appellant to produce his witnesses of defence to prove the documents exhibited by him in defence. He has heavily relied on placentium Q, BB, CC, and DD of Muhammad Azam's case (PLD 1984 SC 95). The learned counsel for State has in a straight forward manner given his consent that in the presence of the principles enunciated in the above-mentioned judgment of the apex court, he had nothing to contend except to agree/this was that a fit case for remand back for providing an ample chance to the appellant to prove the exhibited documents through witnesses of defence.

5. I have pondered about the mutually agreed position of law while considering the facts of the case in hand. I find that the appellant's plea throughout has been that he had not abducted Mst.Kausar Parveen. She had gone with him with her own free will and had entered into a valid marriage with him. During statement under section 342 Cr.P.C. he replies to Question No.5 as under:



" The allegation is incorrect. However, Mst.Kausar Parveen accompanied me to the courts of P.D.Khan with her free consent where she instituted a private complaint titled as Kausar Parveen vs. Abdul Lateef & another U/S 107/150 Cr.P.C. and 506/500/501/34 PPC in the court of A.C. P.D.Khan on 9.1.93 and made her statement before the said court . None else was with us. She also contracted Nikah with me on 9.1.93 with her free consent."

To question No.7 he replied:

"It is incorrect. As Mst.Kausar Parveen was my legally wedded wife as such I performed conjugal rights."

To question No.10 he replied:

"It is incorrect. In fact Mst.Kausar Parveen was major at the time of her Nikah with me."

To question No.12 he replied:

"Mst.Kausar Parveen contracted marriage with me with her free consent and against the wishes of her father. Due to this annoyance the father of Mst.Kausar Parveen got registered this false case against me and others."

In his defence he produced the documents as mentioned in para No.3 of this judgment. Earlier to that Muhammad Munir (PW-8), Investigation Officer, had exhibited two more documents, Ex:PD/1 and PD/2 while deposing in the following words:

" After due investigation I found Shahid Hussain and Tahir Jahangir innocent kept their names in column No.2 of the challan leaving them at the mercy of court and challaned Wajid Hussain accused.

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Accused Wajid Hussain produced before me copy of Nikah-nams Ex:PD/1 and PD/2 which I secured into possession vide recovery memo. Ex.PD mentioned above.

To certain suggestion about Nikah nama he replied,

"The Nikah performed by Allah Ditta Nikah Khawan whose statement was recorded by me in my zimini dated 14-1-1993. I have not recorded the statements of witnesses mentioned in Nikah nama u/s 161 Cr.P.C. separately. It is correct that I have not given any findings regarding Nikah nama Ex:PD/1 and Ex:PD/2 if the same is forged one. "

Now in the presence of this Nikahnama Ex:PD/1 and PD/2 and the circumstances of non-recording of statement under section 161 Cr.P.C. of the Nikah Khawan Allah Ditta and no mention of his name carried in the calendar of PWs and no investigation about the correctness of this Nikahnama fires back upon the story of the prosecution specially when these exhibits PD/1 & PD/2 are fully corroborated by the documents exhibited in defence by the appellant. Ex:DB is an attested copy of application dated 13-5-1993 addressed to A.C city Rawalpindi and signed by both the complainant Muhammad Lateef (PW-6) and appellant praying therein that since the parties had patched up and since Mst.Kausar Parveen was daughter of complainant as well as wife of the appellant and was kept at Darul Aman w.e.f. 6-5-1993, she may

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be permitted to proceed with them to their home. On the back of application is an order dated 13-5-1993 by the authority signed by the three which includes Mst.Kausar Parveen and to the effect that she wants to go with the appellant and her father has no objection. Resultantly such permission was granted. Ex.DC is an attested copy of a bail order dated 20-03-1993 passed by the Additional Sessions Judge, Jehlum. Para Nos.6 and 7 of the said order are relevant and are reproduced as under:

6 " Keeping in view the arguments advanced by the learned counsel for the parties and having perused the record, I am of the considered view that there is nothing on the file to suggest that the abductee was minor at the time of occurrence. Photo copy of Nikahnama dated 9-1-93 has been produced and the original is available on the record. The case was registered on 10-1-93 meaning thereby that at the time of registration of the case, nikah has already been solemnised in between the parties. Copy of nikah-nama has been produced. The complainant who is present in court has filed his affidavit duly sworn by him from which it appears that the parties have compromised and the PWs are not going to support the prosecution version."

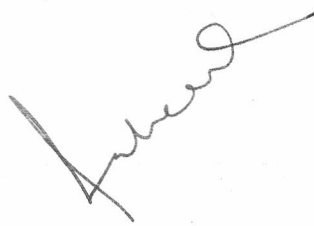
7 "The matter requires further inquiry. I therefore, allow bail to the petitioner in the sum of Rs:25,000/- one surety in the like amount to the satisfaction of this court!"

Ex:DD is an attested copy of an affidavit

sworn in by Nazar Muhammad s/o Fazal Din Khokhar (PW-7) and



is to the effect that he had not seen on 9-1-1993 that Mst. Kausar Parveen was going with the appellant and that he had not given any statement under section 161 Cr.P.C. at police station Pind Dadan Khan. This affidavit was filed before the court of Sessions Judge Jehlum to facilitate the grant of bail in favour of the appellant. Ex:DE is an affidavit sworn in by the complainant father of the alleged abductee filed in the same court and for the identical purpose and to the effect that the appellant had not abducted his daughter and that police had wrongly lodged FIR. Application Mark-A is a complaint filed by Mst.Kausar Parveen before A C & Ilaqa Magistrate Pind Dadan Khan and to the effect that she is adult and intends to marry with her own free will but her father and brother intend to get her married with some one else without her consent. On her refusal she was beaten and an attempt to murder her was being threatened, hence the complaint under Sections 107, 150 Cr.P.C.read with 500,501,506/34 P.P.C. It was filed through Shafqat Hussain Choudhri, Advocate Pind Dadan Khan with an order of the authority to file the complaint as she was showing apprehension and no offence had taken place as yet. Deed of Divorce dated 2-3-1993 is Marked B as against Mst.Kausar Parveen and is signed by her complainant father as

A handwritten signature in black ink, appearing to be 'Shafqat Hussain Choudhri', is written on the left side of the page. A line extends from the end of the signature towards the text of the affidavit.

witness No.3. It appears, prima facie, ^{that this deed} became a point of compromise generating all other affidavits and documents to facilitate the grant of bail.

In the presence of these documents it was a bounden duty of the trial court to deal with this case with utmost care. Principles enunciated at placentum BB,CC and DD cited as PLD 1984 SC 95 are exactly applicable on such like cases which are quoted verbatim:

BB "Far-reaching consequences of wrong findings of fact on plea of marriage, either way can well be visualized. Verdict in the affirmative not only gives legitimacy to conjugal intimacy and the off-springs but; also, binds two persons in a ~~solemn~~ and pious bond which, in turn in our faith, creates rights and obligations of such permanent nature that the life in this World and Hereafter also are influenced. And similarly verdict in the negative amongst others, can have serious repercussions on the questions of legitimacy of conjugal contact, liberty/life of the accused, the life of the off-springs, in addition to the social complications for the future of the concerned individuals!"

CC "Therefore it is on account of the foregoing reasons that a very delicate duty of recording, admission and appreciation of evidence falls on the two Courts of fact namely the trial Court and the Federal Shariat Court!"

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DD It is thus all the more necessary for the two Courts below to make every effort to reach the mark of perfection on the questions relating to facts, regarding the plea of valid marriage. Mere surmises and casualness where cold logic should be the rule might, as would be presently demonstrated by examining the interaction of section 3 of Ordinance which gives it the overriding effect and section 5 of the Family Courts Act which gives exclusive jurisdiction to the Family Courts on questions of marriage, prove harmful in so far as the working of this difficult branch of judicial administration is concerned. The apprehended erosion can, however, be checked if all necessary implications are kept in view."

Then need it not say that the trial Court had unfettered powers under section 540 Cr.P.C. to call for and examine the relevant persons as court witnesses for safe dispensation of justice. Placentium Q of the case cited supra reads:

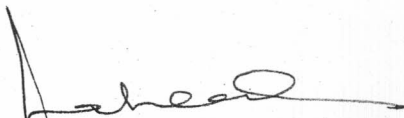
"And as also, subject to what the Federal Shariat Court itself observed in another case Muhammad Siddiqui and another vs. The State (5), that "it is not disputed that under section 540, Cr. p.C. the Court is given unfettered powers to examine any person as a witness at any stage of any enquiry, trial or other proceedings." And it may be added that it becomes obligatory for the Court to do so when it is essential for the just decision of the case, and the same was done by the Federal Shariat Court itself in the case of Din Muhammad V. The State (Criminal Appeal No.61/L of 1981, decided on

Answer

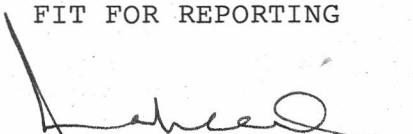


26-1-1982), which would be presently examined in another conneciton."

7. In view of these circumstances of the case and appreciation of evidence, I had order^d for remanding back the case to the trial Court to try the case de novo from the date on which prosecution had closed its side. A short order was passed on 15-5-1997. These are the reasons for the said short order.


(Abdul Waheed Siddiqui)
Judge

FIT FOR REPORTING


(Abdul Waheed Siddiqui)
Judge

Islamabad, the
15th May, 1997.
Zain/*