IN THE FEDERAL SHARIAT COURT

(Appellate/Revisional Jurisdiction)

PRESENT

MR.JUSTICE SHAHZADO SHAIKH
MR. JUSTICE SHEIKH AHMAD FAROOQ

CRIMINAL APPEAL NO. 235/L of 2006

1. Muhammad Hussain alias Mamman s/o Muhammad Sharif, Caste Balouch, r/o Chak No.25/E.B, Arifwala, District Pakpattan Sharif.

2. Mst. Haleema wife of Muhammad Hussain, Caste Balouch, r/o 25/E.B, Arifwala, District Pakpattan Sharif. ... Appellants

Versus

The State .... Respondent

Counsel for the appellant s	.....	Syed Ijaz Qutab, Advocate
Counsel for the complainant	.....	Mr. Abdul Wahid Chaudhry, Advocate
Counsel for the State	.....	Ch. Muhammad Ishaq, D.P.G.
FIR No., Dated Police Station	.....	563/2000 Dated 28.11.2000 Saddar Arifwala, District Pakpattan Sharif
Date of judgment of Trial Court	.....	04.08.2006
Date of Institution Appeal	...	06.09.2006
Date of hearing	....	05.07.2012
Date of decision	....	05.07.2012

-:-

JUDGMENT:

Justice Shahzado Shaikh, J: Through this Criminal Appeal No.235/L of 2006 Muhammad Hussain alias Mamman and Mst.Haleema challenged the judgment dated 04.08.2006 delivered by learned Additional Sessions Judge, Arifwala whereby they were convicted and sentenced as under:-

Muhammad Hussain alias Mamman:

Under section 16 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979	07 years rigorous imprisonment with fine of Rs.5,000/-, in default whereof to further undergo 6 months simple imprisonment.
Under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979	10 years rigorous imprisonment

Both the sentences were ordered to run concurrently.

Mst.Haleema Bibi

Under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979	10 years rigorous imprisonment

Benefit of section 382-B of the Code of Criminal Procedure was given to both the appellants.

Accused Noor Ahmad and Qatab Din alias Qatba were acquitted by the learned trial Court.

2. Brief facts of the prosecution case are that complainant Muhammad Mansha PW-1 got recorded complaint Ex.PA/1 on

28.11.2000 stating therein that on 17.11.2000 at about 9.00 a.m. his wife Mst.Haleema Bibi went to the "Dhari" of Muhammad Hussain Baloch for picking cotton, leaving her children at home. When she did not return home till evening, the complainant got perturbed and started her search but to no avail. On the next day he met with Naseer Ahmad and Mamanda who informed him that they had seen his wife in the company of accused Muhammad Hussain, Noor Ahmad, and Qatab Din alias Qatba at the Dhari of Muhammad Hussain alias Mamman. On receiving this information, the complainant alongwith Naseer Ahmad and Mamanda, witnesses went to the "Dhari" of Muhammad Hussain and on query he came to know that accused Muhammad Hussain, Noor Ahmad and Qatab Din alias Qatba had taken Mst. Haleema Bibi to some unknown place. The complainant arranged a "Punchayat" at the "Dera" of Ashiq Lambardar for return of Mst.Haleema Bibi wherein the relatives of the accused stated that they would make efforts for return of his wife but they could not return her. The complainant alleged that accused Muhammad Hussain with the help of accused Noor Ahmad and Qatab Din alias Qatba had abducted his wife with intention to commit "zina" with her. Hence FIR No.563/2000 Ex.PA was registered at police station Saddar Arifwala on 28.11.2000 on the basis of complaint Ex.PA/1.

3. Police investigation ensued as a consequence of registration of the crime report. After conclusion of the investigation, the local Police submitted report under section 173 of the Code of Criminal Procedure before the Court, requiring the accused to face trial.

Firstly, Charge was framed against accused Noor Ahmad on 22.01.2002 under section 16 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 while the other accused i.e. Muhammad Hussain alias Mamma and Qatab Din alias Qatba were declared proclaimed offenders. Then another charge was framed on 26.07.2002 against accused Qatab Din alias Qatba and Noor Ahmad under section 16 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 while accused Muhammad Hussain alias Mamma was still proclaimed offender. Lastly on 28.08.2003 charge was framed against all the three accused alongwith Mst. Haleema under section 16 and 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. The accused did not plead guilty and claimed trial.

4. The prosecution, in addition to documentary evidence, produced 08 witnesses at the trial in support of its case. The gist of the deposition of the prosecution witnesses is as follows:-

i) PW-1: Muhammad Mansha/complainant of the case reiterated the contents of the crime report.

ii) PW-2: Mamanda stated that about six years ago at 12.00 noon, he was going to Chak No.11/EB, They crossed "Dhari" of Muhammad Hussain and saw accused Qatba, Mst.Nooran, Mst.Haleema Bibi and Muhammad Hussain talking with each other. In reply to his question why she was present there, Mst. Haleema replied that she had come there for picking cotton.

iii) PW-3: Munir Ahmad Constable was entrusted with proclamation of accused Muhammad Hussain Ex.PB, Qutab Din Ex.PC and Noor Ahmad Ex.PD upon which he submitted reports as Ex.PB/1, Ex.PC/1 and Ex.PD/1.

iv) PW-4: Saghir Hussain, Assistant Sub Inspector, stated that on 28.11.2000 he was posted as duty officer, Police Station Saddar, Arifwala when a complaint prepared and sent by Allah Ditta, Assistant Sub Inspector, was received through Muhammad Nawaz at the Police Station whereupon he recorded F.I.R Ex.PA/1 which bore his signatures.

v) PW-5: Muhammad Khalid, Assistant Sub Inspector, stated that on 12.02.2002 he arrested accused Qatab Din and got him remanded to judicial custody.

vi) PW-6: Muhammad Iqbal, Sub Inspector, stated that investigation of this case was entrusted to him on 26.12.2000. He got warrants of accused Muhammad Hussain, Qatab Din and Noor Ahmad on 17.01.2001. He recorded statement of Constable Muhammad Muneer on 23.01.2001. He got the proclamation of the said accused on 31.01.2001 and arrested accused Noor Ahmad on 02.02.2001. He prepared incomplete challan and handed over the same to the SHO.

vii) PW-7: Mazhar Jamil, Assistant Sub Inspector stated that on 29.06.2003 he received information regarding Muhammad Hussain and Mst. Haleema Bibi and arrested them from Adda Rang Shah, interrogated them and found involved. He further stated that both the accused were challaned to Court alongwith

two female babies having age 1½ year and the other of two months.

viii) Allah Ditta, former Assistant Sub Inspector, stated that on 28.08.2002 when he was posted at Police Station Saddar, Arifwala, he alongwith other police official was present at Chak No.25/EB for patrolling purposes, where complainant Muhammad Mansha appeared before him and got recorded his statement Ex.PA which was read over to him and got his thumb impression over it. He sent the complaint Ex.PA to the Police Station through P.Q.R/Muhammad Nawaz for registration of case. He further stated that he went to the spot and inspected the site where he prepared rough site plan Ex.PE and recorded statements of witnesses. He also searched the accused but they could not be arrested.

5. After closure of prosecution evidence, all the accused were examined under section 342 of the Code of Criminal Procedure. They, inter-alia, pleaded their innocence and claimed that they had been falsely involved.

6. Since accused Muhammad Hussain and Mst.Haleema Bibi were convicted and sentenced, therefore, we are going to discuss only their defence pleas. In reply to the question "why this case against you and why the PWs have deposed against you?", appellant Muhammad Hussain alias Mamman stated as follows:-

> "Muhammad Mansha complainant divorced Mst.Haleema my co-accused prior to six years in the presence of Irshad, Manzoor, Akram, Mst.Rajin Bibi

> and other witnesses and after that I contracted second marriage and Shari Nikah was performed with my co-accused Mst.Haleema Bibi and now we have three children from this wedlock."

7. In reply to the question "why this case against you and why the PWs have deposed against you?", appellant Mst.Haleema Bibi stated as follows:-

> "Prior to six yeas, I received divorce from Muhammad Mansha complainant at my parents' house, in the presence of Irshad, Manzoor, Akram and Mst.Rajin Bibi and then after contracted marriage with my co-accused Muhammad Hussain, after that three children were born from our wedlock."

8. Mst.Rajin Bibi appeared as DW-1 and stated that she knew accused Mst.Haleema Bibi and Muhammad Hussain. About six year ago, complainant Muhammad Mansha divorced Mst.Haleema Bibi. At that time when she was coming from Bazar, she heard hue and cry from the house of Muhammad Mansha. Upon this she entered the house, his parents and in-laws were resident of same Ihata. At that time, Akram, Irshad and Manzoor were also present there. Muhammad Mansha in her presence announced divorce three times to Mst.Haleema Bibi. Complainant Muhammad Mansha contracted marriage with Mst.Kausar after four months. After that Mst.Haleema contracted marriage with accused Muhammad Hussain but the complainant Muhammad Mansha got registered this case falsely.

9. The learned trial Court after completing the formalities of the trial, convicted appellants Muhammad Hussain alias Mamman and Mst. Haleema Bibi as mentioned in opening paragraph of this judgment. Hence, this appeal.

10. Syed Ijaz Qutab, learned Counsel for appellants Muhammad Hussain alias Mamman and Mst. Haleema has raised the following points:-

i) The learned trial Court has not properly appreciated the evidence available on the record and convicted the appellant on the basis of surmises and conjectures.

ii) Co-accused namely Qatab Din alias Qatba and Noor Ahmad have been acquitted by the trial Court on the same set of evidence.

iii) The prosecution has not been able to prove its case against the appellants beyond shadow of doubt.

iv) The evidence regarding divorce in presence of Rajin Bibi has been ignored by the prosecution. Even benefit of doubt has not been given to the appellants by the learned trial Court in the light of this evidence.

v) The conviction and sentence awarded to the appellants by the learned trial Court is totally against the law, fact and circumstances of the case.

vi) All the prosecution witnesses were interested witnesses and no independent witness was produced by the prosecution in support of its version.

vii) The evidence produced by the prosecution is full of contradictions, which could not be relied upon for proving the charge against the appellants.

viii) The learned trial Court did not consider this fact that the complainant had illicit relations with one Kausar Bibi and this fact was further fortified when the complainant contracted marriage with her after divorcing Mst. Haleema Bibi, appellant.

ix) The learned trial Court relied upon the documentary evidence regarding suit for jactitation of marriage, filed by Mst. Haleema Bibi with which the appellants were never confronted during the course of their examination under section 342 Cr.P.C.

The learned counsel referred to Article 140 of Qanun-e-Shadadat Order,1984, which is as follows:

> **Cross-examination as to previous statements in writing.** A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

He argued that the charge was neither proved nor disproved from the following conclusion of the learned trial Court, in para 11of the impugned judgment. The relevant portion is reproduced as follow:

> "They have taken plea that complainant Muhammad Mansha has given divorce to Haleema Bibi oral and after that she contracted marriage with Muhammad Hussain. Mst. Haleema Bibi filed suit for jactitation of marriage and suit for dissolution of marriage, but she remained failed to get divorce from his previous husband Muhammad Mansha. The learned Judge Family Court according to Ex.PK has dismissed the suit of Haleema Bibi filed against Muhammad Mansha for jactitation of marriage on 08.06.2004 that has not been challenged by Haleema Bibi before higher courts and according to the contents of the

plaint she has only stated that Muhammad Mansha has divorced her orally. To prove the factum of the divorce, it was the duty of Haleema Bibi that she should prove it that after getting divorce from Muhammad Mansha, she has contracted second marriage with Muhammad Hussain according to law. But despite of that she has contracted marriage orally with Muhammad Hussain, but she has not produced any copy of Nikah Nama that she is living with Muhammad Hussain as wife. They remained at large and during this period three children were born. But despite of that Muhammad Hussain has not produced the copy of Nikah Nama that after getting divorce Haleema Bibi from Mansha, they contracted marriage with each other Muhammad Hussain in his statement has not mentioned the date of Nikah with Haleema Bibi and he further stated that he has contracted second marriage and Shari Nikah was performed, but no evidence like this nature has been produced by Muhammad Hussain to this fact. The accused has produced DW-1, she is the mother of Muhammad Hussain. Only she sated in the presence of her and Irshad, Manzoor and Akram, Mansha divorced to Halima Bibi orally. It is pertinent to note that it was in their knowledge that Mst. Haleema Bibi already a married lady having children from her first husband, but despite of this fact, they have not contracted second marriage according to the law of land. The Mst. Haleema Bibi and Muhammad Hussain contracted second marriage orally but no evidence has been produced to prove this fact that they are living as husband and wife. The spouses lived a sinful life which is against the spirit of Islamic Law and they have committed the offence against the spirit of Islam and Norm of Justice."

In this connection, the learned counsel for appellants also referred to Article 2 (4), (5) and (6), of Qanoon-e-Shahadat Order, 1984 as reproduced below:

Article 2 (4): "A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.'

(5): "A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existance so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist."

(6): "A fact is said not be proved when it is neither proved nor disproved."

The learned Counsel for appellants argued that reading of the above referred para of the judgment of the learned trial Court, shows that it falls within ambit of Article 2 (6) of Qanoon-e-Shadat Order, 1984. Therefore, he was of the view that keeping in view the reading of above provisions under Article 2 (6), and Article 140 of Qanun-e-Shahadat Order, 1984, it is quite clear that the charge has neither clearly been proved nor disproved, that is why the learned trial Court has rightly not declared the marriage of Mst. Haleema appellant with Muhammad Hussain appellant as void/voidable.

x) Lastly, he argued that the prosecution has failed to prove its case against the appellants beyond shadow of doubt, therefore, they deserve acquittal.

The learned Counsel for the appellants has relied upon the following judgments in support of his arguments:-

PLJ 2007 Lahore 114
Shabbir Hussain alias Papu Vs. Station House Officer P.S. Bumbanwala, District, Sialkot and 3 others.

"Marriage between two major Muslims---No cognizable offence---Law regarding marriage is settled by this time to the effect that where two major Muslims of sound mind

solemnize marriage by entering into a contract for procreation and legalization of their children, according to the Muslim Family laws Ordinance, 1961, no cognizable offence under the Offence of Zina (Enforcement of Hudood) Ordinance 1979 is made out."

PLD 1984 Federal Shariat Court 93
Muhammad Ramzan Vs. The State

PLD 1982 FSC 42
Arif Hussain & Azra Parveen Vs. The State

1997 P.Cr.L.J 1666
Sana Ullah Vs. The State

"Marriage which the accused claimed with the alleged abductee was never declared as void by the Judge, Family Court, but the same was declared to be irregular---Documentary evidence on record had amply supported the plea of accused that at one time the abductee had entered into marriage with him of her own free-will and consent which was neither frivolous nor absolutely baseless---Said defence plea when placed in juxtaposition with the prosecution case, the allegation leveled against accused of commission of Zina had become highly doubtful and unsustainable---Prosecution had thus, failed to establish that the accused had "willfully" committed Zina---Accused was acquitted accordingly."

2005 P.Cr.L.J 219
Mst. Nisa Begum & another Vs. The State

"Both male and female accused being sui juris having admitted that they were married to each other and their assertion not appearing to be mere excuse, same had to be accepted unless there was any cogent and reliable material available to negate their assertion---Claim of accused being genuine and bona fide, benefit of doubt was to be extended to them---Valid circumstances were available in the present case to show that accused persons got married to each other---No question was of commission of any Zina and adultery---Conviction of accused under S.10 or 16 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, could not be maintained---Conviction

and sentence awarded to accused by Trial Court were set aside and they were acquitted of charges.

PLD 1999 Lahore 479
Mst. Irfana Tasneem Vs. Station House Officer and others

"Where a major woman and a man acknowledge their Nikah, presumption of truth is attached to it and the onus lies on the person who challenges the said Nikah to disprove it."

1992 SCMR 1273
Allah Dad Vs. Mukhtar and another

"The logical result of this scheme of the provisions of the Ordinance is that if there is a clash between an existing law and the Injunctions of Islam with regard to the validity of a marriage, the Injunctions of Islam shall prevail for the purpose of this Ordinance. Thus, if a marriage is valid in Shariah, it shall be held valid for the purpose of this Ordinance, even though it is not recognized as valid in any other law for the time being in force."

PLD 2000 Federal Shariat Court 63
Abdul Kalam Vs. The State

"Contention of prosecution was that as Nikah was not registered and was not found in Register of Nikah and also that thumb impression was also not found to be that of girl, Nikah was not proved---Validity---Registration of Nikah was not necessarily the proof of Nikah as, in Muslim Law Nikah could be performed by offer and acceptance in presence of witnesses---Non-registration of Nikah would only attract a penalty under S.5(4) of Muslim Family Laws Ordinance, 1961---In absence of any error in Nikah of accused with the girl, conviction and sentence awarded to accused by Trial Court were set aside and he was acquitted."

2001 SCMR 56
Munir Ahmed alias Munni Vs. The State

"Where an incriminating piece of evidence is not put to an accused, the same has not to be considered as evidence against him."

2006 P.Cr.L.J 944
Nadeem alias Baba Vs. The State

"Any piece of incriminating evidence not put to the accused at the time of recording his statement under S.342, Cr.P.C. cannot be used against him."

11. On the other hand, Mr. Abdul Wahid Chaudhry, learned Counsel for the complainant has made the following submissions:-

i) The prosecution has fully proved its case against the appellants beyond any shadow of doubt.

ii) The appellants have failed to prove the fact of divorce given by the complainant as suit for jactitation of marriage filed by Mst. Haleema Bibi was dismissed by the Family Court.

iii) Nikah of Mst. Haleema Bibi with Muhammad Hussain alias Mamman is not proved under the law.

iv) Offence of "zina" is fully proved as both the appellants were living as husband and wife and as a result of this offence the lady accused had born three female children.

v) The learned trial Court has convicted both the appellants rightly as the evidence against the appellants is consistent, although the prosecution witnesses were cross-examined at length by the defence side.

12. Ch. Muhammad Ishaq, DPG appearing for the State has adopted the arguments raised by the learned Counsel for the complainant and supported the impugned judgment.

13. We have heard the learned counsel for the appellants as well as learned Counsel for the complainant and the Deputy Prosecutor

General for the State and perused the record with their assistance. The statements of the accused have also been read and relevant portions of the impugned judgment have been scanned.

14. Complainant/Muhammad Mansha PW.1 got registered the FIR against Muhammad Hussain alias Mamman, Noor Ahmad and Qatab Din alias Qatba with the allegation that they abducted his wife Mst. Haleema with intention to commit 'zina' with her. He stated in his examination-in-chief that he had not divorced Haleema Bibi and two issues were born, before this incident, from this wed-lock. During cross-examination he refuted the suggestion that he had illicit relations with one Kausar Bibi due to which his first wife Mst. Haleema Bibi remained angry with him, however he admitted that he contracted marriage with Kausar Bibi. The occurrence allegedly took place on 17.11.2000 while it was reported to the police on 28.11.2000 after about 11 days whereas the complainant came to know on the next day i.e. on 18.11.2000 that his wife was abducted by accused Muhammad Hussain alias Mamman, Qatab Din alias Qatba and Noor Ahmad. Although he claimed that he made efforts through 'Punchayat' for return of his wife yet he did not produce any member of the 'Punchayat' to prove this fact. It does not appeal to a prudent mind that a husband having knowledge of abduction of his wife by the accused persons remained silent for a long time of about 11 days. He should have straight away approached the police for recovery of his wife.

15. The learned trial Court while giving the verdict of conviction against the appellants had mainly relied upon the judgment

dated 8.6.2004, passed by the Family Court in suit for jactitation of marriage filed by Mst. Haleema Bibi against Muhammad Mansha complainant, which was dismissed. The claim of the appellants is that Muhammad Mansha complainant had given oral divorce to Mst. Haleema Bibi in the presence of Irshad, Manzoor, Akram and Rajin Bibi. In this connection, following needs to be considered:

> Islam does not prescribe any specific mode for "Dissolution of Marriage", it is an overt act on the part of husband which would indicate a clear intention to annul the marriage to operate as a divorce. No particular form of words is prescribed for effecting a talaq. If the words are clear, express and well-understood as implying divorce, no proof of intention is required. It is also not necessary that divorce should be pronounced in the presence of wife or even addressed to her" [2008-80-185 Present before Mr. Justice Iftikhar Hussain Butt (SC AJK) Bilal Hamza Abbasi vs. Wazir Muhammad etc.]

16. In the present case, appellant Haleema (wife) asserts that the complainant Mansha (husband) divorced her in presence of Irshad, Manzoor, Akram and Rajin Bibi. Rajin Bibi appeared as DW.1, and gave unshaken testimony. But the evidence regarding divorce in presence of Rajin Bibi has been ignored by the learned trial Court.

17. In this connection, following is very relevant for consideration:

> Marriage---Onus to prove Divorce ---Factum of marriage was admitted, onus to prove Divorce, heavily lay on the party objecting the same. 2009 CLC 390

18. The factum of earlier marriage of appellant Haleema Bibi with complainant Mansha is an admitted fact. Pronouncement of Talaq by complainant Mansha to appellant Mst. Haleema is asserted by her and her DW.1 Rajin Bibi. From the above case law, it may be construed that "onus to prove divorce" may not lay only on appellant Mst. Haleema, as it is not the "party objecting the same." Yet from the trial proceedings, it appears that it was the appellant Mst. Haleema who was made to prove her Talaq from her former husband complainant Mansha, and also prove her valid nikah with the second husband appellant Muhammad Hussain.

19. In the present case, no documentary proof of either the divorce deed or the Nikahnama between Mst. Haleema and Muhammad Hussain alias Mamman is available on the record. The plea taken by the appellants does not appear to be mere pretext to save themselves from conviction under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979, rather their claim appears to be genuine and bona fide. It is settled principle of law that if both man and woman being sui juris admitted that they are married to each other and their assertion does not appear to be a mere excuse then the same has to be accepted unless there is any cogent and reliable material available on the record to negate or contradict their assertion.

20. A Talaq may be in writing or by word of mouth and no particular form is necessary. In the case of the oral Talaq, communication is necessary. The Appellant Mst. Haleema Bibi remained unshaken all along that her former husband, Complainant

Mansha divorced her in presence of three witnesses, fully supported by the version of DW1 at the witness box.

21. A Talaq becomes irrevocable in Ahsan mode on the expiry of Iddat. Appellant/accused Mst. Haleema vehemently all along asserted that she contracted her second Nikah, after completion of her period of Iddat. Exact time frame is usually unclear in rural settings, where illiterate people recall the events with reference to some natural phenomenon, e.g., floods, etc., etc.

22. Muslim Family Laws Ordinance, 1961, under its Section 7 provides as under:

> 7. Talaq. (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.
>
> (2) Whoever, contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both..."

In this regard, following case law needs to be considered:

> Notice of Divorce to the Chairman, Local Council being not mandatory under the Injunctions of Islam, failure to send such notice to the Chairman of Local Council does not make the Divorce ineffective in Shariah, and the marriage of such a Divorced woman with a third person after the expiry of the necessary period of Iddat is not invalid. 1996 PLD 58
>
> Muslim Family Laws Ordinance 1961 S. 7---Oral Divorce --- Failure to send notice to Chairman, Union Council--Effect--- Divorce would not become ineffective in Shariah, where husband having Divorced his wife orally had failed to send notice to Chairman, Union Council concerned relating to such Divorce .---[Muhammadan Law]. 1995 CLC 724

> No notice of alleged Divorce having been given to the Chairman of Local Council as required by S.7, Muslim Family Laws Ordinance, 1961, Talaq would not become effective. 1992 CLC 596
>
> Necessary requirement or ingredients of talaq is a conscious and willful pronouncement of talaq with intention to release wife from marriage bond. Failure to follow said procedure could entail or be followed by punishment but validity of talaq or separation of spouses from the marriage bond would not be affected. Zafar Pasha Chaudhary, J. reported in 2004- . YLR-619

23. Oral Talaq is effective and has a binding value, in spite of non-compliance of mandatory requirement of S.7, Muslim Family Laws Ordinance, 1961. In this connection following is pertinent for consideration:

> Wife could not claim that non-issuance of notice u/s 7(1) of the Ordinance, 1961 to her either by the Nazim UC or non-supply of the copy of the Talaqnama by her husband, would make talaq ineffective or would invalidate the same, for the reason that the wife knew that talaq had been pronounced by the husband besides the fact that talaq would become effective on expiry of 90 days from the date of its pronouncement irrespective of the service of notice on the Chairman UC or on the wife, and non-service of notice on them would not make talaq ineffective. [PLD-2005-Karechi-358]

24. "Conscious and willful pronouncement of talaq with intention" of divorce to or separation from appellant Mst. Haleema, become obvious in the circumstances that her former husband complainant Mansha had an alleged plan to marry one Kausar Bibi, whom he actually married as his second wife.

25. This case involves important aspects of Talaq, jactitation of marriage, re-marriage, etc., claimed by the divorcee and denied by the husband. Therefore, we would like to examine the same in their proper perspective.

26. The term jactitate is derived from Latin word "jactare," which means to "throw, toss about, discuss, or boast of."

27. It is a false claim by an individual that he or she has married another, from which they may acquire reputation of being married to each other. It is actionable at law.

28. A woman married under Muslim Law is entitled to obtain a decree for dissolution of her marriage under the Dissolution of Muslim Marriages Act, 1939 on basis of specified ground(s), and on ground(s) recognised under Muslim Law.

29. Section 5 of the West Pakistan Family Courts Act, 1964 provides that the Family Courts established under Section 3 shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in Part I of the Schedule which includes, dissolution of marriage (including "Khula), and jactitation of marriage.

30. In English Law, jactitation of marriage is untruthful claim of one party that she/he is married to another. The English ecclesiastical courts began to entertain actions against those who made such claims from at least late fifteenth century onwards. A successful private suit established the plaintiff's right to marry someone else. An

unsuccessful suit established that plaintiff and defendant had entered into a valid marriage.

31. To this suit there are three defences:

1. denial of the claim;
2. truth of representations;
3. allegation (by way of estoppel) whether petitioner acquiesced in the claim of respondent.

32. In Thompson v. Rourke, 1893, Prob. 70, the Court of Appeal laid down that the court will not make a decree in a jactitation suit in favour of a petitioner who has at any time acquiesced in the assertion of the respondent that they were actually married.

> In PLJ 1973 Lahore 492, it was held that the term "jactitation of marriage" is not to be confined to a suit for declaration that there was no marriage. It also includes setting up of a false marriage.
>
> In PLD 1974 Lahore 78 the words jactitation of marriage have been held to mean false pretence of being married. Suit for jactitation of marriage includes suit for a declaration by a person falsely posing to be spouse of defendant. declaration as to status where marriage alleged by one party and denied by another amounts to a decree for jactitation of marriage.
>
> The suit for jactitation of marriage is exclusively triable by Family Court. Zohran Bibi v. Manzoor Ahmed PLD 1976 Lah. 318.

33. From the above, it would be seen that the suit for jactitation of marriage, under discussion in the present Appeal, was in fact not on the basis of denial that the marriage was never set up between the parties or there had never been any marriage between them, or the respondent had set up any false marriage with the

petitioner. There were two children born to them from this wed lock before their divorce. Therefore, the factum of this valid marriage was never denied. The basic point at issue was that whether the Divorce claimed by the petitioner was pronounced/effected by the respondent. It has been observed that such cases of confirmation as to whether Talaq had been effected or not, are also brought in suit for decree for jactitation of marriage. This puts particularly illiterate and poor rural women in a very disadvantageous position.

34. In our society, divorce usually does not take place, amicably. It has been noted that when a husband divorces but does not comply with the provisions of Section 7 of Muslim Family Laws Ordinance, 1961, and the divorcee also out of her socio-economic backwardness and ignorance does not take necessary steps to get the Divorce registered/documented, it is usually the husband who subsequently brings a criminal case, particularly under Zina (Hudood) Ordinance 1979, to damage her maliciously. Although the Quran prescribes not "to leave the other (wife) hanging (i.e. neither divorced nor married)...." [4:129]

35. Legislation is made and jurisprudence is developed with a purpose and an objective to solve problems of people.

36. Examine the striking similarities for the present case in the following case law 2010 PCrLJ 182, and the relief provided by the honourable superior judiciary:

Alleged abductee appeared in court and stated in a surefooted manner that after obtaining Divorce from her husband and observing the period of `Iddat', she contracted a valid marriage of her choice with accused; and that her father got registered a false case with baseless allegation of her abduction---Lady also complained that despite her said version before the Investigating Officer, the challan had been submitted in the court---Charge of abduction against accused persons, in circumstances had fallen to the ground---In case the request for quashing of the F.I.R. and the proceeding was not allowed, it would amount to permit the Investigating Agency, the prosecution and the Trial Court to blindfold the administration of criminal justice---Serious and alarming legal error of omission and commission had occurred in the investigation, prosecution and trial against accused persons and the alleged abductee---In order to enforce law of the land and to enable alleged abductee and her second husband/accused, to lead peaceful matrimonial life of their choice, it was fully justified to exercise constitutional jurisdiction and inherent powers by High Court, in their favour---Such an action by the High Court would not amount to interference in the allotted sphere of Investigating Agency, prosecution and Trial Court because the three organs of administration of justice had stepped over their respective authority---Proceedings conducted against accused persons in the case, was quashed... 2010 PCrLJ 182

Divorce-Mode---Islam did not prescribe any specific mode for dissolution of marriage---Such was an overt act on the part of husband which could indicate a clear intention to annul the marriage to operate as a Divorce ---No particular form of words was prescribed for effecting a Talaq---If the words of 'Talaq' were clearly expressed, and very well understood as implying Divorce, no proof of intention was required---Not necessary that Divorce should be pronounced in the presence of the wife or even addressed to her. 2008 YLR 293

Divorce- Marriage under Islamic Law was a civil contract and not a sacrament as ordained in Holy Qur'an-Islam had laid down parameters for spouses to live within those bounds and if parties transgress those parameters, they

should relieve each other i.e. they could break matrimonial tie with kindness. : 2007 MLD 570

High Court had directed in the earlier constitutional petition that the petitioner was to be lodged in Dar-ul-Aman as two persons were claiming her to be their legally wedded wife---Petitioner admittedly was adult, sui juris and had contracted marriage with her second husband of her free will and consent after having been Divorced by her previous husband---Case had been registered against the petitioner by her parents in connivance with her previous husband denying the Divorce ---Petitioner had filed a suit for jactitation of marriage---Petitioner had moved the present constitutional petition seeking a declaration that her detention in Dar-ul-Aman was not consented by her and she be set at liberty enabling her to pursue the civil and criminal proceedings pending before the lower Courts---Petitioner, present in High Court, had categorically stated that she was not willing to stay in Dar-ul-Amaan and requested to be set at liberty to look after her matrimonial and other affairs of normal life---Adult and major woman who is capable to take decision cannot be forced to be lodged in Dar-ul-Amaan to curtail her right of liberty---Petitioner could not be kept in Dar-ul-Amaan for indefinite period against her wishes as a preventive detention in view of the above circumstances---Petitioner was consequently set at liberty to lead a normal life of a free person---Constitutional petition was allowed accordingly. 2006 YLR 35

Accused lady after having been Divorced by the complainant had contracted a valid, legitimate and perfectly legal marriage with her co-accused---Non compliance of requirement of S.7 of the Muslim Family Laws Ordinance, 1961, regarding sending the notice of "Talaq" to the Chairman, Union Council, had not rendered the "Talaq" ineffective--Continuation of the proceedings in the impugned F.I.R., thus, would not serve any useful purpose and would clearly amount to an abuse of the process of law--F.I.R. was consequently quashed and the petition was accepted accordingly. 2004 YLR 1791

Divorce -deed was not the requirement of law to be written on a stamp paper. 2004 CLC 984

> Female accused was found to have been validly Divorced by the complainant before she entered into second marriage with her co-accused and as such none of them had committed any offence--Accused were acquitted accordingly. 1997 PCRLJ 1312

37. In Islam, a woman can bring complaint against her husband for her rights.

> "Allah has indeed heard (and accepted) the statement of the woman who pleads with you (the Prophet) concerning her husband and carries her complaint (in prayer) to Allah. And Allah (always) hears the arguments between both sides among you: for Allah hears and sees (all things). [58:1]

38. In the present case, it is seen that the appellants Mst. Haleema and Muhammad Hussain, as for their part, clearly 'believed' that Mst. Haleema was validly divorced by the complainant Mansha and they (appellants) were validly married, they were living in 'maroof' way in a family system and they had begotten three daughters from this wed-lock. Let us examine this 'belief' of theirs (appellants') in the light of some Muslim scholar's opinion:

> "If an act which under ordinary circumstances would amount to an offence be done under a mistake, the person doing it will be given the benefit of doubt, so that sentences of the nature of hadd and retaliation will not be inflicted on him. But as to his liability for any injury or loss caused to another's rights, that is, for the violation of individual rights, mistake will not be regarded as a good excuse in law. But it is a good ground for modifying such obligations as have a semblance of benevolence, for instance, the payment of compensation (diyat)." (Abdur Rahim, Barrister-at-law, Majesty's Judge of the High Court of Judicature at Madras, Principles of Muhammadan Jurisprudence, p.225)

"The effect of uncertainty or doubt as to the correct law is also apparent in questions relating to the infliction of certain sentences....(Abdur Rahim, Barrister-at-law, Majesty's Judge of the High Court of Judicature at Madras, Principles of Muhammadan Jurisprudence, p.238)

"I may here mention some of the more important limitations and conditions under which the Muhammadan law allows the infliction of this form of punishment (hadd). The principle underlying them is that any doubt would be sufficient to prevent the imposition of hadd. For instance, such doubt may arise from the nature of the authority applicable to the facts of a particular case or from the character to the evidence or from the state of mind of the accused person, that is, his knowledge of the law or facts, or the state of his will at the time of commission of the offence charged against him. If there be a show of authority, though not of a sound character against the accepted law which declares a particular act to be punishable with hadd, this is treated as a doubt sufficient to prevent the imposition of such a sentence, even if the accused himself did not entertain any doubt on the point. This is called error or doubt with respect to the subject of the application of law (shubhatu'l-mahal). Even when an offender misconceived the law in a case where there is no foundation for such misconception, but he actually believed that what he was doing was'not an offence, the sentence of hadd will not be enforced against him. This is called doubt or error with respect to the act (shubhat-al-fa'il)" (Abdur Rahim, Barrister-at-law, Majesty's Judge of the High Court of Judicature at Madras, Principles of Muhammadan Jurisprudence, p.362)

"In certain cases, such as an offence of whoredom, some jurists go so far as to recommend to a man who has seen it committed not to give information or evidence, though if he chooses to do so his testimony will be admitted, provided he possesses the qualifications of a witness. I may mention that the policy of law in connection with this offence is to punish only those offenders who defy public decency and openly flaunt their vices. Hence it is, that four male eye-witnesses are required for its proof. Even if they are forthcoming which is hardly to be expected, the Magistrate is asked to scrutinize their testimony closely in

> order to see if they are not mistaken, and to allow them to retract what they have deposed to. Furthermore, if there has been any delay in the witnesses coming forward and giving their evidence, that circumstance in itself is held sufficient to raise a doubt. (Abdur Rahim, Barrister-at-law, Majesty's Judge of the High Court of Judicature at Madras, Principles of Muhammadan Jurisprudence, p.362-363)

39. At this point, it may also be relevant to refer to section 10(2) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, to be read with sections 4 and 5 of the same Law. Sections 4 and 5 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 are reproduced as under:-

> 4. **Zina** A man and a woman are said to commit '*Zina*' if they *willfully* have sexual inter-course without being validly married to each other.
>
> 5. **Zina liable to had.** (1) Zina is zina liable to had if-
>
> (a) it is committed by a man who is an adult and is not insane with a woman to whom he is not, and *does not **suspect** himself to be married*; or
>
> (b) it is committed by a woman who is an adult and is not insane with a man to whom she is not, and *does not **suspect** herself to be, married.*

Under section 5, if they *do "not **suspect**" "to be married"*, (to be wife and husband), i.e., validly married, punishment under section 10(2) of this Ordinance, may not be legally admissible. Furthermore, if they "*willfully* have sexual inter-course without being validly married to each other", i.e., knowingly being not married. But in this case they remained consistent in their belief and knowledge about the factum of their valid marriage, for which they have put up full legal battle with all their effort at their command, which is evident from their relevant

family suits in this regard. It is also noteworthy that the requirements under section 8 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, as to the standard of proof of zina could not be met at all, therefore, the corresponding punishment could not be legally awarded.

40. Another very important question is involved in this case, that in such cases where the convicted accused have begotten children, if Talaq from former husband, i.e., Mansha, say, is not established , and/or 2nd marriage of Mst. Haleema Bibi is not proved, then how in the presence of begotten children from such a union could still not prove the allegation of zina under section 10 (2) of the Ordinance. Islam presents a code which can deal with emerging/modern issues in all times, if ijtihad continues. Sharia demands 4 eye witnesses to 'actual penetration', which excludes all manipulations of artificial insemination, test-tube fertilization, surrogation, genetic engineering, etc. Sharia Law specifically cares for family and particularly welfare of minors. It may be pointed out that in this case life and social status of three minor girls (3, 4 and 7 years of age) is also involved, for no fault of theirs.

41. Therefore, in the peculiar circumstances of this case, the punishment can not be awarded to the appellants when 'zina' is not established in any way. Even otherwise, co-accused Qatab Din alias Qatba and Noor Ahmad have been acquitted by the trial Court relying

on the similar evidence, which has made the prosecution story highly doubtful and improbable.

42. In view of what has been discussed above, Cr. A. No.235/L/2006 filed by appellants Muhammad Hussain alias Mamman and Mst. Haleema against their conviction and sentence under sections 16 and 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 awarded to them by the learned trial Court vide its judgment dated 04.08.2006 delivered in Hudood Case No.58 ASJ of 2001, Hudood Trial No.8 ASJ of 2002, is allowed. Mst. Haleema, appellant, already on bail granted by this Court vide order No. 4 dated 26.09.2007, who is present, is acquitted. Her bail bonds and sureties are discharged. Appellant/Muhammad Hussain alias Mamman has already been released from jail on expiry of the term of his sentence which was awarded to him by the learned trial Court in the above-quoted judgment. He is also acquitted of the charges.

43. These are the reasons of our short order dated 05.07.2012.

Justice Shahzado Shaikh

Justice Sheikh Ahmad Farooq

Dated Lahore the
05th July, 2012
*Imran/**

FIT FOR REPORTING.

Justice Shahzado Shaikh