

Fair Judgment

IN THE FEDERAL SHARIAT COURT

(Appellate/Revisional Jurisdiction)

PRESENT

MR. JUSTICE SHAHZADO SHAIKH

CRIMINAL APPEAL No. 50/L of 2007

Muhammad Ilyas s/o Maqbool Hussain,
Caste Jat, r/o Chak No.95/JB, Tehsil Gojra,
District Toba Tek Singh.

... Appellant

Versus

The State

.... Respondent

Counsel for the appellant

.....

Ch. Imtiaz Ahmad Kamboh,
Advocate

Counsel for the State

.....

Mr. Khurram Khan, D.P.G.

Date of Private Complaint

09.07.2002

FIR No., Dated

.....

217/01 Dated 08.07.2001

Police Station

Saddar Gojra, District T.T.Singh.

Date of judgment of Trial Court

.....

26.02.2007

Date of Institution of Appeal

...

09.03.2007

Date of hearing

....

02.08.2012

Date of decision

....

02.08.2012 ✓

:-

JUDGMENT:

Justice Shahzado Shaikh, J: This appeal (Criminal Appeal No.50/L/2007) was jointly filed by appellant Muhammad Ilyas and Mst. Khalida Parveen against the judgment dated 26.02.2007 delivered by the learned Additional Sessions Judge, Gojra, District Toba Tek Singh, whereby they were convicted and sentenced as under:-

i. **Appellant Muhammad Ilyas:**

under section 494 of : three years rigorous
the Pakistan Penal imprisonment with fine of
Code Rs.3,000/- or in default
thereof to further undergo
three months simple
imprisonment.

under section 468/471 : two years rigorous
of the Pakistan Penal imprisonment with fine of
Code Rs.2,000/- or in default
thereof to further undergo
two months simple
imprisonment.

ii. **Appellant Khalida Parveen:**

under section 494 of : two years rigorous
the Pakistan Penal imprisonment with fine of
Code Rs.2,000/- or in default
thereof to further undergo
two months simple
imprisonment. ✓

under section 468/471 : two years rigorous
of the Pakistan Penal imprisonment with fine of
Code Rs.2,000/- or in default
thereof to further undergo
two months simple
imprisonment.

All the sentences were ordered to run concurrently with benefit of section 382-B of the Code of Criminal Procedure. Both the appellants were acquitted from charge under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The learned trial Court also acquitted accused Maqbool, Hussain, Riaz Ahmad, Abdur Rasheed, Muhammad Hanif, Mumtaz Ahmad, Hafiz Gharib Nawaz and Mst. Iqbal Bibi by extending them benefit of doubt.

It is pertinent to mention here that Mst. Khalida Parveen was released on bail by this Court vide Order No.1 dated 25.05.2007 and after her release from jail she was murdered during the pendency of this appeal and FIR No.382/2009 dated 14.03.2009 was registered in this respect at police station Shahdrah, District Lahore. Therefore, the name of Mst. Khalida Paveen appellant was deleted from the array of appeal vide Order No.6 dated 19.11.2009.

2. The prosecution case in brief is that complainant Zulfiqar Ali PW.1 filed private complaint against nine accused on 09.07.2002 wherein it was stated that about four years ago his niece Mst. Khalida Parveen was married with Rashid Ahmad. One month before 07.07.2001 she came to his house after quarrelling with her husband ✓

where she developed illicit relations with Muhammad Ilyas accused. On 07.07.2001 at 2.30 a.m. he saw Mst. Khalida Parveen and Muhammad Ilyas committing zina and got registered FIR No.217/01 dated 08.07.2001 at police station Sadar Gojra under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 but the police in connivance with the accused did not record the case according to his version, therefore, he filed private complaint in the Court of Additional Sessions Judge, Gojra. The complainant further stated that Rashid Ahmad had given one notice of divorce to Khalida Parveen which was withdrawn by him. Accused Muhammad Ilyas and Khalida Parveen were arrested after registration of the case. However they, after obtaining bail, had been living as husband and wife in the house of Maqbool Hussain and Iqbal Bibi. On 10.08.2001 at evening time, the complainant alongwith Muhammad Ashraf father of Khalida Parveen, Khaliq Kanwal and Mushtaq Ahmed went to the house of Maqbool Hussain and Iqbal Bibi and demanded return of Khalida Parveen. Maqbool Hussain and Iqbal Bibi informed them that they had contracted *nikah* of Muhammad Ilyas and Khalida Parveen. The complainant further stated that on 12.07.2001 Khalida Parveen filed private complaint under section 107/150 of the Code of Criminal Procedure against her mother and the complainant in the court of Judicial Magistrate, Gojra wherein at the time of recording her statement she concealed the factum of her previous marriage as well as FIR No.217 against her. She performed second marriage against *shariah* during subsistence of her first marriage and her co-accused ✓

despite having knowledge of her first marriage had contracted her *nikah* with Muhammad Ilyas on 12.07.2001. The complainant moved applications to the police officers for registration of case against the accused but to no avail. Hence he filed present private complaint.

3. The learned Special Judicial Magistrate, after recording cursory statements of the complainant and the witnesses, submitted report under section 202 of the Code of Criminal Procedure on 24.09.2002 wherein it was held that prima-facie the respondents committed offence under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 as well as under sections 494/468/471 of the Pakistan Penal Code. The learned trial Court summoned the accused persons to face trial on 05.11.2002. On 04.01.2003 the learned trial court framed charge against the accused under sections 468 & 471 of the Pakistan Penal Code while Muhammad Ilyas and Khalida Parveen were also charged under section 494 of the Pakistan Penal Code as well as under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

5. The complainant produced two witnesses to prove its case.

The gist of the deposition of the witnesses is as follows:-

(i) Complainant Zulfiqar Ali appeared as PW.1 and endorsed the contents of his private complaint Ex.P.1.

(ii) PW.2 Mushtaq Ahmed stated that on 10.08.2001 he alongwith Muhammad Ashraf, Zulfiqar, Khalid Qamar went to ✓

the house of Maqbool Hussain accused for return of Mst. Khalida but Maqbool Hussain and Iqbal Bibi told that they had solemnized nikah of Mst. Khalida with Muhammad Ilyas accused.

6. The complainant closed his evidence on 14.02.2006 after tendering complaint Ex.PL. Thereafter the learned trial Court recorded statements of the accused under section 342 of the Code of Criminal Procedure. The accused denied the allegations leveled against them and claimed their innocence. Appellants Muhammad Ilyas stated as under:-

“The PWs with complainant filed a false complaint against me and my family with enmity and the PWs are related to the complainant party. --- The occurrence of zina did not happen. Khalida accused in this case is my wife and I did never commit zina bil raza with Khalida before our marriage. The enmity with complainant party is that Zulfiqar complainant had borrowed about Rs.50,000/- from my father namely Maqbool Hussain co-accused prior to registered a case and present compliant against us before my marriage with Khalida she was divorced by Rashid ex-husband of Khalida Parveen co-accused. After divorce Khalida Parveen co-accused insisted Zulfiqar complainant and her parents to marry her with me because Khalida was already engaged with me when my father Maqbool Hussain co-accused demanded the above mentioned borrowed money from complainant, he refused to return the said amount and also refused to give hand of Mst. Khalida Parveen to me. Then after on account of refusal of the complainant Khalida Parveen co-accused contracted ✓

marriage with me with her own consent and then after registration of the case against me and my other relatives my wife Khalida Parveen filed a suit for jactitation of marriage against Rashid ex-husband of Khalida Parveen which was decreed in favour of Khalida Parveen co-accused in the court of Mr. Haji Ahmed Civil Judge/Judge Family Court Gojra. The complaint is absolutely false which was filed against me and my family members. We all are innocent.”

Appellant Khalida Parveen also made the same statement in her defence.

7. The learned trial Court after hearing arguments advanced by the learned counsel for the parties and assessing the evidence convicted the appellant as mentioned in opening paragraph of this judgment.

8. Ch. Imtiaz Ahmad Kamboh, learned Counsel for appellant Muhammad Ilyas has argued that since the complainant has mentioned in the averments of the FIR that his niece Mst. Khalida Parveen was divorced by her husband three months before lodging the FIR i.e. 08.03.2001 and the present appellant Muhammad Ilyas had contracted marriage with Mst. Khalida Parveen on 12.07.2001 after lapse of more than three months. So far as the stance of the complainant side that since the divorce was not declared “*Muassar*” by the Union Council is concerned, the same has been declared un-Islamic by the superior judiciary in reported judgment titled Allah Dad Vs. the State etc. 1992

SCMR 1273. The appellant has been convicted and sentenced under section 494 PPC but before application of section 494 PPC the disputed Nikahnama was required to be jactitated from a Court of competent jurisdiction which has not yet been jactitated in this case. Hence the application of section 494 PPC under the present facts and circumstances of the case is not relevant and the conviction under this provision of law is illegal and unlawful. He further argued that the other sections i.e. sections 468/471 under which the appellant was convicted and sentenced are ancillary sections attached with section 494 PPC. When section 494 PPC which pertains to *marrying again during lifetime of husband or wife* is not proved the application of section 468/471 regarding forged Nikahnama is not relevant. He further stated that Rasheed, who was alleged husband of Mst. Khalida Parveen, had never appeared as witness at the trial. The marriage between Muhammad Ilyas appellant and Mst. Khalida Parveen is an admitted fact. The learned trial Court has wrongly relied only and entirely on the assertion that the Notice of Talaq was later withdrawn, therefore, the divorce was not effected between Mst. Khalida Parveen and her husband Raseeed.

The learned Counsel for the appellant pleaded that while setting aside the impugned judgment dated 26.02.2007 of the learned trial Court the appeal filed by appellant Muhammad Ilyas against his conviction and sentence may be accepted and he may be acquitted of the charges, who is singly parenting two minor ✓

children (a son and a daughter) from this legitimate wed lock, and their unfortunate victim mother, wife of appellant, Mst. Khalida Parveen, has already been murdered.

9. On the other hand, Mr. Khurram Khan, learned DPG appearing for the State has made the following submissions:-

i) The Nikah between Khalida Parveen and Rasheed Ahmed is an admitted fact which was admitted by Mst. Khalida Parveen in her statement under section 342 Cr.P.C. This facts was also admitted by filing a suit for jactitation of marriage titled Khalida Parveen Vs. Rasheed Ahmed which was decided by the Family Court on 31.07.2003.

ii) According to the suit for jactitation of marriage, Mst. Khalida Parveen stated that Rasheed had sent Talaq to her on 14.06.2001. It is mentioned in the judgment of the Family Court that the Notice of Talaq as withdrawn on 17.07.2001, therefore, the Talaq was not effected at the time when the accused persons contracted the marriage. But there are contradictions in the averments of the FIR where according to the complainant Mst. Khalida Parveen was given Talaq by Rasheed Ahmed three months prior to lodging the FIR.

iii) However, evidence available on the record shows that the marriage of Mst. Khalida Parveen with Rasheed subsisted when the accused contracted marriage. ✓

10. I have heard the learned Counsel for the appellant as well as the learned DPG appearing for the State and perused the record with their assistance. Evidence of the prosecution witnesses as well as statements of accused have been perused. The relevant portions of the impugned judgments have been scanned.

11. Initially complainant Zulfiqar Ali had lodged FIR No.217/01 against accused Muhammad Ilyas (present appellant), Abdul Sattar, Abdul Waheed, Ehsan and Mst. Khalida Parveen on 08.07.2001 at police station Saddar Gojra, District Toba Tek Singh wherein he stated that **his niece Mst. Khalida Parveen had been divorced about three months prior to lodging the FIR** and she was living in his house. Accused Muhammad Ilyas had bad eye on Mst. Khalida Parveen and he used to tease her. In the night between 06/07.07.2001 at about 2.30 a.m. when he returned home from Faisalabad he saw in the moonlight that accused Abdul Sattar and Abdul Waheed were standing at the door of his house. He enquired from them the reason of their standing there, upon which they went away. He entered his house and found accused Ehsan standing in the veranda and on his *lalkara* the said Ehsan fled away. In the meanwhile accused Muhammad Ilyas while holding his shalwar appeared from the residential room in naked condition. The complainant tried to apprehend him but he succeeded in fleeing away. He entered the room and saw that Mst. Khalida Parveen was tying her shalwar. On his query, Mst. Khalida Parveen told him that accused Muhammad Ilyas gave him sleeping pills which she mixed in the curry and administered to her maternal grand parents Miraj Din ✓

and Hanifan Bibi. Accused Muhammad Ilyas had been committing zina with her while accused Ehsan remained on guard in the veranda. The complainant further stated that he attended her parents who were unconscious. Whereas in the private complaint (Mark-C) dated 13.04.2002 , the complainant stated that when he entered his house, he found accused Ehsan Bari, armed with hatchet, standing in the veranda, who on seeing the complainant fled away, the complainant entered the room and saw that accused Muhammad Ilyas and Mst. Khalida Parveen were committing zina on a cot after removing their shalwars. On seeing him, accused Muhammad Ilyas, holding his shalwar, pushed the complainant and succeeded in fleeing away. Khalida Parveen tied her shalwar. The complainant taunted Mst. Khalida Parveen and locked her in a room. The complainant further stated that his parents were sleeping in the courtyard but he did not wake them up and he also did not raise alarm due to his honour. He took meal upon which he felt drowsiness because Mst. Khaida Parveen had administered intoxicant in the meal for commission of '*Haramkari*' with Muhammad Ilyas accused. However the complainant had not produced any medical report in this regard. Thereafter the complainant filed the instant private complaint before the Additional Sessions Judge, Gojra on 09.07.2002 against nine accused including Muhammad Ilyas (present appellant) and Mst. Khalida Parveen. However the complainant made improvements in the version of the private complaint by giving details of marriage of Mst. Khalida Parveen with Rasheed Ahmed. He also stated in the private complaint that Rasheed Ahmed, alleged husband of

Mst. Khalida Parveen, had sent a Notice of Talaq to Mst. Khalida Parveen but the said Notice was later withdrawn by Rasheed Ahmed through Union Council No.68, Sitiana Bangla Chak No.39/GB, Tehsil Jarranwala, District Faisalabad upon which the Administrator, Union Council had issued certificate regarding ineffectiveness of Talaq on 02.08.2010. He further stated that on registration of the case both the accused Muhammad Ilyas and Mst. Khalida Parveen were arrested, and after obtaining bails, had been living in the house of Maqbool Hussain and Iqbal Bibi (parents of accused Muhammad Ilyas). The complainant himself admitted in his private complaint that when he alongwith Muhammad Ashraf, father of Mst. Khalida Parveen and Mushtaq Ahmad went to the house of the accused for return of Mst. Khalida Parveen, accused Maqbool Hussain and Iqbal Bibi refused to return Mst. Khalida Parveen stating that they had contracted Nikah of Mst. Khalida Parveen and Muhammad Ilyas.

12. Complainant Zulfiqar Ali appeared as PW.1 at the trial. He was not the eye witness of the actual act of the alleged occurrence of zina because he himself stated that when he entered his home he saw accused Muhammad Ilyas in naked condition coming out of the residential room holding his shalwar in his hand and he succeeded in fleeing away while her niece was tying her shalwar. Whatever he stated about the occurrence of zina was based on hearsay as this information was provided to him by her niece Mst. Khalida Parveen. The other witness who appeared at the trial is PW.2 Mushtaq Ahmed, was also not the witness of the alleged occurrence of zina. He stated that on

10.08.2001 he alongwith Muhammad Ashraf, Zulfiqar and Khaliq Qamar went to the house of Maqbool Hussain accused for return of Mst. Khalida where Maqbool Hussain and Iqbal Bibi stated that they had solemnized Nikah of Mst. Khalida Parveen with Muhammad Ilyas accused.

13. The most important witness in this case was Muhammad Ashraf, father of Mst. Khalida Parveen, who had direct nexus with the case as being father of Mst. Khalida Parveen. He neither lodged the FIR/private complaint nor appeared at the trial as PW. Furthermore Mst. Khalida Parveen while recording her statement under section 342 Cr.P.C. categorically stated that her co-accused Ilyas is her husband. Her ex-husband Rasheed divorced her prior to her Nikah with Muhammad Ilyas and after the divorce her maternal uncle Zulfiqar (complainant) borrowed Rs.50,000/- from Maqbool Hussain (father of accused Muhammad Ilyas) and due to his greed he made her engagement with her co-accused Muhammad Ilyas but later on due to bad intention/mala-fide he refused to give her hand to Ilyas accused. When Maqbool Hussain demanded his money back, the complainant refused to return the same. She further stated that she insisted Zulfiqar complainant and her parents to marry her with Ilyas co-accused but her maternal uncle Zulfiqar complainant refused to do so. Then she with her free consent married with Ilyas co-accused. She further stated that the complainant in connivance with her ex-husband Rashid alongwith her parents obtained a fabricated certificate from the union council, which it was not competent to issue, for invalidating the talaq already ✓

given by her ex-husband Rasheed. Therefore, she filed a suit for jactitation of marriage against Rashid ex-husband which was decreed in her favour by the Family Court, Gojra. However, this judgment dated 31.07.2003 passed by Civil Judge Ist Class/Judge Family Court, Gojra in Family Case No.24-FC of 2003, titled as Khalida Parveen Vs. Rashid was set aside by Additional District Judge, Gojra, vide judgment dated 11.03.2004, in Civil Appeal No.261-13 of 2003, with observation "*the suit of jactitation of marriage of the plaintiff is being treated as suit for dissolution of marriage and the same is decreed and the marriage between the parties would be deemed to be dissolved.*" She also stated that she had a baby girl aged 2 years, at that time, from her wedlock with Ilyas, co-accused.

14. From the above-mentioned facts and circumstances, it is not clear that on what date Rashid, ex-husband of Mst. Khalida Parveen had pronounced talaq to her. In rural areas, illiterate people usually do not keep exact record of dates even about their family events. It appears that the present litigation was triggered after the Talaq was pronounced and the divorcee Mst Khalida Parveen had gone for the second marriage, i.e., with the present appellant Ilyas. The story of withdrawal of the Talaq also emerged afterwards, to block the second marriage of Mst Khalida parveen. **At the time of lodging the FIR the complainant himself reported that Mst. Khalida Parveen was divorced by her ex-husband Rashied three months prior to lodging the FIR.** It seems that at the time of lodging of the FIR the complainant himself was convinced that talaq between Mst. Khalida Parveen and ✓

Rashid was effected. From the record, the actual date of pronouncement of talaq to Mst. Khalida Parveen by her ex-husband Rashid is not clear and the said Rashid, alleged ex-husband of Mst. Khalida Parveen was not produced as a prosecution witness. However, the complainant produced copy of application Ex.PD regarding withdrawal of Notice dated 18.06.2001 of Talaq on 17.07.2001 by her ex-husband Rasheed. The contents of Ex.PD show that Rasheed himself stated in Notice dated 18.06.2001 that **he had already divorced his wife Mst. Khalida Parveen (“talaq dedi hay”)**. From the averments in this document it is established that Rasheed had already divorced Mst. Khalida Parveen prior to this Notice dated 18.06.2001 and it was thereafter that documentary proceedings were initiated for effectiveness of Talaq. The story of withdrawal of the notice had also emerged afterwards. In Shariah, no written document is required for Talaq or Nikah etc. only words of mouth are sufficient for this purpose. However, these are the legal requirements of the law of the land. Such proceedings for recording effectiveness etc., were although initiated, but subsequently stalled, due to the disputes, as narrated by the appellant Ilyas and Mst. Khalida Parveen (murdered) in their statements, and also in order to block the second marriage of Mst Khalida parveen, as is usually the case with unfortunate divorcees, particularly in this segment of the society.

15. Furthermore, it is very important to note that the Additional District Judge, Gojra, District Toba Tek Singh, vide his judgment dated 11.03.2004 passed in Civil Appeal No.261-13 of 2003 ✓

(Rashid Ahmed Vs. Mst. Khalida Parveen), argued about 'irregularity' or 'invalidity' of the second marriage in question, of Mst Khalida Parveen with appellant Ilyas according to Fiqh, but did not declare this marriage as "void", vide its para 8, reproduced below:

"It has also come on the record that the defendant (Rashid Ahmed, first husband) divorced the plaintiff on 14.06.2001 through Ex.D-2 but without intimating the plaintiff withdrew the notice of talaq on 02.08.2001. But the plaintiff during the period of iddat contracted her second marriage with Ilyas on 12.07.2001 and it was not in the knowledge of the plaintiff (Mst. Khalida Parveen) that the defendant had withdrawn the notice of talaq. Muhammad Hussain Secretary Union Council DW-3 deposed that Rashid Ahmed (defendant) submitted his application for withdrawal of notice of talaq on 17.07.2001. This witness admitted that Mst. Khalida (plaintiff) never appeared in the union council and the certificate of ineffectiveness of talaq was issued without hearing her. All these facts show that the withdrawal of notice of talaq was secretly made and without the knowledge of the plaintiff and she contracted her marriage with one Ilyas on 12.07.2001 with the period of iddat. Under Muhammadan Law if any marriage is contracted during the period of iddat then such marriage is not void and it is only an irregular marriage and the child born from the wedlock of the plaintiff with Ilyas is legitimate. Learned trial court has committed illegality while decreeing the suit of jactitation of marriage, therefore, the same is set aside and the suit of jactitation of marriage of the plaintiff is being treated as suit for dissolution of marriage and the same is decreed and the marriage between the parties would be deemed to be dissolved." ✓

In this connection, section 494 PPC, is also reproduced below:

“Marrying again during lifetime of husband or wife. Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

From the above. it is clear that section 494 PPC would have been attracted if the marriage between appellant Ilyas and Mst Khalida Parveen was declared “void”, which is not the case here.

16. For what has been discussed above, I am of the view that the complainant has not been able to prove his case beyond any shadow of doubt. Resultantly, Cr. Appeal No,50/L/2007 filed by appellant Muhammad Ilyas against his conviction under sections 494 PPC, sentence of three years R.I. with fine of Rs.3000/- or in default thereof to further undergo three months S.I. and under section 468/471 PPC and sentence of two years R.I. with fine of Rs.2000/- or in default thereof to further undergo two months S.I. vide judgment dated 26.02.2007 passed by the learned Additional Sessions Judge, Gojra, District Toba Tek Singh in Hudood Complaint No.23-7A of 2002, Hudood Complaint Trial No.3 of 2003, is accepted. Appellant Muhammad Ilyas is present on bail. His bail bonds should be released and the sureties be discharged by the learned trial Court.

17. These are reasons of my short order dated 02.08.2012.

 Sol -
Justice Shahzad Shaikh

Dated, Lahore the
2nd August, 2012
Imran/*

FIT FOR REPORTING.

 Sol -
Justice Shahzad Shaikh