

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL Appeal NO.31/I/2008

1. Muhammad Riaz son of Allah Ditta
2. Mst. Nasim Akhtar daughter of Baqri, wife of
Muhammad Riaz,

Both Muslim Sheikh by caste, residents of Chak No.
24/SB, Tehsil and District Sargodha.

..... Appellants

Versus

The State.

..... Respondent

Counsel for the appellants	...	Ch. Shahid Tabbasum, Advocate
Counsel for the State	...	Ch. Abdul Razzaq, Deputy Prosecutor General
No.& Date of F.I.R Police Station, district	F.I.R No.63/06 dt. 08.04.2006 Bhagtanwala, District Sargodha.
Date of Judgment of trial Court	...	28.01.2008
Date of Institution	...	27.03.2008
Date of hearing	09.01.2009
Date of decision	09.01.2009

JUDGMENT:

Justice Syed Afzal Haider, Judge: Muhammad Riaz and Mst. Nasim Akhtar appellants have jointly filed this appeal whereby judgment dated 28.01.2008 passed by the learned Additional Sessions Judge, Sargodha, convicting both of them under Section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 has been challenged. Muhammad Riaz was sentenced to rigorous imprisonment of ten years whereas Mst. Nasim Akhtar was sentenced to rigorous imprisonment for five years. Benefit of Section 382-B of Code of Criminal Procedure was extended to both the appellants.

2. The prosecution case in brief is that complainant Muhammad Riaz PW.4 got registered a crime report, F.I.R No.63/06 dated 08.04.2006, under Section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 at Police Station Bhagtanwala District Sargodha alleging therein that on 28.07.2005 her elder sister Mst. Asmat Bibi was wife of

Muhammad Riaz accused and they were living in the complainant's house. In the night between 13/14.01.2006 accused Muhammad Riaz, Kala, Shahbaz, Sabtain Shah and two unknown persons abducted/enticed away complainant's unmarried sister Mst. Nasim Akhtar alias Rani with the object of committing Zina-bil-jabr with her. The accused also took away rupees 10,000/- and jewellery weighing 1¼ Tola. In the morning of 14.01.2006 at 7.00 a.m, Sultan and Pervez PWs saw Mst. Nasim Akhtar in a wagon bound towards Sargodha. The complainant approached the accused for return of Mst. Nasim Akhtar. He promised for her return but later on resiled from his promise. The complainant thereafter submitted an application before Additional Sessions Judge, Sargodha and the learned Judge on 01.04.2006 disposed of the said application with a direction to the complainant to approach the S.H.O. Police Station Bhagtanwala. Thereafter the Crime Report was registered.

4. Police investigation ensued as a consequence of registration of F.I.R. Zulfiqar Ahmad SI investigated the case. He prepared site plan, recorded the statements of the PWs under Section 161 of the Code of Criminal Procedure. Muhammad Riaz accused was arrested on 19.05.2005. During investigation Muhammad Riaz and Mst. Nasim Akhtar were found guilty whereas the remaining accused were found innocent. Section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 was altered to Section 10 of the said Ordinance. Mst. Nasim Akhtar refused to get herself medically examined. The S.H.O submitted a report in the Court under Section 173 of the Code of Criminal Procedure requiring the accused to face trial. The names of accused Shahbaz, Bashir Ahmad, Kala, Ghulam Rasool and Sibtain were mentioned in Column No.2, whereas Muhammad Riaz was placed in Column No.3 and the name of Mst. Nasim Akhtar, on pre-arrest bail, was mentioned in Column No.4. The charge was framed on 25.06.2007 against

Muhammad Riaz and Mst. Nasim Akhtar under Section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. Both of them pleaded not guilty and claimed trial.

5. The prosecution produced eight witnesses to prove its case. The gist of the depositions of the prosecution witnesses is as follows:-

- (i) PW.1 Doctor Muhammad Zahid Shah deposed that he medically examined Muhammad Riaz accused on 26.05.2006 and found him fit to perform sexual intercourse.
- (ii) PW.2 Muhammad Akbar S.I. deposed that on 08.04.2006 he recorded F.I.R Ex.PC, on the statement of complainant Muhammad Riaz. After recording F.I.R he forwarded the police file to Zulfiqar Ahmad SI for further action.
- (iii) PW.3 Misry Khan MHC, deposed that on 26.05.2006 Zulfiqar Ahmad SI handed over to him

one sealed envelope which he kept in Malkhana and on 29.05.2006, he handed over the same to Iftikhar Ahmad Constable for its delivery to the office of Chemical Examiner, Rawalpindi. He affirmed that so long as the said sealed envelope remained in his custody no one tampered with it.

(iv) Muhammad Riaz complainant appeared as PW.4 and affirmed the story mentioned in his Crime Report. However, he deposed that during investigation he came to know that accused Riaz had married his sister Nasim Akhtar on 10.12.2005 while her elder sister Asmat Bibi was still the wedded wife of Riaz accused and as such Riaz and Nasim Akhtar were committing Zina with each other.

(v) PW.5 Sultan deposed that on 28.07.2005 Asmat Bibi sister of complainant married Riaz accused

and they started living in the house of complainant.

On 14.01.2006 at about 7.00 a.m, he saw accused

Riaz, Kala, Shahbaz, Sabtain Shah alongwith

Nasim alias Rani going towards Sargodha in a

wagon. He further deposed that during

investigation he came to know that accused Riaz

had married Nasim on 10.12.2005 when Asmat

Bibi was still the wife of Riaz accused.

(vi) PW.6 Muhammad Mumtaz Constable deposed that

he had taken Riaz accused to the Doctor on

26.06.2005 and got him medically examined.

(vii) Abdul Hameed Niazi, S.P. Traffic Police appeared

as PW.7 and deposed that on 15.07.2006 the

Hon'ble Chief Justice, Lahore High Court Lahore,

directed him to look into the facts of this case and

submit a report. He called the Investigating Officer

of the case as well as the parties. He heard both the

parties and found that accused Riaz Ahmad had married Asmat Bibi, elder sister of Nasim Akhtar and then divorced Asmat Bibi on 07.12.2005 and after three days he solemnized Nikah with Nasim Akhtar, younger sister of Asmat Bibi, within Iddat period of Asmat Bibi and since they were living together as husband and wife so the witness

observed that they are committing Zina-un-Niza.

(viii) Muhammad Akbar S.I. appeared as PW.8. He verified the investigation conducted by late Zulfiqar Ahmad, the erstwhile Investigating Officer. He verified his handwriting and signatures on the site plan Ex.PD and the injury statement Ex.PA/1.

6. After close of the prosecution case, the statements of the accused were recorded under Section 342 of the Code of

Criminal Procedure on 14.01.2008. The accused denied the allegations leveled against them. Riaz appellant stated as under:

“Mst. Asmat Bibi was married with me. She desired divorce, so on 07.09.2005 verbally. After divorce her parents demanded more ornaments and money, then I again gave them ornaments and money and got written divorce on 07.12.2005. I performed Nikah on 10.12.2005 with Nasim Bibi with the consent and will of her parents. They again demanded more money to which I refused and they falsely lodged this case against me. I earlier divorced Asmat Bibi on 07.12.2005 which she accepted. I again sent a divorce to Union Council on 06.07.2006 and narrated above facts. PWs are relative inter-se and they deposed falsely against me due to enmity.”

Mst. Nasim stated in her statement as under:

“My sister Asmat Bibi was married with Riaz. She herself demanded divorce from him and Riaz divorced her on 07.12.2005. When my parents received money and ornaments from Riaz they stopped me to enter into Nikah with him. He again gave them money and written divorce was effected on 10.12.2005 I married with Muhammad Riaz after divorce and performance of Iddat of Asmat Bibi. PWs have falsely deposed against me.”

7. The accused produced Muhammad Sarfraz as DW.1 who deposed that "on 07.09.2005 Riaz accused came to me. He took me alongwith Munir to the house of Baqri. Asmat Bibi wanted to get divorce from him. In our presence Riaz accused divorced his wife Asmat Bibi three times. In our presence Baqri, complainant, promised to give hand of his younger daughter Mst. Nasim Bibi to Muhammad Riaz accused, if he pays gold ornaments and Rs.50,000/- to him. Accused Riaz contracted marriage with Nasim Bibi after observing Iddat period. Complainant has lodged this false case due to greed."

8. At the conclusion of the trial the accused were convicted and sentenced as mentioned in opening paragraph of this judgment. Learned trial Court in the concluding paragraph of his judgment struck an issue: "The only dispute is that whether Nikah between both the accused was solemnized during Iddat period of Asmat Bibi or afterwards". Learned trial Court found that two dates were introduced by Riaz accused in order

“to save his skin from punishment”. It was, therefore, held that both the accused married during Iddat period of Asmat Bibi and as such were guilty of the offence of Zina-bil-raza.

9. I have gone through the record and have also perused the evidence both on behalf of the prosecution side as well as the defence. I have also heard learned Counsel for the appellants and learned Deputy Prosecutor General on behalf of the State.

10. On 25.06.2007 the learned trial Court charged both the accused that they were living together and committing Zina-bil-raza punishable under Section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and both of them denied the charge. On 24.09.2007 the complainant stated that he was apprised that marriage between the two accused had taken place on 10.12.2005 when his elder sister, Mst. Asmat Bibi was still the wife of Riaz accused.

11. According to the statement of Riaz accused the sequence of divorce is as follows:-

(a) Accused Riaz gave oral divorce to his wife Mst.

Asmat Bibi on 07.09.2005.

(b) After divorce the parents demanded more ornaments and money and got written divorce on 07.12.2005.

(c) Nikah of Riaz accused with Mst. Nasim Akhtar accused was performed on 10.12.2005 with the consent of her parents.

(d) Still another divorce was sent to the Union Council on 06.07.2006 after the case was registered against him.

12. Statement of Mst. Nasim Akhtar accused corroborates the two dates of the written divorces but she does not say that oral divorce was not given to her sister on 07.09.2005. Learned trial Court has however accepted 10.12.2005.

13. The basic purpose of examination of accused person under Section 342 of the Code of Criminal Procedure is to put the accused to notice on the points which are likely to influence the Court and thereby provide him an opportunity to explain circumstances which, having appeared in the evidence of the prosecution, tend to incriminate him.

14. On 05.11.2008 I had passed the following order:-

“Mst. Nasim Akhtar, appellant is present on bail alongwith his Counsel. During the course of hearing it transpired that the case hinges on a law point regarding validity of marriage of appellant No.1 with appellant No.2.

Learned Counsel wants time to prepare the legal proposition for detailed arguments. He further states that the matter is short and can be disposed of in about an hour and since he has to travel all the time from Lahore to Islamabad so if

the Bench is available at Lahore the case may be heard in Lahore.

I told the learned Counsel that in the week commencing 17th November Bench will be available in Lahore.

The office is directed to place this file before the Hon'ble Chief Justice for this appeal to be transferred to Lahore for disposal on 18th November, 2008. The Counsel has been informed that the case will be fixed on 18.11.2008 in Lahore subject to the approval of My Lord the Chief Justice."

15. Thereafter on two dates the case could not be taken up because on 18.11.2008 learned Counsel for complainant filed power of attorney and sought time to prepare the case and on 11.12.2008 the learned Counsel for appellants was busy before Lahore High Court, Rawalpindi Bench.

16. The final argument that clinched the issue has been stated by learned trial Court in Para 12 of the judgment in following words:-

“This Court is of the view that they both entered in Nikah during Iddat period of Asmat Bibi, and as such, are guilty of committing Zina-bil-raza.

Accused Riaz is the main character of this case....”

17. The crux of the deposition of PW.7 who happened to be S.P. Traffic, quoted above, that a husband after divorcing his wife is not competent to enter into another Nikah so long as the first wife is in Iddat may be overlooked because even senior Government Officers may not be aware of the provisions of their personal law but an Additional Sessions Judge, is supposed to be well versed, as a student of law, with the fundamental principles of Muslim Personal Law pertaining particularly to family life. Iddat is a period at the expiry of which a divorced woman or a widow is entitled, under the

personal law, to contract another marriage. It would be advisable here to dilate upon this aspect of the Muslim Personal Law.

18. The derivative of the word Iddat **عِدَّت** is **ع-د-د**.

The word ADDA in fact means: to count, reckon. The Arabic equivalent, as per Qamus, the Elias Modern Dictionaries

Arabic-English, Ninth Edition, is **حَسِبَ** which means: to

reckon, consider, regard, esteem. It, therefore, implies calculating, counting or reckoning. The words **مَعْرُودَات** meaning

“The prescribed” period, occurs in Verse 185 of Chapter 2 of

Holy Quran; the word **تَعْرَوَا** meaning ‘to count’, occurs in

Verse 34 of Chapter 14 of Holy Quran, the word **مَعْرُورٌ** meaning

“a few” appears in Verse 20 of Chapter 12 of Holy Quran and

the word **عَرَأَ** i.e. to keep a full account finds mention in

Verse 84 of Chapter 19 of Holy Quran, to quote a few

instances. The words are derived from the same root. The

words **تَعْرَان** and **عَرَد** as used in common parlance

being derived from the same root would explain the meaning and scope of the word Iddat. The following Verses of the Holy Quran deal with the period of Iddat in different situations as well as connected matters:-

- i) Verses 224, 228, 232, 235, 240 and 241 of Chapter 2, Sura Baqra of Holy Quran;
- ii) Verse 49, Chapter 33, Sura Al-Ahzab, of Holy Quran, and
- iii) Verses 1, 4, 6 and 7 of Chapter 65, Sura Al-Talaq.

19. It is, therefore, evident that a male is under a disability to contract marriage with a female undergoing period of Iddat relating to her former marriage, which has come to an end on account of death or pronouncement of divorce but this inability disappears when the female wishes to enter into another matrimonial relationship after the period of Iddat has expired.

20. A Survey of the above mentioned Verses indicates that marriage contract can come to an end either by death of

husband or divorce having been pronounced and the period of Iddat consequently depends upon the mode the marriage is terminated. In case of death of husband, when the marriage has been consummated, the period is four months and ten days and in case of pregnancy the period of Iddat would extend upto delivery or the occasion of miscarriage. In case of death of husband the period of Iddat for the wife commences from the time of death. In the case of divorce, on the other hand, the wife has to wait for three menstrual courses and in the event of wife not being subject to menstruation the period of Iddat is three lunar months and Iddat commences from the time the divorce is pronounced.

21. One consequence, however, of an invalid marriage are

- i) that the children conceived and born during irregular or invalid marriage (i.e. not "vitiating and rendered illegal by a radical defect" which makes the marriage void ab-initio) are legitimate;
- ii) Iddat becomes mandatory and
- iii) dower

becomes payable. The reason for conferring legitimacy upon the children born out of an irregular marriage, we are told, is that legitimacy is traced to the date of copulation and not the date of marriage.

22. However the period of Iddat is only a temporary impediment. It is specific period oriented. It is a relative or temporary disability. Under Sunni Law, to which the parties belong as per presumption, an unlawful conjunction by way of temporary barrier i.e. marriage during Iddat, renders the marriage irregular and not void. An irregular marriage automatically becomes regular the moment the bottleneck is removed i.e. the Iddat period expires. The earliest precedent on the point was the case of Aizunissa Khatoon Versus Karimunnis Khatoon reported as (1896) 23 Cal. 130 wherein the marriage with the other sister during the subsistence of marriage with her sister, was declared void but this view was not accepted in the case of Tajbi Versus Mowla Khan reported

as (1917) 41 Bom. 485 = 39 i.e. 603. Thereafter the Lahore High Court in the case of Taliemand Versus Muhammad Din, a D.B. decision in which the judgment was written by Justice Agha Haider, it was ruled, while relying upon the views expressed by Rt. Hon'ble Syed Ameer Ali, that under Hanfi law "marriage with wife's sister during the subsistence of the previous marriage with her sister is only fasid (invalid) and not batil (void ab initio)". Thereafter case of Rahiman Bibi Saheba Versus Mehboob Bibi Sahiba and others reported as AIR 1938 Madras 141 was decided. Reference in this context may also be made to the following precedents:-

(i) Muhammad Nawaz Versus The State
PLD 2004 Lahore 365 (at page 368)

(ii) 1. Shaukat Ali, 2. Mst. Nasim Versus The State
2004 SD 190 (at page 199)

23. Reverting to the facts of the present appeal I find that the element of abduction has not been proved, because Sultan PW.5, according to the complainant is a waj-takkar witness and also paternal uncle of the complainant. There is no direct

evidence of abduction or elopement either. In fact PW.4, Muhammad Riaz, the complainant conceded that his "sister went with Riaz with her free consent". It is in evidence, even of PW.7 Abdul Hamid Niazi, S.P. Traffic that accused Riaz divorced Mst. Asmat Bibi, the elder sister of Mst. Nasim Akhtar, on 07.12.2005 and married the latter three days thereafter i.e. on 10.12.2005. Five other accused were found innocent during investigation. The occurrence is stated to have taken place during night between 13/14 of January 2006 but the crime report was got registered on 08.04.2006 i.e. an unexplained delay of 86 days. Such a delay may be seen in the light of the statement of appellant Muhammad Riaz who stated that after divorce of Asmat Bibi, her parents demanded more ornaments and money at the time of divorce of Mst. Asmat Bibi and still more money at the time of later marriage with her sister.

24. In this view of the whole matter it is not possible to maintain conviction and sentence recorded by learned Additional Sessions Judge, Sargodha under Section 10(2) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 in Hadood Case No.11/2007, Trial No. 7/2007, vice his judgment dated 28.01.2008, impugned in Criminal Appeal No.31-I-2008 as serious doubt has crept in the prosecution version. Consequently the appeal jointly filed by both the appellants is accepted. Mst. Nasim Akhtar is on bail. She is present in Court. She is acquitted and her sureties are released of their bonds. Appellant Riaz is also acquitted. He shall be released forthwith unless required in any other case.

Syaidar

Justice Syed Afzal Haider

Dated Lahore the
9th January 2009
M. Imran Bhatti/*

Fit for reporting.

Syaidar

Justice Syed Afzal Haider