

IN THE FEDERAL SHARIAT COURT.
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE.

CRIMINAL APPEAL NO.43/K OF 2006 (LINKED
WITH)

Khavind Bux son of
Punoo Khan Appellants.

Versus

The State Respondent.

CRIMINAL APPEAL NO.37/K OF 2006.

Nasreen Bibi wife of
Khalil Ahmed, Appellants.

Versus

The State Respondent.

Counsel for the Mr. Mr. Inamullah Khan and
Appellant Abdul Waheed Kanjoo
Advocates, respectively.

Counsel for the Mr. Agha Zaffar, Assistant
State Advocate General, Sindh.

FIR No. date and 01/2000, dated 02.01.2000
Police Station. P.S. New Town (Lady Cell),
Karachi East.

Date of Judgment of 13.7.2006
Trial Court.

Date of Institutions 11.9.2006 and 10.8.2006
..... respectively.

Date of hearing 02.11.2006

Date of decision: 12.12.2006

JUDGMENT.

HAZIQUL KHAIRI, CHIEF JUSTICE:- These two appeals i.e. criminal appeal No.43/K of 2006 filed by appellant Kavind Bux and criminal appeal No.37/K of 2006 filed by Mst. Nasreen Bibi are directed against the Judgment, dated 13.7.2006, passed by the learned District and Sessions Judge, East Karachi in Session Case No.73/2000 whereby appellant Khavind Bux was convicted under section 13 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as "the said Ordinance") and sentenced to undergo five years R.I. and fine of Rs.50,000/- or in default thereof to further suffer six months S.I. whereas appellant Mst. Nasreen Bibi was convicted under section 10(2) of "The said Ordinance" and sentenced to undergo R.I. for three years with fine of Rs.5,000/- or in default thereof to further suffer S.I. for three months. Both the appellants were extended benefit under section 382-B, Cr.P.C. As both the appeals arise from the same judgment, therefore, I propose to dispose of these appeals by this Judgment.

2. Briefly the prosecution case as alleged in FIR dated 2.01.2002 is that the complainant Khalil Ahmed while going to Punjab on 09.09.1999 left his wife Mst. Nasreen appellant herein with his sister Mst. Haseena Mai and his brother-in-law Abdul Hakeem both accused in a house in Al-Hilal Society where they were living together. On 14.9.2000 he came back to Karachi and found all of them were missing from the house. He searched for them and came to know that they had shifted to Bilawal Shah Noorani, University Road, Karachi where he found only his sister Mst. Haseena Mai accused and

brother-in-law Abdul Hakeem accused who told him that his wife had gone to his village in Punjab, he therefore, left for his village in Khanpur in Punjab in search for her and found that she was not there. Therefore, he approached the police and simultaneously carried on private search for her. Ultimately, he registered FIR against both Abdul Hakeem and his wife Mst. Haseena Mai, at Police Station, New town Karachi. Police arrested both of them and Mst. Nasreen appellant was allegedly recovered from their possession. During the course of investigation it was revealed that Mst. Nasreen got married to one Hakim Ali Zardari with the permission of Khalil Ahmed, the complainant in the case through the good offices of appellant Khavind Bux. An interim challan was submitted in the Court in which he was kept in column No.2 along with Hakim Ali Zardari. This interim challan was submitted on 23.2.2000 with offence under sections 15/16/10(2) of "the said Ordinance". Subsequently, further investigation was conducted and Hakim Ali Zardari, Mst. Nasreen and Khavind Bux were arrested. The abductee Mst. Nasreen was examined under section 164, Cr.P.C. before the judicial Magistrate and after completion of investigation Abdul Hakeem and his wife Mst. Haseena Mai accused, Mst. Nasreen and Khavind Bux, appellants were finally charge sheeted under sections 15,16,10(3) of "the said Ordinance" and under section 420/34, PPC. The appellants and other co-accused did not plead guilty and claimed for trial. The prosecution examined the following witnesses:-

3. PW.1 Rab Nawaz, PW.2 Muhammad Ramzan, PW.3 Dr. Summaya Syed, PW.4 PC Samra Khan, PW.5 Khalil Ahmed, PW.6

Azeem Bakhsh, PW.7 Hakim Ali, PW.8 Wahid Bukhsh, PW.9 Faqir Muhammad, PW.10 Dr. Muhammad Hanif Sheikh and PW.11 ASI Huma Farooqi.

4. PW.7 Hakim Ali Zardari and PW.9, Faqir Muhammad, his brother both deposed that in the month of August, 1999 appellant Khavind Bux came to their house in Haji Rind Village, District Sanghar and told them that there was an unmarried girl available belonging to his acquaintances with whom marriage with Hakim Ali could be arranged. According to PW.9 he went to the house of the appellant Khavind Bux situated in Chakiwara Karachi where he was introduced to co-accused Abdul Hakeem, Mst. Haseena Mai and appellant Mst. Nasreen. They all told him that Mst. Nasreen was unmarried which was also confirmed by her. He further deposed that appellant Khavind Bux disclosed that she was the daughter of his friend and since her father was a blind person having minor sons, therefore, he demanded Rs.50,000/- from him towards her dowry. He further deposed that all the above accused along with complainant Khalil Ahmed came to his house in his village in Sanghar and asked him to make arrangements of Nikah. He called his brother PW.7 Hakim Ali from Punjab where he was serving in Army. He paid Rs.50,000/- to Khavind Bux at the time of Nikah on 3.9.1999 while all accused persons including complainant Khalil Ahmed were present. The Nikah was performed by PW.8 Molvi Wahid Bux. After about three months of their marriage appellant Khavind Bux came to him at his village and sought permission to take appellant Mst. Nasreen to Karachi on the plea that her father was seriously ill and promised to

return her after six days. Since she did not come back he came down to Karachi and enquired from Khavind Bux about her and was told that complainant Khalil Ahmed claimed to be her husband and had taken help of the police. He further deposed that no doubt complainant Khalil Ahmed was her husband but he had divorced her before her marriage with his brother Hakim Ali.

5. The deposition of PW.7 Hakim Ali was in line with the deposition of his brother PW.9 Faqir Muhammad on all the material points including payment of Rs.50,000/- made by him to appellant Khavind Bux. In cross-examination PW.7 stated that payment was made at the time of Nikah when so many persons were present including Abdul Hakeem, Mst.Haseena Mai, appellant Khavind Bux and even complainant Khalil Ahmed. They declared that Mst. Nasreen was virgin and unmarried. She lived with him as his wife for three months but he passed only few nights with her as mostly he used to remain on duty. He was informed by his brother PW.9 Faqir Muhammad on telephone at Hafizabad Punjab where he was on duty that his wife Mst. Nasreen had gone to Karachi for six days along with appellant Khavind Bux but on expiry thereof he refused to return her. He further deposed that on receiving this information he came to Karachi and went to Khavind Bux who furnished attested divorce deed dated 3.9.1999 of appellant Mst. Nasreen by Khalil Ahmed, complainant. In his cross-examination he stated that at the time of Nikah, appellant Khavind Bux had acted as Vakeel of Mst. Nasreen Bibi and signed the Nikahnama but other co-accused did not sign the same. This position is denied by Khavind Bux in his statement under

Section 342, Cr.P.C. According to PW.8, Wahid Bux, who performed the Nikah, Mst. Nasreen appellant did not appoint any Vakeel. In cross-examination he stated that he performed Nikah at the instance of Hakim Ali Zardari and his brother PW.9.

6. PW.1 Shah Nawaz and PW.2 Muhammad Ramzan, brothers of appellant Nasreen deposed that they were living in Karachi and their sister was left by Khalil Ahmed complainant with Mst. Haseena Mai and Abdul Hakeem in their house. They were not cross-examined on this point by either of them. In the presence of PW.1 and PW.2, Mst. Haseena Mai, Abdul Haeem and Khavind Bux were arrested. PW.6 Azeem Bukhsh, father of Mst. Nasreen deposed that she was living with Mst. Haseena Mai and Abdul Hakeem and when she was missing from their house, Khalil Ahmed complainant came to Khanpur Rahimyar Khan for her search. He was also not cross-examined by any one.

7. PW.11. Huma Faruqui ASI arrested Mst. Nasreen while she was in the company of Mst. Haseena Mai and Abdul Hakeem, accused while PW.4 Sumera Khan police constable stated that she was brought at the police station by PW.11.

8. The appellants were examined under section 342, Cr.P.C. Both the appellants completely denied the charge against them. However appellant Khavind Bux admitted that he had participated in the marriage between appellant Mst. Nasreen and PW. Hakim Ali Zardari and signed the Nikahnama but denied having acted as her Vakeel and even he had not seen Mst. Nasreen then. However, he admitted that he had brought appellant Mst. Nasreen from the house of PW. Hakim Ali

Zardari on the pretext that her brother was seriously ill as he wanted to rescue the said appellants Mst. Nasreen and to return her to her husband, the complainant.

9. As regards appellants Mst. Nasreen Bibi, her statement under Section 342, Cr.P.C. may be reproduced advantageously as under:-

“Q. It has come in evidence that you went to the house of PW. Faqir Muhammad at Shahdadpur and your marriage was solemnized with PW. Hakim Ali in presence of co-accused Abdul Hakeem, Mst. Haseena Mai and Khavind Bux whereas accused Khavind Bux became your Vakeel in the said marriage and you put your RTI on the Nikahnama, Ex.13-A, voluntarily as the bride. What have you to say?

A. I was forcibly taken by Abdul Hakeem and Mst. Haseena Mai to Shahdadpur. Accused Hakeem committed Zina with me and maltreated. Ex.23-A, is not bearing my RTI.

Q. It has come in evidence that you started living at Shahdadpur with PW. Hakim Ali as his wedded wife for about 3 months during which you conceived and then you were brought to Karachi by co-accused Khavind Bux on the pretext that your brother was sick and thereafter you were arrested on 20.3.2000 by ASI Huma Farooqi vide Ex.10-A. What have you to say?

A. PW. Hakim Ali also committed Zina with me for three months. Thereafter Khavind Bux brought me and rescued me. I did not conceive from Hakim Ali but after 8 months of my release I conceived from my husband complainant Khalil.”

10. She also recorded her statements under Sections 161 & 164, Cr.P.C. As per her statement dated 03.01.2000, under Section 161, Cr.P.C. her husband Khalil Ahmed had left her at the house of his sister Mst. Haseena Mai and her husband Abdul Hakeem situated in Bilawal Shah Noorani, University Road, Karachi. One day, she along with them visited a house where she was served tea whereafter she became unconscious. When she regained her consciousness, she found

that both of them, under a plan, had left her alone with PW.7 Hakim Ali Zardari in his house. He told her that he had purchased her and will get married to her. Thereafter she was taken away to Sanghar from where Karachi police recovered her and brought her back to Karachi. She had also made a statement under Section 164, Cr.P.C. before a Magistrate, reference of which is found vide order dated 01.05.2000, passed by Mr. Hussain Shah Bukhari, Sessions Judge, Karachi on her bail application. However, it is regrettable that such an important statement is missing and could not be traced out from the record. There is not a word about it in the impugned judgement also.

11. What is established beyond any shadow of doubt is that the complainant Khalil Ahmed had left appellant Mst. Nasreen Bibi with his sister Mst. Haseena Mai and brother-in-law Abdul Hakeem in Karachi and as per PW.11, Huma Farooqui she had arrested Mst. Nasreen along with them. According to PW.7 Hakim Ali Zardari and PW.9 Faqir Muhammad, both Mst. Haseena Mai and Abdul Hakeem were present at the time of Nikah ceremony at Sanghar. Neither PW.7 nor PW.9 were cross-examined by Mst. Haseena Mai or Abdul Hakeem and their statements in this regard stand unrebutted.

12. I will not rule out the possibility of accused Abdul Hakeem to have committed Zina with Mst. Nasreen Bibi, as alleged by her, in connivance with his wife while she was in their custody. How she came into the hands of PW.7 Hakim Ali Zardari and PW.9 Faqir Muhammad, is anybody's guess but she could not be a willing party to the scheme melted out by them. She remained first at the mercy of Mst. Haseena Mai and Abdul Hakeem and then at the mercy of

strangers who confined her in a house in Sanghar. The version of Mst. Nasreen Bibi was that in a state of intoxication she was made to put her thumb impression on the alleged Nikahnama. This was supported by his father PW.6 Azeem Bukhsh. He was not cross-examined on this point by accused Abdul Hakeem and Haseena Mai. No benefit monetarily or otherwise appears to have been accrued to appellant Nasreen Bibi in the entire episode. The role played by accused Abdul Hakeem, Haseena Mai, Hakim Ali Zardari and his brother is not free from doubt. It is not conceivable that appellant Nasreen Bibi will persuade her husband's real sister and her husband to take her into the interior of Sindh for sale to a total stranger namely Hakim Ali Zardari or for purposes of committing Zina with him or any other person. What transpires from the evidence on record is that she was a helpless women thrown at the mercy of a gang of criminals. Her plea that she was subjected to Zina at the very hands of Abdul Hakeem in connivance with her husband's sister Haseena Mai was not considered by learned Additional Sessions Judge. It cannot be ruled out that the said husband and wife might have played a major role, which is not all that visible. Similarly it cannot be ruled out that compelled by circumstances she became a tool in the hands of her near relations and strangers while apprehending her life in danger. However the other version as borne out from evidence on record is that Mst. Nasreen Bibi was divorced by complainant Khalil Ahmed vide divorce deed dated 7.5.1999, whereas her alleged Nikah with Hakim Ali Zardari had taken place on 03.09 1999. But there is nothing to show that she received the divorce deed/notice from the complainant or that a notice was sent to the Chairman under Section 7 of the Muslim Family Laws

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Ordinance. Learned counsel for the appellant also brought to my notice how the signature of complainant Khalil Ahmed on the alleged divorce deed was different and distinguishable from his signature on other documents on record. However without going into the question as to its validity or genuiness of the divorce disputed by the appellant Nasreen Bibi followed by her Nikah with Hakim Ali Zardari, it is pertinent to note that when she came back to Karachi with appellant Khavind Bux, Police was investigating into the matter for which reason PW.7 and PW.9 had allowed her to go along with Khavind Bux a stranger to her. In these circumstances it cannot be said that she had willfully committed sexual intercourse with any one within the meaning of Section 10(2) of the Ordinance and is thus entitled to benefit of doubt. Her appeal is accepted.


9. Now the case of appellant Khavind Bux is that he had sold away Mst. Nareen wife of the complainant for Rs.50,000/= to PW.7 Hakim Ali Zardari. His brother PW.9 Faqir Muhammad is stated to have paid the dowry amount for her marriage with him but no dowry whatsoever was provided by the appellant. The payment of this amount to him was categorically denied by him. There is thus word against word.

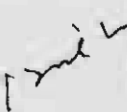
10. It may be pointed out that the payment of Rs.50,000/- was made in cash and no receipt was obtained by PW.9 from Khavind Bux for payment of this dowry amount nor it was mentioned in the Nikahnama which renders payment thereof to the appellant Khavind Bux highly doubtful. In Civil Cases the burden of proof of payment of money is upon the plaintiff. In a criminal cases much more is

required to convict an accused person. The prosecution has failed to establish, firstly, that there was sale of Nasreen Bibi as envisaged under section 13 of the Ordinance, and; secondly, the appellant had received the sale consideration viz Rs.50,000/- from Hakim Ali (PW.7) or his brother Faqir Muhammad (PW.9). What may not be overlooked is that there were many persons from the side of PW.7 at the time of Nikah ceremony but none of them was produced by the prosecution to prove payment of Rs.50,000/= to appellant Khavind Bux. Hence I hold that the prosecution has failed to prove that appellant Khavind Bux had sold away Nasreen Bibi for the purpose of illicit intercourse or for any unlawful and immoral purpose. Accordingly his appeal is also accepted.


11. These are the reasons for setting aside the impugned judgment dated 13.7.2006 vide my short order on 12.12.2006 with the result that the P.R. bond and security provided by appellant Mst. Nasreen Bibi, who was on bail, stood discharged and she was set free.

12. Accordingly, the jail authorities were also directed to release appellant Khavind Bux, if he was not required in any other criminal case.


(JUSTICE HAZIQUL KHAIRI)
Chief Justice

 Karachi, the
12th December, 2006.
Daud Rustmani/**P

Approved for reporting


(JUSTICE HAZIQUL KHAIRI)
Chief Justice

