

IN THE FEDERAL SHARIAT COURT  
( Appellate Jurisdiction )

PRESENT:

MR.JUSTICE ABDUL WAHEED SIDDIQUI

Criminal Appeal No.22/I of 1999

1. Tariq Mahmood s/o Mohammad Malik	.....	Appellants
2. Mst.Nasreen Akhtar d/o Muhammad Khan		
both by caste Rajput Bhatti, r/o Miana Phimbal, P.S Jatli Teh: Gujar Khan Distt: Rawalpindi		
	Versus	
The State	.....	Respondents
Counsel for the appellants	.....	Mr.M.Arshad Malik, Advocate
Counsel for the complainant	.....	Syed Hamid Bokhary Advocate
Counsel for the State	.....	Sardar Abdul Sami, Advocate
FIR No. Date and Police Station	.....	73 dated 2-7-1991 P.S Jatli
Date of judgment of trial court	.....	17-2-1999
Date of Institution	.....	6-3-1999
Date of hearing	.....	25-08-1999
Date of decision	.....	11-10-1999

Cr.A.No.22/I/99

JUDGMENT.

ABDUL WAHEED SIDDIQUI, J:- Appellants have assailed a judgment delivered by <sup>the</sup> court of Additional Sessions Judge, Gujar Khan on 17-2-1999 where by they have <sup>been</sup> /convicted under article 10(2) of the Offence of Zina(Enforcement of Hudood) Ordinance,1979 here after referred to as the said ordinance, and sentenced to R.I for 10 years each and whipping numbering 10 stripes each. They are also made liable to pay Rs.10,000/- each as fine and in case of default the defaulter shall suffer S.I for six months. Benefit of section 382-B Cr.P.C has also been extended to them.

2. Story of the the prosecution in brief is that Muhammad Khan(P W-1) submitted a written complaint(Ex.PA) on 2-7-1991 at P.S Jatli alleging therein that he is resident of Deh Phambal Miana, <sup>and</sup> is a village teacher. His close relative Muhammad Malik alongwith his wife Mst. Afsar Jan have been asking for marriage of his daughter Mst. Nasreen Akhtar aged 13½ years for their son Tariq Mahmood who is an employee in army. He refused about such marriage but due to close relationship these people used to come to his house. On 25-6-1991 at about 8.30 P.M Mst.Afsar Jan came to their house and took his daughter Mst.Nasreen Akhtar to her house and such permission was granted

due to relation-ship. Later on Mst Nasreen Akhtar was enticed away by Muhammad Malik, Mst.Afsar Jan, Muhammad Bashir and Muhammad Nazeer with a motive to force her for marriage with appellant Tariq Mehmood. Since the daughter of the complainant did not return, he started searching her. On 26-6-1991 he came across Allah Ditta (PW-2) and Muhammad Latif(PW-3) who informed him that all the above-named persons were seen by them accompanied by his daughter at Adda Doltala on the previous night who had enticed away his daughter for marriage as mentioned above. The complainant has been requesting Muhammad Malik etc. for return of his daughter, but they are keeping him on false promises. On the date of report they refused finally to return his daughter. Hence the complaint.

Originally six persons including the appellants were challaned and charged. MUhammad Malik, Muhammad Bashir, Muhammad Nazir and Mst. Afsar Jan were charged under article 11 of the said ordinance to which they did not plead guilty. Appellants were charged under article 10(2) of the said ordinance to which they also did not plead guilty.

3. To prove its case, prosecution examined 11 witnesses. Appellants and 4 acquitted accused examined 4 witnesses in their defence. Without summarising the entire evidence, to avoid unnecessary discussion, the crucial point in the present case <sup>for as</sup> so/ a just decision is concerned

is the determination of age of appellant Mst.Nasreen Akhtar on the

date of marriage without the permission of Wali which

marriage is admitted to have taken place according/both <sup>to law by</sup> the sides.

To question No.2 in her statement u/s 342 Cr.P.C, appellant

Mst.Nsreen Akhtar has replied:

"It is incorrect. I was major and sui juris at the time of occurrence and the document Ex.PH is a forged and fabricated having no connection with me which has been managed by the complainant in connivance with the Secretary Union Council and the police."

This Ex.PH is a copy of the register of Birth of Union Council Raman Tehsil Gujar Khan in which Date of Birth of this appellant — is shown as 5-1-1978. This document has been proved and exhibited by Safdar Hussain (PW-11), Secretary Union Council in the following words;

"On 26.6.1991, I was posted as Secretary in Union Council Rama , Gujar Khan. On the same day on the request of Muhammad Khan father of Mst Nasreen Akhtar, I issued the attested copy of birth certificate of Mst.Nasreen Akhtar, Ex.PH which is in my hand and bears my signatures. It is true copy of the birth entry NO.03 dated 10.1.1978. It has been compared with the original register also."

Inspite of a lengthy cross upon him, and even the multi-pronged court questions, the defence has failed to dislodge him.

4. About age of appellant Nasreen Akhtar, there is a part of medical evidence which is, at the first sight, in conflict with the above-mentioned Ex.P.H.(Certificate of the Union Council). Another part of the said evidence

corroborates Birth certificate Ex.PH. Lady Dr.Rukhsana (PW-10) who examined appellant Mst. Nasreen Akhtar on 9.12.1992 had found her to be 14-15 years of age at that time. During cross she has admitted that she had not advised for determination of the examinees clinical age. Volunteered that she was not requested for such. This witness has further admitted that at the time of examination, the examinee was apparently a mature and major girl. This part of the medical evidence corroborates the prosecution and Ex.P.H. The evidence of Dr.Muhammad Aslam DW-2 is however on different footings. He is deposing:

"On 3.12.92 I was working as Medical Superintendent in D.H.Q Rawalpindi, on that day Mst.Nasreen Akhter d/o Muhammad Khan was brought before me for assessment of age. I referred Mst. Nasreen Akhter to Radiologist D.H.Q,Rawalpindi for assessment of age. According to his report No.470 dated 3-12-92 the age of Nasreen Akhter is about 18 to 20 years. Certificate Ex. DW-1/A is my original certificate and carbon copies with the record."

During Cross he has admitted as under:

It is correct that on the application of Nasreen Akhtar d/o Muhammad Khan, there is no identity on the application and the thumb impression is not attested by me whether it belongs to Nasreen Akhter. It is correct that the report No.490 dated 3.12.92 is not written by me and signed by me.It is correct that the radiologist who has written report No.470 is alive and is in service. It is correct the Radio Grapher took X-ray were not taken in my presence.It is correct that certificate Ex.DW/A is based on the report of the radiologist No.470.

In view of this position, it was incumbent for the trial court to summon the Radiologist as a court witness but it was not done. Another piece of medical evidence which is in conflict with Birth Certificate Ex.PH is the deposition of Dr. Robina Awan DW-4. She has stated as under;

" I was posted as W.M.O. at the Office of Surgeon Medico Legal Punjab, Lahore, on 3.8.1991. On the same date, I medically examined Mst. Nasreen Bibi daughter of Muhammad Khan, resident of C.M.A. Quarter No.2, Lahore cantt: for the purposes of age assessments. It was done by me by the orders of Court of Illaqa Magistrate Lahore, dated 3.8.1991. My findings were following;-

Her height was five feet two inches, weight was 56 kilograms, dental data was 7x7/7x7. Her secondary sexual character was well developed. She was advised x-rays for age purposes.

Vide X-ray report No.869-A to 874-A dated 5.8.1991 the approximate estimated age was seventeen years.

It is correct that order on the application of Mst. Nasreen which was moved through her counsel was "Allowed per rules" It is correct that it was not marked to me. Volunteered that it was marked to Office of Medico Legal Surgeon, Lahore. It is correct that there is no order of the Magistrate specifically marking the application to the office of Surgeon Medico Legal Lahore. Volunteered Police Dispensary, Neela Goband has been mentioned in the application and not in the orders, which is also called Office of Surgeon of Medico Legal, Lahore. Surgeon Medico Legal was the Incharge of Office of Surgeon Medico Legal, Lahore

while I was working as W.M.O. It is correct that there is no order by the Incharge in my name to examine the examinee. I do not remember who had brought Mst. Nasreen to the Dispensary for examination. 28 teeth are almost completed at the age of puberty. It is correct that I have not mentioned essential characteristics about puberty. The x-rays were got done for unions of bones. Those x-rays reports are not before me. It is correct that I am not the Radiologist. It is correct that the result of the x-rays or the opinion on the x-rays were given by the Radiologist. It is correct that the opinion about age is not that of my own."

This deposition in itself speaks a lot about the way this matter was dealt with. In the absence of orders from the competent authorities as admitted by this witness, it cannot be ruled out that somewhere the factor of connivance with these DWs on the part of appellants has taken place.

5. Now comes the turn of dealing with the X-Rays and the reports thereof specially about the union of bones to which a reference has been made by DW-4 as mentioned above. In this context I find that Gulraiz Akhtar (DW-1), Dispenser/Record Keeper District Head Quarters, Rawalpindi has proved record of the report No.470 dated 3-12-1992 of Radiologist D.H.Q Rawalpindi bearing No.14707 dated 3.12.1992.

He has also proved application of appellant Mst.Nasreen Akhtar for examination and report.

Since it was essential, under the above-mentioned circumstances, to summon Radiologist, DW-1 and DW-2 under the provision of section 540 Cr.P.C, I made the following orders Vide Order Sheet entry dated 10.6.1999

" Heard the learned counsel for appellants, complainant and State. Miss Rukhsana Malik, A.A.G., has been appointed as amicus curie in this case as there are certain important and crucial legal points about attainment of the status of sui juris of females in the present case. While the counsel as well as amicus curie were on their heels, it appeared essential to summon the Radiologist D.H.Q Rawalpindi who had reported about the age of appellant Mst. Nasreen Akhtar as well as to summon Dr. Muhammad Aslam (DW-2) and Gulraiz Akhtar (DW-1) under the provisions of section 540 Cr.P.C to attend this court alongwith the X-Rays taken and ossification notes prepared by them plus the magnitude of the Rhoengen unit applied for taking the x-ray and the specifications thereof. Adjourned.

In the meanwhile, a new point of law arose during arguments on 28.6.1999 which point was disposed off through the following obiter dictum in the interest of justice vide Oder Sheet entry dated 28.6.1999:

"According to all the counsel present as well as amicus curie, the presence of Dr. Muhammad Aslam DW-2, and his additional evidence shall not be essential in the circumstances of the present case; Consequently, it shall be in the interest of justice to dispense with his presence in the Court.



Consequently, this witness and his presence is dispensed with hereby. On the coming dates his presence shall not be necessary.

So far as the presence of Dr.Tahir Aziz, Radiologist DHQ, Rawalpindi is concerned he has presented the original record of X-Rays and other documents for which necessary receipt is given by the reader of this court. The learned counsel for complainant has made a reference to section 353 Cr.P.C r/w section 540-A Cr.P.C and has objected that the witness can not be called into the witness box because of the absence of accused appellants who are in custody.

The learned counsel for appellant has contended that the absence of the accused/appellants has not prejudiced their interest as their pleader is present in the court, and also that proceedings in this court are running under chapter XLI of Cr.P.C which chapter has not been mentioned in section 353 Cr.P.C and therefore, the Radiologist must be called into the witness box and his deposition may be recorded.

The learned counsel for State as well as the learned counsel for appellants and amicus curie are of the opinion that a plain reading of these sections needs a thorough going interpretation in the light of rules of interpretation as provided in General Clauses Act 1896 and this is not a stage where said interpretation shall serve the purpose of the justice as this matter might take a further

time and delay the disposal of the appeal whereas the maxim delay in justice is denying the justice must be kept in mind. At this stage the learned counsel for appellant also gives his consent that without going into the interpretation of section 353 Cr.P.C r/w section 540-A Cr.P.C and 540 Cr.P.C, it shall be in the interest of justice to summon the accused/appellants from the custody as soon as possible. The learned counsel for appellant has stated at Bar that accused/appellant Mst.Nasreen Akhtar is in custody at Central Jail, Multan. In view of this position the office is directed to arrange the presence of both the appellants/accused in this court on 30-6-1999 on which day the witness Radiologist is also directed to be present at 9-00 A.M for the evidence as required by law.

Consequently, the Radiologist gave his evidence and was crossed at length by the respective counsils.

6. Dr.Tahir Aziz, Radiologist, DHQ Hospital Rawalpindi was examined as CW-1 by this court on 2-7-1999. He has deposed that on 3-12-1992 he examined X-Ray of (appellant) Mst.Nasreen Akhtar. According to X-Ray report No.470 dated 3-12-1992 epiphysis around elbow wrist and shoulder wrist were fused, the bony age was about 18 to 20 years. He has exhibited his original report as Ex.CW-1/1. He has also exhibited X-Rays of fused epiphysis in original

on the basis of which this report was prepared and these are exhibited as CW-3 and 4. On court questions he has replied:

"If epiphysis around iliac is completely fused then she should be about 20 but since epiphysis is not completely fused therefore, on the said date of X-Rays, the female X-Rayed was less than 20 years of age. As epiphysis of the elbow wrist and shoulder were fused she was not less than 16 years of age. I am deposing with all suerty that radiologically she was in way not less than 16 years of age on the date of X-Rays.

During cross by the learned counsel for complainant, he has admitted:

"It is correct that there is variation in the epiphysis of fusing of bones due to climate, diet and genetic variations. It is correct that epiphysis fusion of bones comes earlier in tropical countries as compared to non-tropical countries. It is correct that I did not make any enquiry regarding the place of birth, the place of bringing up and the place of residence at the time of examination of the examinee. It is correct that the age of examinee is not cent percent correct and that is the reason that while assigning the age of examinee it is always written as an approximate age. I cannot be sure as to whether the birth certificate issued by the competent authority is more authentic about the exact birth date. It is correct that other factors include development of sexual character, the dental age and the general appearance before reaching the final conclusion regarding the determination of age.

During cross to the learned counsel for State, he has admitted as under:-

"It is correct that the examination of bone when it is cross-sectioned gives better results. It is correct that the even three dimensions X-Ray of the bone is not 100 percent correct."

These admissions are coherent with the opinion of the leading experts on Forensic Science. Modi in his classic on "Medical Jurisprudence and Toxicology" is writing on chapter on Age as under:-

"Ossification of Bones:- This sign is helpful for determining age until ossification is completed, for skiagraphy has now made it possible to determine even in living persons the extent of ossification, and the union of epiphyses in bones. Owing to the variations in climatic, dietetic, hereditary and other factors affecting the people of the different states of India it can not be reasonably expected to formulate a uniform standard for the determination of the age of the union of epiphysis for the whole of India. However, from investigations carried out in certain provinces it has been concluded that the age at which the union of epiphysis takes place in Indians particularly of Bengal Punjab and South India is about 2 to 3 years in advance of the age incidence in Europeans and that the epiphyseal union occurs in females somewhat earlier than in males also

reported that the fusion in Uttar Pradesh occurs some what earlier in girls than in boys, usually by 1 to 2 years-Jr.Ind.Med.Ass. Jan. 1, 1974, 10-12. S.D Loomba has shown that in the people of Uttar Pradesh epiphyseal union occurs at a slightly later period than in other states of India, however, it is earlier than in English subjects but slightly later than that occurring in America, Australia, Egypt and Burma. D.R.Kothari working in Marwar region of Rajasthan also reported that the fusion occurs earlier in girls than in boys, his actual figures vary a little from other states-Jr Ind. Med.Ass, Oct.16, 1974, 252-256.

In ascertaining the age of young persons radiograms of any of the main joints of the upper or the lower extremity of both sides of the body should be taken, and an opinion should be given according to the following table, but it must be remembered that too much reliance should not be placed on this table as it merely indicates an average and is likely to vary in individual cases even of the same province owing to the eccentricities of development, (For Table see pp.33 to 36). Recent work has shown that the range of error may be upto  $\pm 3$  year.<sup>22a</sup>

J.S.Sakesena and S.K..Vyas<sup>22b</sup> X-rayed 50 boys and 25 girls of Rewa medical college from Madhya Pradesh in the age group of 16-21 years and found epiphyseal union at the wrist in females at the age of 17-18 and in males 19-20 years; at the knee in females 16-17 and

in males 18-19 years and at the iliac crest in females 18-19 and in males 20-21 years.

Dr.S.Siddiq Husain has written in his Text Book of Forensic Medicine and Toxicology as under:-

"For ascertaining age, skiagrants are taken of main joints of both sides usually elbow and wrist, etc. If all epiphyses have fused, then age may be taken to be above 25 years. Too much reliance cannot be placed on this sign alone as it has to be taken in conjunction with other signs."

In view of the admissions of Dr.Tahir Aziz (CW-1), the Radiologist, as quoted verbatim above, and the opinions of experts of Medical Jurisprudence, I have come to the conclusion that the Radiologist CW-1 has relied only on the factor of epiphyses and fusions of elbow wrist, shoulders and iliac crest and has not made efforts to refer to the Radiology of sternum, Xiphisternum, sutures of skull, mandibles, vertebrate of the decurm region, segements of coccyx, teeth, hight, weight and climatic, dietetic, hereditary and other factors. The witness has himself admitted that the age of the examinee as mentioned by him is not cent percent correct. He has also admitted that the epiphyses of fusion of bons comes earlier in tropical countries and still earlier in the case of females. He has also admitted that

the determination of age depends on other factors as well like development of sexual character, dental age and the general appearance which had not been referred to by him. He has also admitted that at the time of examination, the examinee did not produce her identity card. He has also admitted that he cannot be sure as to whether the birth certificate issued by competent authority is more authentic about the exact date of birth.

7. In view of the above made discussion I have come to the conclusion that in the presence of proved certificate of birth Ex.PH, it shall not be safe to rely upon the report of the radiologist which report in itself suffers from infirmities and has been obtained in obscure circumstances. Consequently, the only document which remains in the field is a copy of the registration of birth of Union Council Aman Tehsil Gujar Khan which is Ex.PH and according to which the date of birth of the appellant Mst.Nasreen Akhtar is 5-1-1978. Once established so, then on the date of the Nikah which is 28-7-1991 appellant Mst.Nasreen Akhtar was of the age of around 13+ years. Since she had not yet attained the age of 16 years on the date of Nikah <sup>and she</sup> attain~~ment~~ <sub>ment</sub> puberty is not proved from the record, I have come to the

conclusion that she had not yet attained the status of sui-juris. According to the existing law of the country, appellant Mst.Nasreen Akhtar could not enter into the Nikah with another appellant Tariq Mehmood without the consent of her Wali. It stands proved that such a consent does not exist and on the contrary her own father, being her Wali, is the complainant in the present case.

8. In view of the above discussion, I hold that no valid nikah existed between the two appellants and they have been indulging into zina-bil-Raza without any force or coercion. Consequently, the impugned judgment is upheld with a modification of suspension of whipping which is no more required by law. Appeal, therefore, is dismissed.

Approved for reporting

( Abdul Waheed Siddiqui )  
Judge

Announced in the open court

Islamabad, the  
11th October, 1999.  
Zain/\*