

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)



PRESENT

MR.JUSTICE NAZIR AHMAD BHATTI, CHIEF JUSTICE.
MR.JUSTICE ALLAMA DR.FIDA MUHAMMAD KHAN.

JAIL CRIMINAL APPEAL NO.180/I OF 1994
JAIL CRIMINAL APPEAL NO.244/I OF 1994
CRIMINAL REVISION NO.19/P OF 1994.

1. Said Mahmood s/o Omat Shah, ... Appellants
resident of Asban and

2. Mst.Almas daughter of Said
Ghaffar, resident of Ouch,
District Dir,

(Said Mahmood confined in
District Jail Swat and Mst.Almas
confined in Central Prison,Peshawar)

Versus

me The State ... Respondent
For the appellants ... Sh.Muhammad Naeem,Advocate
Mr.Muhammad Aslam Uns,
Advocate.
For the State ... Mr.M.Khalid Khan,
Advocate
No.& date of F.I.R ... No.106,dt.24.4.1993,
Police Station P.S.Ouch,District Dir.
Date of order of ... 14.6.1994.
the trial court
Date of Institutions ... 7.8.1994 and
of both the appeals. ... 13.11.1994 respectively
Date of hearing ... 7.2.1995.
Date of decision ... 15-3-1995

CRIMINAL REVISION NO.19/P of 1994.

Muhammad Shahinshah s/o Zaheeruddin ... Petitioner
r/o Shine Talash Teh:Taimergara, Dir.

Versus

Said Mahmood etcs and the State ... Respondents
For the petitioner ... Petitioner in person.
Date of Institution ... 8.8.1994
Date of hearing ... 7.2.1995.
Date of decision ... 15-3-1995



JUDGMENT

NAZIR AHMAD BHATTI, CHIEF JUSTICE.- Mst.Spogmay widow of

Said Ghafar went to Police Station Ouch District Dir on 8.4.1993 and reported that her daughter Mst.Almas aged about 21/22 years was engaged to Shahinshah who was in jail since a long time, that 4 days earlier she went to the court premises to consult lawyer on the point that her daughter was pubert and since Shahinshah was in jail, some way could be found out for her daughter, that when she returned home she found her daughter missing and that she suspected that Mst.Khurshida wife of Abdul Sattar had enticed away her daughter but there was no previous animosity with the said woman. This report was recorded at searial No.30 on 8.4.1993 in the daily diary of the police station.

2. It transpires tht the aforesaid Mst.Almas and accused Said Mahmood were both arrested by the police of Police Station Gumbat District Khairpur from where they were brought to Police Station Ouch and then F.I.R No.106 was recorded on 24.4.1993 for offences under the Offence of Zina(Enforcement of Hudood) Ordinance,1979 against the aforesaid Said Mahmood, Mst.Almas, Mst.Khurshida, Mst.Spogmay and Mst.Noor Jehan. Accused Mst.Almas was also medically examined on 24.4.1993 by P.W.10 lady Dr.Mussarat Asad, according to which Mst.Almas had had sexual intercourse.

3. Accused Said Mahmood and accused Mst.Almas both made confessional statements on 28.4.1993 before P.W.11 Syed Amir Shah,

Magistrate First Class. In his confessional statement accused

Said Mahmood stated that he had cohabited with accused Mst.Almas.

The latter mentioned in her confessional statement that accused

Said Mahmood and others wanted to sell her but as they were demanding

huge money, no one purchased her and that accused Said Mahmood had

subjected her to sexual intercourse.

4. After investigation all the 5 accused were sent up

for trial before Sessions Judge Dir who charged all of them under

sections 148/149 PPC, charged accused Said Mahmood and Mst.Almas

under section 5 of the Hudood Ordinance, also charged accused Said

Mahmood, Mst.Khurshida, Mst.Spogmay and Mst.Noor Jehan under sections

13 and 14 of the Hudood Ordinance. All the accused pleaded not

guilty to the charges and claimed trial.

5. During the trial 11 witnesses were produced by the

State in proof of the prosecution case. All the accused made

depositions under section 342 Cr.P.C but none of them made any

deposition on oath nor they produced any defence evidence.

6. After the conclusion of the trial the learned Sessions

Judge acquitted accused Mst.Spogmay, Mst.Khurshida and Mst.Noor Jehan

but convicted accused Said Mahmood and accused Mst.Almas under section

10(2) of the Hudood Ordinance and sentenced each of them to undergo

rigorous imprisonment for 5 years, to suffer 15 stripes and to pay

a fine of Rs.5000/- or in default to undergo simple imprisonment

for 3 months. Convict Said Mahmood has challenged his conviction



and sentence by Cr.A.No.180/I of 1994 sent from jail. Convict Mst.Almas has challenged her conviction and sentence by Cr.A.No.244/I of 1994 sent from jail. Muhammad Shahinshah claiming to be the husband of convict Mst.Almas also filed Cr.Rev.No.19/P of 1994 for setting aside the order of acquittal of the aforesaid three acquitted accused and for enhancement of the sentence of the two convicted appellants. Since both the appeals and the revision petition have arisen from the same judgment, they are being disposed of by single judgment being written in J.Cr.A.No.180/I of 1994 in hand.

7. The admitted facts are that appellant Mst.Almas was previously married to Muhammad Shahinshah petitioner, that appellant Said Mahmood and appellant Mst.Almas were found together in district Khairpur and they were brought together from there by the police of Police Station Ouch, that both the appellants had been cohabiting with each other prior to their arrest.

8. P.W.8 Muhammad Shahinshah had deposed that his nikah with Mst.Almas was performed on 13.7.1986 but he had admitted that after the nikah Mst.Almas had not lived with him as his wife and that on 13.5.1987 he was sent to judicial lock-up in connection with a criminal case and during his detention Mst.Spogmay and Mst.Noor Jehan visited him at District Jail Timargara on 2.3.1993 and pressed him either to get himself released or they will marry Mst.Almas to



-5-

some one else. P.W.4 Hafiz Ihsanullah stated that he had performed the nikah of Mst.Almas with Muhammad Shahinshah on 13.7.1986. But he had not previously seen Mst.Almas at that time and could not say what was her age at that time. However, it was not denied by the prosecution that Mst.Almas was a minor at the time of her nikah with Muhammad Shahinshah and rukhsati had not taken place till the time of her arrest.

9. Making a deposition under section 342 Cr.P.C, Mst.Almas stated that she was engaged to Muhammad Shahinshah at the age of 8/9 years ~~xxxxxx~~ but no nikah had been performed and that after attaining puberty she had married co-accused Said Mahmood. The latter also stated that he had legally performed marriage with Mst.Almas with her *we* willingness. In so far as the confessional statements are concerned, appellant Said Mahmood stated that he was forcibly made by the police to give a statement before Magistrate whereas Mst.Almas stated that she had remained in police custody for 8/9 days and third degree methods had been adopted by the police to procure her confessional statement.

10. We have anxiously considered all the aspects of the matter very carefully. It had been proved affirmatively that the nikah of appellant Mst.Almas was performed on 13.7.1986 by her mother as her father had died with Muhammad Shahinshah petitioner but she was minor at that time, that according to her own deposition she was 8/9 years old at that time, that no rukhsati had taken place after that nikah, that according to their own versions both the appellants had married each other and



-6-

were living as husband and wife when they were arrested by the Gumbat Police. The main question for consideration was whether in the circumstances any offence had been committed by both the appellants. So far as appellant Said Mahmood is concerned, he was stranger and he did not know that Mst.Almas had already been married and there was complete lack of knowledge of this circumstance on his part. In so far as the case of appellant Mst.Almas is concerned, since her nikah was performed when she was minor and consummation of marriage had not taken place, whether her second marriage with co-appellant Said Mahmood was a perfect and legal exercise of her Khyar-ul-Bulugh.

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11. There is no express verse of the Holy Quran and Hadith of the Holy Prophet (PBUH) wherein exercise of option of puberty may have been mentioned. However, Muslim Scholars have recognised this right.

12. According to Imam Abu Hanifah if a guardian other than father or grandfather contracts the marriage of a minor male or female, he or she has the option to confirm or annul such marriage after becoming pubert. Similarly according to Imam Abu Yousuf and Imam Muhammad if the father or grandfather contracts the marriage of his minor son or daughter with a person who is not equal to him or her, or with lesser dower, he or she has the opinion to confirm or annul such marriage after becoming pubert. Imam Abu Hanifah however, opines that if father or grandfather contracts the

33

marriage of his minor son or daughter, there will be no option to such minor to annul such marriage in any case after becoming pubert. He argues that father and grandfather have more affection with his minor son or daughter than any other person and as such their marriage should be retained in such case.

13. Regarding the duration of the exercise of the right of option of puberty the jurists concur that as this is a weak right, it should be exercised forthwith after attaining puberty in the meeting (assembly) wherein such minor is informed of such marriage. Any silence or delay will annul the right of option. And when such female minor attains puberty, having been a virgin and she keeps quiet for a second, her option shall become void, and if she cancels the marriage as soon as she attains puberty, and calls witnesses to this cancellation, it will be valid. But in the case of a boy or in the case of a girl who had already been married once, their option of puberty shall not become void by their silence, and their option shall not be coupled with the condition that the option shall be exercised at the same meeting of attaining puberty, and she shall still have her right of option until she makes a declaration of her consent, or does an act which denotes consent such, for example, as giving the husband an opportunity to have carnal intercourse with her, or asking for her maintenance or dower in which cases she denotes her consent and forfeits her option (Fatawa Kazi Khan, Volume I page-93)



-8-

14. The right of option of puberty has also been laid down as a ground for dissolution of marriage in the Dissolution of Muslim Marriages Act, 1939. Section 2 of the said Act gives the grounds for decree for dissolution of marriage and clause (vii) pertains to the exercise of right of option of puberty by a muslim wife. It is reproduced as under:-

"Clause (vii), that she, having been given in marriage by her father or other guardian before she attained the age of (sixteen) years; repudiated the marriage before attaining the age of eighteen years: Provided that the marriage has not been consummated."

It shall be seen that under the Islamic Law a wife whose nikah had taken place during her minority has the right to repudiate it after attaining puberty provided the marriage has not been consummated but the wife must exercise this right immediately after attaining puberty and if there is any delay on her part then she loses this right.

While under the aforesaid Act of 1939 such wife has a right to repudiate the marriage before attaining the age of 18 years. Thus the most important questions which required consideration are; firstly, whether appellant Mst.Almas had validly exercised her right of option of puberty; and secondly, in what manner such right had to take effect.

15. Mst.Almas was about 15/16 years of age when she contracted a second marriage with her co-appellant Said Mahmood which would clearly establish that she had attained puberty in those very days and her second marriage tantamounted to repudiation of her first marriage. So appellant Mst.Almas validly exercised her right of option of puberty.



16. It is now to be seen whether her second marriage without first obtaining a declaration from a Qazi with regard to the repudiation of first marriage was an appropriate repudiation or not. As already stated there is neither any Verse of the Holy Quran nor any Hadith of the Holy Prophet(PBUH) and this right was acknowledged by latter Muslim Jurists, whereas there are many judgments of the Superior Courts of this country where both in criminal and civil proceedings it was held that without getting approval of a Qazi with regard to the repudiation of the first marriage, the contracting of a second marriage by such a muslim wife in fact tantamounted to repudiation of the first marriage and since this right had to be essentially exercised by the wife and the approval of the Qazi was only to authenticate it, mere exercise of this right by the wife was a perfect repudiation of first marriage and there was no need to get it confirmed by the Qazi. Since there is neither any Verse of the Holy Quran nor any Hadith of the Holy Prophet(PBUH), the fact of the wife having contracted a second marriage without getting approval of the Qazi in respect of repudiation of her first marriage did not offend against any Injunction of Islam and was perfectly justified.

17. It was held in the case reported as P.L.J 1976 Lahore 294 that "if a minor girl enters into a second marriage on attaining puberty, it would be sufficient proof of her having repudiated



-10-

the earlier marriage and the subsequent marriage would be valid."

It was again held in the case reported as P.L.J 1982 Lahore 501

that "a decree of court was not necessary for imparting validity

to the exercise of the option of puberty." It was held in the case

reported as P.L.D 1950 Lahore 203 that "a declaration could be given

by the court itself even in the course of criminal proceedings

initiated under section 494 Cr.P.C to the effect that the first

marriage stood dissolved by the option of puberty having been exercised."

The unanimous opinion of the courts was that no judicial approval

was necessary for having exercised the right of option of puberty

by a wife and the first marriage subsequently stood dissolved when the

wife contracted second marriage after attaining puberty. The

essence of the matter is the actual repudiation of marriage by the

woman immediately on attaining puberty.

18. In the circumstances we have come to the conclusion that

no offence was committed by both the appellants Said Mahmood and

Mst.Almas under the provisions of Hudood Laws and they were properly

married husband and wife.

19. Consequently both the appeals are accepted. The conviction

and sentences of both the appellants recorded on 14.6.1994 by the

learned Sessions Judge Dir at Timargara are set aside and they

are acquitted of the offence for which they were convicted and

sentenced. They shall be set at liberty forthwith if not wanted in

J.Cr.A.No.180/I of 1994
J.Cr.A.No.244/I of 1994
Cr.Rev.No.18/P of 1994



-11-

any other case. Since we have accepted both the appeals,

the revision petition become infructuous and meaningless and

the same is dismissed.

Fit for reporting

(NAZIR AHMAD BHATTI)
CHIEF JUSTICE

(DR.FIDA MUHAMMAD KHAN)
JUDGE

Announced on 15.3.95
at Islamabad.
M.Akram/