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The State ... Respondent

For the appellant

... Mr. Javed Aziz Sindhu
Advocate

For the State ... Mr. Muhammad Aslam Un
Advocate

Mr. Khalid Khan, Advoc.
as amicus-curaie.

No.& date of F.I.R ... No.150,dt.21.5.1989,
Police Station P.S Saddar Karror Pa

Date of order of ... 24.3.1991.
the trial court

Date of Institution ... 1.9.1992.

Date of hearing ... 28.9.1992.
and decision

(22)

JUDGMENT

NAZIR AHMAD BHATTI, CHIEF JUSTICE.-Complainant Allah

Wasaya had performed the nikah of his daughter Mst.Mukhtar Mai on 30.9.1988 with Budha and in exchange the nikah of Mst.Janu Mai sister of the latter was performed with Mukhtar Ahmad son of the complainant on the same date. However, both the girls were minor, so their nikah was neither registered nor rukhsati had taken place but an agreement had been executed on a stamp paper. One Khan Muhammad used to live in the neighbourhood of the complainant. The said Khan Muhammad, Muhammad Ramzan, Arif and Mst.Maqsood Mai visited the house of the complainant many times and made requests to him to marry his daughter Mst.Mukhtar Mai to Falak Sher but he refused. On 16.11.1988 the complainant and his wife had gone to the market for shopping and when they came back they found their daughter missing. They were searching for her when they were informed by Mahmood Khan and Lal Khan that their daughter had been taken away by the aforesaid Khan Muhammad etc. Complainant Allah Wasaya submitted a written complaint in Police Station Saddar Karror Pacca on 21.5.1989 whereupon F.I.R No.150 was registered on 21.5.1989.

2. Mst.Mukhtar Mai returned to the house of her parents on 21.6.1989 and she was medically examined on the

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same day by P.W.1 Lady Dr. Kausar Sultana, according to which she had been subjected to sexual intercourse and vaginal swabs taken by the lady doctor were found stained with semen. Accused Falak Sher was arrested on 26.6.1989 and after investigation he was sent up for trial before Additional Sessions Judge Multan camp at Lodhran who charged him under sections 11 and 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 to which the appellant pleaded not guilty and claimed trial.

3. During the trial 11 witnesses were produced by the State in proof of the prosecution case whereas the appellant Falak Sher made a deposition under section 342 Cr.P.C but he neither produced any defence nor made any deposition on oath.

4. After the conclusion of the trial the learned Additional Sessions Judge convicted accused Falak Sher under sections 16 and 10(3) of the Hudood Ordinance by judgment dated 24.3.1991 and the appellant was sentenced under both the offences to undergo rigorous imprisonment for 5 years and to suffer 30 stripes^{separately.} The appellant had challenged his conviction and sentence by criminal appeal No.224/I of 1992 but the same was summarily dismissed by my learned Predecessor on 28.9.1992 on the ground that it was time barred by 462 days.

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The aggrieved appellant filed Cr.A.No.15(S) of 1994

before the Supreme Court of Pakistan which was accepted

by judgment dated 19.4.1995 and the appeal was remanded

for consideration on merits.

5. I have heard learned counsel for the parties at length who also led me through the entire record of the case.

6. The case of the complainant was that he had performed the nikah of his daughter Mst.Mukhtar Mai with Budha on 30.9.1988 but rukhsati had not taken place as his daughter was a minor at that time. However, he could not produce any nikha nama nor any other oral testimony about the factum of nikah except an agreement deed Ex.PF, executed on 30.9.1988. The perusal of this document does not reveal that any nikah had been performed or who were the nikah khawn and witnesses of nikah and whether the said nikah had been registered with any Registrar of the nikah.

It shall thus be seen that there was brought no evidence on the record to prove that Mst.Mukhtar Mai had been a legally wedded wife of Budha. At the most the said document revealed that it was an agreement to marry Mst.Mukhtar Mai with Budha at a certain date in future and it was only an engagement.

It shall thus be seen that at the time of her alleged abduction by appellant Falak Sher Mst.Mukhtar Mai was not the wife of any person.

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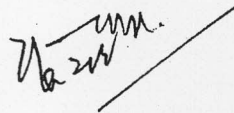
7. On the contrary the plea of the appellant was also to the effect that he had married Mst.Mukhtar Mai. But this was an oral assertion and he had also not produced any evidence, oral or documentary, to prove the allegation that Mst.Mukhtar Mai was his legally wedded wife.

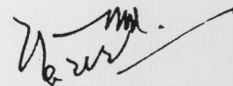
8. The other circumstances of the case which came to light during the trial show that Mst.Mukhtar Mai had disappeared from the house of her parents on 16.11.1988 and according to her allegation she had been abducted by the appellant. However, she returned to the house of her parents after more than 7 months. During all this period she lived in the company of the appellant but she never made any complaint to any body that she had been abducted by the appellant or was being raped against her will by him. This will clearly indicate that Mst.Mukhtar Mai had eloped with the appellant voluntarily and she was being subjected to sexual intercourse by the appellant with her consent and there was no question of zina-bil-jabr.

9. Consequently there was neither any evidence of abduction of Mst.Mukhtar Mai by the appellant nor there was any evidence of zina-bil-jabr. The net result of the above discussion is that the appellant had not committed any

offence under section 16 of the Hudood Ordinance. He is, therefore, acquitted of the said offence and his conviction and sentence on this offence are set aside. In so far as the conviction of the appellant under section 10(3) of the Hudood Ordinance is concerned, that is converted into one under section 10(2) thereof. But the sentence awarded to him by the learned trial court for this offence is upheld with no change therein. The appellant is however, given the benefit under section 382-B Cr.P.C and he shall be released forthwith if not wanted in any other case.

Fit for reporting.





CHIEF JUSTICE

Islamabad, 5.7.1995.
M.Akram/