

IN THE FEDERAL SHARIAT COURT  
(Appellate Jurisdiction)

22

PRESENT

MR.JUSTICE NAZIR AHMAD BHATTI, CHIEF JUSTICE.

JAIL CRIMINAL APPEAL NO.82/I OF 1994.

1. Jamroz son of Duran  
resident of Mainai,  
District Swabi. and ... Appellants
2. Mst.Khatoon wife of Nabi  
Shah,r/o village Mainai,  
Tehsil and District Swabi,  
(now both confined in Central  
Jail Peshawar)

Versus

The State	...	Respondent
For the appellants	...	Ch.Ghulam Ahmad and Javed Aziz Sindhu,Advocates.
For the State	...	Syed Amjad Ali, Advocate
No. & date of F.I.R Police Station	...	No.20,dt.21.1.1993, P.S Topi
Date of order of the trial court	...	19.12.1993.
Date of Institution	...	5.4.1994.
Date of hearing	...	26.10.1994.
Date of decision	...	29-11-1994.

23

JUDGMENT

NAZIR AHMAD BHATTI, CHIEF JUSTICE.- One Nabi Shah went to Police Station Topi on 11.12.1992 and reported that he had married Mst.Khatoon, appellant No.2 herein, about 12/13 years ago, that she had borne two sons and two daughters out of whom one minor daughter was surviving, that about 25/26 days ago he had gone to Swabi Katchery and when he returned to his house he found his wife and minor daughter missing. This report was recorded in the said Police Station at serial No.8 of the daily diary and inquiry was commenced. On 21.1.1993 appellant Mst.Khatoon went to the same police station and recorded F.I.R No.20 wherein she disclosed that she had developed strained relations with her husband Nabi Shah about two months ago and had started living with her brother Jamroz, appellant No.1 herein, in village Mainai, that her brother took her to the house of one Shafi in village Marghuz where they remained for three days, that her brother then took her to village Kopra in Punjab where he left her in the house of one Bashir and went back to village Mainai on the pretext of obtaining Talaq from her husband, that the aforesaid Bashir disclosed to her that she had been purchased by him from her brother for Rs.32000/- but she being a married woman refused to perform nikah with him, that after about a month her brother Jamroz again came and told her about the illness of her mother whereupon she went back to her village where her brother again attempted to sell her whereupon she took refuge in the

24

house of one Iqbal and after a month her neighbours Shanai and Aminullah brought her to Topi where she recorded the F.I.R.

2. She was also examined by P.W.8 Lady Dr.Altaf Begum on 21.1.1993 according to which she had a pregnancy of six months.

Appellant Mst.Khatoon also made a confessional statement before P.W.1 Anwar Zaib Khan, Magistrate Ist Class on 24.1.1993,

3. After investigation Jamroz, Mst.Khatoon, both appellants herein, Aminullah, Ramzan son of Yaqoob and Shan Muhammad alias Shanai were made accused. Accused Shah Muhammad alias Shanai was reported absconding. The other four accused were sent up for trial before Sessions Judge Swabi. The learned Sessions Judge charged accused Jamroz, appellant herein, under section 13 of the Offence of Zina(Enforcement of Hudood) Ordinance, 1979 whereas accused Mst.Khatoon, appellant herein, was charged under section 10(2) of the Hudood Ordinance and accused Aminullah and Ramzan were charged under section 10(2) and 13 of the Hudood Ordinance read with sections 109/34 PPC. All the four accused pleaded not guilty to the charges and claimed trial.

4. The State produced 10 witnesses in proof of the prosecution case whereas all the four accused made depositions under section 342 Cr.P.C but none of them made any deposition on oath nor produced any defence evidence.

25

5. After the conclusion of the trial the learned Sessions Judge acquitted accused Aminullah and Ramzan and convicted accused Jamroz ~~and Mst.Khatoon~~ under section 10(2) of the Hudood Ordinance read with ~~the~~ section 109 PPC and <sup>accused</sup> Mst.Khatoon under section 10(2) of the Hudood Ordinance. Accused Jamroz was sentenced to undergo rigorous imprisonment for 10 years, to suffer 30 stripes and to pay a fine of Rs.20,000/- or in default to further undergo rigorous imprisonment for one year. ~~Accused~~ Mst.Khatoon was sentenced to undergo rigorous imprisonment for 5 years, to suffer 30 stripes and to pay a fine of Rs.5000/- or in default to further undergo rigorous imprisonment for six months. Both the convicts have challenged their conviction and sentence by the appeal in hand, sent from jail.

6. I have very minutely gone through <sup>the</sup> entire record of the case and have also heard learned counsel for the parties at length.

7. The facts which came to light during the trial are that appellant Mst.Khatoon was married to P.W.4 Nabi Shah, that she had left the house of her husband somewhere in the month of November,1992, that she appeared in Police Station Topi on 21.1.1993 and recorded F.I.R.No.20 wherein she charged her brother Jamroz appellant herein, for attempt to sell her, that P.W.5 Bashir resident of village Kopra District Sialkot had married Mst.Khatoon allegedly on 24.11.1992 and in that regard he had paid in all a sum of Rs.42000/- to acquitted

26

accused Ramzan and that she remained with him as his wife for about a month and a half, that thereafter accused Jamroz appellant herein, and absconding accused Shanai visited his village and took Mst.Khatoon with them on the pretext that her mother was ailing and later on P.W.5 Bashir came to know that appellant Mst.Khatoon was a married woman, that at the time of nikah she had disclosed her name as Yasmeen and Jamroz appellant had acted as pidar wakeel. However, it had not come in the evidence whether any amount was received by appellant Jamroz from the amount which was allegedly paid to acquitted accused Ramzan. P.W.5 Bashir, with whom second nikah was performed, had stated that appellant Jamroz had acted as pidar wakeel whereas P.W.6 Abdullah, brother of P.W.5 Bashir, had stated that appellant Jamroz was not present at the time of said nikah. It had also come in the evidence that appellant Jamroz was seen by P.W.5 Bashir and P.W.6 Abdullah for the first time after a month of said nikah when he had come to take away appellant Mst.Khatoon. The prosecution evidence would also indicate that during the negotiations about the second nikah of Mst.Khatoon appellant Jamroz had neither appeared nor had in any way taken <sup>any</sup> part therein. The aforesaid amount of Rs.42000/- was also received by accused Ramzan who was acquitted by the learned trial judge. Although P.W.5 Bashir had stated that appellant Mst.Khatoon had lived with him as his wife for about a month and a half but her vaginal swabs taken by the

27

lady doctor were not produced in evidence. It is also note-worthy that she was already pregnant at the time of her second marriage.

8. I have very anxiously taken into consideration the aforesaid facts and circumstances. I have come to the conclusion that after leaving the house of her husband, appellant Mst.Khatoon had fallen prey to the aforesaid circumstances and was compelled to marry P.W.5 Bashir. However, she was still the wife of P.W.4 Nabi Shah at the time of her second marriage with P.W.5 Bashir and she had neither disclosed ~~with~~ this fact at the time of second nikah nor had offered any resistance. The role of appellant Jamroz in all these affairs had become very doubtful because he had neither met P.W.5 and P.W.6 before or at the time of nikah of Mst.Khatoon with P.W.5 nor was there any evidence to prove that he had taken any part in disposing her for her second marriage. He appeared on the scene only when he took appellant Mst.Khatoon with him to his own village on the ground that her mother was ailing. This would also show that after abandoning the company of her husband P.W.4 Nabi Shah, appellant Mst.Khatoon was under great stress and she might have been exploited by accused Aminullah and Ramzan but both of them were acquitted by the learned trial judge. In that event there was no evidence on the record to prove that appellant Jamroz had taken any part as an abetter of the offence of <sup>second</sup>nikah committed by his sister appellant Mst.Khatoon and his conviction under section

28

10(2) of the Hudood Ordinance read with ~~section 10(2)~~ section

109 PPC was unwarranted. He is, therefore, acquitted of the offence for which he was convicted and sentenced. He shall be set at liberty forthwith if not wanted in any other case.

9. In so far as the conviction of the appellant Mst.Khatoon under section 10(2) of the Hudood Ordinance is concerned, there had come evidence on the record to show that she lived as wife of P.W.5 Bashir for about a month and a half during the months of December,1992 and January,1993 but her second marriage had taken place in the circumstances which were beyond her control.

As such, although she was guilty of the offence under section 10(2) of the Hudood Ordinance yet a lenient view had to be taken with regard to the sentence. Consequently while maintaining the conviction of the appellant Mst.Khatoon under section 10(2) of the Hudood Ordinance, I sentence her to undergo rigorous imprisonment for 2 years, to suffer 30 stripes and to pay a fine of Rs.500/- or in default to further undergo rigorous imprisonment for seven days. She shall also be entitled to the benefit under section 382-B Cr.P.C.

Fit for reporting.

*[Handwritten signature]*

*[Handwritten signature]*  
CHIEF JUSTICE

Announced on 29/11/94  
at Islamabad  
M.Akram/

*[Handwritten signature]*  
29/11/94