IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

Present

MR.JUSTICE M. MAHBOOB AHMED, CHIEF JUSTICE

(23)

Jail Criminal Appeal No.197/I of 1996

1. Mst.Khial Meena w/o Khan Bahadur	....	Appellants
2. Kishar Khan s/o Khan Zarin Both residents of Karbari District Dir.		
	Versus	
The State	....	Respondent
For the appellants	....	Miss Tehmina Razzaq Bhatti, Advocate.
For the State	....	Mr.Akhtar Naveed,Advocate.
FIR.No.Date & Police Station	....	46, 4-5-1995 Wari.
Date of order of the trial court	....	19-9-1996
Date of Institution	....	16-10-1996
Date of hearing	....	22-1-1997
Date of decision	....	22-1-1997

JUDGMENT

M.MAHBOOB AHMED, CHIEF JUSTICE. This appeal is directed against judgment dated 19-9-1996 delivered by Additional Sessions Judge/Izafi Zila Qazi, Camp Court Wari, District Dir whereby he convicted the two appellants U/S. 10(2) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter called the Ordinance) and sentenced each one of them to 7 years rigorous imprisonment, 20 stripes and Rs.10,000/- fine; in default whereof to undergo rigorous imprisonment for 6 months.

2. The case against the appellants was registered vide FIR No.46 dated 4th May, 1995 with police station Wari on the complaint of one Sher Tawab the brother of Khan Bahadur husband of appellant No.1. According to the prosecution story Mst.Khial Meena appellant No.1 is the wife of Khan Bahadur the brother of Sher Tawab complainant. Khan Bahadur had gone to Saudi Arabia in connection with his employment there about 2 years before the date of occurrence. During his absence Mst.Khial Meena left her two daughters from Khan Bahadur in the house and eloped with appellant No.2 Kishar Khan who is the cousin of the complainant. The two appellants were arrested U/S.109/55 Cr.P.C. in the Malakand Agency area and were on bail in the said case when they were taken into custody by the Dir police in connection with the

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case registered against them U/S.10(2) of the Ordinance. The medical examination of both the appellants was got conducted and thereafter their statements U/S.164 Cr.P.C. were also recorded. On completion of investigation, challan was put up in the court. After examination of 12 prosecution witnesses, the statements of the appellants were recorded U/S.342 Cr.P.C. The defence of appellant No.1 was that on account of her strained relations with her in laws her husband used to beat her and ultimately divorced her and turned her out of the house whereupon she contracted second marriage with Kishar Khan out of whom she has two children and that she has not committed any zina. She in her statement U/S.342 Cr.P.C. also denied having made a confessional statement which she termed as fictitious, collusive and result of police aggression against her. She opted not to give statement on oath U/S.340(2) Cr.P.C. and also declined to produce any evidence in defence.

3. Similarly the defence of appellant No.2 was that as a result of the strained relations of Mst.Khial Meena, the appellant No.1 with her in laws she was divorced by her husband whereafter according to the custom in vogue in the area the two of them contracted marriage out which wedlock two children have been born. Appellant No.2 also denied having made voluntary confessional statement and dubbed the same as fictitious, collusive and result of police atrocity on

him. This appellant did not opt to make statement on oath and declined to produce any defence evidence.

4. The learned counsel for the appellants has raised number of contentions. She has mainly submitted that it was incumbent upon the prosecution to have produced the appellant's husband namely Khan Bahadur in view of the plea that she had been divorced by him and it was thereafter that she contracted the second marriage with appellant No.2. In the same context it was urged that despite the fact that Khan Bahadur afore-mentioned was available in the country after the registration of the case as is evident from the statement of Sher Tawab P.W.11, the prosecution did not care to produce him in the evidence nor the police recorded his statement U/S.161 Cr.P.C.

5. It was next submitted by the learned counsel for the appellants that all the four material witnesses of prosecution viz: P.W.9 Zubair, P.W.10 Muhammad Zubair son of Khaibar, P.W.11 Sher Tawab the complainant and P.W.12 Mst.Dur Jana mother of complainant have all stated that they were not the eye witnesses of the occurrence and that their testimony is in essence heresay only.

The further contention of the learned counsel for the appellants was that a material illegality has been committed by

the trial court in recording the statements of the accused/ appellants U/S.342 Cr.P.C., in that the certificate required to be given at the end of the statement U/S.342 Cr.P.C. is not in accordance with the requirements of Section 364(2) Cr.P.C. which are mandatory in nature. In this regard the learned counsel placed reliance on:

i. Raheel Sajid Vs. The State, 1986-P.Cr.L.J.1006;
ii. Shabbir Ahmed Vs.The State,1986-P.Cr.L.J.1730; and
iii. Ashraf Mian Vs. The State, 1989-P.Cr.L.J.1079.

7. The learned counsel appearing for the State has not been able to urge anything to meet the submissions made on behalf of the appellants.

8. Having given consideration to the controversy I am of the view that contentions raised on behalf of the appellants have force. It is by now well settled that the provisions contained in Section 364(2) Cr.P.C. are mandatory in nature and the trial court recording the statement of the accused U/S.342 Cr.P.C. of necessity has to certify under his own hand in the manner prescribed that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused. The record shows that such a certification has not been appended by the learned Additional Sessions/Additional Qazi Judge/

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under the statements of both the appellants made recorded U/S.342 Cr.P.C. The non compliance of a mandatory provision of law viz: Section 364(2) Cr.P.C. is not a mere irregularity which is curable but is an illegality which is not curable. That being so on this short ground alone the appeal merits to be accepted and case remanded to trial court for trial afresh.

9. Yet another important aspect of the matter is that in view of the categorical defence taken by both the appellants about the divorce of appellant No.1 by Khan Bahadur it was incumbent upon the court to arrive at a definite conclusion in this respect. The prosecution should have taken care to produce Khan Bahadur as a witness to prove its case regarding the alleged subsistence of the marriage between appellant No.1 and Khan Bahadur. This was not done by the prosecution but then it does not absolve the court from taking all necessary steps on its own to determine such an important controversy conclusively and justly. In such cases the trial court should not treat the proceedings as ordinary adversary proceedings. These matters effect the moral fibre of the society as also the paternity and legitimacy of the children and therefore call for taking of extraordinary care and caution. If the matter is lightly taken as it appears to have been done in the instant case, the result would be that the offsprings would be treated as illegitimate under the court verdict, which would be a constant sore

in their lives. From the above discussion it emerges that before, the Court discards the defence plea of such nature as raised in this case, and gives a finding of illegal sexual relationship of a man and a woman it should make all possible efforts to reach the truth so that illegitimacy of the children is not lightly certified by it. Even if for recording a definite finding about the divorce plea in such cases the court has to wait for some longer period, it should not hesitate to do so. The expediency of disposal of cases should not be allowed to prevail on the true and effectual dispensation of justice. In my view if the prosecution had not produced Khan Bahadur as a witness the court should have called him as court witness and examined him on the point of divorce asserted by Mst.Khial Meena.

10. In view of the foregoing discussion I would allow this appeal and remand the case to the trial court for retrial and not only record the statements of the appellants U/S.342 Cr.P.C. in accordance with law but also allow the parties to adduce evidence on the plea in defence about the divorce and in case the evidence produced by the parties is not sufficient to record a definite finding in this respect to examine such person/persons as court witnesses as the trial court may deem fit.

CHIEF JUSTICE

Islamabad
January 22, 1997.
UMAR DRAZ/

APPROVED FOR REPORTING.

CHIEF JUSTICE