IN THE FEDERAL SHARIAT COURT.

(Appellate Jurisdiction)

PRESENT

MR.JUSTICE ZAFAR PASHA CHAUDHRY

JAIL CRIMINAL APPEAL NO.15/I OF 2003.
JAIL CRIMINAL APPEAL NO.22/I OF 2003.

1. Shoukat Ali son of
Wali-ud-Din,

2. Mst. Nasim wife of Naseer,
both residents of Mohallah
Tahir Khel, Wan Bhachran.... Appellants.

Versus.

The State	...	Respondent.
Counsel for the Appellants	... ...	Mr.Muhammad Yousaf Zia, Advocate.
Counsel for the State	...	Mr.Muhammad Sharif Janjua, Advocate.
Case F.I.R. No. date & Police Station.	... ...	No.21,31-01-2002. P.S. Wan Bhachran, District Mianwali.
Date of Judgment of Trial Court.	...	01-08-2002
Date of Institution	...	30-1-2003 & 10-2-2003, respectively.
Date of Hearing	...	22-10-2003.
Date of decision	...	22-10-2003.

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JUDGMENT

ZAFAR PASHA CHAUDHRY, J: - Vide judgment dated 1.8.2002 Mr. Tahir Pervez, Additional Sessions Judge, Mianwali convicted Shoukat Ali and Mst. Naseem under section 10 (2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the Ordinance), and sentenced them to suffer six years rigorous imprisonment each, also to pay a fine of Rs.10, 000/- each, in default whereof to further undergo simple imprisonment for six months each.

The conviction was also recorded under section 468 Pakistan Penal Code and both were sentenced to suffer R.I for three years each with a fine of Rs.5000/- or in default thereof to suffer S.I for three months each.

They were also convicted under section 471 P.P.C and sentenced to one year R.I, each, with a fine of Rs.2000/-, or in default of payment to suffer one month S.I each. All the sentences were ordered to run concurrently. The benefit of section 382-B, Criminal Procedure Code was allowed to both the appellants.

2. Shoukat Ali, appellant filed criminal appeal No.15/I of 2003 whereas Mst. Naseem preferred criminal appeal No.22/I of 2003. Both the appeals were filed from jail through their respective superintendents. The appeals were barred by time. Separate criminal miscellaneous applications No.207/I of 2003 and 208/I of 2003, respectively, praying for condonation of delay, were moved on behalf of both the appellants. Both the applications were allowed and appeals were ordered to be heard on merits.

3. The proceedings initiated against the appellants on recording F.I.R No.21, dated 31.1.2002 registered with Police Station Wan Bhachran, district Mianwali at the instance of Zulfiqar son of Muhammad Rafique, the brother of Mst. Naseem, appellant.As per his statement,his sister Mst.Naseem (appellant) was got married to Naseer Ahmad about 10/11 years ago; out of the wedlock three daughters were born who are alive. Shoukat, appellant at the time of alleged occurrence was residing in the neighbourhood of Mst. Naseem, who developed illicit relation with Mst. Naseem. The complainant on coming to know stopped

Shoukat Ali from visiting her house.

On 25.1.2002 Zulfiqar Ali, complainant visited the house of Mst. Naseem, his sister. After taking their evening meals the complainant as well as Muhammad Naseer alongwith other family members went to sleep. When they got up in the morning they found Mst. Naseem missing from the house. A search was made and they were informed by Muhammad Tayyab and Ehsan Haider that Mst. Naseem and Shoukat Ali alongwith their two companions were proceeding towards Kaloor Kot in a car with registration No.6363/OKA. It was alleged that Shoukat Ali had kidnapped Mst. Naseem for commission of Zina and immoral purposes.

4. After registration of the case, investigation was commenced by Abdul Sattar, S.I. He performed the usual necessary formalities. During investigation the appellants produced a copy of divorce deed marked "A" and also a Nikah Nama evidencing the marriage of Shoukat Ali and Mst. Naseem, i.e. the appellants. According to the Investigating Officer the divorced deed marked "A" was found to be forged, however, the

verification of Nikah Nama regarding marriage in between the appellants could not be made as the same had been registered in province of Sindh. Both the appellants were sent up to face trial. The learned trial Judge framed charge under three heads, firstly under section 10 read with section 16 of the Ordinance, secondly under section 468 P.P.C for having prepared a forged divorced deed marked "A" and thirdly under section 471 P.P.C for using the Talaq Nama (divorce deed) in court as genuine. Both the appellants pleaded not guilty and claimed trial.

5. The prosecution examined eight witnesses in support of its case. Zulfiqar, complainant (PW.1) reiterated the statement already made by him before the police. He attested the complaint Ex.PA on which formal F.I.R Ex.PA/1 was registered. Next is PW.2 Ehsan Haider, who is resident of village Khushab. He on coming to know that appellants have developed illicit relations in between them prevented Shoukat Ali from visiting the house of Mst. Naseem, who was his sister in law (Sali). According to him he also saw Mst. Naseem and Shoukat Ali boarding a blue colour car and proceeded towards Kaloor Kot

thereafter. PW.3 Muhammad Rafique is a witness of divorce deed, i.e. Talaq Nama marked "A". According to him the same had not been executed in his presence. The remaining witnesses are just formal except Abdul Sattar, ASI (PW.8), who conducted the investigation.

6. Appellant Mst. Naseem Bibi in her statement under section 342 Cr.P.C denied the allegations against her and stated that Naseer Ahmad, her former husband, had divorced her on 2.10.2001 verbally and later on 18.1.2002 conveyed a written Talaq Nama as well. She after having been divorced married Shoukat Ali with whom she was living as his wife. She further stated that PWs who are in fact her brother and brother-in-law, wanted to marry her with an old man for a consideration of huge amount. As she did not accede to their demand she was falsely implicated in the present case.

Similarly Shoukat Ali also denied the allegations against him and stated that he was innocent; the previous husband of Mst. Naseem Bibi had divorced her and thereafter he entered into Nikah with her. Mst. Naseem Bibi tendered in evidence copy

of Talaq Nama mark"A" and Nikah Nama mark "B" and with that she closed her defence.

7. As evident from statements of witnesses and also the prosecution version that Mst. Naseem Bibi was wife of Naseer Ahmad who had been divorced by him, she was not eligible to enter into Nikah with Shoukat Ali. The Nikah in between Shoukat Ali and Mst. Naseem Bibi is admitted by both of them and they also admitted that they have been living as husband and wife since the performance of their Nikah.

The prosecution case is entirely based on the genuineness of Talaq Nama, i.e. divorce deed. As according to PW.8 no divorce had been pronounced, therefore, Mst. Naseem was wife of Naseer Ahmad who during subsistence of her earlier marriage contracted second marriage. The subsequent marriage as such was void and as such both were living in adultery and guilty of commission of Zina. As the appellant prepared a forged Talaq Nama, therefore, they have committed an offence under 468 P.P.C. Since the forged Nikah Nama was relied upon in court, therefore, its illegal use constituted an offence under section 471

9. As described above, in support of these allegations the above said three witnesses have been produced. The statements of Zulfiqar (PW.1) and Ehsan Haider (PW.2), both revolve around the fact that Mst. Naseem was wife of Naseer Ahmad; she eloped with Shoukat Ali and left for Kaloor Kot. What has been deposed by them is not of much importance to the prosecution because the appellants admitted having been entered into Nikah, therefore, the allegation of elopement of Mst. Naseem with Shoukat Ali does not in any manner add any weight to the allegations that they were committing Zina or they were guilty of offence under section 468 or 471 P.P.C.

10. The material question, which requires adjudication is whether Mst. Naseem had been divorced by her earlier husband. The prosecution has not produced any evidence oral or documentary in this behalf except the statement of Muhammad Rafique, PW.3, whose statement in fact is in rebuttal of a document tendered by Mst. Naseem, appellant in support of her plea of divorce. There could be no dispute with the proposition when an accused person is charged with an offence then the

entire onus has to be discharged by the prosecution and it is obligatory that the offence should be proved beyond any reasonable doubt. The onus never shifts to the defence. The law is settled as far back 1953 vide ruling by the Federal Court in Safdar's case, P.L.D 1953 Federal Court 93.

11. In the instant case, the conviction has been recorded mainly on the ground that the defence plea as set up by the appellants has not been substantiated. The evidence comprising of mark "A" the evidence of Talaq Nama and Nikah Nama mark "B" according to the learned trial Judge was not sufficient to discharge the onus as laid on them. The finding, however, is erroneous both on legal as well as factual plain.

12. On factual plain mark "A" Talaq Nama is the main document relied upon by Mst. Naseem. A careful perusal and examination of mark "A" reflects two things, firstly that Talaq had been pronounced verbally on 2.10.2001 by Naseer Ahmad whereas the deed was drafted later on 18.1.2002. The deed has been thumb marked by Naseer Ahmad, whose national identity card number has also been recorded on it. Apart from Naseer

Ahmad, husband of Mst. Naseem, it has been witnessed by three persons namely Muhammad Khalil, Salim and Muhammad Rafique. Muhammad Khalil and Salim had put down their signatures whereas Muhammad Rafique affixed his thumb impression. Neither all the three persons, i.e. Naseer Ahmad, Muhammad Khalil or Salim were examined as witnesses nor there is anything on the record to indicate that the thumb impression of Naseer Ahmad or signatures of Muhammad Khalil or Salim are bogus. One of the witness Muhammad Rafique was examined as PW.3. He made a probe into the matter and gave statement, which is negative in nature. According to him Talaq Nama marked "A" was never executed in his presence. In the first line of cross-examination he admits having affixed his thumb impression on the stamp paper. Once a person admits affixation of his thumb impression or signature on it, normally the document is accepted as valid unless it is established that the same had been done under duress or obtained through deceit. Out of the remaining three witnesses as noted above, none came forward to disown or to disprove his thumb

impression or signature. It was necessary for the prosecution to prove that Naseer Ahmad's thumb impression was bogus and he did not affix the same. Failure on the part of the prosecution in this behalf cannot be treated a mere lapse but the same appears to be deliberate. Had the thumb impression being not of Naseer Ahmad it would be very conveniently disproved by obtaining his thumb impression and getting comparison made by finger print expert. The presumption in this regard would be against the prosecution and in favour of the appellants that the Talaq Nama does bear the thumb impression of Naseer Ahmad.

13. Apart from this, the subject and contents of Talaq Nama does not in any manner indicate or suggest that the same could be prompted or forged e.g. it contains that the dowry and other goods had been handed over to Naseem Bibi. Had it been prepared by Naseem Bibi then why she should have inserted this clause which obviously operates to her detriment? Talaq Nama has been scribed on a stamp paper, which must have been purchased from a stamp vendor; verification regarding its genuineness could be made from stamp register maintained by

stamp vendor as well. It has been attested by Notary Public or Oath Commissioner which will carry a strong presumption of correctness of the deed and its due attestation. The divorce to appellant No.2 therefore can safely be accepted as genuine.

14. On legal plain an objection has been raised that Talaq Nama should have been conveyed to the arbitration council, which in original is supposed to be available its record, but As the accused have failed to prove the same, therefore, it cannot be treated as a genuine document.

It is true that the accused/appellants have not produced any evidence in this behalf but as observed above, the onus squarely lies on the prosecution to prove the case and not on the defence to disprove the same. The prosecution equipped with all necessary mechanism and specialized agencies could have very easily repel or disprove the defence plea by producing the concerned officials or by referring to relevant record. Mere opinion by the investigating officer, which has been relied upon by the learned trial Judge that Talaq Nama is bogus, is not even admissible in evidence. The investigating officer should have

disclosed its source and should have placed on record the material or the evidence on which the same had been based. Nothing has been done in this respect.

15. The learned counsel for the state has raised another legal objection that Talaq has not been pronounced in accordance with section 7 of Muslim Family Laws Ordinance 1961.

The contention cannot be accepted because under section 7 (1) "Any man who wishes to divorce his wife shall, as soon as may after the pronouncement of talaq in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife"

This section stipulates following steps: firstly there has to be pronouncement of talaq, i.e. it has to be verbally pronounced as mandated by Shariah; secondly, be the pronouncement in any form whatsoever, which would mean that in any prevalent mode, i.e. one's own language or as the case may be, in Arabic as some sects prescribe in this behalf; thirdly the verbal pronouncement of talaq has to be reduced into writing and has

to be conveyed to the Chairman of Union Council with a copy to the wife.

16. According to the learned counsel since the requirements of section 7 of the Muslim Family Laws Ordinance 1961 have not been fulfilled, therefore, no valid talaq has been pronounced.

The argument appears to be misconceived. Although a procedure has been laid down but failure to strictly comply with the procedure will not, in my humble estimation, invalidate the talaq. The necessary requirement or ingredient of talaq is a conscious and willful pronouncement of talaq with intention to release the wife from marriage bond, which has been fulfilled in this case. The failure to follow the above-prescribed procedure may entail or be followed by the punishment prescribed under the succeeding sub sections but the validity of talaq or the separation of the spouses from the marriage bond will not be effected.

17. The next question relates to the validity of the Nikah Nama. Both the appellants, i.e. Shoukat Ali and Mst. Naseem

Bibi admit of having entered into Nikah and they also admit the solemnization of the marriage. The fact that the record of the concerned union council about the registration of the Nikah has not been produced, cannot operate only against the accused/ appellants but it equally operate against the prosecution because no evidence to disprove the Nikah has been collected nor even any attempt in this regard has been made by the prosecution. The presumption in all probabilities when both the parties, i.e. the appellants, admitted solemnization of Nikah and also admit the execution of the Nikah Nama, be in their favour and the marriage will be treated as valid. It is the spirit of shariah and Islamic principles as well.

18. The learned counsel for the State although not very strongly, hinted that the subsequent marriage took place on 3.2.2002 whereas the Talaq Nama is dated 18.1.2002. According to him the period of Iddat if computed from e.g. 18.1.2002 is not completed and subsequent marriage without completing the period of Iddat is not valid. The plea is not supported by relevant principles of Islamic Law. As per section 257 Mulla's

Muhammadan Law Chapter XIV of 1996, the marriage of a woman before completion of her Iddat is irregular, not void. In this behalf reliance is placed on Allah Dad...Vs...Mukhtar and another, 1992 S.C.M.R 1273.

Marriage may be irregular and it may have its own consequences under personal law but the same cannot be treated as void. Union of the appellants in consequence of Nikah in between themselves as husband and wife cannot be regarded as un-Islamic or against Shariah. The prosecution plea that the appellants claim to have married each other without completing iddat and no official record of Nikah Nama has been produced in this regard but based on mere assertion is no marriage and even contrary to the provisions of Islamic Law. The contention is misconceived on factual plain as well because as per contents of mark "A" talaq had been pronounced verbally on 2.10.2001, whereas the subsequent Nikah was performed on 3.2.2002, i.e. after expiry of period of iddat.

While winding up the discussion an extremely important fact that Naseer Ahmad, the previous husband of Mst. Naseem,

has not come forward to deny or dispute the validity of talaq nama, is by itself sufficient to hold that he has divorced his wife.

19. In the light of the above discussion the prosecution has failed to prove the guilt of the appellants under section 10 (2) of the Ordinance and after accepting the talaq nama as genuine the appellants' conviction under 468/471 Pakistan Penal Code cannot be sustained.

20 In view of the above discussion, the prosecution has failed to prove its case against the accused/appellants; therefore, by accepting both the appeals, i.e. jail Cr.A.No.15/I of 2003 filed by Shoukat Ali and jail Cr.A.No.22/I of 2003 preferred by Mst. Naseem Bibi, they are acquitted of the charges. They shall be released forthwith from jail if not required in some other case.

ZAFAR PASHA CHAUDHRY
Judge

Approved for reporting.

ZAFAR PASHA CHAUDHRY
Judge

Islamabad the
October 22,2003
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