

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR.JUSTICE ZAFAR PASHA CHAUDHRY.

J. CRIMINAL APPEAL NO.92/I OF 2004 (L.W)

J.CRIMINAL APPEAL NO.195/I OF 2004

1. Mst. Nisa Begum daughter
of Baloch Khan,
2. Muhammad Munir son of Allahdad,
Both residents of Gogee Masrial,
Rawalpindi.

VRSUS

The State

Respondent

Counsel for the
Appellants.

Mr.M. Aslam Uns
Advocate

Counsel for the
State

Mr.Sher Zaman Bhatti
Advocate.

F.I.R No. date &
Police Station

No.75, dated 2.5.1998,
P.S, Chauntra,
District Rawalpindi.

Date of Order of
Trial Court

1.6.2001

Date of Institution

12.4.2004 & 30.6.2004
Respectively.

Date of Hearing

16.9.2004.

Date of Decision

16.9.2004

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JUDGMENT

ZAFAR PASHA CHAUDHRY, J:- This judgment will dispose of jail criminal appeal No.92/I of 2004 on behalf of Mst.Nisa Begum and jail criminal appeal No.195/I of 2004 on behalf of Muhammad Munir. Both the appellants alongwith their co-accused namely Ghulam Mehdi and Azhar Mahmood, were sent up to face trial in the court of Mr. Tariq Mahmood Iqbal Khan, Additional Sessions Judge, Rawalpindi. The learned trial Judge vide his judgment dated 1.6.2001 convicted both Mst. Nisa Begum and Muhammad Munir under section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 (hereinafter referred to as the Ordinance) and sentenced each of them to imprisonment for ten years. Muhammad Munir was also convicted under section 16 of the Ordinance and sentenced to undergo seven years R.I and also to pay a fine of Rs.5,000/- or in default of payment of fine to further suffer one year R.I. Both the convicts were allowed the benefit of section 382-B, Criminal Procedure Code.



2. The prosecution version as put up by Sher Abdul, complainant (PW.2) is that, he was employed in army and was posted in Azad Kashmir; his sister Mst. Nisa Begum had been married to one Muhammad Razzaq about five years ago; she however had no issue. About one year prior to lodging of the F.I.R Mst. Nisa Begum left the house of her husband due to strained relations; Muhammad Munir, appellant was on visiting terms with the complainant; he developed illicit relations with Mst. Nisa Begum. On 19.2.1998 at about 10.00 p.m. Muhammad Munir, appellant alongwith Mehdi Khan and Azhar Mahmood (acquitted co-accused) came to the house of the complainant, where his father Baloch Khan was also present. All the three took Mst. Nisa Begum alongwith them and were taking her out of the house, the complainant's father who is father of Mst. Nisa Begum as well, resisted but the aforesaid three persons took away Mst. Nisa Begum alongwith them.

The complainant, who was employed in army, could not remain in his house. He however, came on leave and was



present in the house for the last number of days. He searched for Mst. Nisa Begum, the appellant, but did not find any clue. He reported that Muhammad Munir had taken away Mst. Nisa Begum alongwith his two companions Mehdi Khan and Azhar Mahmood for adultery.

A report was lodged with police station Chauntra, district Rawalpindi. A formal F.I.R was registered thereon. Investigation was taken up and on conclusion of the investigation all the four accused, i.e. Muhammad Munir and Mst. Nisa Begum, the appellants and Mehdi Khan and Azhar Mahmood (acquitted co-accused) were sent up to the court to face trial, where they were charged under two heads, i.e. under section 16 and 10 of the Ordinance read with section 109 P.P.C. All the accused persons pleaded not guilty and claimed trial.

3. The prosecution in order to prove its case examined six witnesses. Sher Abdul, brother of Mst. Nisa Begum was examined as PW.2. Baloch Khan father of Mst. Nisa Begum was examined as PW.3. Dr.Muhammd Tabbasam Zia was examined



as PW.4 and lady doctor Tallat Mahmood, W.M.O appeared as PW.5. She medically examined Mst. Nisa Begum. She gave her age as 35 years. It was opined that she was habitual to sexual intercourse. Regarding recent sexual intercourse the vaginal swabs were obtained and sent to the Chemical Examiner. Muhammad Bashir, S.I (PW.6) carried out the investigation. He furnished the details of the investigation conducted by him. The remaining witnesses are formal in nature.

4. On close of prosecution evidence, the appellants were examined under section 342 Cr.P.C. Mst. Nisa Begum denied the allegations against her. In answer to question "why this case against you and why the PWs have deposed against you" she made the reply some how in the following terms:-

"Sher Abdul, (PW.2) and Baloch Khan, (PW.3) are son and father interese. The PWs have falseiy involved both the accused, i.e. appellants. due to dispute in between them. In fact she (Mst. Nisa Begum) was given in marriage to one Abdul Razzaq in exchange of marriage of Sher Abdul, her real brother with "Bhanjee" (niece) of Abdul Razzaq namely Mst. Fareeha. Mst. Fareeha was divorced by her husband Sher Abdul in the year 1997 and in reaction Abdul Razzaq, previous husband of Mst.



Nisa Begum, turned out of his house and divorced her. Mst. Nisa Begum's brother Sher Abdul then married the sister of Muhammad Munir, appellant and in lieu of that he got married her, i.e. Mst. Nisa Begum to Muhammad Munir. One year prior to the lodging of the F.I.R their marriage was solemnized and they were enjoying peaceful matrimonial life but due to internal dispute with Sher Abdul, complainant at the instance of Baloch Khan PW they have falsely involved them in the instant case. There is no truth in this false story"

Muhammad Munir, appellant also denied the charges. He like Mst. Nisa Begum came forward with the similar plea by stating that they both were married to each other and were living as man and wife. In answer to question No.7, he made explanation in the following terms:-

"Sher Abdul, (PW.2) and Baloch Khan, (PW.3) are son and father interese. The PWs have falsely involved both the accused, i.e. appellants, due to dispute in between them. In fact she (Mst. Nisa Begum) was given in marriage to one Abdul Razzaq in exchange of marriage of Sher Abdul, her real brother with "Bhanjee" (niece) of Abdul Razzaq namely Mst. Fareeha. Mst. Fareeha was divorced by her husband Sher Abdul in the year 1997 and in reaction Abdul Razzaq, previous husband of Mst. Nisa Begum, turned out of his house and divorced her. Mst. Nisa Begum's brother Sher Abdul then married his, i.e. Muhammad Munir's sister and after one year Muhammad Munir, appellant proposed Mst.



Nisa Begum. One year prior to the lodging of the F.I.R their marriage was solemnized and they were enjoying peaceful matrimonial life but due to internal dispute with Sher Abdul, complainant at the instance of Baloch Khan (PW.3), they have falsely involved them in the instant case. There is no truth in this false story"

5. On conclusion of the trial, the learned Additional Sessions Judge, convicted the appellants and awarded sentence as detailed above. Both of their co-accused who were stated to be accomplices and companions of Muhammad Munir for abduction of Mst. Nisa Begum, were acquitted of the charges.

6. Aggrieved by the conviction and sentences both the appellants have come up in appeal before this court. Both the appeals have been filed through superintendent jail, therefore, a counsel at State expense was provided to both the parties to pursue the appeal and assist the court.

7. The learned counsel for the appellants in the first instance has tried to argue that there is no evidence regarding commission of Zina, therefore, the conviction of the appellants was not sustainable. He referred to the medical evidence and



especially to the report of the Chemical Examiner, according to which the vaginal swabs obtained from Mst. Nisa Begum were found not to be stained with semen.

The learned counsel however, realized that the plea raised at the bar is ^{not} consistent with the stands taken by the appellants in their statements under section 342 Cr.P.C. According to both the appellants they got married and were living as man and wife at the time of registration of the case and their arrest. The learned counsel then switched over to the argument that if the evidence as brought on the record by the prosecution itself is critically assessed and analyzed it abundantly proves that the defence plea raised by Mst. Nisa Begum and Muhammad Munir appellants, is not devoid of truth. The learned counsel in this respect has referred to the statements of the complainant himself and submits that not only Muhammad Munir has married Mst. Nisa Begum but also complainant Sher Abdul, i.e. brother of Mst. Nisa Begum got married to the niece of Abdul Razzaq. In those areas it is a



known practice that the girls are generally given in exchange marriage. The defence plea of Mst. Nisa Begum that niece of Abdul Razzaq namely Mst. Fareeha had been given in exchange marriage to her brother Sher Abdul, complainant and according to her, Sher Abdul divorced Mst. Fareeha, therefore, Abdul Razzaq turned Mst. Nisa Begum out of his house. According to Mst. Nisa Begum after Abdul Razzaq, her previous husband, deserted her she came to the house of her father Baloch Khan, (PW.3). According to the appellants, they got married to each other and in exchange of marriage of Muhammad Munir and Mst. Nisa Begum, sister of Muhammad Munir was given in marriage to Sher Abdul. This fact is not denied by the complainant Sher Abdul that he was married to the sister of Muhammad Munir and also that the marriage in between Sher Abdul and sister of Muhammad Munir still subsists.

8. After going through the evidence of complainant Sher Abdul and Baloch Khan, i.e. PW.2 and PW.3, the question for determination arises whether Mst. Nisa Begum had been



divorced by Abdul Razzaq and as such she was free to marry Muhammad Munir, appellant. No documentary evidence in form of a certificate of the concerned Union Council or any written divorce notice on behalf of Abdul Razzaq is present on the record. However, the consistent stand taken by Mst. Nisa Begum that she was turned out of the house by Abdul Razzaq and thereafter she was released from the marriage bond. The question arises whether the conviction under section 10 of the Ordinance can be sustained merely because no divorce certificate or written notice on behalf of Abdul Razzaq is necessary. It is true that under the provision of Muslim Family Laws Ordinance the marriage as well as divorce has to be duly registered with the concerned Union Council. The elaborate procedure for divorce has also been laid down in the Ordinance and rules have been framed thereunder. Say, in case the divorce certificate or the written divorce notice is not present on the file but there is reliable evidence on the record from which it can unequivocally be inferred that possibility of tendering divorce



cannot be ruled out then it will be not only unsafe rather highly unjust to convict a woman for offence under section 10 of the Ordinance merely because she could not produce the relevant document.

9. In order to ascertain whether the defence raised by Mst. Nisa Begum^{is} supported by the circumstances of the case and conduct of the accused, I find that Baloch Khan (PW.3) father of Mst. Nisa Begum in answer to a question replied that "I do not know as if she was divorced by Razzaq. Volunteered that no divorce was given in my presence". The father of Mst. Nisa Begum could not categorically deny the suggestion that Razzaq had not divorced her. The answer to the question made by him is rather evasive and he simply stated that he does not know and supplemented with his statement that no divorce was given in my presence, meaning thereby that the divorce might have been pronounced by Abdul Razzaq but not in his presence. This stand taken by Mst. Nisa Begum is further supported from the



in the family of the complainant rather generally solemnized

as "~~تبادل~~" (exchange marriage). Now it is an admitted position

that earlier marriage of Mst. Nisa Begum with Abdul Razzaq was

an exchange marriage, Mst. Fareeha niece of Abdul Razzaq had

been given in marriage to Sher Abdul brother of Mst. Nisa

Begum, i.e. the complainant. Sher Abdul divorced Mst. Fareeha

and as a consequence thereof Abdul Razzaq turned Mst. Nisa

Begum out of her house. The possibility that in retaliation of

divorce of Mst. Fareeha, Abdul Razzaq would have divorced Mst.

Nisa Begum cannot be ruled out. Rather it appears very probable

that he would have divorced Mst. Nisa Begum.

10. The next question arises whether Mst. Nisa Begum

got married to Muhammad Munir. This assertion is also

supported by admitted fact that Muhammad Munir gave the

hand of his sister to Sher Abdul. As noted above, the marriage in

between the families of the appellants are ordinarily organized

as exchange marriage. As such the defence plea put forward by

Mst. Nisa Begum and Muhammad Munir, appellants does not

appear to be only a mere pretext to save themselves from conviction under section 10 or the Ordinance, rather their claim appears to be genuine and bonafide. To record or maintain their conviction, the benefit of doubt is invariably to be extended to the accused persons. If both man and woman being sui-juris admitted that they are married to each other and their assertion does not appear to be a mere excuse then the same has to be accepted unless there is any cogent and reliable material available to negate or contradict their assertion.

11. In the instant case, there are valid circumstances available to show that the appellants Mst. Nisa Begum and Muhammad Munir got married to each other, therefore, there was no question of commission of any Zina or adultery. Their conviction by the learned trial Judge under section 10 or 16 of the Ordinance cannot be sustained, the same is set-aside. Both the appellants are acquitted of the charges. They are stated to be confined in jail, they will be released forthwith if not required in some other case.



12. It is painfully noted that Mst. Nisa Begum has already undergone imprisonment for a period of about four years and four months. Similarly Muhammad Munir has already served out a sentence of about six years and four months. Be that as it may, their appeals are accepted and they have been ordered to be acquitted.



(ZAFAR PASHA CHAUDHRY)
Judge

Islamabad the
September 16, 2004.
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Approved for reporting.

