

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE MUHAMMAD ZAFAR YASIN

MR. JUSTICE SYED AFZAL HAIDER

JAIL CRIMINAL APPEAL NO. 175/I OF 2005 LINKED WITH

Fazal Hussain alias Fajja son of Ghulam Hussain,
r/o Mohalla Yousfabad, St: No.6, Chak No.203/RB
Manawala, Faisalabad.

... Appellant

Versus

The State

... Respondent

CRIMINAL APPEAL NO.198/L OF 2005

Ashiq Ali son of Ahmed Din,
r/o Chak No.202/R.B. Bhai Wajia Mohallah Mehrban Abad
Faisalabad.

... Appellant

Versus

1. ~~Fiaz~~ Hussain Shah son of Ahmed Din,
r/o Chak No.202/R.B. Bhai Wajia Mohallah Mehrban Abad,
Faisalabad.
2. The State ... Respondents

Counsel for appellant ... Qazi Nisar Ahmed,
Advocate

Counsel for complainant ... Mr. Muhammad Sharif Janjua,
Advocate

Counsel for respondent ... Mr. Muhammad Siddique Alvi,
Advocate

Counsel for the State ... Mr. Shafaqat Ullah Butt,
Deputy Prosecutor General

FIR. No. Date &
Police Station ... 216, 20.03.2004
Nishatabad, Faisalabad

Date of judgment of
trial court ... 26.05.2005

Dates of Institution ... 11.06.2005 & 16.06.2005
respectively

Date of hearing ... 04.02.2009

Date of decision ... 04.02.2009

JUDGMENT

SYED AFZAL HAIDER, Judge.: Fazal Hussain alias

Fajja appellant through Jail Criminal Appeal No. 175/I of 2005 has challenged the judgment dated 26.05.2005 delivered by learned Additional Sessions Judge, Faisalabad whereby he has been convicted firstly under section 16 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to four years of rigorous imprisonment with a fine of Rs.10,000/- and in default whereof to further undergo six months simple imprisonment and secondly under section 10(3) of Ordinance VII of 1979 and sentenced to seven years rigorous imprisonment with fine of Rs. 10,000/- and in default to further suffer six months simple imprisonment. Both the sentences are ordered to run concurrently. Criminal Appeal No. 198/L of 2005 has been filed by Ashiq Ali, complainant against the same judgment challenging the acquittal of Fiaz Hussain Shah who was tried alongwith Fazal Hussain alias Fajja. Since both the appeals have arisen from the same judgment so both are being disposed of by this Single Judgment.

2. Facts giving rise to these appeals are that a crime report was lodged at Police Station, Nishatabad, Faisalabad on the written application, Ex.PA, of Ashiq Ali, complainant/ P.W.3, addressed to the SHO regarding an occurrence alleged to have taken place on 11.03.2004 in the area of Mohallah Mehrbanabad. This report was registered as FIR 216 dated 20.03.2004 wherein the complainant stated that accused Fazal Hussain alias Fajja and Muhammad Fiaz (acquitted accused) lived in the street behind his house and whenever they would pass through the street they would tease his daughter Mst. Asima, aged about fourteen years. On her protest the complainant remonstrated with the accused. On 11.3.2004 the complainant went to his shop leaving his daughter Mst. Asima and his sister Mst. Musarat alias Nanni back in the house. The accused Fiaz and Fazal, duly armed, at about 10.00.a.m. entered the house of the complainant and forcibly abducted his daughter and transported her in a white coloured car. The complainant got information of this incident at his shop through his sister Mst. Musarat. Abid Ali and Muhammad Ali not produced, reportedly had seen the two accused escorting Mst. Asima in the

car. The complainant along with witnesses went to the accused and demanded the return of Mst. Asima. The accused restored his daughter on 12.03.2004 after getting his signatures on blank paper. The accused also warned him not to take any action against them. Mst. Asima told the complainant that both the accused committed Zina with her.

3. Police investigation ensued as a consequence of the registration of the crime report. The investigation was undertaken by Sabir Hussain, ASI, P.W.6. He visited the place of occurrence on 20.03.2004, prepared rough site plan Ex.PE, recorded statements of the victim as well as the other witnesses under section 161 of the Code of Criminal Procedure, arrested accused Fazal Hussain alias Fajja on 17.04.2004 after his pre-arrest bail was rejected and got him medically examined regarding his potency on the same day. After completion of investigation a report was submitted by the local police in the court under section 173 of the Code of Criminal Procedure requiring the accused Fazal Hussain to face trial while co-accused Fiaz Hussain was placed in column No.2 of the report. However, the trial court also summoned him to face the trial.

4. The trial court framed charges against both the accused on 02.12.2004 under sections 11 and 10(4) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

5. The prosecution in order to prove its case produced six witnesses at the trial. Mst. Asima victim appeared as P.W.1 and supported the story narrated in the crime report Ex.PA. Mst. Musarat Parveen appeared as P.W.2 and corroborated the story narrated by victim PW.1. Ashiq Ali complainant appeared as PW.3 and endorsed the facts stated by him in his application Ex.PA submitted on 20.03.2004 before the SHO. Abdul Ghaffar Muharrar appeared as PW.4. He had formally registered FIR Ex.PA/1 after having received the application Ex.PA on 20.03.2004. Lady Dr. Salma Iqbal appeared as P.W.5. She had undertaken medical examination of the victim PW.1 on 17.03.2004. She observed: "hymen torn and was healed. Vagina admitted two fingers tightly". Sabir Hussain, ASI appeared as P.W.6. His statement has already been referred to above.

6. The trial court after close of the prosecution evidence examined the accused under section 342 of the Code of Criminal Procedure. Accused Fiaz Hussain Shah gave a lengthy account in reply to question No.8 wherein he gave the background of relationship of Mst. Asima and Fazal Hussain alias Fajja and other matters on the basis of which he was found innocent. Since Fiaz Hussain has been acquitted by the learned trial court, his statement before the learned trial court would not be considered here in connection with the appeal of his co-accused. However his co-accused, the appellant, took up the plea that Mst. Asima was his married wife but this marriage was not accepted by her father with the result that "the instant case was lodged against him". The accused did not make statement on oath under section 340(2) of the Code of Criminal Procedure but each accused produced three witnesses in his defence. The resume of three defence witnesses produced by Fiaz Hussain Shah needs no comment in Jail Criminal Appeal No. 175/I-2005. However, the crux of the deposition of DWs 3,4 and 5 who appeared on behalf of the appellant is as follows:-

i. DW.4 Sahibzada Tariq Mahmood is the Nikah Khawan. He claimed having performed Nikah of appellant Fazal Hussain with Mst. Asima in the presence of witnesses and with the consent of the bride and the Nikahnama Ex.DC bore his signatures. He further stated that he had also tendered an affidavit to the same effect to the police.

ii. DW.5 Muhammad Imran is a witness of Nikahnama. He deposed that Nikah of appellant Fazal Hussain was performed with the consent of Mst. Asima.

iii. DW.6 Iftikhar Ahmed is another a witness of the Nikah performed by DW.4 and he stated that "Asima had accepted her Nikah with Fazal in my presence."

7. Learned trial court after hearing both the parties acquitted Fiaz Hussain Shah on the ground that: "Even in the statement of Mst. Asima before police, she never alleged that Fiaz Hussain Shah accused had committed Zina with her." As regards Fazal Hussain alias Fajja the learned **court** trial found that Asima was "enticed away by him" and consequently he was convicted under section 16 of Ordinance VII of 1979 and sentenced as noted above in the opening paragraph of this judgment.

8. We have gone through the file and perused the evidence adduced by the parties as well as the impugned judgment with the

assistance of learned counsel for the parties appearing in both the appeals.

Adverting to the impugned judgment we find that the learned trial court in this case came to the following conclusion:-

i That "As Mst. Asima was of the age of about 14 ½ years on the date of occurrence. Hence, she was not in a position to give her consent for a valid Nikah with accused Fazal Hussain alias Fajja" (Paragraph 27). The learned trial court further found that no value could be attached to the Nikahnama because "she was not in a position to give her consent for a valid Nikah".

ii. That Mst. Asima "was not forcibly abducted by the accused but she was enticed away by Fazal Hussain alias Fajja accused. As she was minor, so even her consent to go with Fazal Hussain alias Fajja did not dent the case of the prosecution because the consent of a minor is meaningless". (para 28).

9. Ashiq Ali complainant during the pendency of Jail Criminal Appeal No.175/I of 2005, dated 11.06.2005, moved Criminal Appeal No.198-L of 2005 on 16.06.2005 against the acquittal of co-accused Fiaz Hussain Shah. Ashiq Ali appellant has also filed a criminal Miscellaneous No.107/I of 2008 whereby he seeks permission to place the following documents as additional evidence:-

i The suit dated 01.04.2004 filed by Fazal Hussain accused in the family court against Mst. Asima Bibi for restitution of conjugal rights;

ii. The order sheet of the family court in the above mentioned suit from 02.04.2004 upto 12.10.2004. The last entry in the order sheet is the statement of Mst. Asima Bibi wherein she stated that her Nikah was performed forcibly after abducting her. She expressed hatred for Fazal Hussain and claimed Khula in consideration of the return of Haq Mehr. The order sheet reveals that the defendant i.e. Mst. Asima Bibi daughter of Ashiq Ali complainant was duly served and she put up appearance through her counsel and also filed written statement on 04.10.2004. On the next date hearing, which was fixed for reconciliation, she appeared in person and claimed Khula. This happened on 12.10.2004.

iii. Judgment and decree of the family court dated 12.10.2004 whereby the marriage between the parties was "dissolved on account of Khula and the dower money i.e. Rs.500/- was paid by the defendant to the plaintiff. Copy of the judgment be issued and sent to the Union Council concerned."

10. Since the application for additional evidence has come from the complainant, the appellant in the connected appeal Criminal Appeal No. 198/L of 2005 and the facts narrated therein have a direct bearing on the facts and circumstances of the Jail Criminal Appeal No. 175/I of 2005,

so for a just disposal of the matter in hand, we allow this application as envisaged by sections 375 and 428 of the Code of Criminal Procedure which provisions authorize the appellate court at appropriate stage to bring on record additional evidence which has a bearing on the guilt or innocence of the convict accused. We asked the learned counsel for the appellant if he has any objection to the reception of additional evidence sought to be produced by the complainant and the learned counsel in reply stated that he would have no objection and would take the opportunity to rely upon these documents because in the cross-examination of the witnesses for the prosecution suggestions as regards marriage between the appellant and Mst. Asima has already come on record.

11. However to satisfy ourselves we also enquired from Ashiq Ali complainant, present in court along with his learned counsel about the authenticity of the documents sought to be produced and whether he had authorized and handed over the said documents authorizing him to file this application for additional evidence. The complainant stated that he had obtained attested copies of these documents and given to his lawyer for

presentation in this court. We feel that these documents relating to the period April to October, 2004 should have been produced in the trial court which decided the case on 26.05.2005 because in view of the decision of the Apex Court in Azam's case reported as PLD 1984 Supreme Court 95, the decision of the Family Court in matrimonial matters is the determining factor. The learned trial court on 05.04.2005 recorded reply of Fazal Hussain appellant to question No.6 in which he stated that he had contracted marriage with Mst. Asima. Suggestions to that effect had been put to witnesses. The complainant was also asked whether suit for jactitation was filed by him. Today we find the same complainant producing evidence to the effect that the Family Court had taken cognizance of the matrimonial dispute between the appellant and Mst. Asima. It is rather unfortunate that parties do not take the Court into confidence with the result that the real story is shrouded in mystery and ultimately the benefit is claimed by the accused party. Hon'ble Members of the Bar as well as the functionaries of the prosecution branch can provide guidance and remedial measures.

12. Learned trial court has observed that Mst. Asima, being 14 ½ years old and hence a minor, was not competent to give her consent for a valid marriage. The definition of the term marriage, for the purpose of Ordinance VII of 1979, as given in clause (c) of section 2 of the Ordinance is as follows:-

“Marriage” means marriage which is not void according to the personal law of the parties, and “married” shall be construed accordingly.”

The marriage of a minor, who has attained puberty as contemplated by the definition of the term “adult” in clause (a) of section 2 of Ordinance VII of 1979, has not been considered void at all. For the purposes of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 a pubert girl is an adult person. It therefore implies that consummation of marriage, which is not void ab-initio, is not covered by the mischief of section 10 of Ordinance VII of 1979.

13. The learned trial court having held that Mst. Asima was not forcibly abducted, came to the conclusion that “she was enticed away by Fazal Hussain alias Fajja accused” which is certainly not backed by

evidence. Mst. Asima is undoubtedly a pubert and as such, for the purposes of Ordinance VII of 1979 is an adult. Firstly there is no evidence of enticement as Abid Ali and Muhammad Hussain, witnesses named in the FIR were not produced and secondly the fact that she is under 16 years of age would not stand in her way to give consent for marriage if she has attained puberty. We have also considered the impact of additional evidence sought to be brought on record by the complainant himself. These documents prove that Mst. Asima, daughter of the complainant appeared in person before the family court and not only demanded Khula but also returned the amount of Haq-Mehr to secure her release. It was on 12.10.2004 i.e., the date of the judgment and decree of the Family Court. It was on this date that separation took place formally between the appellant and Mst.Asima. The decision of the Family Court is final as it was not challenged in appeal. The criminal courts are bound by the decision of the Family Courts in matters which is the exclusive preserve of the Family Courts. Decree dated 12.10.2004 was not produced before the trial court at all. In view of the decree passed by Judge Family Court dated 12.10.2004

dissolving the marriage between Mst. Asima and Fazal Hussain appellant on the ground of Khula, the findings of the Criminal Court declaring the marriage as worthless and having no value is without jurisdiction. It is worthy of mention that the Muslim Personal Law gives recognition to the *incidents of marriage*. Even after obtaining Khula from appellant Fazal Hussain on 12.10.2004 Mst. Asima was bound to observe Iddat under her personal law. Had she become pregnant and given birth to a child she could claim maintenance for the child from the appellant and the child would have inherited from father as well. These are the recognized incidents of marriage. The very appearance and statement of Mst. Asima made in the Family Court to demand Khula in consideration of the return of Haq-Mehr received by her in fact relieves the appellant from proving the factum of marriage. He is no more covered by the mischief of Ordinance VII of 1979.

14. Criminal Appeal No.198-L of 2005 filed by Ashiq Ali against the acquitted of Fiaz Hussain Shah must fail for the reason that the learned trial Court in paragraph 26 of the impugned judgment found that Mst. Asima Bibi never alleged Zina against Fiaz Hussain Shah when she made a

statement Ex.DA, before police under section 161 of the Code of Criminal

Procedure. The learned trial Court held that "It seems that she had made

dishonest improvement in this regard as far as accused Fayyaz Hussain

Shah is concerned." We endorse this conclusion of the learned trial Court.

We are fortified by the statement of PW.6 Sabir Hussain, the investigating

officer, who stated that accused Fiaz Hussain Shah was found innocent in

the case and this finding of the investigating officer was also endorsed by

his Inspector as well the D.S.P.

15. We are not impressed by the evidence of Mst. Asima

P.W.1. She has not been consistent. On one hand she pretended that she

did not know the accused persons prior to the occurrence though her

father claimed that on her complaint made to him he had protested with

accused and told them not to tease her in future but on the other hand

she claims that some time back there was a quarrel between the

children of accused party and the complainant group which ended in a

compromise. She also stated that threats were given to her father by the

accused in her presence. It is therefore not possible to believe that she

did not know the accused before the alleged date of occurrence. It is also stated by her that she returned home at 10.00 a.m. the next day on 12.03.2004 but her father claims that she was handed over to him after he had signed blank papers on the demand of accused parsons. The story of her return does not inspire confidence either. She admits having gone to the Courts as well on 12.03.2004 in connection with signatures and her affidavit. She never raised hue and cry in the court premises. The element of delay of nine days in lodging the crime report casts doubt on the entire story. The prosecution has deliberately not taken the court into confidence. Real facts have not been disclosed. This aspect has damaged the appeal of the complainant.

16. In view of the discussion noted above it is not safe to maintain the conviction and sentence recorded by learned Additional Sessions Judge, Faisalabad in Hudood Case No.9-7 A of 2004, Hudood Trial No.12-7A of 2005 in the impugned judgment dated 26.05.2005. The appeal of the appellant registered as Jail Criminal Appeal No.175-I of 2005 succeeds. The connected appeal filed by Ashiq Ali, registered

as Criminal Appeal No.198-L of 2005 is dismissed. Appellant Fazal Hussain alias Fajja shall be set at liberty unless required in any other case.

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JUSTICE SYED AFZAL HAIDER

M. Z. Yasir

JUSTICE MUHAMMAD ZAFAR YASIN

Islamabad the 4th February, 2009
*Mujeeb ur Rehman/**

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Fit for reporting

