

IN THE FEDERAL SHARIAT COURT.
(Appellate Jurisdiction)

PRESENT.

MR. JUSTICE ZAFAR PASHA CHAUDHRY

JAIL CRIMINAL APPEAL NO.200/I OF 2002 (Linked With)
JAIL CRIMINAL APPEAL NO.245/I OF 2002

1. Afzal Masih alias Noori Masih,
Son of Rashid Masih,
2. Mst. Maqsoodan wife of
Ashiq Masih, both
Residents of Nasirat Colony
Jhang Road Faisalabad --- Appellants.

Versus

The State --- Respondent.

Counsel for the --- Chaudhry Razaqat Ali,
Appellants. --- Advocate.

Counsel for the --- Syed Muzahir Hussain Naqvi,
The State --- Advocate.

Case F.I.R No, date --- No.7, dated 3.1.2002,
& Police Station --- P.S, Jhang Bazar,
Faisalabad.

Date of judgment --- 15.07.2002.
Of trial court

Date of Institution --- 12.8.2002 & 14.10.2002
Respectively.

Date of Hearing --- 29-03-2004.

Date of Decision --- 19-4-2004.

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JUDGMENT

ZAFAR PASHA CHAUDHRY, J: - Jail Criminal

appeal No.200/I of 2002 filed by Afzal Masih and Jail Criminal appeal No.245/I of 2002 filed by Mst. Maqsoodan have arisen out of common judgment dated 15.7.2002 passed by Syed Afzal Sharif Kazmi, Additional Sessions Judge, Faisalabad. In fact both the appeals arise out of the same facts and allegations, which were contained in F.I.R No.7, dated 3.1.2002 registered at Police Station Jhang Bazar, Faisalabad. Both the appeals have been taken together and are being disposed of by a single judgment.

2. The prosecution version are revealed from the application moved by Ashaq Masih complainant before the S.S.P Faisalabad is that, he was Christian by faith and about 20 years before he was married to Mst. Maqsoodan Bibi, one of the appellants. Out of this wedlock three sons and four daughters were born. Mst. Shahnaz who was wife of Afzal Masih alias Noori Masih, the other appellant was on visiting terms with his family. Afzal Masih through Mst. Shahnaz developed illicit relations with Mst. Maqsoodan Bibi. About 1.1 /2 months prior to the registration of the case, Ashaq Masih complainant had left his house for livelihood. Afzal Masih abducted Mst. Maqsoodan Bibi and thereafter kept her in his house for commission of Zina. The complainant made efforts to retrieve Mst. Maqsoodan Bibi through the good offices of respectables but Afzal Masih kept on evading complainant on one pretext or the other. Ultimately on 23.12.2001 he flatly refused to return Mst. Maqsoodan Bibi.

3. On the above statement and allegations made by Ashaq Masih, case F.I.R No.7 was registered at Police Station Jhang Bazar, Faisalabad under sections 10 and 16 of the Offence of Zina (Enforcement

of Hudood) Ordinance, 1979 (hereinafter referred to as the Ordinance). Usual investigation was conducted and ultimately a report under section 173 Cr.P.C/challan was submitted against Ashaq Masih and Mst. Maqsoodan Bibi appellants holding that both were guilty of commission of Zina-bil-raza with each other, and as such offences under sections 10 and 16 of the Ordinance had been committed. On receipt of the report by police, learned Additional Sessions Judge framed charges under two heads, i.e. under sections 16 and 10 of the Ordinance, against Afzal Masih and Mst. Maqsoodan Bibi, appellants. Both the appellants pleaded not guilty therefore, they were put on trial.

4. The prosecution produced six witnesses in support of its case. Out of them Ashaq Masih complainant PW.4 is relevant. He endorsed the contents of application made by him before the police and stated in court that Afzal Masih and Mst, Maqsoodan Bibi developed illicit relations with each. Thereafter Mst. Maqsoodan Bibi on .8.11.2001 eloped with Afzal Masih who kept her in his house. Ashiq Masih approached Afzal Masih to return Mst. Maqsoodan Bibi but he did not accede to his demand. Both the appellants kept on committing adultery.

The remaining witnesses are not of much significance especially in view of the defence plea raised hereinafter by the appellants. Muhammad Anwar, S.I (PW.6) furnished the details of the investigation as carried out by him.

5. On close of the prosecution evidence, the defence counsel Mr.Shahzad Nazir, tendered in evidence copy of Nikahnama Ex.D.1. in between Afzal Masih and Mst. Maqsoodan Bibi, copy of affidavit Ex.D.2. sworn by Mst. Maqsoodan Bibi (Noor Fatima) and copy of certificate marked "A" evidencing conversion to Islam by both the appellants, Afzal

Masih and Mst. Maqsoodan Bibi. Mst. Maqsoodan Bibi was examined under section 342 Cr.P.C, she denied the allegations and came forward with a plea in the following terms.

"On 24.9.2001, I myself converted to Islam and thereafter I asked my previous Husband Ashiq Masih to embrace Islam or to divorce me but he did not agree, thus I with my free consent married to my co-accused on 24.12.2001 and due to this grudge present F.I.R was registered against me and my co-accused. PWs are interse related"

Afzal Masih was also examined under section 342 Cr.P.C. He too denied the allegations and set forth his defence plea as under: -

"This case is registered against me and my wife Mst. Maqsoodan Bibi because we have embraced Islam and got married each other and the complainant and PWs are still Christian and they have grudge against me and my wife because we have accepted Islam. I and my co-accused accepted Islam on 24.9.2001 and thereafter my name was converted Noor-ul-Mustafa instead of Afzal Masih and my co-accused's name was converted as Noor Fatima in stead of Maqsoodan. My co-accused Maqsoodan asked the complainant to accept Islam or to divorce her because she became Muslim, but her previous husband refused to accept Islam as well as to divorce her. Thereafter she with her free consent married to me on 24.12.2001. PWs are Christian and due to their common religion with the complainant and close relations as well, deposed against me and my co-accused.

The medico legal report or the report of the Chemical Examiner Ex.P.G would not be of any importance because both the appellants admit that they lived as husband and wife after getting themselves married by entering into Nikah under Islamic Law.

6. The learned trial Judge did not accept the defence plea and held that both the appellants Mst. Maqsoodan Bibi and Afzal Masih had been committing Zina-bil-raza without being validly married. He accordingly convicted both the appellants under section 10 (2) of the Ordinance and sentenced them to undergo five years R.I, each and fine of Rs.5000/- or in default to suffer two months R.I, each. Benefit of section 382-B, Cr. P. C was extended to them. Both the appellants filed separate appeals from jail before this court. they have been provided with a counsel at State expense as per rules of this court. The respective counsel on behalf of the appellants as well as State addressed their arguments.

7. After going through the evidence and hearing the arguments, it is observed that on factual plain there is no controversy inasmuch as it is admitted by Mst. Maqsoodan Bibi appellant that she was Christian by faith and got converted to Islam. It is also stated by her that after becoming Muslim she offered her husband to accept Islam, which according to her, he did not accept. Similarly Afzal Masih was a Christian. He got converted to Islam and became a Muslim. Both the appellants embraced Islam without any external pressure, duress or instigation. There is not even any allegation in this behalf. There is also no controversy in between the prosecution and the defence that both the appellants after accepting Islamic faith and becoming Muslims got married to each other in accordance with the Islamic law. They entered into Nikah in accordance with the Islamic Injunctions and the marriage had duly been registered under the provisions of Muslim Family Laws Ordinance. Both the appellants accepted the performance of Nikah and entering into marriage and admitted that after they were validly married, they kept on

living as husband and wife and also performed their respective marital obligations..

8. The only question which requires determination is that if two persons are married to each other under the law and also in accordance with the Injunctions of their faith they were following, then performance of marital obligations by each of them would fall within the definition of Zina as contained in the offence of Zina (Enforcement of Hudood) Ordinance, 1979 and if the offence does not fall within the definition as contained in the Ordinance then they cannot be held guilty there-under and they cannot be convicted for the same.

9. At the moment the matter before the court is to sustain or annul the conviction recorded by the trial court. The court has to consider the appeals while exercising its revisional and appellate jurisdiction as conferred by the constitution. To decide whether the offence of Zina is constituted or not, the status and position of the respective parties have to be seen at the time of alleged commission of the offence. It is not disputed or controverted that at the time of alleged commission of Zina, both the appellants Mst. Maqsoodan and Afzal Masih who has adopted his Islamic name as Noor Mustafa and they had also entered into Nikah as Muslims. If two persons commit sexual intercourse and they claim rather explain that they were both Muslims, both adults and had entered into a valid Nikah, their case does not fall within the purview of section 4 of the Ordinance herein reproduced below: -

"A man and a woman are said to commit 'Zina' if they willfully have sexual intercourse without being validly married to each other"

Similarly the definition of marriage is in the following terms:-

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

In order to determine whether the marriage is valid, the position and status of the parties at the time of alleged offence has to be seen. As referred to above as well, both the appellants were Muslims and they got married to each other and their marriage cannot be held to be invalid.

10. As has been observed in the preceding paras, to determine guilt or offence of an accused person especially for offence like the one in hand, i.e. commission of Zina, the position of the accused persons at the time of commission of the offence would be relevant and not his previous history. It would be enough to examine that any person who claims to be a Muslim, he believes in oneness of Allah and Prophet-hood of Muhammad (S.A.W) being the Last Prophet, will be accepted as a Muslim. There is no cavil with this proposition. The position or the previous history of an accused prior to the time of the commission of the alleged offence will not be relevant to determine his guilt. Merely because some times before the commission of the offence the appellants were not Muslims or in that position had they continued to remain Christians they could not have married to each other, to my mind, would be beyond the scope and perimeters of the criminal appeals preferred before this court. These questions might have been relevant if there was any question to determine the legal status or the positions of their previous relations or bonds. To decide a criminal appeal, the purpose and scope is limited only to determine the guilt or innocence of a person. Penal provisions of any law have always to be strictly construed and the court always leans towards the accused. As observed above, the definition of the crime and

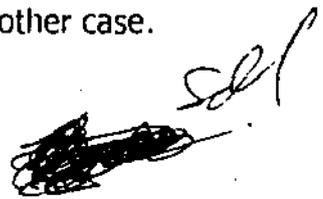
the ingredients of the offence as laid down in the Penal sections, i.e. sections 2 and 4 of the Ordinance, have to be seen and kept in view. If the ingredients are not fulfilled then no conviction can be recorded under these sections. Undisputedly both the appellants are Muslims and their marriage is duly registered under the prevalent law, therefore, it would be inappropriate and unjust to treat the marriage as invalid at least to determine their guilt which in fact is the fact in issue in the appeals under consideration. Consequently, they cannot be held guilty of commission of Zina as per provisions of the Ordinance.

11. The learned counsel for the appellants in support of his contention apart from referring to the law enunciated in case of Muhammad Ramzan-Vs-The State, NLR 1984 SD 420 also referred to the case of Mst. Naziran alias Khalida Parveen-Vs-The State, PLD 1988 SC 713. The learned counsel has also referred to sections 19 and 20 of Muhammadan Law by Mulla contained in Chapter II, which states as under:-

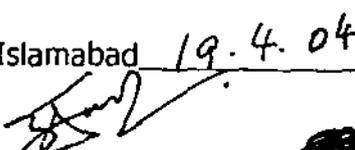
"19. Who is a Mahomedan,-- Any person who professes the Mahomedan religion, that is, acknowledges (1) that there is but one God; and (2) that Mahomed is His Prophet, is a Mahomedan. Such a person may be a Mahomedan by birth or he may be a Mahomedan by conversion. It is not necessary that he should observe any particular rites or ceremonies, or be an orthodox believer in that religion; no Court can test or gauge the sincerity of religious belief. It is sufficient if he professes the Mahomedan religion in the sense that he accepts the unity of God and the prophetic character of Mahomed"

"20. Conversion to Mahomedanism and marital rights. — (1) Before the Dissolution of Muslim Marriages Act, 1939, apostasy from Islam of either party to a marriage operated as a complete and immediate dissolution of the marriage. However, under section 4 of the Act the mere renunciation of Islam by a married woman or her conversion to any other religion cannot by itself operate to dissolve her marriage but she may sue for dissolution on any of the grounds mentioned in section 2 of Dissolution of Muslim Marriages Act, 1939"

12. In view of the above discussion, the conviction of both the appellants recorded by the learned Additional Sessions Judge, Faisalabad vide his judgment dated 15-7-2002 in case FIR No.7 dated 3-1-2002 registered at Police Station, Jhang Bazar, Faisalabad is not sustainable and the same is set aside. Both the appeals are accepted. The appellants Afzal Masih and Mst. Maqsoodan are stated to be confined in jail. They shall be set at liberty provided they are not required in any other case.


ZAFAR PASHA CHAUDHRY
Judge

Announced at Islamabad
M.Khalil




Approved for reporting.