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IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT.

HON: MR. JUSTICE SAEED-UR-REHMAN FARRUKH

Jail Criminal Appeal No.269/I of 2002

Tariq Masih son of Eida Masih
Caste Esai R/o St. No.8, --- Appellant
Warispura, Faisalabad.

VERSUS

The State	---	Respondent
Counsel for the appellant	---	Mr. Javed Aziz Sindhu, Advocate
Counsel for State	---	Mr. Arif Ali Zafar Chohan, Advocate
Case No. Date of FIR and police station	---	429, 2.8.2001 P.S Nishatabad, Distt; Faisalabad.
Date of decision of trial Court	---	22.10.2002
Date of Institution	---	14.11.2002
Date of hearing	---	12.01.2004
Date of decision	---	12.01.2004

JUDGMENT.

SAEED-UR-REHMAN FARRUKH, J.:- By this judgment I

propose to dispose of the following two matters as these arise out of the same judgment dated 22.10.2002 passed by learned Additional Sessions Judge, Faisalabad:-

1. Jail Criminal Appeal No.269/I of 2002
(Tariq Masih Vs; The State)

2. Jail Criminal Appeal No.6/I of 2003
(Mst. Nagina Masih Vs; The State)

2. Vide impugned judgment, Tariq Masih appellant was convicted for offence under section 16 of the Offences of Zina (Enforcement of Haddood) Ordinance, 1979 and sentenced to suffer five years R.I with a fine of Rs.20,000/-. He was also sentenced to five years R.I and a fine of Rs.20,000/- and in default to undergo six months imprisonment for indulging in illicit intercourse with Mst. Nagina Masih. Both the sentences were ordered to run concurrently.

Vide same judgment Mst. Nagina Masih was convicted under section 10(2) of the Offences of Zina (Enforcement of Haddood) Ordinance, 1979 and sentenced to five years R.I. She was also directed to pay a fine of Rs.10,000/- and in default of payment of fine to suffer further six months S.I.

Benefit of section 382-B Criminal Procedure Code was extended to both the appellants.

The three co-accused of the appellants namely, Saleem Masih, Allah Rakhi and Mst. Rashidan were acquitted.

The prosecution story, as unfolded in the FIR (EX.PA),

2.08.2001, recorded at police station Nishatabad, Distt:

Faisalabad, on the statement of Shehbaz Masih PW.4, is that one year prior to the occurrence he was married with Mst. Nagina Masih, appellant. On 12.7.2001 he had gone to Chenab Mills, Faisalabad leaving his mother Rani Masih and Mst. Nagina Masih in the house. Allegedly, Mst. Rakhu Masih and Saleem Masih took his wife out of the house on the pretext of shopping. When he returned home he found his wife missing. Search was started for her. He was informed, in the process, by Akbar Masih and Pervez Masih near the railway crossing Bhaiwala, that they had seen the two appellants going along with Saleem Masih, Allah Rakhi and Mst. Rashidan (acquitted accused) in a Riksha towards city. He went to the house of the accused alongwith his mother and demanded that his wife be returned to him but they, despite confessing their guilt, refused to hand over Mst. Nagina Masih to him. He then went to the police station and got case registered. According to him, while leaving his house, Mst. Nagina Masih appellant took a ring weighing $\frac{1}{2}$ tola and Rs.5,000/- in cash with her.

4. After necessary investigation, the five accused, mentioned in the FIR, were arrested and challaned to Court. They were charge sheeted. They pleaded innocence and claimed to be tried.

5. At the trial, the prosecution examined as many as seven witnesses out of whom the statements of Muhammad Azam H.C, PW.1 and Haider Ali Shah PW.7 are of formal nature and need not be dilated upon.

Dr. Mujahid Latif, APMO, Allied Hospital, appeared as PW.2 and deposed that as per examination of Tariq Masih appellant he was found fit to perform intercourse (vide his report Ex.PB/1). PW.3 Dr. Bushra Tahir, WMO, Allied Hospital examined Mst. Nagina Masih appellant on 25.11.2001 and reached the conclusion that intercourse had been committed with her (vide report Ex.PD).

Shehbaz Masih, complainant entered the witness box as PW.4 and reiterated the allegations levelled by him in the FIR. In his cross-examination, he denied the suggestion that on 19.7.2001 both Mst. Nagina Masih and Tariq Masih "accepted Islam" and, thereafter, they had contracted marriage inter-se. According to him, Mst. Nagina Masih neither obtained divorce nor embraced Islam and then entered into marriage with Tariq Masih. He also denied the suggestion that his attitude towards Mst. Nagina Masih was not good and that she had not been abducted by anyone. The last sentence of his cross-examination

is to the effect that "I do not know whether Mst. Nagina Masih had accepted Islam."

6. Pervez Masih PW.5 deposed that he saw the accused taking away Mst. Nagina Masih with them and informed the complainant in this regard.

In his cross-examination he also stated "I do not know whether on 19.7.2001 Mst. Nagina Masih had accepted Islam and contracted nikah with Tariq Masih with his new name as "Ghulam Mustafa." He contended that in Christianity there was no concept of divorce.

7. Nasrullah S.I, PW.6 conducted necessary investigation. He deposed that during the course of investigation, on 17.8.2001, Saleem Masih told him that he had received a chit from someone mentioning tht Mst. Nagina Masih had embraced Islam and her new name was Kaneez Fatima. He then made necessary inquiry and verified the fact from the "Molana" of that locality who stated that three persons met him namely, Tariq, Kaneez Fatima and one "Molvi". He further deposed that he recorded the statement of Mst. Nagina Masih, who took the plea that she had not been abducted by anyone. Mst. Nagina Masih produced an affidavit before him regarding her conversion to Islam. According to him, "Molana" Aslam Razvi also made a similar statement. Fazal Karim of Jamia Razvia/did not make any state-

ment but he verified the certificate issued by the said "Jamia" about the acceptance of Islam by Mst. Nagina Masih. He deposed that in his view Mst. Nagina Masih had embraced Islam.

8. After closure of the prosecution evidence, the statements of the accused were recorded, wherein they denied the suggestions levelled against them by the prosecution in toto. Tariq Masih appellant took up the plea that the complainant and other accused persons were Christians whereas he and Mst. Nagina Masih were Muslims. On being questioned as to why the case had been registered against him and the prosecution witnesses had deposed against him he made the following statement:-

"It is a false case. Kaneez Fatima (new name of Nagina) has embraced Islam and she did not like to spend her life with non-Muslim. She had married with me (Tariq) according to the teaching of Islam. All the PWs are interested witnesses and deposing falsely being Christians only to depress us all are saged due to acceptance of Islam and the alleged story mentioned in Ex.PA is concocted, false and frivolous one."

He stated that he would not appear in witness box as his own witness under section 340(2) Criminal Procedure Code nor he would produce any defence evidence.

9. In her statement under section 342 Criminal Procedure Code Mst, Nagina Masih also took up the plea that the complainant

and the other accused were Christians whereas she and Tariq Masih

(appellant) were Muslims. She, in reply to the question as to why

she had been implicated in the case, gave the following answer:-

"It is a false case. Kaneez Fatima (new name of Nagina) has embraced Islam and I did not like to spend my life with non-Muslim. I had married with Tariq according to the Teaching of Islam. All the PWs are interest witnesses and deposing falsely being Christians only to depress us all are saged due to acceptance of Islam and the alleged story mentioned in Ex.PA is concocted, false and frivolous one."

She also did not opt to appear as her own witness in the witness box under section 340(2) Criminal Procedure Code and stated that she would not lead any defence evidence. Saleem Masih, Allah Rakhi and Mst. Rashidan, in their statements under section 342 Cr.P.C, supported the appellants qua their plea that they had embraced Islam and then contracted marriage inter-se.

10. I have heard the learned counsel for the parties and perused the record with their assistance.

11. Perusal of the impugned judgment shows that the learned Additional Sessions Judge proceeded on the premises that marriage between a Christian Couple can not be dissolved except through Court of Law. According to him, the marriage between the complainant and Mst. Nagina Masih (appellant), not having been annulled by

Court continued to subsist. In this view of the matter, taking into consideration the stance of the two appellants in their respective statements under section 342 Cr.P.C that they had entered into marriage inter-se and were living as spouses, he reached the conclusion that this admission was sufficient, coupled with other material on record, to hold that they were guilty of living in adultery, rendering them liable to be convicted under the Haddood Ordinance. According to him the plea of the appellants that prior to their marriage they had embraced Islam was of no avail to them to save them from the rigors of the Penal Law on the subject.

He has referred to and relied upon a judgment of Lahore High Court reported as PLJ 2001 Cr: Cases 294 for seeking fortification of his view that a marriage between Christian spouses cannot be dissolved except through Court of Law and, that too, only on the ground of adultery.

12. I am afraid learned trial Judge has not only misdirected himself as to the core of controversy involved in this case but has also displayed lack of knowledge of the law applicable on the subject.

There is no cavil with the proposition that as between Christian spouses, process of law has to be adopted in case dissolution/annulment of marriage is sought for and the ground as avail-

able in the relevant statute has not only to be pleaded specifically but also positively proved before success is achieved in this process. However, the facts of the present case cover entirely different situation which had to be dealt with and decision arrived at with regard to the culpability or otherwise of the two appellants in the criminal proceedings, leading to their impugned convictions and sentences in this Hadood Case. The ratio of precedent case is not at all attracted to the facts of the present case.

13. Both the appellants had taken a specific plea that they firstly embraced Islam, thereby renouncing their original faith i.e, Christianity and thereafter, entered into martial relationship with each other.

There is ample evidence/material on the record to show that the above plea was not wholly without substance, rather sufficient proof was forthcoming in the prosecution case itself in this regard. Two prosecution witnesses namely, Shehbaz Masih complainant PW.4 and Pervez Masih PW.5 did not positively assert that both the appellants had not embraced Islam and gave evasive reply to the question put to them in this behalf by deposing that they did not know whether the appellants had "accepted" Islam. The Investigating Officer namely,

Nasrullah S.I, PW.6 made a probe into this aspect of the matter and reached the conclusion, after contacting the religious personage of the locality (Molana), that Mst. Nagina Mashh appellant had embraced Islam. He also recorded her statement to the same effect, besides receiving an affidavit from her on the same lines. He also verified the correctness of the certificate issued by "Jamia Rizvia" about the conversion of Mst. Nagina Mashh to Islamic faith. He deposed that in his view this stance of the lady was correct.

14. Faith is personal to any individual and if he/she openly professes to believe/follow a particular faith no further enquiry/evidence would be called for to verify its correctness. In Islam no rituals of specific nature are required to be undergone by a non-Muslim before he is to be treated to have renounced his/her earlier faith and joined the ranks of believers in Islam. All that is necessary is a declaration in this behalf and recitation of Kalima, belief in one God, the finality of Prophethood of Holy Prophet (Peace be upon Him) and Holy Quran. A true Muslim must also declare his/her faith about the earlier Prophets and the divine books revealed unto them and the day of judgement.

15. The pre-requisites of embracing Islam having been fulfilled by the two appellants it had to be concluded that they

were no longer Christians by faith. This conclusion, unfortunately, was not drawn by the learned trial Judge and he grossly misdirected himself qua this crucial aspect of the case.

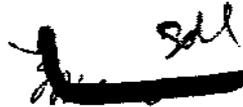
16. There are three authoritative pronouncements by this Court to the effect that as a result of embracing Islam, the marriage between Christians stood ipso-facto annulled. See "Salamat Ali Vs; The State" (P.Cr.LJ 1989 FSC 978), "Sardar Masih Vs; Haider Masih etc" (PLD 1988 FSC 78) and "Mst. Zarina and another Vs; The State" (PLD 1988 FSC 105).

17. In view of the law down supra, it was manifestly proved on record that Mst. Nagina Masih no longer remained legally wedded wife of the complainant, who continued to follow his original religion. The marital relationship between them, having been severed perpetually, Mst. Nagina Masih appellant was legally free to enter into marriage with Tariq Masih appellant (both having embraced Islam). Marriage in Islam is in the nature of civil contract entered into between man and woman and no formal deed, as per Sharia, is necessary to be drawn to prove that a valid marriage has come into being. In the instant case, however, there is available on record a Nikahnama evidencing the marriage of the appellants inter-se, (page 29 of record of trial Court).

18. Viewed in the above perspective of the legal position on the subject the evidence on record was sufficient to establish that no offence, cognizable in law, had been committed by the appellants.

The convictions and the sentences imposed upon them were wholly unjustified and same are hereby set aside by accepting their appeals. They are directed to be released from jail, forthwith, if not required in connection with any other case.

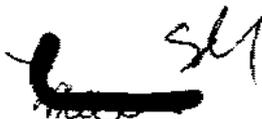
The above are the reasons for short order dated 12.1.2004.



(SAEED-UR-REHMAN FARRUKH)
JUDGE

Islamabad the,
12th January, 2004
Jaleel.M/*

Approved For Reporting.



Judge.