

IN THE FEDERAL SHARIAT COURT  
(APPELLATE JURISDICTION)

(3)

PRESENT

(13)

HON MR. JUSTICE B.G.N.KAZI.

Criminal Appeal No.58/I of 1983

1. Mian Dad s/o Essa Khan Dhoond
2. Mst. Murbat Jan d/o Khan-i-Zaman  
w/o Mian Dad, resident of Sarri cum  
Bagh, Tehsil and District,  
Abbottabad. .... Appellants

Versus

The State	.....	.... Respondent
For the Appellant	.....	Malik Muhammad Rafique, Advocate.
For the State	.....	Mian Muhammad Ajmal, Assistant Advocate General, NWFP.
Date of hearing	.....	2nd July, 1983.

JUDGMENT

B.G.N.KAZI, J.

The Sessions Judge, Abbottabad tried Essa Khan, Mian Dad, Allah Dad, Mst. Muhammadi, Khan-e-Zaman, Muhammad Bashir and Mir Zaman on the charge of enticing away Mst. Murbat Jan with intent that she may have illicit intercourse with Mian Dad and thereby committing an offence punishable u/s 16 of the Offence of Zina (Enforcement of Hadood) Ordinance, 1979 (Ordinance VII of 1979) (hereinafter referred to as the Ordinance), and also tried Mst. Murbat Jan for abetting the co-accused - an offence punishable under section 19(2) of the Ordinance, and acquitted all the accused except Mian Dad and Mst. Murbat Jan whom he convicted under section 16 and 19(2) of the Ordinance and sentenced each of them to rigorous imprisonment for four years, 20 stripes and a fine of Rs.2000/- or in default to undergo further S.I. for one year. This appeal has been

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filed by the two appellants against the aforesaid convictions and sentences.

2. The prosecution case against the appellants is as under:-

On 7th January, 1982, at 12.00 noon Sultan s/o Dost Muhammad Dhoond lodged FIR with Ghulam Mustafa Moharrar, Bagnotar Police Station, which was recorded and read out to him, in which he stated that he had married Mst. Murbat Jan, d/o Khan-e-Zaman. There was no issue of the marriage. His wife being angry with him had been living her father for last four months. He was doing labour at Karachi and 3/4 days before the date of lodging the report his mother had asked him to return home. On 5th January, 1982, when he reached home he came to know from his mother that his wife Mst. Murbat Jan was abducted by Mian Dad s/o Essa Khan with the consent and help of Khan-e-Zaman, Bashir, Mst. Muhammadi w/o Khan-e-Zaman, Mir Zaman, Essa Khan s/o Said Khan, and Allah Dad son of Essa Khan on 30th December, 1981. He further stated that his wife had taken away Rs.4000/- in cash, a locket, nose pins and ear rings of gold weighing 3 tolas, besides 8 'juras' of clothes. ASI Mohazum Shah of Bagnotar Police Station arrested Bashi, Mir Zaman, Khan-e-Zaman and Mst. Muhammadi accused, On 7-1-1982. Complainant Sultan Khan produced a letter purporting to have been written by accused Essa Khan and handed over to Roshan Din barber, which was secured in presence of Mashirs, Sher Zaman and Ali Zaman. On 8-1-1982, the ASI inspected the scene of offence and prepared Site Plan. He found that accused Mian Dad, Ali Zaman, Allah Dad and Mst. Murbat Jan were absconding and initiated proceedings against them under sections 87 and 88 Cr.P.C. and obtained warrants under section 204 Cr.P.C. from the Illaqa Magistrate.

3. An application was submitted to Officer Incharge of the Colony Police Station Karachi by the brother of

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Sultan complainant in July, 1982, mentioning that absconding accused were living in Karachi. The same was marked to ASI Nasiruddin Ansari for action. He took a lady constable and arrested the accused from a house in Gutter Bagheecha and brought them to the Police Station and informed Police Station Bagnetar about the arrest of the proclaimed offenders. At first Mian Dad, Allah Dad and Mst. Murbat Jan were arrested and on Mian Dad giving the address of his father Essa Khan, he too was arrested on the same day i.e. 26-6-82. On 28-6-1982 he obtained remand of the accused in Police Custody when Head Constable Abdur Rashid of Bagnetar Police Station reached there, handed over the four accused to him. Abdur Rashid after obtaining requisite permission brought the accused to Abbottabad where Mst. Murbat Jan was medically examined.

4. SI Masud Parvaiz who was SHO Police Station Bagnetar then sent up the accused for trial.

5. At the trial all the accused persons including the two appellants pleaded not guilty. Appellant Mian Dad took the plea that it was for Mst. Murbat Jan to say whether at all there was her marriage with Sultan. In any case he had married her in Karachi after she had been divorced by Sultan on the decision of Jirga. He totally denied the enticing and taking away of Mst. Murbat Jan and he also denied that he, his brothers and father had absconded. It was his case that they had gone to Karachi seeking employment. He had married Mst. Murbat Jan with her consent and in presence of her parents and other persons and the Nikah has been performed.

6. Mst. Murbat Jan appellant had also totally denied her enticement by Mian Dad. She stated that she was married to Aurangzeb, the younger brother of Sultan who had died. She did not want to marry Sultan and had never given her consent to any such marriage. She had been pressurized by Sultan for marriage and she had not given consent voluntarily. She denied that she had given birth to any

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child of Mian Dad whom she had married after Sultan divorced her. She totally denied being enticed by the accused or that she had absconded and further stated that she alongwith other members of her family was residing in Karachi and Mian Dad was earning his livelihood there. She further stressed that she is innocent and had not been charged by Sultan of any offence but it was the mother of Sultan, with whom she had not good relations and who had falsely deposed against her, as she entered into marriage with Mian Dad. Similarly, all other co-accused namely relatives of Mst. Murbat Jan and Mian Dad totally denied any enticing or taking away of Mst. Murbat Jan.

7. On behalf of prosecution as many as 13 witnesses were examined at the trial and I have gone through the evidence on record and have heard the arguments of Malik Muhammad Rafiq Khan, the learned counsel for the appellants and Mian Ajmal, the learned Assistant Advocate General for the State, who incidently did not support the convictions.

8. It is apparent from the perusal of the evidence on record that even <sup>the evidence shows</sup> the factum ~~about~~ of the marriage of Sultan with the appellant No.2 does not inspire confidence. It is admitted position that Mst. Murbat Jan was married to Aurangzeb the younger brother of Sultan and that Sultan was previously married and has another wife. This was admitted by Maulvi Muzafar Hussain neighbour of Sultan who had also solemnized the marriage. According to this witness marriage of Sultan with Mst. Murbat Jan took place six and half months after the death of her husband Aurangzeb. He also stated that Sultan s/o Shah was one of the witness who conveyed the consent of the bride. However, Sultan s/o Shah had stated that the marriage had taken place three or three and a half years after the death of Aurangzeb. The witness also admitted that there was no writing to evidence the Nikah. It had been contended by the appellant Mst. Murbat Jan that she had not given her consent voluntarily. At this stage, it may be mentioned that Malik Muhammad Rafiq Khan, the learned counsel

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for the appellant pointed out that under section 6 of the Muslim Family Law Ordinance, 1961, since Sultan was already married, he had to seek permission of Chairman Union Council before he could contract scnd marriage and there is no mention by him that he sought such permission. This, could be considered merely to add to the weak nature of evidence with regard to the marriage, as <sup>failure to obtain</sup> ~~without~~ such permission attracts penal action, but does not ~~second marriage~~ invalidate the <sup>second</sup> marriage.

9. Be that as it may be, it appears from the perusal of the record of the trial that there was absolutely no evidence about enticing or taking away Mst. Murbat Jany by the accused. The learned Sessions Judge while discussing the case of six accused whom he acquitted observed that not a single witness out of the prosecution witnesses produced by the Prosecution had stated that he saw accused enticing or taking away Mst. Murbat Jan and further that although Allah Dad and Essa Khan were also arrested from Karachi alongwith the appellants, this fact was not sufficient to connect them with the crime. As a matter of fact, there is no evidence at all about abduction or enticement, as according to the complainant his mother Mst. Amir Jan had given him the names of the seven accused who according to her had enticed away Mst. Murbat Jan on 30-12-1981, whereas it is clear that even according to the complainant and his mother, Mst. Murbat Jan had been taken away by her parents and was residing with them. Mst. Amir Jan had just stated that she got information without even caring to give source of such information. The so called letter stated to have been given by the accused Essa to Roshan Din, barber, does not help the prosecution as it does not even bear a date and cannot be considered as proved, nor could it be considered as admission of any sort, on the part of the two appellants.

10. With regard to the allegation that the appellants and some accused persons had absconded to Karachi, even

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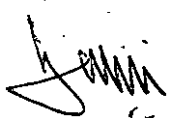
complainant Sultan had himself left his home in the village and had gone Karachi for employment/labour. Why should, therefore, any such extreme presumption be drawn or conjecture made about the families of Khan-e-Zaman and Essa Khan having gone to Karachi.

11. With regard to the divorce given by Sultan, he had stated that he given it on 8-4-1982 in accordance with the decision of Jirga. The fact about the decision of Jirga in favour of divorce shows that there was no marriage or living together by the two appellants at that time, and the fact also supports the contention of Mst. Murbat Jan about her being pressurized into the so called marriage, which was without her consent.

12. The fact that appellants were found living together on 26-6-1982 should not have been considered to be sufficient for proving enticement and abetting enticement as, of the assertion about their marriage after divorce is considered such living together is sufficiently explained.

13. In Sarkar Vs. Muhammad Yunous, a decision of High Court of Azad Jammu and Kashmir (reported in 1981 Pakistan Criminal Law Journal 971) where there was no evidence on record to hold that accused either enticed away the woman with intent to have illicit intercourse with her, knowing well that she was married woman, or of actually committed adultery with her - it was held that mere inference of offences on account of alleged recovery of woman from the custody of accused would not be sufficient. The order of acquittal was maintained in the circumstances.

14. During the arguments of the learned counsel it was pointed out to them that even if the contention that Nikah of the appellant was held on 7-6-1982 is accepted, marriage would be before the expiry of the period of Iddat. As an appellate Court, this Court has authority to consider on the facts brought out on record, even if the offence



charged has not been spelt out, whether any other offence has been committed. In Badai-us-Sanai by Allama Kasani a famous Hanafi Jurist (Vol.VII pp 35-36), the learned author inter alia expressed the view that intercourse with a woman who is in Iddat of another person will not be punishable with Hadd if he married with her before the expiry <sup>of the</sup> period of Iddat. According to him "Hadd will not be implemented on him due to the fact that he contracted the marriage with woman who was eligible for that and there is a doubt that he understood that marriage with that woman was not allowed to him. This is according to Imam Abu Hanifa". Developing his argument, the learned writer further states that, "this Nikah is Nikah-e-Fasid and intercourse in Nikah-i-Fasid does not amount to adultery with concensus of the Jurists and this <sup>is</sup> why Hadd of adultery will not be imposed in such case just as in case of intercourse after marriage without witness".

15. To the same effect is section 257 of the Principles of Muhammadan Law by F.D.Mulla (Pakistan edition by Dr. M.A. Manan p.258), that a marriage with a woman before the completion of Iddat is irregular and not void.

16. For the reasons given it is apparent that there is no evidence on which conviction under section 16 of the Ordinance or abetment of the offence under section 19 of the Ordinance can be sustained. The appeal is accordingly accepted and the two appellants are acquitted. They are on bail and their bail bonds stand cancelled.

*BB, K. A. S.*  
JUDGE-II

Islamabad, the 5th July, 1983  
\*M. Faridun\*

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6/7/83

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