

**`JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)**

Cr.A No. 158-M/2015

JUDGMENT

Date of hearing: **17.12.2015**

Appellants: (Ajab Khan and one other) by
Mian Muhammad Riaz, Advocate.

Respondents: (State) by Mr. Sabir Shah, A.A.G.
(Bakht Sherawan) by
Mr. Mukaram Shah, Advocate.

HAIDER ALI KHAN, J.- This criminal appeal is directed against the judgment dated 06.6.2015 of the learned Additional Sessions Judge/Izafi Zilla Qazi, Swat at Kabal, delivered in case FIR No. 237 dated 29.11.2013 registered under sections 496-A/496-B/203/379/34 PPC at Police Station Shah Dherai, District Swat whereby the appellants were convicted and sentenced as under:

Appellant Ajab Khan

- i) Under Section 496-A PPC to imprisonment for five years with fine of Rs.10,000/- or in default

- thereof to suffer further two months S.I.
- ii) Under Section 496-B/34 PPC to imprisonment for five years with fine of Rs.10,000/- or in default thereof to suffer further two months S.I.

Appellant Mst. Naseema

Under Section 496-B/34 PPC to imprisonment for five years with fine of Rs.10,000/- or in default thereof two months S.I.

2. Precise and relevant facts of the case are

that the complainant Bakht Sherwan on 27.11.2013 reported to the local Police Station Shah Dherai to the effect that his daughter Mst. Naseema, who was already engaged to one Abdur Raziq through a valid *Nikah*, was enticed away by Ajab Khan on the previous night for the purpose of contracting illegal marriage with her. The complainant further reported that Mst. Naseema also took away gold ornaments weighing 5 *tolas* owned by his daughter-in-law Mst. Khaista Bibi. Report of the complainant was recorded vide Daily Diary No. 11 dated 27.11.2013, on the basis whereof Murasila Ex.PA

was drafted which lastly culminated in registration of FIR, Ex.PA against both the accused namely Ajab Khan and Mst. Naseema (the appellants herein).

3. After arrest of the accused and completion of investigation, challan was submitted in the Court of learned Judicial Magistrate who formally indicted the accused for the offences. The accused pleaded not guilty and opted to face the trial whereafter evidence of the prosecution was recorded. Thereafter, statements of the accused under Section 342, Cr.P.C were recorded wherein they professed their innocence, however, neither they felt need of producing any evidence in their defence nor they opted to be examined on oath under section 340(2), Cr.P.C. After hearing the arguments, the learned Judicial Magistrate came to the conclusion that the prosecution has successfully proved its case against the accused, however, it was opined by the learned Judicial Magistrate that award

of sentence more than three years imprisonment would be in excess of his jurisdiction, therefore, the accused were taken into custody and the case was sent to the learned Sessions Judge, Swat vide order dated 17.4.2015 with the request of carrying out further proceedings. On receiving the case, the learned Sessions Judge entrusted the same to the learned Additional Sessions Judge, Swat at Kabal who rendered the impugned judgment of conviction dated 06.6.2015 after hearing arguments of the parties. Being aggrieved of their conviction, detail mentioned in para No.1, the appellants have preferred the instant appeal before this Court.

4. Learned counsel for the appellants/convicts contended that the impugned judgment of the learned trial Court is against the law and facts on the record; that the witnesses produced by the prosecution are highly interested, therefore, their testimony cannot be legally relied upon for

conviction of the appellants/convicts; that the learned trial Court has failed to properly analyze the evidence according to the settled principles of law besides, the prosecution has badly failed to prove its case against the appellants/convicts; and that there are glaring contradictions in the statements of the prosecution witnesses but the trial Court ignored them and recorded the impugned judgment of conviction which has resulted in miscarriage of justice to the appellants/convicts, hence, the same is not legally maintainable.

5. On the contrary, learned counsel for the complainant as well as the learned A.A.G appearing on behalf of the State argued that the available evidence on the record is sufficient in bringing home guilt to the appellants/convicts, therefore, the learned trial Court has committed no illegality while convicting them after proper appraisal of the material available on the record. It was lastly

contended that the act of the appellants/convicts is against *Sharia* as such, they have got what they deserved in accordance with law, therefore, the impugned judgment of conviction rendered by the learned trial Court in no manner warrants interference of this Court.

6. I have heard the arguments of learned counsel for the parties and have gone through the record.

7. According to the prosecution version, the appellant Ajab Khan enticed away the co-appellant Mst. Naseema for the purpose of illegal marriage despite the fact that *Nikah* of Mst. Naseema had already been effected with one Abdur Raziq. In support of its above contention, the prosecution has produced and exhibited the alleged *Nikah Nama* dated 13.11.2012 as Ex.PW-4/1. A bare perusal of the said *Nikah Nama* reveals that the same has neither been signed or thumb impressed by the

husband Abdul Raziq nor it bears the signature or thumb impression of the appellant/convict Mst. Naseema. Although it is also the stance of the prosecution that consent of the appellant Mst. Naseema had been obtained by her Wali/attorney namely Lal Muhammad (PW-5) who is her maternal uncle, but astonishingly the purported *Nikah Nama* Ex.PW-4/1 does not bear his signature or thumb impression neither in the capacity of a Wali nor as her attorney. Another witness namely Pacha Gul (PW-6) who recorded his statement regarding the said *Nikah Nama*, stated in his cross-examination that:

"یہ درست ہے کہ جو مبینہ نکاح نامہ ضبط تحریر
میں بوقت نکاح لایا گیا تھا وہ ایک باقاعدہ رجسٹرڈ
نکاح نامہ تھا۔"

According to this witness, the *Nikah* Nama which he signed as a witness was in duly printed form but perusal thereof reveals that it was on a plain paper which does not carry signature or thumb impression of this witness i.e PW-5.

Moreover, as observed earlier, no prescribed *Nikah* Form was used for the purpose nor the same was registered by the authority concerned. Similarly, the *Nikah Nama* (Ex.PW-4/1) was neither signed by the appellant/convict Mst. Naseema nor by her *Wali*/attorney, therefore, its status has become highly doubtful.

8. Another important aspect of this case is the age of the appellant/convict Mst. Naseema at the time of her previous *Nikah*. Although, the prosecution has badly failed to prove the factum of the alleged former *Nikah* between the appellant Mst. Naseema and Abdur Raziq, however, if the same be considered as proved for a while even then it is of no avail to the prosecution. It is evident from the statements of prosecution witnesses especially PW-5 that the appellant Mst. Naseema was 13/14 years of age at the time of the alleged *Nikah*. There is no authentic document on the record to show her

exact age, however, the appellants have contracted marriage and out of the wedlock they have an offspring who is being taken care of by the relatives of appellant Ajab Khan. So far as validity or otherwise of this marriage is concerned, the status of the previous *Nikah* has already been held as doubtful, therefore, the said offspring cannot be left on the mercy of the society to be branded a result of adulterous relationship because the future of a child is also to be considered by this Court. Record also shows that the appellant Mst. Naseema has got a decree for dissolution of her marriage with Abdur Raziq by exercising her right of puberty. The relevant portion of the order dated 25.11.2015 of the learned Civil Judge-IV/Family Court is as under.

“In the circumstances of the case, the parties cannot live together within the limits prescribed by Almighty Allah, therefore, plaintiff is held entitled for the decree of dissolution of her marriage with the defendant on the basis of Khula as alternative relief, in consideration of

dower which shall be deemed to have been waived by the plaintiff. Ex parte decree is accordingly granted in favour of the plaintiff.”

9. No doubt, marriage by a girl without getting the consent of her parents/Wali as well as the act of elopement, have always been considered as detestable by *Sharia* and by the customs of the area, however, both the appellants have exercised their option of to tie the knot being adult and sane citizens which is not prohibited by the law of the land.

10. In view of what has been discussed above, I allow this appeal, set aside the impugned judgment dated 06.6.2015 rendered by the learned Additional Sessions Judge/Izafi zilla Qazi, Swat at Kabal, delivered in case FIR No.237 dated 29.11.2013, under sections 496-A/496-B/203/379/34 PPC registered at Police Station Shah Dherai, District Swat and resultantly acquit the appellants Ajab Khan and Mst. Naseema of the charge levelled

against them. They be released forthwith if not required in any other case.

Above are the reasons of my short order of the even date announced in the open Court.

Announced.
Dt: 17.12.2015.

JUDGE