

JUDGMENT SHEET

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

Cr.A. No. 215-M/2015.

JUDGMENT

Date of hearing: **06.02.2017**

Date of announcement: **07.02.2017**

Appellants:- *(Mst. Ulfat Bibi & 1 another) by Mr. Sajjad Anwar, Advocate.*

Respondents:- *(the State & 1 another) by Mr. Sabir Shah, A.A.G and Mr. Allah Dad Khan, Advocate.*

MOHAMMAD IBRAHIM KHAN, J.- Mst.

Ulfat Bibi and Farhad Khan accused/Appellants were convicted by the judgment dated 08.9.2015 in case FIR No. 1202 dated 02.11.2014 charged under sections 365-B, 494, 493-A PPC registered at Police Station Chakdara Dir Lower under the following sentences:-

- *U/S 365-B PPC accused Farhad is convicted and sentenced to undergo imprisonment for life alongwith payment of fine of Rs. 20,000/- in default thereof, he shall further undergo SI for six months.*
- *Similarly, U/S 494 PPc accused Ulfat Bibi is convicted and sentenced to undergo SI for seven years alongwith payment of fine of Rs. 10,000/- in default thereof she shall undergo SI for three months.*
- *As it was also established that co-habitation was not caused by deceitful means of accused Farhad rather both accused cohabitated*

willingly, therefore instead of section 493-A PPC, both accused are hereby convicted and sentenced under section 496-B PPC for five years each alongwith payment of fine of Rs. 10,000/- in default thereof both the accused shall undergo SI for three months each.

2. Accused/Appellants were jointly tried by the Court of learned Additional Sessions Judge/Izafi Zila Qazi Chakdara Dir Lower for assertions:-

- ***Firstly, accused Farhad Khan on 25.10.2015 at 6:00 hours abducted Mst. Ulfat Bibi from the house of the complainant for the purpose of an unlawful marriage; thereby the offence cover for punishment U/S 365-B PPC.***
- ***Secondly, Mst. Ulfat Bibi knowingly that she was under the lawful wedlock of the complainant contracted an unlawful marriage with co-accused Farhad Khan, the offence requiring punishment U/S 494 PPC.***
- ***Thirdly, accused Farhad Khan after abducting Mst. Ulfat Bibi co-habitated with her through deceitful means of a lawful marriage, the offence cover U/S 493-A PPC.***

3. The prosecution in order to bring home the charges against the accused/Appellants examined Wasif Khan as PW-1 who is lodger of the first information report Ex. PW-1/1. PW-2 is Mst. Zeenat Bibi, who is the real sister of the accused/Appellant Mst. Ulfat Bibi, supported the statement of Wasif Zaib PW-1. PW-3 Nawab Said is the real brother of the accused/Appellant Mst. Ulfat Bibi, who has confirmed that prior to the occurrence 4/5 months back his sister was married to Wasif Zaib. PW-4

Muhammad Badshah who is Taxi driver and he has been given the role to the extent that he driven away accused/Appellant Mst. Ulfat Bibi from her house to a place known as Sabsezai Mandi Mardan. PW-5 Muhammad Umar who is close relative of the accused/Appellant Farhad Khan and he accommodated the accused in his house. PW-6 Fazal Ghafoor Khan ASI, who has obtained permission for initiation of an inquiry U/S 156 (3) Cr.P.C through an application Ex. PW-6/1, recorded statements of the prosecution witnesses under sections 161 & 164 Cr.P.C. He has collected the record pertaining to the CDR data and *Nikah-Nama* (Ex. PW-3/1) in between Wasif Zaib and Mst. Ulfat Bibi was taken into possession vide recovery memo. PW-7 Lal Shehzada, who is police official being witness to the recovery memo Ex. PW-7/1. PW-8 Arshad Iqbal who has stated that on 6.11.2014 in his presence the police has taken into possession the motorcar No. 1671/MPR Model 1986 vide recovery memo Ex. PW-8/1. PW-9 is Dr. Javaid Iqbal Medical Officer, THQ Chakdara who has examined the accused/Appellant Farhad. His report is placed on file as Ex. PW-9/1. PW-10 is Dr. Rehana Medical Officer THQ Chakdara, who has examined the

accused/Appellant Mst. Ulfat Bibi. According to her report Ex. PW-10/1 she has given the following opinion:-

“She has conducted intercourse. She was pregnant for a period of 8 weeks and 6 days. According to ultrasound report period of gestation was of two months. Nothing case said about the date of intercourse”

PW-11 is Akbar Ali Khan Judicial Magistrate Chakdara, who has recorded confessional statement of the accused/Appellant Farhad Khan, which appears on pages No. 45 & 46 of the proceedings of trial Court as Ex. PW-11/2 while certificate is Ex. PW-11/3.

4. After closure of the prosecution evidence, accused/Appellants were separately examined under section 342, Cr.P.C, wherein they denied the charges, posed innocence and stated to have falsely been implicated in the case. They however wished to produce no defence, not to examine themselves on oath as required under section 340(2), Cr.P.C.

5. Evidence of the prosecution entailed judicial prudent mind of the Presiding Officer of the

Court of learned Additional Sessions Judge/Izafi Zila Qazi Chakdara, therefore sentences thought for were passed.

6. Having heard arguments of the learned counsel for the accused/Appellants, learned counsel for the complainant and learned A.A.G, record gone through with their assistance.

7. We have noticed that the accused/Appellant Farhad Khan has been charged for enticing away accused/Appellant Mst. Ulfat Bibi to contract an unlawful marriage with her, therefore the offence is covered U/S 365-B PPC. The charge was framed but in contrast accused/Appellant Mst. Ulfat Bibi was charged to have contracted an unlawful marriage with co-accused/Appellant Farhad Khan, thereby charge within the meaning of section 494 PPC was framed against her. Under the 3rd head of the charge accused/Appellant Farhad Khan has been further arraigned U/S 493-A PPC that he has

co-habitated with Mst. Ulfat Bibi through deceitful means of a lawful marriage.

8. In compass very closely observed that as far as prosecution evidence which pertains to levy of section 365-B PPC and are clear in our mind that the element of Section 365-B which is a requisite condition that after a woman is kidnapped or abducted with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will, in order that she may be forced or seduced to illicit intercourse, it invites a punishment for imprisonment for life with fine.

9. Here forceful illicit intercourse in between the accused/Appellants is lacking, as after the recovery the statement of Mst. Ulfat Bibi recorded under section 161 Cr. P.C does not signal her abduction or elsewhere has been subjected to illicit intercourse. There is no kidnapping or abduction as

all the witnesses of the prosecution are silent to this effect.

10. If at all depositions under section 494 PPC against the accused/Appellant Mst. Ulfat Bibi were to be proved, the prosecution at least the Investigating Officer should have brought any evidence to the effect that from 25.10.2014 till the accused/Appellants were arrested they had contracted an unlawful marriage. Either some witnesses should have been examined or at least the *Nikah-Nama* to that effect in black & white would have been part of the evidence.

11. The last charge against the accused/Appellant Farhad Khan is that he abducted Mst. Ulfat Bibi and co-habitated with her through deceitful means for a lawful marriage. Coming to the statement of PW-10 Dr. Rehana Medical Officer THQ Chakdara, although she has formed an opinion that Mst. Ulfat Bibi has conducted intercourse and she was pregnant for a period of 8 weeks and 6 days,

but there were no signs of fresh intercourse as she plainly stated in her medical report that she could not give the exact date of intercourse.

12. There is confusion about the pregnancy report that if at all Mst. Ulfat Bibi was found pregnant for 8 weeks and 6 days, on the calculation from the date 03.11.2014 on which date she was examined for her medical checkup. By the said date i.e. 3.11.2014 she might have got pregnant approximately on 1st September, 2014. *Nikah-Nama*, Ex. PW-3/1 pertaining to the marriage of the complainant Wasif Zaib and his wife Mst. Ulfat Bibi was prepared on 28.9.2014 and it was registered on 30.10.2014. It suggest that the accused/Appellant Mst. Ulfat Bibi was even pregnant prior to her consummation with her husband a month earlier. Obviously, this pregnancy is not during the time when it is as asserted that Mst. Ulfat Bibi was kidnapped on 25.10.2014.

13. Coming to the confessional statement of the accused/Appellant Farhad Khan, in this respect statement of Akbar Ali Khan Judicial Magistrate Chakdara was recorded as PW-11. His cross-examination is of paramount importance. This witness deposed in his cross-examination as under:-

"یہ درست ہے کہ ملزم کو میرے روبرو پیش کرنے اور
Ex. PW1/11 اس کا بیان قلمبند کرنے کی نسبت قلمی حکم
تا Ex. PW-11/3 میں موجود نہ ہے۔"

As far as identification of the accused/Appellant before the Judicial Magistrate is concerned, the same has also been doubted. There is no cavil with the legal proposition that while evaluating the confessional statement main object of law is to ensure the voluntariness and truthfulness of the statement. It would be a right place to mention here that a greater duty is casted upon the Magistrate recording confession to be satisfied that such confession is voluntarily made and to that end he must make an inquiry before recording the confession.

14. No doubt, conviction can be based on the retracted confession alone but if it is found voluntary, true and confidence inspiring. Honourable Supreme Court in a case titled **Bahadur Khan vs. The State (PLD 1995 S C 336)** it has been held that *"retracted confession has to be accepted only if it is corroborated by clear, cogent and independent evidence". Court is called upon to act upon a retracted confession to enquire into all the material points and surrounding circumstances and satisfy itself fully that the confession cannot but be true."*

In such state of affairs, it can safely be held that the so called retracted confession was neither voluntary nor true. In the instant case, the very voluntary nature and truthfulness of the retracted confession is under cloud, so, no reliance can be placed on the same.

15. Regarding the golden principle of benefit of doubt, reference can be made to the celebrated judgment of the apex Court title "**Muhammad**

Luqman Vs. The State (1970 S.C.-10), where the

Hon'ble Bench have observed that:-

"It may be said that a finding of guilt against an accused person cannot be based merely on the high probabilities that may be inferred from evidence in a given case. The finding as regards his guilt should be rested surely and firmly on the evidence produced in the case and the plain inferences of guilt that may irresistibly be drawn from that evidence. Mere conjectures and probabilities cannot take the place of proof. If a case were to be decided merely on high probabilities regarding the existence or non-existence of a fact to prove the guilt of a person, the golden rule of "benefit of doubt" to an accused person, which has been a dominant feature of the administration of criminal justice in this country with the consistent approval of the superior Courts, will be reduced to a naught".

16. The dicta laid down in the above precedent has been re-enforced by the august Supreme Court in the cases of **Tariq Parvez Vs. The State (1995 SCMR-1345)**, **Muhammad Khan and another Vs. The State (1999 SCMR-1220)** and **Muhammad Akram Vs. The State (2009 SCMR-230)**.

17. In view of the above, we do not hesitate to accept this appeal, set aside the conviction and

sentences recorded by the learned trial Court. Ergo
acquit the accused/Appellants from the charges
levelled against them in the present case. They shall be
released forthwith, if not required in any other case.

By our short order of even date, we had
accepted the appeal and acquitted the
accused/Appellants. Hereinabove are reasons for the
same.

Announced.

Dt: 07.02.2017.

JUDGE

JUDGE