Judgment Sheet

IN THE PESHAWAR HIGH COURT, PESHAWAR
(JUDICIAL DEPARTMENT)

Cr. Appeal No. 624-P/2022

"Muqadas Khan...Vs...The State & another"

JUDGMENT

Date of hearing.....**06.09.2022**

Appellant by: Syed Mazhar Hussain, Advocate

Respondent/State by: Mr. Muhammad Nisar Khan, AAG assisted by Mr. Ibarar-ul-Haq, Advocate, for the complainant.

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SHAKEEL AHMAD, J.- This appeal calls in question the judgment dated 22.06.2022 of the learned Additional Sessions Judge-III, Kohat, whereby appellant has been convicted under Section 4 of Elimination of Custom of Ghag Act, 2013 and sentenced to Seven (7) years rigorous imprisonment and a fine of Rs. 500,000/- (Five Lac), in default of payment whereof simple imprisonment for six months. He was also adjudged guilty under Section 506 PPC and sentenced to rigorous imprisonment for two (02) years & a fine of Rs. 10,000/- (Ten thousands) or in default thereof to undergo simple imprisonment for one month. Both the sentences were ordered to run concurrently. Benefit of Section 382-B Cr. PC was also extended to the accused.

2. Briefly stated the prosecution case as set up in Crime No.1056 dated 22.06.2022 registered at Police Station City Hangu is that the complainant Haneef Khan (PW.7) submitted an application to the SHO of P.S City Hangu for registration of FIR against the accused under Section.4 of the Elimination

of Custom of Ghag Act, 2013; as per the contents of application the Nikah of his sister Mst. Inaz Begum was solemnized with the respondent/accused on 12.11.2011, however, later on due to domestic issues, their relations discontinued. To resolve the dispute Jirgas were constituted, however, failure of jirgas to settle the matter between the parties amicably, the dispute was brought before the Family Judge, Kohat. After a full dressed trial, the matrimonial tie between appellant and Mst. Inaz Begum was dissolved on the basis of Khula vide judgment and decree dated 16.11.2016. It was stated in the application that since then his sister is residing in the house of the complainant and accused/appellant has raised objection/voice on second Nikah/marriage of her sister. It was alleged in the petition that many people asked the hands of his sister, however, due to his open declaration that she is still his legally weded wife, the people refrained from taking her hand in marriage because of that declaration, and to restrain him from giving hands in marriage to anyone, he issued threats to him and his family members. On the basis of the said application, the police initiated inquiry under Section 157 (1) Cr.PC. The inquiry was conducted by Sher Zaman ASI (PW2). He proceeded to the spot, prepared site plan Ex.PB. He also recorded statement of PWs under Section 161 Cr. PC, and ultimately, it culminated in registration of ibid FIR. The date and time of occurrence was neither disclosed in the application nor in the crime report, however, the crime was reported on 06.08.2019 at 12.00 noon.

3. After registration of the case, the investigation was entrusted to Nazeer Bad shah ASI (PW-3). He proceeded to the spot and summoned the complainant. On reaching the spot, the complainant also came there. He discussed the site plan Ex. PB with the complainant who relied upon the site plan, already prepared by the Inquiry Officer. He also summoned the witnesses to the spot who also relied upon the statements already recorded by the Inquiry Officer under Section 161 Cr.PC. On 01.09.2019, he searched for the accused/appellant in his house, in this respect, he prepared the search memo, which is Ex.PW3/1. The accused was arrested by Sher Zaman ASI on 01.09.2021. On return to the P.S, the card of arrest (Ex.PW2/1) of the accused was handed over to him. He also issued Parwana for the addition of a section of the law against the accused, Ex.PW.3/2. On 02.09.2019, he produced the accused before the Illaqa Magistrate for obtaining Physical custody of the accused vide application Ex.PW 3/3, which was refused. He recorded the statement of accused under Section 161 Cr. PC in the Court Premises, thereafter, the accused was sent to Judicial Lockup. After completion of investigation, he handed over the case file to the SHO, Fazal Muhammad (PW1) for submission of the complete challan.

4. The accused was put to trial. After compliance of Provisions of Section 265-C Cr. PC charge was framed on 02.11.2019 to which he pleaded not guilty and claimed trial. In order to prove its case prosecution examined as many as seven (7) witnesses.

5. Before the trial Court appellant in his statement recorded under Section 342 Cr. PC has taken the defence that the parties profess Fiqa Jafria, and according to him the decree of the Court is not effective according to his faith. Appellant has further stated that he is innocent. It was pleaded by him that procedure for Talaq as provided in Fiqa Jafria has not been complied with, therefore, the decree of Khula by Court is legally not effected. In this respect, he produced copy of the appeal filed by Mst: Inaz Begum in the Court of District Judge, Kohat, wherein in the prayer clause, she clearly stated that direction may be given to respondent that khula/Tanseekh-e-Nikah may be granted to her according to Fiqa Jafria through Alim-e-Din. The attested copy of the appeal, order sheet, judgment and decree sheet were produced as Ex. D-1 consisting of 15 pages. According to him, the application submitted to SHO on 01.08.2019, and Talaq Nama which was produced by the complainant is dated 02.01.2021 meaning thereby that Mst. Inaz Begum was legally his wife till 02.01.2021, as per his belief.

6. Learned counsel for the appellant submitted that both the parties profess Fiqa Jafria. According to him, no doubt, vide judgment and decree dated 16.11.2016 marriage between the appellant and Mst Inaz Begum has been dissolved on the basis of khula, however, as per his religious belief matrimonial tie between the parties could only be broken unless talaq is pronounced, after recitation of sigha in presence of two witnesses. He further argued that now matrimonial tie has been broken between the appellant and Mst. Inaz Begum, as per his religious belief is no more wife

of the appellant. He lastly argued that he posed himself to be husband of Mst. Inaz Begum under his religious belief, therefore, his case does not fall within the ambit of Section 4 of the Elimination of Ghag Act, and prayed for outright acquittal of the accused/appellant.

7. As against that the learned counsel for the respondent/complainant and learned AAG representing the State jointly argued that despite a valid decree of the dissolution of marriage from the Court of competent jurisdiction, the appellant posed himself to be the husband of Mst. Inaz Begum, and refrained the people from taking hands of the sister of the complainant in marriage, therefore, he was rightly convicted by the learned trial Court and prayed for dismissal of the appeal.

8. I have heard arguments of the learned counsel for the parties and have examined the record with their valuable assistance carefully.

9. The leading facts of the case are the appellant contracted marriage with Mst. Inaz Begum on 12.11.2011 and admittedly, the marriage was solemnized according to Shia law/Fiqa Jafria, and matrimonial tie between the parties existed till 02.01.2021, as per appellant's belief, when matrimonial tie between the parties was dissolved as per Shia law/Fiqa Jafria, on the said date, however, it was contended by the complainant party that their marriage was dissolved by way of Khula vide judgment and decree dated 16.11.2016 of the learned Judge Family Court, Kohat and thereafter, claim of the appellant that Mst. Inaz Begum (sister of the

complainant), is still his legally weded wife is illegal. I find from the record that he was put to criminal prosecution on the allegation that despite dissolution of marriage on the basis of khula by the court of competent jurisdiction, he posed her to be his legally weded wife by raising Ghag. The defence plea of the appellant was that, both the parties profess Fiqa Jafria and marriage was also solemnized according to Shia/Fiqa Jafria Law, and he was under the bonafide impression that his marriage could only be dissolved in accordance with Shia Law, thus claimed her to be his wife, because as per the law governing their sect it was necessary that the divorce had been pronounced and recited in Arabic words, reciting the specific Khutba-e-Talaq in presence of two witnesses as well as presence of wife is necessary, which was not done, therefore, dissolution of marriage by way of khula was not in accordance with Shia Law and he was under the bonafide and strong belief that Mst. Inaz Begum is still his wife. However, after following the aforesaid procedure, his marriage was dissolved on 02.01.2021, where-after, he has got no concern with Mst. Inaz Begum. In the light thereof, the real questions for determination before me would be whether it is the requirement of a valid talaq under the Shia Law/Fiqa Jafria that it shall have no effect unless it is pronounced strictly in accordance with Shia Law, in Arabic Words in presence of two adult male witnesses and the wife, and if presence of wife cannot be procured then the husband can pronounce talaq in specific Arabic words, which is known as Khutba-e-Talaq in presence of two adult male witnesses and the same can be reduced into writing and forwarded to wife or

it may be intimated to her thrice and whether the appellant posed himself to be husband of Mst. Inaz Begum as his legally wedded wife under his religious belief and bonafide impression. Whether *mens rea* is lacking in the instant case, whether the act of the appellant falls within the definition of Ghag as provided by the Elimination of Custom of Ghag Act, 2013 and whether conviction and sentence of the appellant under Section 4 of the Elimination of Custom of Ghag Act, 2013 is illegal and not warranted by law.

10 In this case, it would be appropriate to first examine the requirement of talaq in Fiqa Jafria/Shia Law. Since it was vigorously pleaded by the appellant that the law of Fiqa Jafria relating to talaq has not been followed. Under the Shia /Fiqa Jafria Law, the following are four conditions of a valid talaq;

i) Presence of the wife.

ii It must be uttered/pronounced orally.

(iii) In the presence and hearing of two male witnesses who are Muslim and approved probity and

iv) Recital of sigha of talaq.

11. It is, however, not necessary that nor it has been provided that anywhere in the text of shia/fiqa jafria that divorce must be pronounced in presence of "Imam". The only mandatory requirement for a valid talaq is that must be orally pronounced in Arabic in the presence and hearing of two "Aadil" witnesses. In this context reference may be to the case reported as **Dilshada Masood Vs. G.G Mustafa (AIR 1986 J&K 80)**. In this behalf reference may also be made to the following cases/books on the subject: -

"Syed Ali Nawaz Gardezi v. Lt. -Col. Muhammad Yousuf P L D 1963 Supreme Court 51, Mst.

Maryam Bano v. Hussain Ali and another 1984 C L C 1961; Syed Azharul Hassan Naqvi v. Hamida Bibi alias Eshrat Jahan and 3 others 1987 C L C 1041, Naheed Fatima v. Syed Amir Azam Rizvi and others Mst. Basra v. Abdul Hakim and 2 others P L D 1986 Q.298; P L D 1987 Kar.670. Reliance was also placed on the text-books of Baillie's Digest of Mohammadan Law 1869 edition, Vol. 11, pp.113-117, Mulla's Mahomedan Law 1981 edition p.327, Mohammadan Law by Syed Ameer Ali 1965 edition p.444,

AI-Shari'ah by S.C. Sircar, Vol. 11 p.399, Muslim Law of Divorce by K.N., Ahmad 1972 edition, p.33, Muslim Law by Kashi Prasad Saksena, third edition, p.115 Jami al-Jafari,Vol. 11, p.8, Tudih al-Masalil by Ayatullah Khuil, Tudih al Masalil by Roohullah Khumaini and A Code of Muslim Personal Law by Justice Dr. Tanzil-ur-Rahman Vol.1, 1978 page 338.

In the case reported as ***Syed Ali Nawaz Gardezi v. Lt. -Col. Muhammad Yousuf*** **(*P L D 1963 Supreme Court 51)***, the August Supreme Court of Pakistan in paragraphs Nos.32 and 37, appearing at pages 72 and 74, observed as under: -

"**The** *alleged talaq could at best be described as talaq bidat, which is not recognized as valid by Shia law (See Baillie's Digest of Muhammadan Law, Part 11, p.118, Taybjils Muhammadan Law, Third Edition, Sections 136-142, Mulls's Muhammadan Law, p.662, Fifteen Edition, Amir Ali's Muhammadan Law, Fourth Edition, Vol.11, p.533). These text-books writers, moreover, are unanimous in stating that according to Shia doctors, the talaq must be orally pronounced by the husband, in the presence of two witnesses and the wife, in a set form of Arabic words. A written divorce is not recognized, except in certain circumstances which do not exist in the present case. The learned trial Judge took the view that Exh.D.1, even if it was executed by the complainant, was not effective in law to separate the two spouses because of these provisions of the Shia Fiqh. The Appellate Bench of the High Court regarded the provisions of the Shia Fiqh with regard to the presence of witnesses and the necessity of an oral pronouncement of divorce, as merely rules of evidence which could be disregarded. The law being, however, laid down in categorical terms, it is open to question whether the view taken by the Appellate Bench can be sustained. The learned Judges do not appear to have adverted to the point that the alleged talaq was in the heretical form (Talaqul Bidat) which the*

Shia dispensation of Islamic Law does not sanction."

"Coming next to the important section 7 itself, it seems to us that the Legislature had attempted to incorporate the Islamic Law provisions with regard to the two forms of "Talaq-usSunnat", viz., "Talaq Ahsan" and "Talaq Hasan", as far as may be, in this section. The first of them is that form in which a single pronouncement of divorce is made during a period of menstrual purity, no intercourse having taken place during that period, and is followed by a period of Iddat. The second is one in which the first pronouncement made in similar circumstances is followed by two further pronouncements in succeeding period, no intercourse taking place at any time during the three periods. Such a divorce becomes irrevocable on the third pronouncement. Whether the result achieved is in strict conformity with Islamic Law is a question which does not fall within the province of this Court to determine by reason of Articles 5 and 6 of the Constitution. The section clearly contemplates a machinery of conciliation whereby a husband wishing to divorce his wife unilaterally, may be enabled to think better of it, if the mediation of others can resolve the differences between the spouses. The talaq pronounced is to be ineffective for a period of 90 days from the date on which notice under subsection (1) of this section is delivered to the Chairman and this period is to be utilized for the attempt at reconciliation. Subsection (6) makes it clear that even if talaq has become effective under the previous subsections, the spouses would not be prevented from re-marrying, without an intervening marriage with a third person, unless such termination is effective for the third time. All that the section requires is that the marriage in question should be dissolvable by means of a talaq and it does not seem necessary to adopt the narrow construction contended for on behalf of the respondent, that the wife mentioned in the section must necessarily be a Pakistani. citizen. To suggest, as Mr. Mahmud Ali has done, that unless she is such a citizen she would have no right to appoint Arbitrator on her behalf, under section 2(a) of the Ordinance, appears to beg the question. 11

In the case reported as Maryam Bano Vs Hussain Ali (1984 C L C 1961 Karachi), the case related to a husband and wife both Muslims belonging to Shia Asna Ashari Sect. Husband divorced his wife by a divorce deed witnessed by two witnesses, copy of which was sent to Chairman Union Committee for confirmation. Reconciliation proceedings having failed divorce was declared by the Chairman as effective after expiry of 9(-

days. The validity of the said divorce was challenged by the wife by filing a Constitutional Petition, wherein it was observed by a learned Single Judge that under Shia Law a husband can divorce his wife by pronouncing Talaq in her presence in Arabic in a prescribed manner. In this regard reference was made to Arsenals "Muslim Law as administered in British India" who has commented as follows:

> ***"Under Shia Law, a Talaq is of no effect unless it is pronounced,***
>
> ***(1) Strictly in accordance with Sunna.***
>
> ***(2) In Arabic terms.***
>
> ***(3) In the presence of at least two adult male witnesses."***

12. It was thus held by the learned Single Judge that "Talaq pronounced by respondent No.1 was not valid as it did not comply with the legal requirements prescribed by Shia Law. If a Shia is unable to pronounce Talaq in presence of his wife in the prescribed manner, then it can be pronounced in presence of two male witnesses and communicated to her in writing. There is nothing on record to show that the respondent No.1 was incapable to pronounce divorce in the prescribed form before his wife, or that Talaq was at all pronounced in the prescribed form and manner before the witnesses.As Talaq was not validly pronounced by the respondent No.1 the entire proceedings under section 7 and the order passed by respondent No.2 are without lawful authority and without jurisdiction".

13. The case reported as **Azharul Hassan Naqvi vs Hamida Bibi alias Eshrat Jahan (1987 CLC 1041)**, related to Shia spouses. The trial Court on basis of evidence led by parties reaching conclusion that pronouncement of divorce made by husband on wife did not conform to requirements of Shia law

inasmuch as it was not heard by two Adil males and, therefore, lady could not be said to have ceased to be his wife. The finding of fact was upheld by the Appellate Court. Interference was also declined by High Court in constitutional jurisdiction.

14. In in this behalf reference may be made to the case reported as **Mst Basra Vs Abdul Hakim and 2 others (PLD 1986 Quetta 298)** the wife asserted that her husband pronounced Talaq three times at her parents' residence. Family Court, for cogent reasons, disbelieved wife's witnesses and highlighted material discrepancies in their statements in its judgment which was concurred by the Appellate Court. Finding of Family Courts that Talaq was not proved was maintained, in the circumstances by a Division Bench of the High Court of Baluchistan as it was not found based on misreading of evidence or contrary to evidence on record.

15. The case reported as **Naheed Fatima Vs Amir Azam Rizvi (PLD 1987 Kar. 670)** pertains to Shia spouses. It was held by a learned Single Judge of this Court that the Talaq must be pronounced by husband orally and in presence of two competent witnesses. The divorce communicated in writing was not valid under Shia law unless husband was physically incapable of pronouncing it orally. However, the learned Court dismissed the petition on the ground that there was laches of six years in invoking constitutional jurisdiction by the wife.

In this behalf reference may also be made to Baillie's Digest of Mohammadan Law, pp.113-117, it states that: -

> ***"Repudiation cannot be effected by writing, nor in any other language than the Arabic when there is ability to pronounce the words specially appointed, nor by signs except where the party is unable to speak. If he is dumb, repudiation may be effected by any signs sufficiently indicative of his purpose.***

And, though it cannot be given in writing by one who is present and able to pronounce the proper words, yet if he is unable to do so and writes them fully intending repudiation, it takes effect and is quite valid."

"The fourth pillar of repudiation is Testimony; and it is necessary that two witnesses should be present and hear the repudiation given, whether they are called upon to attest it or not. It is a condition essential to the validity of a Talaq that the witnesses should hear the actual words. So, that if they are merely present, repudiation does not take effect, though all other conditions are complied with."

16. In Mulla's Mahomedan Law, Baillie has been quoted as above, for Shia Law and it states that "A divorce must be pronounced orally in the presence of competent witnesses and a Talaq communicated in writing is not valid unless husband is incapable of pronouncing it orally.

Ameer Ali in his book on Mohammedan Law, Vol. II, page 444, writes that: -

"Under the Shia Law, it is further necessary that there should be two reliable witnesses present at the time of repudiation to hear the words in which it is pronounced, or in the case of a dumb individual, to see the writing or the signs in which it is expressed. Not only must the witnesses be present at the time, but they should understand the nature of the act and hear the distinct wording of the repudiation. If they be unable to testify to the exact character of the Talaq, or the words or signs used, it is invalid, although all other conditions may have been duly complied with.

It is a further condition under the Shiah doctrines that the witnesses should be present together. The Shia Law is so strict in the matter of repudiation and throws so many obstacles in the way of a dissolution of marriage by this process, that it declares that, if one of the witnesses should be present at one stage and the other at another stage of the proceeding, the Talaq would not be valid. When they testify to the acknowledgment by the wife of a repudiation, it is not necessary that their testimony should be concordant, or relate to one and the same time, or 'be given together'. Yet says the Shara'a, 'if one should testify to the fact of repudiation and 801 the other to the Acknowledgment of it, their testimony would 1094 not be admissible'.

When a Talaq is pronounced in the presence of witnesses, it takes effect only when the appropriate words are employed. If a husband were to repudiate his wife first without witnesses and then in their presence, the former proceeding would count for nothing. The dissolution would come into effect only from the date of the second Talaq if valid.11

In Al-Sharia, Vol.11 by S.C. Sir car, pp.399-400, it is stated that:

"Divorce cannot be effected in writing nor in any other language than the Arabic, when there is ability to pronounce the (Arabic) words especially appointed, nor by signs except where the party is unable to speak. So, -

If the husband is dumb, divorce may be effected by any signs indicative of his purpose.

Though divorce cannot be given in writing by one who is present and able to pronounce (the proper words), yet, being unable to speak, if he (the divorcer) writes them, thereby intending divorce, it is valid and effective.

Some Doctors are of opinion that divorce takes place by writing if the husband were absent from his wife, but this opinion is not to be relied upon.

K.N. Ahmed in his book, Muslim Law of Divorce, referring to Wasilat al-Najat, Abul Hasan al-Mustafa, Najaf, 1364 A.H., p-370, at page 33 writes as under: -

"Presence of two trustworthy male witnesses at the time of divorce is an essential condition under the Shia Law. They should be present together at that time. A Full Bench of the Lahore High Court has expressed the view that 'the rule regarding the presence of two witnesses is a rule of evidence which stands replaced by the Evidence Act. The Supreme Court of Pakistan did not approve of the view and stated in its judgment that 'the law, however, being laid down in categorical terms, it is open to question whether the view taken by the Appellate Bench can be sustained. It may be noted that the view expressed by the High Court requires reconsideration. The rule regarding presence of witnesses is certainly not a rule of evidence, but

belongs to the substantive Shia Law of divorce and is an essential part of the same. Under the Shia Law, a divorce pronounced in the absence of witnesses shall be invalid. It is stated in Shari'ah al-Islam that the hearing of the pronouncement of divorce is an essential condition for the validity of the divorce. The Shia Law is so strict in the matter that it has laid down that in the absence of witnesses no divorce shall be effected even if all the other conditions are satisfied, nor shall a divorce be effected if only one witness be present or the two witnesses 'present are not just and reliable. The Shia jurists rely on their interpretation of the verse of Surah al-Talaq (LXV: 2) which enjoins the presence (of two witnesses at the time of divorce. Thus, the Shia law is more strict in the matter of divorce than the Sunni Law.

Saksena in his book on Muslim Law, p.113, states that:

"Under the Shia law, talaq in writing or by signs is not allowed, unless the husband is unable to pronounce the formula of divorce and unless the document is written or the signs made with the intention of Talaq and in the presence of two male witnesses."

It has been further stated that:

"The Shias insist on the presence of two Muslim witnesses of approved probity at the pronouncement, which must be in proper form and in Arabic terms, if possible, and there must be intention to dissolve the union."

In Jamilal-Jafri, Vol. 11, page 9. Lahore,

(Urdu translation) it is stated as under: -

In "A Code of Muslim Personal Law," Volume I written by His lordship Mr. Justice Tanzil-ur-Rehman, learned counsel relied on at page 338 which is as under:

"Shi'ah Law prescribes a particular formula for the pronouncement of divorce. If that is not employed, divorce would be ineffective. Thus, according to Shi'ah Doctors, the Talaq must be orally pronounced by the husband, in the presence of two witnesses and the wife in a set form of Arabic words except where it is established that the husband is incapable of pronouncing the talaq in the manner mentioned above. PLD 1963 SC 51; 1963(l) PSCR 356; 15 DLR (SC) 9). It will be noticed that it is not with regard to proof of divorce that the Shilah law insists on two witnesses but to the very act of divorce and, therefore, the matter does not relate to proof only. It is a part of substantive law PLD 1962 (W.P.) Lah. 558; PLD 1965 Kar.185.

17. For the discussion made hereinabove, I am of the considered opinion that the appellant was under firm belief that divorce has not taken place between the spouses, unless, procedure of talaq as provided under Shia law/Fiqa Jafria was followed, and under this belief, as pleaded by him, he posed himself to be husband of Mst Inaz Begum and refrained the people from taking her hand in marriage.

18. Turning to other points, it is reflected from the record that, the prosecution before the learned trial Court heavily placed reliance upon the evidence of PW.3 (I.O). PW. 4 Mst. Inaz Begum and PW. 7, complainant/Muhammad Haneef, brother of Mst. Inaz Begum. During cross-examination, PW-3 admitted that during inquiry proceedings, Fatwa from Moulana Sabeel Hussain Mazahri was produced, which is available on the file and according to Fiqa Jafria Talaq/Khula is not completed unless and until,

طلاق خلع کے صیغے جاری نہ کئے جائے تب تک طلاق خلع واقع نہیں ہوتی

19. PW.4 and PW.7 admitted that the parties belong to Fiqa Jafria and procedure for Talaq/Khula, provided in the Fiqa Jafria as discussed in the preceding para was not adopted. It seems that for this very reason, Mst Inaz Begum P.W.4, in Para No.5 and 8 of the memo of her appeal stated as below: -

یہ کہ فیصلہ عدالت فاضل ماتحت سراسر غلط، خلاف قانون، خلاف شریعت، خلاف فقہ جعفریہ ہے نیز قابل بحالی نہ ہے۔

یہ کہ مدعیہ کو 2013 نومبر سے کفالہ ماہانہ ادا نہ کیا اور نہ ہی حق مہر جو کہ بذمہ مدعاعلیہ واجب الادا ہے جو کہ بحساب مبلغ ۱۰ ہزار روپے ماہانہ سے آج تک تقریباً 380000 ہزار روپے بنتا ہے اور بذمہ مدعاعلیہ واجب الادا ہے اور آئیندہ بھی ہو گا۔ نیز عدالت خلع کی ڈگری بھی غیر قانونی و غیر شرعی طور صادر کی ہے۔ اور مدعاعلیہ سے صیغے بحق مدعیہ نہ دلوائے ہیں جسکی وجہ سے

مدعاعلیہ اب بھی مدعیہ کو نام ونہاد بیوی کہہ کر بدنام کر دیا ہے۔ جسکی وجہ مدعیہ اور مدعاعلیہ کے خاندانوں میں شدید کشیدگی پائی جاری ہے۔ اور اسکی وجہ شدید جانی نقصان کا خطرہ ہے۔

20. This clearly demonstrates that she herself had not accepted the decree of Khula/dissolution of marriage due to non-adoption of procedure of Talaq as provided under Shia Law/Fiqa Jafria. It is also worth mentioning that Haneef Khan (Complainant) PW.7, on 20.03.2021, got recorded his statement and stated that he does not want to prosecute the accused and has got no objection, if he is acquitted of the charges.

21. It is by now settled that in every criminal act (crime) has three stages, the first one is mens rea, the second stage is preparation and the third stage is the decisive step taken thereto i.e. completion of the criminal act, but above all intention/mens rea is the most essential part of a crime, therefore in every crime it is a matter of high importance that the intent and act must concur to constitute an offence. True that an intention may be inferred from the act of the accused person, but the manifestation must provide clear link therewith. There is no evidence on record whatsoever, to disclose that the appellant posed himself to be husband of Mst Inaz Begum with malafide intentions rather he was under belief that talaq has not taken place between the parties as as per shia law/Fiqah Jafria, till proper procedure was followed on 02.01.2021. It is the golden principle of criminal jurisprudence that an accused cannot be held guilty for a crime on the basis of probabilities, presumption, conjectures and summaries and that no one shall be construed into crime without concrete legal proof. In this context, reliance can well be placed on the judgments reported as **State vs M. Idrees Ghauri (2008 SCMR 1118)** and **Federation of Pakistan Vs Hazoor Bukhsh and 2 others (PLD 1983 FSC 255)**.

22. In my view, the defence plea of the appellant is more plausible and convincing and he while acting in good faith claimed himself to be husband of Mst Inaz Begum till matrimonial tie between the parties was dissolved in accordance with Shia Law/Fiqa Jafria on 02.01.2021, is based on truth and that his act does not fall within the ambit of Section 4 of the Elimination of Ghag Act, 2013 and his conviction, and sentence under the said section of law is factually and legally not maintainable being not based on proper appreciation of evidence on record.

23. So far as conviction and sentence recorded under Section 506 PPC is concerned, the same was also bad for want of proof.

24. In consequence to what has been discussed hereinabove, the conviction and sentence awarded to the appellant vide impugned judgment dated 22.06.2022, is set aside and he is acquitted of the charges levelled against him with a result this appeal is allowed. He be set at liberty forthwith if not required to be detained in any other case.

These are detailed reasons of my short order of even date.

Announced:
06.09.2022
(Ayub)

JUDGE