Dates of hearing: 16.1.2007 and 25.1.2007.

Judgment

Salahuddin Mirza, J.--These appeals are directed against the same judgment dated 18 March 2006 whereunder, out of the 14 accused sent up for trial, eleven were convicted and three were acquitted and a proclaimed offender Muhammad Shafi was also acquitted by the learned Additional Sessions Judge Rajanpur Mr. Malik Muhammad Nawaz Samtiah. Ali these appeals which are filed by the eleven appellants are being disposed off by this judgment. A summary of the convictions is given below:

2.(a) Appellant Aqeel is convicted under Sections 10 & 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to 25 years' rigorous imprisonment and fine of Rs. 50,000/- or six months' S.I. in lieu of fine. Appellant Aqeel is also convicted under Sections 420/466/468/471 PPC and sentenced to seven years' R.I. and fine of Rs.20,000/- or Simple imprisonment for the three months in default of payment of fine.

(b) Appellants Allahwasaya, Elahi Bux, and Ghulam Akbar were convicted under Section 11 of the Zina Ordinance and sentenced to 25 year's R.I. They are also convicted under Sections 420/466/468/471 PPC and sentenced to 7 years' R.I. and fine of Rs. 20,000/- or S.I. for three months in default of payment of fine.

(c) Appellants Allah Ditta, Ghulam Akbar, Mukhtar Ahmad, Iqbal, Ismaeel, Jodat Kamran and Ajmal were convicted under Sections 420/466/468/471 PPC and sentenced to seven years' R.I. and fine of Rs.20,000/- or three months' S.I. in default of payment of fine.

(d) All the sentences are to run concurrently and benefit of Section 382-B Cr.P.C. was also allowed to the appellants.

3. The basis of the prosecution case is FIR No.14/2001 lodged by complainant Javed Aslam at Police Station City, Rajanpur, on 21.1.2001 at 1945 hours. Javed Aslam reported that his family consisted of two brothers, including himself, and two unmarried sisters, Mst. Asiya aged 15 years and Mst. Naddia aged 14 years and they went to bed as usual on the night of 19 January but when he woke up in the morning of 20th January 2001 he found that Mst. Asiya was missing from the house and he Immediately left his house to search her and met his relatives Jameel and Ghulam Nabi, both brothers and sons of Beer Ail, who informed him that they had seen Mst. Asiya in the company of Appellants Aqeel, Elani Bux and Allahwasaya who were all going (presumably on foot) towards the public road on which a red-coloured `Dala' No.889 - 011/ Karachi was parked, that they chased them but could not succeed in catching up with them who all escaped in the said `Dala'. The complainant further stated that Allahwasaya was his neighbour and Aqeel was his (Allahwasaya's) relative and he often used to visit Allahwasaya and, in the course of his visits to the house of Allahwasaya, Aqeel had developed illicit relations with Mst. Asiya and had now abducted Mst. Asiya for immoral purposes. [The complainant, however, did not disclose the name or age of his brother who was part of the family nor he clarified why Jameel and Ghulam Nabi did not themselves come to inform him of what they had seen, nor he disclosed at what place, and how far away from his house and at what time did he meet Jameel and Ghulam Nabi nor did he disclose in what vehicle, if any, Jameel and Ghulam Nabi said they had chased the fleeing party or had chased them on foot].

4. In all, the prosecution had sent up the following 14 (fourteen) accused persons for trial on various charges.

1. Aqeel S/o Qadir Bakhsh.
2. Allahwasaya S/o Jumma Khan.
3. Elahi Bux S/o Bakhshan.
4. Ghulam Akbar S/o Bakhshan.
5. Ghulam Akhtar S/o Muhammad Bakhsh.
6. Mukhtar Ahmad S/o Muhammad Bakhsh.
7. Iqbal S/o Allah Bakhsh.
8. Ismaeel S/o Elahi Bakhsh.
9. Jodat Kamran S/o Abdul Hayee
10. Muhammad Ajmal S/o Elahi Bakhsh.
11. Allah Ditta S/o Ghulam Akbar.
12. Kundan Mai W/o Goram.

trespassed into the room and awakened her and ordered her at gun point to keep quiet and go with them. The question arises as to how they could trespass into the room. The door must have been bolted from inside; and if it was not, she did not say so nor explained why it was not so bolted. Moreover, her sister Mst. Nadiya was sleeping by her side and it not possible to believe that she (Mst. Nadiya) did not awake inspite of the commotion that must have erupted when the three accused trespassed into the room and ordered Mst. Asiya at gun-point to keep quiet and then took her away by force. At any rate, Mst. Nadiya was the most natural eye witness of the abduction but she was not examined by the prosecution and therefore presumption must be drawn that had she been produced she would not have supported the prosecution case.

10. This brings us to the deposition of Mst. Asiya PW.1, the alleged abductee and the so-called victim of the offence. While complainant Javed Aslam stated in the FIR, and also repeated this in his deposition as PW.2, that accused Aqeel used to come to his relative Allahwasaya who was his (complainant's) neighbour and during the course of such visits he (Aqeel) had developed illicit relations with Mst. Asiya, Mst. Asiya herself says

proceedings. Ex.DE. is copy of the order dated 23.2.2001 passed by the Bahawalpur Bench of Lahore High Court in Crl. Misc.No. 489/B/2001. This is an application through which Mst. Asiya and Aqeel had sought bail before arrest in respect of Crime No. 14 of 2001 recorded on 21.1.2001. This is the same FIR which was lodged by complainant Javed Aslam under which the appellants were challaned and convicted. Vide order dated 23.2.2001 Mst. Asiya and accused Aqeel were granted pre-arrest bail till 28.2.2001 with the direction that they should avail legal remedy before the tower forum within this period. Ex.DB is copy of the Writ Petition No. 1874/2001 instituted by Mst. Asiya and accused Aqeel on 27.2.2001 (the last but one day till when the pre-arrest bail was affective) for the quashment of the same FIR No. 14/2001 on the ground that there was no abduction and that they had been lawfully married to each other with the free consent of Mst. Asiya and the FIR had been filed by Javed Aslam, the brother of Mst. Asiya on wholly concocted grounds because she had married without the consent of her family. Complainant Javed Aslam was made Respondent No. 3 in the Writ Petition Ex.DB/1 is order dated 13.3.2001 passed by the Multan Bench of Lahore High Court on this writ petition which shows that at first the Court had ordered issuance of notice to the respondents but while the order was still being

dictated Mr. Tahir Mahmood Advocate entered appearance notice on behalf of Respondent No.3 (that is, complainant Javed Aslam of this case) and accepted notice on behalf of Respondent No.3 whereas Respondent No.2 (the SHO who had recorded the FIR) was asked to submit comments. Mst Asiya and accused Aqeel move yet another Crl. Misc. No. 752/B/2001 (EX.DD) before the Bahawalpur Bench of Lahore High Court in which order was passed on 28.3.2001 whereunder pre-arrest bail was granted to them till 2.4.2001 by which time they were directed to move the Court of first instance for seeking bail. During all these proceedings, specially Cr. Misc. applications for seeking pre-arrest bail, Mst. Asiya, who was petitioner/Applicant No. 1 in all these proceedings must have personally appeared before the various Court; otherwise, ad-Interim relief in the form of pre-arrest bail even for the limited time would not have been given to her. Thus/she had more than ample opportunity to raise hue and cry and complain that she had been abducted by Aqeel, who must also have been present in the Court during the hearing of these writ petitions and Crl. misc. petition in which case she would surely have been relieved of her captivity at the hands of Aqeel and others. However, she did nothing of the sort. And now she has the cheek to say, while appearing in the Court as PW. 1, that she had never instituted any legal proceedings in any Court. Under these circumstances, who is to be believe the honourable Judges of Multan and Bahawalpur Benches of the Lahore High Court or Mst Asiya who has already been earlier proved to be a liar who had perjured herself? In this regards, learned counsel for the appellants has referred us to the judgment reported as PLD 1986 FSC 162 (Nazeer Ahmad etc. Vs. The State) in which it is held by this

Court that when a girl is taken from place to place and kept in abadi but still raises no hue and cry and keeps quiet, she means that she had gone with the accused with her free with and charge of abduction is therefore not established.

A

12. Besides, it is pertinent to note that PW.10 Bashir Ahmad ASI had arrested accused Aqeel and Mst. Asiya from bus stand of Fazilpur on 10.6.2006 (although, as far as Mst. Asiya is concerned he says that she was `recovered'). He says that both of them were standing by the side of the road when he arrested one and `recovered' the other and he further stated that the statement of Mst. Asiya was then recorded and she did not involve any accused persons, that is to say, she did not allege in her statement that the accused persons were involved in her abduction or in forging the nikahnama. Another police officer, CW. 1 Syed Zahid Hussain Shah Inspector, stated that he posted as SHO of P.S. City/Rajanpur, when on 26.2.2001 at about 1930 hours Mst. Asiya and Aqeel appeared before him in connection with the investigation of this case and he recorded their statements after informing them that he was the SHO of the police station and Aqeel also produced a copy of the nikahnama (of his marriage with Mst. Asiya) which was attested by the Chief Officer of D.G.Khan Municipality and he also produced copy of a writ petition in connection with their protective bail (evidently, the SHO was referring to the Crl. Misc. No. 489/B/2001). CW.1 Syed Zahid Hussain Shah further stated that Mst. Asiya complained that her father had earlier married her to Aqeel but Rukhsati could not take place and later her father wanted to marry her to an old man instead of performing her Rukhsati with Aqeel and she also stated that she had married Aqeel and was performing marital obligations as his wife and was living with Aqeel with her free will and that none of the accused persons had abducted her. The SHO further stated that Mst. Asiya had recorded her statement with her free consent and without any external pressure.

13. The evidence of PW.10 Bashir Hussain ASI and of CW. 1 Syed Zahid Hussain Shah Inspector, as narrated in the previous paragraph, clearly shows that after obtaining bail before arrest from the High Court, accused Aqeel and Mst. Asiya appeared before the then SHO of Police Station City, Rajanpur, on 26.2.2001 at their own accord to participate in the investigation and Mst. Asiya clearly described herself as the wife of Aqeel and affirmed to her marriage with Aqeel with her free consent and absolved all the accused from the charge of abducting her or of forging a bogus nikahnama and even made allegations against her father that inspite of marrying her with Aqeel some long time ago he not only was reluctant to affect her Rukhsati but even attempted to marry her a new to an old man. This clearly shows that on 26.2.2001 and, even at the time of her arrest alongwith Aqeel on 10.6.2001, she debunked the allegation of abduction against all the accused and of Zina-bil-jabr against accused Aqeel and did not involve any of the accused in her alleged abduction or rape.

14. Moreover, by admitting that she was married to Aqeel and Nikahnama Ex. P-1 was executed, albeit under coercion and without her consent and free will, she gives a lie to the entire prosecution case, as per the FIR and the evidence of the prosecution witnesses, that she had been abducted during the night between 19 and 20 January 2001 as the nikah was performed (under duress and without her consent, according to her) three months prior thereto, namely, on 15.10.2000 which means that she had been running away from her house even before 15.10.2000 and not in the night between 19 - 20 January 2001.

15. In the face of such unreliable prosecution evidence on the point, we are of the view that the prosecution has failed to prove that the accused persons had abducted Mst. Asiya. In fact, the evidence on record, specially the evidence of PW.10 Bashir Hussain ASI and of CW. 1 Syed Zahid Hussain Shah Inspector, and the circumstances of the case lead to the inescapable conclusion that Mst. Asiya had gone with Aqeel of her free will and none of the co-accused had anything to do with her going with appellant Aqeel. It is a clear case of elopement. The entire trouble arose when, after arresting Mst. Asiya (or `recovering her' as he put it), PW.10 Bashir Hussain handed her over to her parents (line 10 of his examination-in-chief). After learning from Mst. Asiya herself that she had not been abducted by anyone and had gone with Aqeel at her own and had married him with her free will, it was his duty to keep her in police or judicial custody or to send her to Darul Amaan or any other place where she could live without the fear of any coercion or maltreatment at the hands of her brother and other members of her family and under no circumstances she should have been handed over to her parents or her brother who were, in the light of her statement, as good as her enemies. As could only be expected once under the custody of her brother and parents, she succumbed to their pressure and took an about-turn and commenced accusing the appellants. There seems to be a good deal of force in the submission of the learned counsel of the appellants that she was threatened that she would be killed as `kari' if she did not support them in the prosecution of the appellants.

16. This brings us to the necessity of determining the age of Mst. Asiya.
17. In the FIR Complainant Javed Aslam gives the age of Mst. Asiya as 15 years. In her deposition as PW.1, Mst. Asiya's age is recorded as 16/17 years. However, Dr. Naushaba, the then W.M.O. of D.H.Q. Hospital Rajanpur, found her to be aged about 18/20 years and she recorded this age in the Medico-legal Certificate Ex.PH which she issued after examining Mst. Asiya and she also gave this age when she appeared as a witness as PW.16. In the absence or any better evidence, the opinion of the lady doctor as to the age of Mst. Asiya must be taken to be authentic and must be preferred over the estimated age as given by the complainant in the FIR. We note that whereas no birth certificate was tendered in evidence by the prosecution but, while shuffling through the file of the learned trial Court, we found lying amongst the misc. papers in the R & P of the case a birth certificate giving the date of birth of Mst. Asiya as 16.4,1986. However, it is not part of evidence and cannot be taken notice of and therefore must be ignored. Under the circumstances, we rely on the medical evidence in this regard and on its strength we would hold that Mst. Asiya was about 18/19 years of age at the relevant time and was therefore sui-juris and competent to marry whomsoever she liked without the consent of her brother or any other member of her family.
18. On the point of the invalidity of marriage, the prosecution has examined PW.4 Muhammad Bux, Secretary of Union Council Kotla. Naseer, Rajanpur, who stated that Muhammad Ismaeel accused, who performed the nikah of Mst. Asiya and Aqeel, was not the nikah registrar of Union Council Kotla Naseer nor per his record he worked as Nikahkhwaan. Similarly, PW.5 Faiz Ahmad, nikah registrar of Mouza Asni, Tehsil Rajanpur, stated that the parat of nikannama Ex. P1 did not relate to the register of nikahnamaas issued to him by his union council nor he had performed the nikah of Mst. Asiya and accused Aqeel nor it was entered in his register and that accused Ismaeel, who had allegedly performed this nikah is the registrar of Mouza Asni and that the Nikahnama Ex. P 1 is forged, raise and fabricated. Both these witnesses are totally irrelevant because it is not the case of the accused that Ismaeel accused was the nikah registrar of Union Council Kotla Naseer or he worked as nikahkhawaan as per the record of Union Council Kotla Naseer nor it is the case of the accused that the nikah of Mst. Asiya and Aqeel was performed by PW.5 Faiz Ahmad. It is not required by law that nikah must of necessity by performed by the nikah registrar of the union council where the bride resides and must be registered in the said union council. Accused Ismaeel, nikah registrar of Mouza Asni was fully competent to perform the nikah even though Mst. Asiya was the resident of another union council. Nikahnama Ex. P1 cannot be termed forged, false and fabricated merely because was registered in another union council and the nikah was performed by a nikahkhwaan of another union council. And even if the nikah was performed under duress, it can still not be said that the nikahnama was false, fabricated and forged although it will be open to the bride to seek the annulment of her marriage and a declaration to the effect that her nikah had been performed under coercion and duress and without her free will. PW.8 Qamruz Zamaan, Niab Nazim of Tehsil Council Dera Ghazi Khan, stated that the nikah of Mst. Asiya and accused Aqeel was performed by accused Ismaeel and was registered by accused Jodat Kamran and that nikahnama Ex. P1 is a loose parat and not from the register supplied to the nikah registrar while the parat Ex.P4 is from the register supplied Jodat Kamran. However, Qamruz Zamaan was examined twice as a prosecution witness. He was first examined as PW. 1 on 15.6.2002 and was fully cross-examined by all the accused then facing trial but when some of the absconders were subsequently arrest and sent up for trial, learned Additional Sessions Judge, Instead of just recalling the prosecution witnesses examined till then and asking the newly arrested accused to cross-examine them, again examined these witness de-novo on 8.3.2003 and this time Qamruz Zamaan was examined PW.8. However, none of the accused cross-examined him this time and their learned counsel recorded his statement that the accused relied on the cross-examination done on 15.6.2002. In his cross-examination recorded on 15.6.2002, Qamruz Zamaan clarified the position as regards the performance of nikah and the registration of nikahnama and stated that if a nikah is performed on a loose parat of nikahnama obtained from the bazaar or from any other place and it is registered with the nikah registrar, the nikah registrar incorporates the same nikahnama in his own register provided to him by the council and then both the nikahnamaas are considered to be one nikahnama. Referring to the nikahnama Ex.P2, which was exhibited as P-1 on 15.6.2006, he said that it was registered by Jodat Kamran accused/absconder on 10.1.2001 but was deposited with the tehcil council on 21.2.2001 and the fee of nikah registrar amounting to Rs. 52.00 was also deposited on the same date in the account of the Municipal Committee vide Receipt No. 48, Book No.5045 dated 21.2.2001 and that both the parats of nikahnama were under official custody and were the part of the official record. He further stated that under the rules, any person can work as nikahkhawaan but he is bound to deposit the nikahnama with the registrar and that if a nikah is performed on loose parat, and thereafter if it is registered it would be deemed a true nikahnama. What this witness stated is according to the rules and, as such, even if appellant Ismaeel recorded the nikah on loose parat, this did not reflect adversely on its validity because it was duly registered by nikah registrar, appellant Jodat Kamran. There may be some irregularity in the registration of the nikahnama or about the parat being not from the register supplied to Jodat Kamran but this does not mean that the nikahnama is a forged document. Its scribe, its registrar, its marginal witnesses, the participants of the nikah and one of the parties to the nikah, namely, accused Aqeel, affirm to its genuineness and it cannot be held to be forged merely because it was written on a loose parat or the nikah was performed by someone who was not the nikahkhwaan or the place where the bride lived. This view finds support from the view expressed in the judgment of this Court reported as PLD 1982 FSC 42 (Arif Hussain Vs. The State) in which it is held by Maulana Taqi Usmani thar registration of nikah is not compulsory either under the Sharia or under the Muslim Family Laws Ordinance and as per judgment in the case of (Muhammad Imtiaz Vs. The State) PLD 1981 FSC 38 it is held that, under the Hanafi School, Nikah of an adult girl is not invalid merely because of absence of permission of the Wali or the girl.
THE CHARGE OF FORGERY AND FRAUD: SECTIONS 420/466/468/471 PPC.
19. In view of what has been stated above, the charges of abduction, of commission of Zina of zina-bil-jabr and of committing forgery and fraud cannot be sustained. Learned trial Judge has not appreciated the evidence on record in an unbiased manner and has ignored those parts of the evidence which reflect upon the innocence of the accused, specially the evidence CW. 1 Syed Zahid Hussain Shah.
20. There is one more unfortunate aspect of this case. As has been held above, a valid marriage had taken place between accused Aqeel and Mst. Asiya on 15.10.2000, on 10.6.2001 Mst. Asiya was arrested by the police and two days thereafter she was medically examined by Dr. Naushaba, WMO of DHQ Hospital Rajanpur, and was found to be pregnant and sometime thereafter she gave birth to a girl, as admitted by her in her cross-examination and as stated by accused Aqeel in his 342-Cr.P.C. statement who also stated that the child was separated by the complainant from her and admitted in the Edhi Welfare Home in Rahim Yar Khan. The child was admitted born after the passage of six months from the date of marriage and therefore, in view of the judgment reported as PLD 1995 Peshawar 124 (Maqbool Hussain Vs. Abdur Rehman), the child is the legitimate offspring of the couple and it is a great cruelty both to the child as well as to her mother that she (the child) should be kept away from the loving care of her mother.

It was stated at the Bar that Mst. Asiya has been forcibly married to someone in the meanwhile. This second marriage of Mst. Asiya during the subsistence of her first marriage is obviously void and illegal. The proper forum to agitate these points is, however, the Family Court and we feel helpless to take any action in this regards.

21. We are therefore satisfied that the impugned judgment is perverse and cannot be sustained on the basis of the evidence on record. We would, therefore, accept the appeals, set aside the impugned judgment and acquit all the appellants/accused who may be released forthwith if not required in any other case.

(N.F.) Appeals accepted