

Cr.A.No.50/K/2007

**IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)**

PRESENT

MR. Justice Rizwan Ali Dodani
Mr. Justice Muhammad Jehangir Arshad.

CRIMINAL ACQUITTAL APPEAL NO.50K/2007

Abdullah S/o Abdul Wadood Appellant.

Versus

1. The State		
2. Shahbaz Ahmed Khan		
S/o Ijaz Ahmed Khan		
3. Mst. Masahiba Khan		
D/o Mohammad Baz Khan		Respondents.

For the appellant ... Mr. M.M. Aqil Awan, Advocate

For Respondents 2 & 3 ... Nemo

For the State ... Mr. Zahoor Shah Assistant Prosecutor General

FIR NO., date and Police Station ... 145/2002 dated 02.10.2002 P.S. Jauharabad.

Date of the judgment of Trial ... 30.06.2007.
Court

Date of Institution ... 16.08.2007

...

Date of Hearing ... 31.01.2013

Date of Decision ... 31.01.2013.

JUDGMENT

MUHAMMAD JEHANGIR ARSHAD, .J:- This appeal is directed against the judgment dated 30.07.2007 passed by learned IInd. Additional District & Sessions Judge, Karachi Central, whereby the learned trial Court acquitted the respondents 2 & 3 in Criminal Case FIR NO.145/2002 dated 02.10.2002 under Section 10(2) Offences of Zina (Enforcement of Hudood) Ordinance 1979 lodged at P.S. Jauharabad.

2. The facts briefly stated are that Abdullah appellant got registered the above noted case against the above private respondents through the FIR mentioned above alleging therein that Mst. Masahiba Khan respondent No.3 being his legally wedded wife contracted second marriage with Shahbaz Khan respondent No.2, thus they be tried and punished.



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3. The concerned police after investigation submitted challan before the learned trial Court and the learned trial Court on the basis of material made available with the prosecution framed the following charge against both the respondents on 14.04.2003:

"Shahbaz Ahmed Khan S/o Aijaz Khan

Mst. Misahiba D/o Haji Baz Muhammad.

That on 26.09.2002 at about 0300 hours you accused Shahbaz Ahmed Khan enticed away co-accused Mst. Misahaba, the wife of complainant Abdullah from her House bearing Flat No.D-54, Ist. Floor, Yousuf Plaza, Block No.16, Federal "B" Area Karachi with intention to commit zina with her and you thereby committed an offence punishable under Section 16 Offence of Zina (Enforcement of Hudood) Ordinance, 1979, within the cognizance of this Court.

And I hereby direct you to be tried by this court on the aforesaid charge."

4. The prosecution produced as many as 13 witnesses and after recording statement of both the respondents under section 340(2) Cr.P.C., the trial Court ultimately came to the conclusion that the

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prosecution failed to prove its case beyond any reasonable doubt against both the accused/respondents, thus acquitted them through the impugned judgment, hence this appeal.

5. In this case pre-admission notice was issued to the private respondents as well as the State on 30.09.2009. However, the private respondents could not be served and report to this effect has been submitted by ASI Mukhtar of P.S. Jauharabad to the effect that the private respondents have shifted to somewhere from the given address and could not be served. ~~However,~~ ⁱⁿ view of the proposed judgment we do not consider necessary the presence of the private respondents at the *limine* stage. However we have heard Mr. M.M. Aqil Awan learned counsel for the appellant as well Mr. Zahoor Shah Assistant Prosecutor General Sindh for the State.

6. It would not be out of place to mention here before proceeding further that the claim of the appellant is that Mst. Masahiba Khan was his legally wedded wife, therefore, her Nikah with Shahbaz Ahmed Khan respondent No.2 was not lawful

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and thus they were committing zina within the meaning of Section 10

(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

However, on getting knowledge of the FIR Mst. Masahiba Khan

immediately filed suit for jactitation of marriage on 06.11.2012

before the competent concerned Judge of Family Court. At the first

instance her suit was dismissed by the learned Court of VIIth Civil &

Family Judge Karachi Mr. Ashraf Yar Khan vide judgment dated

09.06.2003. However, on an appeal filed by Mst. Masahiba Khan

respondent No.3 the learned District Judge Karachi Central vide

judgment dated 16.07.2004 set aside the judgment of the learned

Judge of Family Court and decreed the suit for jactitation of marriage

as prayed by Masahiba Khan respondent No.3. The matter did not

end here; the appellant further challenged the above noted

judgment of the learned District Judge Karachi Central through Writ

Petition NO.458/2004 in the Hon'ble Sindh High Court at Karachi but

the said petition was ultimately dismissed by the learned Judge of

the Sindh High Court on 05.03.2008. The judgment of the learned

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Judge of Family Court dated 19.06.2003 and that of learned District Judge Karachi Central dated 16.07.2004 are available on the file of this Court. Similarly the judgment of the Hon'ble Sindh High Court dated 05.03.2008 is also placed on the record of this file.

7. At the very outset the question^u as to how present appeal was maintainable after the suit filed by Mst. Masahiba Khan respondent for jactitation of marriage was decreed against the appellant by the court of competent jurisdiction i.e. District Judge Karachi Central and the same having been maintained by the Hon'ble Sindh High Court, and the decree passed by Family Court as held by the apex Court in the case of ***Muhammad Azam v. Muhammad Iqbal (PLD 1984 SC 95)*** was binding even Upon the Supreme Court. Learned counsel for the appellant submits that despite the said decree in favour of Mst. Masahiba Khan holding that she was not wife of the appellant, still this appeal was maintainable as the fact remained that the marriage between both the private respondents was neither proved nor was a legal marriage because the private respondents have not

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produced any evidence to this effect and the alleged Nikahnama dated 26.09.2002 was also not proved, especially when the parents of Mst. Masahiba Khan had deposed against her. Learned counsel, therefore, argued that since both the private respondents are leading unlawful and immoral life, they are thus guilty of commission of offence of Zina bilraza within the meaning of Section 10(2) of the Ordinance and are liable for punishment for their sin and for this reason too, this appeal was competently filed.

8. On the other hand, Mr. Zahoor Shah, learned Assistant Prosecutor General Sindh, has opposed this appeal by arguing that the appellants had no *locus standi* to file this appeal, especially when the Court of competent jurisdiction has also declared that no marriage between the appellant Abdullah and Mst. Masahiba Khan was ever contracted and the Nikahnama produced by Abdullah was a fake and fictitious document, therefore, this appeal be dismissed in limine.



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9. We have considered the above noted arguments of the learned counsel for the appellant and the learned Assistant Prosecutor General for State and have also perused the entire record with their assistance.

10. So far as the *vires* and legal validity of the judgment of learned District Judge dated 16.07.2004 decreeing the suit of Mst.Masahiba for jactitation of marriage is concerned, we are satisfied that the same has attained finality and can neither be called into question nor any contrary view can be taken by this Court in view of the law declared by the apex Court in the case of *Muhammad Azam v. Muhammad Iqbal (PLD 1984 SC 95)* holding that Decree passed by the Family Court was even binding up to apex Court. The apex Court in subsequent judgment *Abdul Waheed v. Asma Jehangir (PLD 2004 SC 219)* further held "Question of validity of a marriage falling within the exclusive domain of the Family Court established under the West Pakistan Family Courts Act, 1964, High Court could and ought to have avoided the needless controversy on the subject". Therefore, the

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chapter to the extent of marriage between the appellant and Mst. Masahiba Khan stood closed, rather in the light of the finding of the learned District Judge and maintained by the Hon'ble Single Judge of the Sindh High Court, declaring the Nikhanama produced by the appellant to show his marriage with Mst. Masahiba Khan as not genuine but fake document, we feel that appellant even should have been prosecuted for producing forged document and making false claim of marriage between him and Mst. Masahiba Khan. However, due to passage of time we do not find it proper to reopen the said matter. So far as the question of legal marriage between private respondent is concerned we observe that under the Muslim Law even the fact of acknowledgment by the man of the woman as his wife is a sufficient proof about the existence of valid marriage between them. Para 268 (c) of Muhammadan Law by Mullah may be referred to with advantage. However, in the present case, the statement of both the private respondents got recorded by them before the learned trial Court under Section 342 Cr.P.C. admitting

valid marriage between them was a sufficient evidence to hold that at the time of registration of FIR and till ~~to~~ date they both were and are still living lawful matrimonial life as wife and husband and no further evidence to this effect was required. Further the apex Court in Abdul Waheed case, noted above, in express terms held that even the consent was not required and a *sui juris* Muslim female can enter in valid Nikah/marriage of her own free will and the marriage would not be invalid on account of alleged absence of consent of Wali. In the presence of law declared expressly by the apex Court which is binding on all authorities of the country per Article 199 of the Constitution, this Court under no circumstances can declare that the private respondents were living either illegal or immoral life. Their admission as wife and husband amounts to acknowledgment of their valid marriage contracted by them with their free consent.

11. We are, therefore, satisfied that the learned trial court while acquitting both the respondents committed no error, illegality or irregularity and they were rightly acquitted by the learned trial Court.

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We, therefore, find no force in this appeal and dismiss the same in

limine.

Above are the reasons for our short order dated 31.01.2013.

Sd/-
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JUSTICE MUHAMMAD JEHANGIR ARSHAD

Sd/-
[Redacted]
JUSTICE RIZWAN ALI DODANI

Sd/-

Karachi,
February 4, 2013
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Approved for reporting.

JUSTICE MUHAMMAD JEHANGIR ARSHAD