

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.138 of 2012

Present: **Mr. Justice Nazar Akbar**

Appellant : Mst. Tabish Sikandar
Through Mr. Muhammad Aslam Bhutta,
advocate.

Respondents : The State
Through Ms. Rahat Ahsan, Addl. P.G.

Date of Hearing : 31.07.2018

Reasons : 22.09.2018

J U D G M E N T

NAZAR AKBAR, J.--- Appellant Mst. Tabish Sikandar has preferred this Crl. appeal against the judgment dated **07.4.2012** delivered by learned Vth Additional Sessions Judge, Central Karachi in Sessions Case No.199 of 2008, whereby she was convicted U/S 494 P.P.C and sentenced to undergo R.I for 03 (Three) years and to pay fine of Rs.10,000/- and in default thereof, she was further ordered to undergo S.I for one month more.

2. Brief facts of the prosecution case leading to the appeal are that complainant Syed Adnan Hussain, resident of Azizabad and employee in NED University on **10.6.2007** lodged FIR at P.S Azizabad against his wife, the appellant herein and others for offences under **Sections 365/B, 494 and 34 PPC**. He has stated in his statement under Section 154 Cr.P.C that he contracted marriage with appellant/accused on **31.3.2000** and out of this marriage two children were born. On **17.7.2005**, when there was valima ceremony of his younger brother Syed Noman Hussain at his house, Mst. Tabish/appellant alongwith wife of Noman proceeded to beauty parlor by taking Rs.250,000/- and golden ornaments of Rs.500,000/-. She

thereafter left beauty parlor with Raza, Yasir Mahmood, Hammad and Ghazanfar Ali for the purpose of Zina. After about six days she was caught by police of Shahrah-e-Faisal Police Station alongwith Hammad and Ghazanfar and such intimation was furnished to the complainant by the Police Station Shahrah-e-Faisal. The complainant alongwith his father and mother-in-law went to bring appellant from the police station and the appellant from the police station went to her mother's home. After few days, the complainant was informed that she got married with Yasir Mahmood s/o Fateh Muhammad without pronouncement of Talaq by him. The family case was subjudice in the Court and the complainant had not given her Talaq. He claimed that his wife had left his house for the purpose of Zina with the aforesaid persons, therefore, the FIR be registered and action be taken against the culprits. Consequently FIR No.94/2007 was registered.

3. After usual investigation police submitted challan in which in Column No.7 offence under Section **365 PPC** was dropped on **10.7.2008** and **Section 406 PPC** was added for the appellant to face the trial. Names of other accused were shown in column No.2 of the charge sheet with blue ink. Co-accused Yasir Mahmood was declared absconder by order Ex:I. Since the entries in Column No.7 of the challan were amended, charge under Section **365/B PPC** for kidnaping, abducting or inducing woman to compel her for marriage against any of the accused etc mentioned in the FIR was not even framed and charge was framed only against the appellant/accused under Sections 406, 494 and 34 PPC. The charge is reproduced below:-

C H A R G E

*I Mrs. Tasneem Sultana, Vth Additional Sessions
Judge Karachi Central do hereby charge you:*

Mst. Tabish wife of Yasir Mahmood.

As under:-

That on 17.07.2005 you while leaving the house bearing No.1387, Block-8, Azizabad Federal B Area, Karachi of your husband/complainant namely Syed Adnan Hussain dishonestly took away Rs.250000/- and gold ornaments valued Rs.500000/-, subsequently you contracted marriage with absconding accused Yasir Mahmood son of Fateh Muhammad during existence of first marriage and without obtaining divorce from your husband/ complainant. Thereby you have committed an offence punishable under section 406, 494, 34 P.P.C and within the cognizance of this court.

And I hereby direct that you be tried by this court on the aforesaid Charge.

4. In order to substantiate the charge against the accused, prosecution has examined complainant Syed Adnan Hussain (PW-01) as Ex:4. Syed Farhan Hussain (PW-02) as Ex:5. Mariam (PW-03) as Ex:6. Syed Iqrar Hussain (PW-04) as Ex:7. ASI Abdul Wahid (PW-05) as Ex:8. Dr. Kishwar Fatima (PW-06) as Ex:9. Civil Judge Mrs. Kaneez Fatima (PW-07) as Ex:10. SIP Zafar Iqbal (PW-08) as Ex:11 and thereafter prosecution closed its side vide Ex:12. Statement of accused/appellant Mst. Tabish under Section 342 Cr.PC was recorded on **17.8.2010** wherein she claimed herself innocent. To the specific question regarding offence under **Section 494 PPC**, she claimed that she had obtained Khula prior to second marriage. Questions No.2&3 by the trial court under section 342 CrPC and appellant's replies are reproduced below:-

Q. No.2 It has come in evidence against you that on 17.7.2005 (you) has left the house of complainant Syed Adnan Hussain at about 4.00 p.m, alongwith P.W. Mariam for Sania Beauty Parlor situated at Gulshan-e-Iqbal Block 13-D Karachi and by leaving Mst. Mariam at Beauty Parlor left away and you also took with you golden ornaments of Rs. 500000/- and cash amount of Rs. 250000/-

with you which was belonging to the complainant. What have you to say?.

Ans. No Sir. It is false.

Q. No.3. It has further come in evidence that on 24.8.2006 you contracted second marriage with absconding accused Yasir Mahmood s/o Fateh Mahmood in existence of your first marriage with complainant without obtaining divorce from your previous husband (complainant). What have you to say?

Ans. No sir. I have filed suit for dissolution of marriage by way khula against the complainant vide suit No.1101/2005 which was decreed in my favour and therefore I have contracted second marriage.

5. Learned trial Court after recording evidence and hearing the learned counsel for the parties concluded that:-

“No sufficient evidence has been brought on record that accused has took away with her Rs. 2,50,000/- and golden ornaments of Rs. 500,000/- belonging to the complainant as none of the P.W has corroborated the evidence of the complainant on this point therefore, Point No.1 is accordingly answered as doubtful. However, it has been established by the prosecution that accused has contracted second marriage with absconding accused Yasir Mahmood in existence of her previous marriage with the complainant”

Thereafter the trial Court convicted the appellant by impugned judgment dated **07.04.2012**.

6. The sole point for determination in this appeal is that when the complainant has miserably failed to establish charge of criminal breach of trust by dishonestly leaving house of complainant on **17.7.2005** and taking away his Rs.2,50,000/- in cash and gold ornament of Rs.5,00,000/-, the complainant at the same time proved charge against the applicant that she contracted marriage in existence of first marriage without obtaining Khula was still not free of iota of doubts for her conviction under **Section 494 PPC**.

7. Learned counsel for the appellant has contended that ex-husband of the appellant has falsely implicated the appellant knowingly well the family suit No.1101/2005 was filed by her for Khula in which pre-trial has failed. In fact, on the failure of pre-trial the mandate of law was that marriage stand dissolved by way of Khula and formal decree was to be passed by the family Court. He has further contended that her lawyer has informed the appellant that her marriage has been dissolved by way of khula and he has even provided her certified copy of decree of dissolution of marriage by way of Khula. Therefore, she *bona fidely* and in good faith contracted second marriage and cannot be guilty of an offence under **Section 494 PPC.**

8. None has appeared for the complainant despite notice. The complainant has also engaged a counsel but he is also absent without intimation. However, learned Addl. P.G has supported the impugned judgment by referring to the findings of the trial Court that at the time of second marriage she has not disclosed in the Nikahnama that she was divorcee or she has obtained Khula.

9. I have heard learned counsel and perused the entire evidence placed on record. The record shows the FIR was lodged on **10.6.2007** and the date of alleged offence was on or about **17.7.2005**. The allegation was that the appellant has gone with three other persons namely Raza Murtaza, Hamaad and Ghazanfar Ali alongwith cash and ornaments for the purpose of committing **Zina**. However, after six days (**23.7.2005**), as alleged in the FIR the appellant was apprehended with Hamad and Ghazanfar by Shahra-e-Faisal P.S and such information was received by the complainant, who alongwith his father and his mother-in-law (appellant's mother) went to the police

station to bring appellant home and on the way, appellant preferred to go with her mother. The FIR further reads that **after few days of 17.7.2005** it came to the knowledge of the complainant that the appellant was married with a person namely Yasir Mehmood S/O Fateh Muhammad without obtaining divorce from the complainant and the matter is pending before the Court but so far he has not pronounced divorce.

10. The judge of the family Court was the star witness since she has bravely stated under oath that she has not granted Khula to the appellant in suit No.1101/2005 which was pending in her court since **18.10.2005** and she dismissed the same on **29.3.2007** for non-prosecution despite the fact that:

- (1) On **14.12.2005** complainant in his written statement declared the appellant is a “**characterless woman**”;
- (2) On **07.01.2006** complainant again stated before the Family Judge in writing that he did not want to keep her (appellant) in his house;
- (3) On **09.03.2006** the Presiding Officer of family court herself declared that **pre-trial is failed**;
- (4) On **01.7.2006** she has already recorded evidence of appellant and in rebuttal the complainant has not recorded his evidence;
- (5) Yet on **29.3.2007** she dismissed suit for dissolution of marriage by way of Khula after about two years in violation of **Section 12-A** of the Family Court Act, 1964;
- (6) On **15.8.2006** pending family suit, the complainant, who never led evidence in rebuttal to evidence of appellant in family suit, sent legal notice to the plaintiff/appellant and three others **alleging that appellant has committed Zina with Raza Murtaza, Hamad and Ghazanfar Ali**. These allegations were the same which were dismissed by the

Sessions Judge in his order dated **16.1.2006** on his **CrI. Misc: Application No.644/2005** under Section 22-A Cr.P.C for lodging FIR;

- (7) After seven months of legal notice and three months of dismissal of family suit for non-prosecution on **29.3.2007** in his presence, the complainant on **10.6.2007** in FIR No.94/2002 declared that *“the matter is pending before the Court but so far I have not announced divorce now my complaint is against the aforesaid persons and my wife for escaping with **intention of Zina**”*.

11. The complainant/defendant at least from July, 2005 has repeatedly made accusation of serious nature of committing Zina against his wife. Even in his subsequent legal notice in **2006** such accusation has been made by the complainant/defendant and he has never shown his willingness of any reconciliation whatsoever at any point of time. But he claimed that he never pronounced divorce to her, nor the Court despite failure of pre-trial passed a mandatory decree of Khula in terms of mandatory provisions of **Section 10(4)** of the Family Court Act, 1964.

12. The applicant on the one hand says that within few days from **23.7.2005** he had come to know that his wife has contracted marriage with a person namely Yasir Muhammad S/O Fateh Muhammad without obtaining divorce from him. But in his complaints to the police in 2005 or even in the legal notices from his counsel before filing the first CrI. Misc: **Application No.644/2005**, he alleged that his wife has escaped with intention to commit Zina and he did not allege second marriage by his wife. Even in his written statement to suit No.1101/2005 which he has filed on **14.12.2005** he did not even mention about the second marriage by the appellant. In the cross examination of the appellant which was concluded on

21.7.2006 he did not suggest that the appellant has contracted second marriage during the subsistence of his marriage with her.

13. The record of family Court further shows that much before her conviction, when the appellant came to know that her family suit No.1101/2005 has been dismissed on **29.3.2007** for non-prosecution, she on **26.6.2007** filed an application for restoration of her suit by relying on a “**true certified copy of decree of dissolution of her marriage by way of Khula on 23.8.2006**”. She has categorically stated on oath in her affidavit in support of condonation of delay in filing restoration application that such true certified copy of decree was provided to her by her counsel **Aijaz Hussain Shaikh**. Her application for restoration of family suit was dismissed. However, it was allowed by the Family appellate Court in **Appeal No.60/2007** by Judgment dated **17.7.2008** meaning thereby the learned Family appellate Court in view of the mandatory provisions of **Section 10(4)** of the Family Court Act, 1964 has accepted appellant’s bonafide reliance on the true certified copy of the decree of Khula.

14. The learned trial Court while convicting the appellant relied only on the evidence of the learned Presiding Officer of the family Court and the statement of the complainant that neither the Khula was granted nor divorce was pronounced and failed to take into account all other circumstances of the appellant which led her to believe that the court has granted her Khula before she contracted second marriage. Had she any intention of committing an offence under **Section 494 PPC**, she could not have filed suit for dissolution of marriage by way of Khula in **18.10.2005**.

15. The learned trial Court had failed to appreciate that the defence taken by the appellant was that before contracting second marriage her first marriage was dissolved by way of Khula. She has relied upon true certified copy of the judgment of Khula in her favour in family suit No.1101/2005 provided to her by her counsel who was representing her since **18.10.2005**. It has never been held by the Court that true certified copy was fraudulently obtained by the appellant nor her claimed that it was provided to her by her counsel was refuted by anyone. Admittedly she has handed over true certified copy of the Khula to the Investigation Officer on the first instance. But the Investigation Officer or the complainant have never questioned and examined her lawyer namely Aijaz Hussain Shaikh to refute the claim of the appellant that a **certified copy of decree of Khula** had not been provided to her by her counsel. As stated in para-13 above, she had used the same copy even in the family court and the family appellate court and it has not been held by either of the two Courts that the true certified copy of the dissolution of marriage by way of Khula on **23.8.2006** relied upon by the appellant were an attempt of fraud played by the appellant herself on the Court in obtaining the certified copies. The prosecution has not even alleged that she has used as genuine a forged document nor she was charged for an offence under **Section 471 PPC** before charging her for offence under **Section 494 PPC**. Section 471 PPC is reproduced below:-

471. ***Using as genuine a forged document.***
Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.

Since appellant has taken the defence of having a true certified copy of decree of Khual as a basis for entering into second marriage, unless the court concludes that it was even in the knowledge of the appellant that the true certified copy of decree of Khula was a forged/fabricated and further that she has knowingly used it as genuine in Court for restoration of her family suit and also to justify second marriage. In absence of such findings, it cannot be concluded that her defence that she is **not** guilty of an offence under **Section 494 PPC** was not proved. The evidence of Presiding Officer of the Court that despite whatever stated in para-10 above, she has not granted Khula, does not mean that such state of unlawful conduct of the Court was in the knowledge of the appellant and that the true certified copy of the decree of Khula was not to be believed by the appellant. The question before the learned trial Court was **not** that whether Khula has been granted by the family court to the appellant or not. The question before the trial Court was whether the applicant has contracted second marriage with knowledge that her first marriage was not dissolved and true certified copy provided by the counsel to the appellant was fraudulently obtained by the appellant from some other source or whether it was a fraud played by the counsel Mr. Aijaz Hussain Shaikh on his client/appellant which resulted in commission of an offence under **Section 494 PPC** by the appellant. By filing a suit for dissolution of marriage, she, by her conduct, has expressed her intention that she never wanted to commit an offence under **Section 494 PPC** and the decree of Khula provided to her by her counsel was enough for her to believe that her first marriage had been dissolved. The trial Court has not examined the evidence in the light of cardinal principle of criminal justice system that nobody can be convicted unless it is proved by the

prosecution that in the given facts of the case the accused acted with guilty mind. The circumstances of the case of appellant do not point towards her intention to marry another person during existence of her first marriage. The appellant never had the intention of committing offence under **Section 494 PPC** as is evident from the fact that she has first filed a suit for dissolution of marriage in 2005 and resume of all the proceedings of the family court mentioned in para-10 above were in such direction that she had no reason to believe that her suit for dissolution of marriage could be dismissed. In view of the facts narrated in para-10 above, a prudent mind cannot believe that “Khula” has not been granted on failure of pre-trial. Therefore, when her counsel provided true certified copy of the judgment of Khula she had reasons to believe that her first marriage was not in field when she entered into second marriage because she had full TRUST in her lawyer who had been with her not only till failure of pre-trial on **09.3.2006** but also till her evidence was concluded after her cross examination with his help. Her lawyer Mr. Aijaz Hussain Shaikh has never withdrawn his power from family suit No.1101/2005.

16. In view of the above, instant Criminal Appeal was allowed by short order dated **31.7.2018** and the appellant was acquitted and her bail bond was cancelled and surety furnished by her was also discharged. Above are the reasons for the short order.

JUDGE

Karachi
Dated: 22.09.2018