# ENTICEMENT OF MINOR AND THE VALIDITY OF HER MARRIAGE UNDER MUSLIM LAW

*Re Husseinah Banoo*

The case of Husseinah Banoo [1] has raised a number of interesting questions of law, which had to be decided not only in the High Court but also in the Shariah Court.

The facts of the case were shortly as follows: Husseinah Banoo was a fourteen year-old girl, the daughter of one Mohamed Majomil. On the 2nd January, 1962 she ran away from home and in the company of one Abdul Rahman went to Seremban. There, on the 8th February, 1962, they were married by the *Kathi* of Lengging, Negri Sembilan. In the meantime the father had made reports both to the Police and the Sharaiah Court. When the parties returned to Singapore Abdul Rahman was arrested by the Police and later charged under s. 363 of the Penal Code for kidnapping the girl out of the lawful guardianship of her father. The girl was detained in the Muslim Women's Welfare Home. She was pregnant and later gave birth to a child. The father brought an action in the Sharaiah Court to declare the marriage invalid.

In the case in the District and Magistrate's Court the District Judge, at the end of the prosecution case, acquitted Abdul Rahman of the charge of kidnapping as he felt himself bound by the case of *Ghouse bin Haji Kader Mustan* v. *Rex* [2] to hold that as the girl had attained puberty she no longer had a lawful guardian and in the circumstances could not be said to have been taken away from lawful guardianship within the meaning of s. 361 of the Penal Code. The Deputy Public Prosecutor appealed against the acquittal and Winslow J. held that the accused should have been called upon for his defence.[3] The accused on being called for his defence pleaded guilty and was awarded an absolute discharge, as the learned Judge felt that "it had been shown that the couple had eloped by mutual consent to escape the objections of her father and had in fact got married". Winslow J. had to consider the validity of the precedent in the *Ghouse* case. He distinguished and refused to follow it on a number of grounds which may be summarised as follows.

Firstly he held that the most that can be gleaned from the authorities which McElwaine C.J. relied upon is that, according to the rule of the *Hanafi* sect, a daughter can enter into a contract of marriage on attaining puberty without her father's consent and that therefore she is only free from the custody of her guardian as regards the selection of the husband. He referred to the Malayan cases of *Noordin* v. *Shaikh Mohamed Meah Noordin Shah*[4] and *Salmah* v. *Soolong* [5] and the Indian case of *Ibrahim* v. *Gulam Ahmad* [6] and stated that it was unnecessary in those cases to consider the question of the girl's absolute emancipation from the *patria potestas* or the father's guardianship for all purposes and that these cases do not in fact support the view of McElwaine C.J. in the *Ghouse* case, *i.e.* that a Muslim girl who

1. Shariah Court Case No. 2 of 1963; Singapore Magistrate's Appeal No. 20 of 1963 (2nd Criminal District Court Case No. 259 of 1962).
2. (1946) 12 M.L.J. 36.
3. *P.P.* v. *Abdul Rahman* (1963) 29 M.L.J. 213.
4. (1907) 10 S.S.L.R. 72.
5. (1878) 1 Ky. 421.
6. (1864) 1 Bom. H.C.R. 236.

had attained puberty had no guardian and therefore could not be taken out of the keeping of the lawful guardian.

Secondly he held that no consideration was given to the provisions of the Guardianship of Infants Ordinance in *Ghouse's* case. That Ordinance made no exception in the case of Muslims and therefore must be taken to supersede whatever law might have been applied previously. Section 5 of the Ordinance provides that the father of an infant shall ordinarily be the guardian of the infant's person and property. He quoted with approval the dicta of Brown J. in the Singapore Court of Appeal case of *Re Omar and Hamisah* [7] in which Brown J. said "It seems to me that if, in the case of *Ghouse bin Haji Kader Mustan* v. *Rex* the Court's attention had been drawn to section 5 of the Guardianship of Infants Ordinance the decision must have been different, because to hold that the girl in that case had no lawful guardian was to ignore section 5 which expressly provides that her father was her lawful guardian".

Lastly the learned Judge held that it would be dangerous to regard a Muslim girl of the *Hanafi* sect as being without any lawful guardian for the purposes of the Penal Code merely because she has attained puberty and is free, without the guardian's consent, to make her own selection of her future husband. "To hold otherwise would", he said, "be to expose every Muslim girl professing the tenets of the *Hanafi* school, who has attained puberty, to the rapacity or cunning of every would-be Lothario, enticer or potential seducer who would only need to cite *Ghouse's* case to escape conviction and punishment".[8]

Although both *Ghouse's* and *Abdul Rahman's* cases are decisions of a single Judge of the High Court, it is submitted that the decision in Abdul *Rahman's* case is correct and more in line with the principles of the Muslim law and its application in Singapore.

Winslow J. awarded an absolute discharge to Abdul Rahman on the ground that the parties had been married. The question of the validity of the marriage was not raised in the criminal court proceedings but was raised before the Shariah Court. In his submission before the Shariah Court, counsel for the father firstly asked the court to hold that the marriage was invalid on the grounds that there was no marriage ceremony at all and even if there was a ceremony it did not constitute a valid marriage between the parties. Secondly, he submitted, assuming that the court held that there was a valid marriage, that the court should on the request of the father set aside the marriage on the ground of inequality and the absence of *kufu.*[9] On the fisrt point Counsel for the father asked the court to hold that the evidence of *Kathi of* Lengging, who solemnized the marriage, could not be relied on and to find that the *Kathi* should not have solemnized the marriage as he knew the parties had eloped from Singapore; that the father and the Shariah Court in Singapore had made inquiries about the girl and that the *Kathi* of Seremban had in fact refused to solemnize the marriage. The *Kathi* of Lengging in his evidence stated that he was justified in solemnizing the marriage without the consent of the lawful guardian, the father, as the father was more than 60 miles or two *marhalah* distant [10] and as he feared that if they were not married they would commit the offence of illegal sexual intercourse *(zinah)* or be liable to be accused of committing it. Ho quoted as his authority the *Hashiyah I'anatu al-Talibin.*[11] The *Kathi* of Lengging in his evidence stated that he did not ascertain the school of law to which

7. *Re Omar and Hamisah* (1948) M.L.J. 186.

8. (1963) 29 M.L.J. 213 at p. 215.

9. *Kufu* is the Malay equivalent of k*afa'a* or marriage equality. In Muslim law, a woman may not marry or be given in marriage to one who is not her equal, unless both she and her guardian consent.

10. This distance is known as *masafat al-qasr,* a journey long enough to justify the shortening of prayers. The distance is two marhalah, the equivalent of which is usually given as 88½ kilometeres or 48 miles. Under the *Shafii* law where the *wall* is away at the distance which is more than the *masafat al-qasr,* then the right of guardianship for marriage devolves on the Ruler or the *Kathi,* as his delegate.

11. The *Ianat al-Talibin* (Cairo, 1884, 4 volumes) by Syed Bekri Abu Bakr Shatta, a Mecca Professor. is a gloss on the *Qurrat al-Ayn* of Zayn-al-din al-Malibiri. a leading authority of the *Shafii* school. The *lanat al-Talibin* gives the recent legal rulings and is much used in Malaysia and Indonesia. The reference here is to the *hashiyah* or gloss on the *Ianat al-Talibin.*

the girl belonged. Imam Haji Ali bin Haji Mohamed Said Salleh, the former *Chief Kathi* of Singapore, who was called as an expert witness, in his evidence, gave it as his opinion that the marriage should not have been solemnized by the *Kathi* of Lengging as the girl, being only about fourteen years of age, had not attained sufficient maturity to be allowed to manage and direct her property and therefore could not in accordance wiith the *Hanafi* school of law marry without the consent of her guardian. It is significant that counsel for the father did not adopt the arguments of Imam Haji Ali, which appear to go against the generally accepted view both in the English textbooks on Muslim law and in the cases both in Malaya and in India, referred to for example in *Abdul Rahman's* case, that a *Hanafi* girl who has attained puberty is free to marry without the consent of her guardian. There would appear however to be some support for the view of Imam Haji Ali in the view expressed by Syed Ameer Ali that the girl must not only be adult *(baligha)* but also discreet *(rashida).*[12] Imam Haji Ali in his evidence further implied that the age of majority and discretion is eighteen years although Syed Ameer Ali, for example, states that majority is presumed among the *Hanafis* on the completion of the fifteenth year.[13] The argument of counsel for the father on the question of validity was that the *Kathi* of Lengging was not a judge and had no power to solemnize marriages, as he was not appointed by the Yang di-Pertuan Besar in accordance with the provisions of the Negri Sembilan Administration of Muslim Law Enactment, 1960. It is difficult to follow this argument in view of the saving clause in s. 173 of the Enactment. No reference was made to s. 118 of the Negri Sembilan Administration of Muslim Law Enactment which requires a marriage to be solemnized in the *kariah masjid*[14] in which the bride ordinarily resides, with power for the Registrar having jurisdiction in such *kariah* to permit the marriage to be solemnized elsewhere It could have been argued that as in this case the permission of a *Kathi* in Singapore had not been obtained, the marriage could not be solemnized in Lengging.

It is strange that the runaway marriage in this case was so easily solemnized in a State where according to a recent authority "such a marriage is impossible in custom; for it brings disrepute to the family and shames the tribal relatives".[15] The *Kathi* of Lengging appears to have made the minimum of enquiry in this case. It is perhaps too much to expect the *Kathi* to consider the question whether a girl of fourteen years is old enough and discreet enough to be able to decide on a marriage against the wishes of her father. It is true that Muslim law does not prescribe any minimum age for marriage but the *Shafii* school of law does give a discretion to the *wali* or guardian for marriage, and it would have been wise for the *Kathi* to bear in mind the immaturity of the girl and the social undesirability of too early a marriage. The danger of the parties falling into the sin of illegal sexual intercourse could have been avoided by placing the girl in a social welfare home. The legalistic reliance on the rule relating to the absence of the w*ali,* as he was more than sixty miles or two *marhalah* distanct, seems out of place in twentieth century Malaya, when it was possible for the *Kathi* without much difficulty or delay, to communicate with the father and the religious authorities in Singapore. The mere fact that the parties had come to solemnize a runaway marriage in Negri Sembilan when they could have applied to have the marriage solemnized in Singapore should have placed the *Kathi* on his guard. The *Kathi* again made the minimum of inquiry on the question of *kufu* or equality, though the lack of equality would clearly bring disrepute to the family of the girl. The leading *Shafii* authority *Nawawi,* gives the opinion that "neither the Sultan nor the Judge for him can legally give a woman in marriage to a man of inferior condition, even though she may desire it".[16]

The President of the Shariah Court in his judgment held that the marriage

12. Syed Ameer Ali, *Mahommedan Law* (Calcutta, 1929), Vol. II p. 238. The authorities quoted by Syed Ameer Ali are those of the *Shiah* school of law, which though in many respects similar to the *Hanafi* school of law is different from the *Sunni* school of law to which the *Hanafi* and *Shafii* schools belong.

13. *Ibid.* at p. 275.

14. *Kariah masjid* means the prescribed area *(kariah)* within which a mosque *(masjid)* is situated.

15. Haji Mohamed Din bin Ali. "Two Forces in Malay Society" (1963) 1 Intissari 26 (part 3).

16. Nawawi, *Minhaj-et-Talibin* translated by E.C. Howard, (London, 1914) p. 288. The *Minhai-et-Talibin* is one of the principal authorities of the *Shafii,* school of law and was written by Muhiudin Abu Zakaria Yahya bin Sharaf An-Nawawi (died 676) .

was valid according to the *Shafii* school of law as the girl had obtained the consent of the *Kathi* as *wali hakim* who was satisfied that the girl was equal in status to the man as they belonged to the same race. The President appears to have taken the view that he was not bound to decide the validity of the marriage according to the *Hanafi* school of law; [17] nor did he deal with the extent of the power of the *kathi* to solemnize the marriage in accordance with the provisions of the Negri Sembilan Administration of Muslim Law Ordinance, 1960.

On the question of *kufu* or marriage equality counsel for the father argued that the *Hanafi* school of law gave great importance to this matter and, where there was no *kufu,* the father has the right to have the marriage cancelled through the judge of the court. Reliance was placed on a legal opinion given by *Kathi* Haji Mohamed Idris Gawhary, the Hanafi Kathi for Singapore, and on the evidence of Imam Haji Ali bin Haji Mohamed Said Salleh. On this question the learned President of the Shariah Court decided in favour of the father and held that as the man Abdul Rahman, was unequal to the girl and her father in position, employment, society and in religion [18] the father was entitled to apply for *fasakh* or judicial annulment of the marriage and the court therefore pronounced such annulment. The view of the learned President on this point appears to be supported by the *Hanafi* authorities. In the *Hedaya,* for example, it is stated that "if a woman should match herself to a man who is her inferior, her guardians have the right to remove the dishonour they might otherwise sustain by it." [19] Syed Ameer Ali states "the Hanafis hold that equality between the two parties is a necessary condition in marriage and that an ill-assorted union is liable to be set aside by a decree of a judge".[20]

The delay of a guardian in instituting proceedings to set aside a marriage on the ground of *mesalliance* does not lead to a forfeiture of his right. But after the woman has actually borne a child to her husband, the guardians have no right to have the marriage cancelled for, adds the *Radd-ul-Mukhtar,* it would damage the interests of the child.[21] In this case the learned President annulled the marriage, although the woman had given birth to a child, because he said the father had commenced proceedings to annul the marriage before the child was born. If however damage to the interests of the child is the test, it would appear that as the right of annulment is a discretionary one, the learned President could have refused to annul the marriage in the interests of the child.

The learned President appears on the question of *kufu* to have considered only the doctrines of the *Hanafi* school of law and to have accepted as sufficient to constitute the validity of the marriage in accordance with the *Shafii* school of law the evidence of the *Kathi* that he was satisfied that the man was equal in status to the girl. The *Shafii* school of law seems however to place as much importance on equality of status as the *Hanafi* school. In fact, the position taken by the *Shafii* school is similar to that of the *Hanafis,* even though the *Hanafi* school is stricter and judges suitability on the basis of reputation.[22] It appears to be the view of *Kathi* of Lenging and the President of the Shariah Court that according to the *Shafii* school of law, equality only depends on race. But Nawawi also mentions character and profession as being matters which should be taken into consideration. Moreover, it is stated that "where there are several persons who by their degree of agnation are equally competent as guardian, the consent of all is necessary to a mesalliance"

17. The *Hanafi* school of law insists that only the prior guardian may act if he is present; but where he is at such a distance that an opportunity for *a* suitable match might be lost by awaiting his return, or by sending to consult him, the next entitled guardian, and not the Ruler, should give the girl in marriage. As regards the distance which would justify a remote guardian marrying a minor in the absence of the nearer wali, the Hanafi authorities hold it to be three days and nights' journey and this is called g*hibat-ul-munkata* — See Syed Ameer Ali *op. cit.* Vol. I at pp. 299-300.

18. Evidence was given by a police officer that he mixed with gangsters; and by the girl that he did not pray.

**19.** *Hedaya* translated by C. Hamilton p. 110. The *Hedaya* is one of the most esteemed authorities of the *Hanafi* school of law and was written by Shaik Burhannudin Al-Marginani (died 593).

20. *Op. cit.* at p. 364.

21. *Ibid,* at p. 369. The *Radd al-Mukhtar* of Mohamed Amin bin Abidin (died 1252) is one of the later authorities of the *Hanafi* school.

22. See Muhammad Abu Zahrah, *Law in the Middle East* (Washington, 1955) at p. 138.

"neither the Sultan nor the judge for him can legally give a woman in marriage to a man of inferior condition, even though she may desire it".[23]

In modern times it is the *Shafii* Alawi Syeds of Hadramaut who have taken an extreme view on the question of equality and in the case of *Salmah* v. *Soolong*[24] the Mufti of Johore, Syed Mohamed bin Shaikh bin Sahil then gave it as his opinion that "neither by the *Shafii* nor *Hanafi* law can a virgin contract a valid marriage that is not 'koofoo' without the consent of her parent or guardian, and if that parent or guardian has been absent, and the marriage contracted by the *Kathi* as *wali,* the parent or guardian has the power to separate the parties on his return until there has been issue of the marriage".[25] It is even arguable that according to the *Shafii* school a marriage where there is no equality is invalid, while the *Hanafi* school does not go so far but postulates an application on the part of the guardian to have the marriage annulled.[26]

The legal effect of *kafa'ah* or equality, it has been said, is that a guardian can dissolve the marriage of his female ward to a man not her equal if the guardian did not consent to the marriage or was deceived into consenting to it. Such a marriage could take place under two circumstances: either the woman, being of age, marries herself off without the consent of her guardian, or a purported guardian marries a virgin off without the consent of the real guardian. In either case the marriage is voidable (unless the woman is pregnant or gives birth to a child) at the instance of the real guardian in order to protect himself and his family from the shame of *mesalliance.* The doctrine of *kafa'ah* recognises that a marriage does not only join two individuals but also two families and establishes that the family which sets the standard for equality is the wife's family.[27]

Although the doctrine of *kafa'ah* is part of the classical law of Islam its influence is waning. In Syria the usage which required that the husband be equal to his wife in birth and which prohibited *mesalliance* is fading more and more, especially in the big cities, although it is still part of the law.[28] In *Fazlan Bibi* v. *Mohamed Din Kashmiri*[29] the Court of Appeal for Eastern Africa upheld the view that *kafa'ah* in marriage was now obsolete in Uganda. The Chief Justice of Zanzibar has held that the rule which prohibits an Arab woman from ever marrying a non-Arab except with the agreement of her marriage guardian cannot be upheld in every case in Zanzibar today. In support of his attitude he quoted the modern *Shafii* publication *Bughyat al-Mustarshidin* to the effect that "if the old and strict view of equality is insisted on, it would cause much inconvenience and harm to the woman."[30] On the other hand the doctrine of *kafa'ah* appears to be still important in Egypt where it is considered as one of the essentials of a valid Muslim marriage. According to the Egyptian Code of Personal Law the husband should be more or less equal to his wife's statue in birth, if they are both of Arab origin, and in Islamic ancestry, fortune, virtue and professional or social status. Although every Muslim woman who has attained the age of fifteen years is legally entitled to enter into a valid contract of marriage either by herself or through the intermediary of an agent, her freedom to marry is subject to the rules of equality set out in the Code. A marriage contract entered into by a Muslim woman with a husband who is inferior to her is subject to annulment.[31]

In India it has been laid down that the disregard of the rules of equality does

23. Nawawi, *op. cit.* at pp. 288-289.

24. (1878) 1 Ky. 421.

25. *Ibid,* at p. 423.

26. M. Hasbi Ash Shiddiqy, *Pedoman Hukum Sjary,* (Djakarta, 1956), Vol. I p. 118.

27. Farhat J. Ziadeh "Equality in the Muslim Law of Marriage" (1957) 7 American Journal of Comparative Law p. 510.

28. *Ibid,* at p. 516.

29. (1921) 8 K.L.R. 200.

30. Anderson, *Islamic Law in Africa,* (London, 1954), at p. 72.

31. Muhammad Rashid Feroze, "The Reform in Family Laws in the Muslim World" (1962) 1 Islamic Studies at p. 117.

not render the marriage *void ab initio* and it was further said that the court was not justified in dissolving the marriage.[32] In Singapore in the case of *Salmah* v. *Soolong,* where the daughter of an Arab father had married a Muslim Tamil, the Court held that as on the authorities a Muslim girl belonging to the *Hanafi* school who had attained puberty is legally emancipated from all guardianship and can select a husband without reference to the wishes of the guardian, it would be wrong for the court to interfere with her choice on the ground of inequality, as this would in effect mean that she cannot select a husband without reference to the wishes of the guardian. The Court therefore refused to grant an injunction to restrain the girl from consummating the marriage.[33] The case of *Salmah* v. *Soolong* is not strictly binding on the President of the Shariah Court but it, and the cases in India, would appear to be at least of persuasive authority and it is unfortunate that the attention of the learned President was not drawn to these cases.

If as the learned President seems to hold there is a difference between the *Shafii* and the *Hanafi* schools this would appear to be that the *Hanafi* girl who enters into a contract of marriage with a man who is not her equal is liable to have her marriage annulled on the application of her father or guardian for marriage. This would appear to be a heavy price to pay for the privilege of being able to contract the marriage without the consent of her guardian.

M. SIRAJ (MRS.)

32. *Jamait All Shah* v. *Mir Muhammad* [1916] Punjab Record 361.

33. *Salmah* v. *Soolong* (1878) 1 Ky. 421.