



198743 - Ruling on one who commits zina after doing the marriage contract and before consummation of the marriage

the question

There is a young man who married a young woman, but she is still living in her family's home and the marriage has not been consummated with her. Her father gave her the mahr in full, according to local tradition and custom. But the girl fell into zina and became pregnant as a result. The hadd punishment was carried out on her and on the one who committed zina with her, namely one hundred lashes, according to the text of the Holy Qur'an, and banishment for one hijri year. Then we separated her from her husband, and ruled that the entire mahr that her father took must be returned. We quoted as evidence for that the hadeeth of Abu Dawood, who narrated it in Kitaab an-Nikaah (the Book of Maariage), when the Prophet (blessings and peace of Allah be upon him) ordered that a woman who was pregnant as a result of zina be given one hundred lashes, and he said: "She is entitled to the mahr for what she permitted of intimacy with her." And he separated them. In this case, the husband did not have any intimacy with his wife at all.

Our question is: did we do the right thing in ruling that the entire mahr taken by the father in his daughter's name should be returned, and we said that she is not entitled to any mahr, because of the apparent meaning of the hadeeth quoted above?

Detailed answer

Praise be to Allah.

Firstly:

If a woman commits zina before consummation of her marriage, then she is to be treated in the same manner as a virgin with regard to the hadd punishment, because the description of having been previously married, in which case the hadd punishment is stoning, does not come into effect



merely with the drawing up of the marriage contract, even if the spouses have been alone together in addition to having done the marriage contract. Rather it is essential that vaginal intercourse should have occurred, as we have explained in fatwa no. 120913

The hadd punishment for an unmarried woman, if she commits zina, is one hundred lashes. The basis for that is the verse in which Allah, may He be exalted, says (interpretation of the meaning): “The woman and the man guilty of illegal sexual intercourse, flog each of them with a hundred stripes. Let not pity withhold you in their case, in a punishment prescribed by Allah, if you believe in Allah and the Last Day. And let a party of the believers witness their punishment.” [an-Noor 24:2].

To that may be added banishment for one each year; this is proven according to the Sunnah. It was narrated that ‘Ubaadah ibn as-Saamit said: The Messenger of Allah (blessings and peace of Allah be upon him) said: “Learn from me, learn from me. Allah has ordained a way for them. For an unmarried person with an unmarried person, one hundred lashes and exile for one year. For a married person with a married person, one hundred lashes and stoning.”

Narrated by Muslim (1690), Abu Dawood (4415) and at-Tirmidhi (1434).

This is the view of the majority of scholars, even though some of them differed concerning that. Ibn Qudaamah (may Allah have mercy on him) stated that there was a difference of opinion concerning that, and he quoted the evidence of those who say that the woman is not to be banished. He said:

In addition to flogging, the zaani is to be banished for one year, according to the majority of scholars. That was narrated from the Rightly Guided Caliphs, and it was the view of Ubayy, Ibn Mas‘ood and Ibn ‘Umar (may Allah be pleased with them), as well as ‘Ata’, Tawoos, ath-Thawri, Ibn Abi Layla, ash-Shaafa‘i, Ishaq and Abu Thawr.

Maalik and al-Awzaa‘i said:

Only the man is to be exiled and not the woman, because the woman needs to be guarded and



protected, and because her exile will be either with or without a mahram, and it is not permissible for her to be exiled without a mahram, because the Prophet (blessings and peace of Allah be upon him) said: "It is not permissible for a woman who believes in Allah and the Last Day to travel the distance of one day and one night except with a mahram." Moreover, exiling her without a mahram exposes her to temptation and may be the cause of her being neglected. However, if she is exiled with a mahram, that is exiling someone who did not commit zina and banishing someone who did not commit a sin, even if she is forced to give him money in return. Doing that is adding to the punishment something that is not prescribed.

End quote from al-Mughni (9/43)

The correct view concerning this matter is that a woman may be exiled if she has a mahram with her, because the hadeeths that speak of exile are general in meaning and include everyone who commits zina, whether man or woman.

An-Nawawi said in his commentary on the hadeeth of 'Ubaadah quoted above: With regard to the words of the Prophet (blessings and peace of Allah be upon him) "and he is to be banished for one year", this gives proof for ash-Shaafa'i and the majority of scholars, who said that punishment for one year is obligatory, whether the guilty party is a man or a woman.

End quote from Sharh an-Nawawi 'ala Muslim (11/189)

But if she does not have a mahram, then that she is not to be banished, because banishing her in that case would be exposing her to temptation and encouraging her to deviate.

Shaykh Ibn 'Uthaymeen (may Allah have mercy on him) said: She is to be banished for one year, so long as she has a mahram, and she is to be banished to a safe place. The fuqaha' of the (four) madhhabs are of the view that she is to be banished, even if she has no mahram.

The second view is the one that is more correct, that she should not be banished if she is on her own. That is because the purpose behind banishment is to keep her away from temptation, but if she is exiled on her own, that is more likely to lead to temptation and evil, because she has no one



with her to check her, and because if she is exiled without a mahram - especially if she needs money - then she may end up selling her honour so that she can eat and drink.

The correct view is that if she does not have a mahram, it is not permissible for her to be exiled. But what should we do? Some of the scholars said that she should be taken out to a nearby town, within the distance at which shortening prayers become permissible, and her guardian should be instructed to keep an eye on her. But the correct view is that there is no need for that, and she should remain in her own city.

It was also said that she should be detained in a safe place. Detention in this case takes the place of exile. That is because she will not get in touch with anyone and no one will get in touch with her and this opinion carries some weight.

End quote from ash-Sharh al-Mumti' 'ala Zaad al-Mustaqni' (14/237)

Secondly:

It is not necessary to separate a woman who committed zina and her husband, whether she committed zina before or after consummation of the marriage, because marriage is not rendered invalid by zina. Ibn Qudaamah (may Allah have mercy on him) said: If a man's wife commits zina, or her husband commits zina, the marriage is not annulled, whether that occurred before consummation of the marriage or afterwards, according to most of the scholars.

End quote from al-Mughni (9/565).

Thirdly:

If the husband chooses to separate from his wife who committed zina before consummation of the marriage, then he must divorce her (talaaq), and if he divorces her then she is entitled to half of the agreed-upon mahr, because Allah , may He be exalted, says (interpretation of the meaning): "And if you divorce them before you have touched (had a sexual relation with) them, and you have appointed unto them the Mahr (bridal money given by the husbands to his wife at the time of marriage), then pay half of that (Mahr), unless they (the women) agree to forego it, or he (the



husband), in whose hands is the marriage tie, agrees to forego and give her full appointed Mahr” [al-Baqarah 2:237].

It is permissible for the husband to prevent her marrying someone else by refusing to divorce her or consummate the marriage with her, so that she will release herself from him by giving wealth, because Allah, may He be exalted, says (interpretation of the meaning): “O you who believe! You are forbidden to inherit women against their will, and you should not treat them with harshness, that you may take away part of the Mahr you have given them, unless they commit open illegal sexual intercourse. And live with them honourably. If you dislike them, it may be that you dislike a thing and Allah brings through it a great deal of good” [an-Nisa’ 4:19].

The “open illegal sexual intercourse” mentioned in the verse is zina, as we have explained in detail in fatwa no. 146100.

And Allah knows best.