

STATE

A

v.

NADEEM KHAN

ADDITIONAL SESSIONS COURT II

B

ROHINI COURTS, DELHI

KAMINI LAU SJ

[FIR NO: 180/12]

19 DECEMBER 2012

MARRIAGE: Polygamy - Absence of special circumstances - Consent of first wife not obtained - Consent of the parents of the prosecutrix not obtained - Reason for entering polygamous marriage - Equal and fair treatment to both the wives

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CRIMINAL LAW: Anticipatory bail - Matters to be considered in granting anticipatory bail - Willingness of the accused to join investigations - Seriousness of the offence

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This was an application for grant of anticipatory bail filed on behalf of the applicant/accused Mustafa Raja a priest (Maulvi) for an alleged apprehension of arrest by the police officials of Aman Vihar Police Station for harassing the applicant/accused and his family. The additional public prosecutor opposed the said application on the ground that the allegations against the applicant/accused are grave, serious and involved the life of a young girl (prosecutrix) and that the applicant/accused had forcibly got the marriage/*Nikah* of the prosecutrix performed with the co-accused Nadeem Khan (who was already married with living wife and children), which *Nikah* he had performed in the absence of the girl's parents and without the consent of the prosecutrix. On the other hand, the main argument of the applicant/accused was that he had committed no wrong and that what he did was fully permitted under Muhammadan Law/Shariah as a Muslim can indulge in polygamy by having four wives at a time and that the prosecutrix was a consenting party to the same.

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Held (dismissing the applicant's application for anticipatory bail):

(1) From the evidence which has already come on record, it is writ large that during *Nikah* ceremony between the co-accused Nadeem Khan and the prosecutrix performed by the applicant/

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- A accused, neither the first wife of the co-accused was present to indicate her consent nor the parents of the prosecutrix or her family members participated in the same indicating their acceptance to this alliance. It is not disputed that the co-accused Nadeem Khan was already married with living wife and child and no special circumstances had been disclosed to justify the second marriage with the prosecutrix. What the applicant/accused has done is not only a moral and legal wrong but is also against the tenets of the Holy *Quran* (religious wrong). (para 5)
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- C (2) Polygamy is permissible as part of social duty and charitable motives or when it seeks to prevent destitution but is not permissible under the following conditions *ie, inter alia* (i) when there are no special circumstances, (ii) when the first wife does not consent to the second marriage, (iii) when the man is not in the position to provide equal and fair treatment to both the wives, and (iv) when it tantamounts to leaving the first wife in a suspense and depriving his children and first wife of an acceptable standard of living. (para 11)
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- E (3) Taking into account the conduct of the applicant/accused who was not ready and willing to join the investigation and the seriousness of the offence involved, there was no ground to grant any indulgence to the applicant/accused. The application for grant of anticipatory bail filed on behalf of the applicant/accused Mustafa Raja is hereby dismissed. (para 16)
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Headnotes in Bahasa Malaysia

- G **PERKAHWINAN:** *Poligami - Ketiadaan keadaan-keadaan khas - Persetujuan isteri pertama tidak diperoleh - Persetujuan ibu bapa pendakwa tidak diperoleh - Alasan-alasan untuk memasuki perkahwinan poligami - Layanan adil dan saksama kepada kedua-dua isteri*

- H **UNDANG-UNDANG JENAYAH:** *Jaminan jangkaan - Perkara-perkara untuk dipertimbangkan dalam memberikan jaminan jangkaan - Kesediaan tertuduh untuk menyertai penyiasatan - Keseriusan kesalahan*

Ini adalah satu permohonan untuk pemberian jaminan jangkaan yang telah difailkan bagi pihak pemohon/tertuduh Mustafa Raja seorang imam (Maulvi) terhadap satu dakwaan kebimbangan

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penangkapan oleh pegawai-pegawai polis dari Balai Polis Aman Vihar untuk menangkap pemohon/tertuduh serta keluarganya. Pendakwa raya tambahan telah menentang permohonan tersebut atas alasan-alasan bahawa dakwaan-dakwaan terhadap pemohon/tertuduh adalah kuat, serius dan melibatkan kehidupan seorang anak gadis muda (pendakwa) dan pemohon/tertuduh secara paksaan telah melangsungkan perkahwinan/pernikahan pendakwa dengan tertuduh bersama iaitu Nadeem Khan (yang sudah berkahwin serta mempunyai isteri yang masih hidup dan anak), di mana pernikahan tersebut telah dilangsungkan tanpa kehadiran ibu bapa pendakwa tersebut serta tanpa persetujuan pendakwa. Sebaliknya, hujahan utama pemohon/tertuduh adalah bahawa pemohon/tertuduh tidak melakukan sebarang kesalahan sebaliknya apa yang telah dilakukan oleh pemohon/tertuduh adalah dibenarkan sepenuhnya di bawah Undang-Undang Muhammadan/Syariah kerana seseorang yang beragama Islam boleh terlibat dalam poligami dengan mempunyai empat orang isteri pada satu masa dan pendakwa adalah pihak yang mempersetujui perkahwinan tersebut.

Diputuskan (menolak permohonan pemohon untuk jaminan jangkaan):

- (1) Daripada keterangan yang telah direkodkan, jelas kelihatan bahawa ketika upacara nikah antara tertuduh bersama iaitu Nadeem Khan dengan pendakwa yang telah dilangsungkan oleh pemohon/tertuduh, isteri pertama tertuduh bersama tersebut itu langsung tidak hadir untuk menyatakan persetujuannya mahupun ibu bapa pendakwa atau keluarganya menyertai perkahwinan tersebut untuk menyatakan penerimaan mereka terhadap ikatan ini. Ia adalah tidak dipertikaikan bahawa tertuduh bersama iaitu Nadeem Khan sudah berkahwin dengan isteri yang masih hidup serta mempunyai anak dan tiada keadaan khas telah dikemukakan untuk menjustifikasikan perkahwinan kedua dengan pendakwa tersebut. Apa yang telah dilakukan oleh pemohon/tertuduh bukan sahaja salah dari segi moral dan perundangan tetapi juga bertentangan dengan nas-nas *Al-Quran* yang suci (kesalahan agama). (perenggan 5)

- A (2) Poligami adalah dibenarkan sebagai sebahagian daripada tanggungjawab sosial dan bermotifkan kebajikan atau apabila ia berusaha untuk menghalang daripada kemiskinan tetapi ia tidak dibenarkan di bawah keadaan-keadaan berikut iaitu antaranya
- B (i) apabila tidak terdapat keadaan khas, (ii) apabila isteri pertama tidak memberikan persetujuan untuk perkahwinan kedua, (iii) apabila lelaki tersebut tidak berupaya untuk memberikan layanan yang adil dan saksama kepada kedua-dua orang isteri, dan (iv) apabila ia mengakibatkan meninggalkan isteri pertama dengan keadaan yang tegang dan melucutkan anak-anak dan isteri pertama untuk satu taraf hidup yang boleh diterima (perenggan 11)
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- D (3) Dengan mengambil kira kelakuan pemohon/tertuduh yang tidak bersedia dan sanggup untuk menyertai penyiasatan dan keseriusan kesalahan yang terlibat, justeru tiada asas untuk memberikan sebarang pertimbangan kepada permohonan/tertuduh. Permohonan pemberian jaminan jangkaan bagi pihak pemohon/tertuduh Mustafa Raja adalah dengan ini ditolak. (perenggan 16)

- E **Qur'anic verses(s) referred to:**

An-Nisa', verses 3, 129

Reported by Thirunavakarasu Vijayan

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JUDGMENT

Kamini Lau SJ:

- G **Order**

- H [1] This application for grant of anticipatory bail has been filed on behalf of accused Mustafa Raja (Maulvi). It is pleaded that the applicant/accused has an apprehension of arrest by the police officials of Police Station Aman Vihar who are harassing him and his family. It is further pleaded that the applicant is a poor person belonging to a respectable family and has deep roots in the society and is an innocent person and has not committed any offence. It is also pleaded that there are no chances of absconding or tampering with the prosecution evidence and he undertakes to join
- I the investigations, if any, as and when required by the IO/SHO.

[2] Addl. PP for the state on the other hand has vehemently opposed the grant of anticipatory bail on the ground that the allegations against the applicant/accused are grave and serious and involves the life of a young girl. He has submitted that the applicant had forcibly got the marriage/*Nikah* of the prosecutrix performed with the accused (who was already married with living wife and children) which *Nikah* he had got performed in the absence of her parents and also without the consent of the prosecutrix.

[3] I have gone through the grounds raised in the application and perused the record. I am informed by the investigating officer that the accused is absconding and is not co-operating with the investigations *qua* him and hence NBWs have already been taken from the court of the competent Magistrate. At this stage, Sh R D Dubey, advocate, appearing on behalf of the applicant/accused has been asked by this court if the applicant/accused was present in the court or if he was ready and willing to join the investigations with the investigating officer and surrender, on which the Ld. counsel submits that the applicant/accused is not present in the court nor he has instructions to give such an undertaking that he would make himself available before the investigating officer.

[4] As per the prosecution case, the allegations against the applicant are that he was a Maulvi (priest) who was involved in forcibly marrying the prosecutrix and performing her *Nikah* against her wishes/consent with a man (Nadeem) who was already married having a family comprising of his living wife and children after which the co-accused Nadeem on the same day made physical relations with the prosecutrix and raped her. The Ld. Addl. PP has argued that the absence of consent of the prosecutrix is apparent from the fact that the prosecutrix on an earliest possible opportunity escaped from the clutches of the co-accused Nadeem and reached back to her house and informed her parents of the incident. On the other hand the main thrust of the argument of the applicant/accused is that he committed no wrong and that what he did is fully permitted under Muhammadan Law/Shariah in as much as a Muslim can indulge in polygamy by keeping four wives at a time. It is further contended that the prosecutrix was a consenting party to the same. Since it is this argument which is the main plank on which the applicant has rested his case, it has therefore become necessary for this court to deal with the same exhaustively.

A [5] I have considered the rival contentions and I may observe
that the facts of the case are so glaring that they speak for
themselves. From the evidence which has already come on record,
it is writ large that during the *Nikah* ceremony between the
co-accused Nadeem and the prosecutrix performed by the
B applicant/accused, neither the first wife of the accused was
present to indicate her consent nor the parents of the prosecutrix
or her family members participated in the same indicating their
acceptance to this alliance. The photographs placed on record by
C the accused and put to the prosecutrix during her cross-
examination indicate the same. It is not disputed that the accused
Nadeem was already married with living wife and child and no
special circumstances had been allegedly disclosed so as to justify
the second marriage with the prosecutrix. In this background,
what the applicant/accused Maulvi Mustafa Raja has done is not
D only a moral and legal wrong but is also against the tenets of the
Holy *Quran* (religious wrong).

[6] Applicant Maulvi Mustafa Raja has tried to take refuge of
Holy *Quran* and Sharia Law by stating that *Quran* permits
E polygamy and under the Sharia the accused Nadeem Khan can
maintain up to four wives. I may observe that even countries
governed by Shariah (Islamic) law the second marriage is permitted
under special circumstances, such as an illness of the first wife or
her inability to bear children. In these cases, with the first wife's
F consent, a man may marry again and this is referred to as
polygamy, a subset of polygamous marriages. The Holy *Quran*
permits a Muslim man to marry more than one woman at a time
(up to a maximum of four), but does not encourage such
behaviour. Polygamy is only permitted in certain circumstances,
G such as when the death of another man has left his wife with no
other means of support. All wives are entitled to separate living
quarters at the behest of the husband and, if possible, all should
receive equal attention, support, treatment and inheritance.

H [7] Jurists are unanimous in their view that in Islamic societies,
polygamous marriage are permitted, but only in certain
circumstances that is primarily in situations where a man's death
has left his widows with no means or support. The basis of these
rules can be found in verse 4:3 of Holy *Quran*, which states: "And
I if ye fear that ye will not deal fairly by the orphans, marry of the

woman, who seem good to you, two or three or four; and if ye fear that ye cannot do justice (to so many) then one only.” Further, verse 4:3 states that it is better for a man to marry a captive slave woman, who does not have a bride-price, than for him to marry a free woman and, in paying the bride-price, deprive his children and his other wives of an acceptable standard of living. The practice of polygamy as dictated by the *Quran* is more strictly regulated by ethical codes than it was in the societies of pre-Islamic Arabia. Polygamy is neither mandatory nor encouraged but merely permitted. The *Quran*’s conditional endorsement of polygamy stresses that self-interest or sexual desire should not be the reason for entering into a polygamous marriage. It is a practice associated with the social duty of Islamic men have to protect the social and financial standing of the widows and orphans in their community. The permission to marry up to four wives is discouraged unless the children of a widow are in danger of being disinherited or forced into unsuitable marriages. In addition to the charitable motivations described in the *Quran*, Islamic scholars have suggested other circumstances in which polygamy is acceptable. Some of these are backed by statements in the *Hadith* and *Quran*, while others are based more on social expedience. In common with the instructions given in verse 4:3, these interpretations do not encourage polygamy but view it as preferable to the alternatives (Ref.: E-book on ‘Modern Muslim Societies’ by Florian Pohl).

[8] The Holy *Quran* further provides that those men who choose to take multiple wives are under an obligation to treat them equally. The importance given to equal and fair treatment serves to emphasise the undesirability of polygamous marriage in Islamic society and this is demonstrated in verse 4:129, which acknowledges that “you will not be able to deal equally between (your) wives, however much you wish (to do so)”. This means that the actual practice of polygamy will inevitably fall short of acceptable standards of personal conduct. The same verse does, however, establishes the limits of acceptable behaviour, urging Muslim men to, at the very least, “turn not altogether away [from one (wife)], leaving her as in suspense”.

[9] Many scholars have reviewed verse 4:129 as an implicit prohibition of polygamy. In the year 1958 the Tunisian government cited this verse to support their decision to ban

- A polygamy. They claimed that its assertion that no man could ever actually treat his wives fairly or equally meant that any real-world example of polygamy was a violation of Islamic law (Ref.: E-book on *'Modern Muslim Societies'* by Florian Pohl).
- B **[10]** In modern practice, it is uncommon for a Muslim man to have more than one wife; if he does so, it is often due to the infertility of his first wife. This practice of polygamy has been regulated or abolished in many Muslim states/nations and so also cannot be encouraged in a liberal democracy as ours since no
- C civilised nation encourages polygamy under normal circumstances. In the secular states of the Muslim world such as Turkey and Tunisia, polygamy is illegal in any form. Even in the nations where it is permitted, polygamy is only practiced by a small minority.
- D Before a man can take an additional wife, he is required to obtain the consent of his existing wife or wives. He must also prove that he has the means to support an additional wife without harming the well-being of his existing wives or children. In some cases, men are also required to provide reasons to taking an additional wife that are justifiable under Sharia law, such as an existing wife's
- E infertility or unwillingness to engage in sexual activity. In some countries, acquiring this legal permission is a formality, while in others, such as Malaysia and Morocco, entering a polygamous marriage require the husband to prove his financial means and justify his motivations at a court hearing.
- F **[11]** Coming now to the position in democratic India, it is time to clear certain misconception and misgivings regarding Islam. Merely because the Muhammadan Personnel Law does not stand codified, it does not in any manner entitle a violator/accused to
- G get away with an interpretation which suits his convenience. Polygamy is permissible as a part of social duty and charitable motives or when it seeks to prevent destitution but is not permissible under the following conditions:
- H - When there are no special circumstances (as contemplated in the Holy *Quran*).
- When the first wife does not consent to the second marriage (before such second marriage).
- I - When the man is not in a position to provide equal and fair treatment to both the wives.

- When it tantamounts to leaving the first wife in a suspense and depriving his children and first wife of an acceptable standard of living (financial incompetence). A

[12] It is unfortunate that regressive practices derogatory to women, who constitute one half of the Indian population, are being followed, propagated and encouraged in the name of religion by some only to escape legal consequences. Such practice, regressive to rights of women and which directly come into conflict with the constitutional and fundamental rights of citizens cannot be encouraged. The Indian legal system provides sufficient space for religious freedom but whenever any such regressive religious practice come into conflict with the rights of the citizens as enshrined in the Indian Constitution, it becomes obligatory for the Courts of Law to ensure that it is the majesty of law and the constitutional mandate which prevails. It is equally the duty of the Religious Heads, Priest, Maulvies and all those involved in propagating religion to ensure that the religious texts are progressively interpreted and to confirm that it is only those beneficial practices which are in the best interest of all sections of humanity which are encouraged and observed. However, it pains me to observe that instead, some of these Religious Heads/Priests like the applicant/accused before this court are often found to be indulging and encouraging practices which are derogatory and regressive to women (particularly those belonging to the poor section of the society) which they do with impunity by seeking the cover of religion. B
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[13] The prosecutrix in the present case has been examined in the court and has been very categorical in her testimony before this court, on the following aspects: G

- That she has been compelled into the marriage with the accused Nadeem Khan.
- That the marriage has been forcibly performed by the Maulvi (present applicant) against her wishes and without her consent. H
- That the said marriage was performed by the Maulvi in the absence of her parents/guardians/relatives.
- That after the marriage ceremony the accused Nadeem Khan made physical relations with her on the same day by intoxicating her. I

- A - That the marriage certificate/Nikahnama Ex.PW12/DX-2 is admitted by the prosecutrix which is in the handwriting of applicant Mustafa Raja and does not bear the signatures of the prosecutrix and bears the signatures of one Rashid who according to the prosecutrix was not even present at that time, which shows that the alleged Nikahnama was perhaps prepared later.
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- C - That the Maulvi (present applicant) had compelled her to sign the document Ex.PW12/DX1 which is written by her on a stamp paper to the extent that she has with her consent married the accused. This *prima facie* indicates that the applicant/accused Mustafa Raja was already aware of the fact that what he was doing was illegal and hence in order to save himself from any legal consequences the prosecutrix was compelled to write the document or else there was no requirement for doing the same. So not only did the applicant commit the crime but he also simultaneously started the operation cover-up.
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- E [14] It is not disputed that the accused Nadeem Khan is already married with a living wife and three children. It is writ large that the accused Nadeem Khan belongs to lower middle class rather lower strata of the society and is financially not in a position to maintain his existing family what to talk about two wives and that too separately. Before his alleged marriage with the prosecutrix neither the special circumstances in which marriage was necessitated are reflected nor the consent of the first wife stand indicated. It is further evident from the record that the parents/guardians of the prosecutrix were not present at the time of the solemnisation of the alleged marriage and on the same day of marriage the prosecutrix returned to her home and informed her parents about the incident. All this reflects the lack of consent of the prosecutrix and her parents/guardians.
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- H [15] This court cannot be a party to these regressive practices where a young woman of vulnerable age and immature understanding is allured, enticed or even compelled into a marriage with a man already married having a living wife and children who on the face of it appear financially incompetent to maintain her nor will this court permit the offender to take refuge of religion.
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Merely because the lustful eyes of a man have fallen on a young girl of immature understanding, it does not create special circumstances so contemplated in the Holy *Quran* which on the contrary stresses that self interest or sexual desires shall not be a reason for entering into a polygamous marriage. Any person who is found indulging into such kind of activities which are a moral, social and legal wrong and who exploits a woman by taking the refuge of religion, has to be taken to task.

[16] Hence, in view of the above and also keeping in mind the conduct of the applicant/accused Mustafa Raja who is not ready and willing to join the investigations and also keeping in view the seriousness of the offence involved, I find no ground to grant any indulgence to the applicant/accused. The application for grant of anticipatory bail filed on behalf of the applicant/accused Mustafa Raja (Maulvi) is hereby dismissed and nothing stated herein above shall be construed as an expression of opinion having a bearing on the merits of the case.

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