

P L D 2015 Sindh 382

Before Muhammad Ali Mazhar and Shahnawaz Tariq, JJ

Mst. MARIUM TARIQ and others---Petitioners

versus

SHO OF POLICE STATION DEFENCE and others---Respondents

Constitutional Petition No.D-3693 of 2013 and Constitutional Petition No.D-1105 of 2012, decided on 31st March, 2015.

(a) Guardians and Wards Act (VII of 1890)---

----Ss. 12 & 25---Penal Code (XLV of 1860), Ss. 363 & 34---Criminal Procedure Code (V of 1898), S. 154---Constitution of Pakistan, Art. 199---Constitutional petition---Custody of minor girl---Kidnapping, offence of---Scope---Natural guardian of minor not liable for kidnapping---Quashing of FIR lodged against mother for kidnapping her minor child ---Father and mother of minor girl were divorced from each other---Father filed application before the Family Court for custody of the minor girl---During pendency of said application mother left the country to pursue further studies and took the minor girl along, who was 2-½ years old---Family Court decided in favour of the mother and allowed her to retain custody of the minor girl---Father lodged an FIR against the mother for abducting the minor girl---Plea of father was that the mother denied him access to his daughter when the Family Court had allowed him visitation rights; that he had also filed an application to restrain the mother from taking their daughter abroad and for deposit of their passports in the Family Court; that the mother kidnapped the minor girl and took her to a foreign country; that intervention of the International Criminal Police Organization (INTERPOL) was required both for producing the accused mother before the Trial Court and for retrieving the custody of the minor---Validity---Family Court did not disturb the custody with the mother which order was upheld by the Appellate Court as well as by the High Court---Mother contended that she got admission in a foreign university for post-graduation studies with financial

assistance, so under the force of circumstances, she left for the foreign country along with her 2-1/2 years daughter who could not be looked after properly in Pakistan in the absence of her real mother---Element of mens rea for kidnapping was thus missing in the circumstances of the present case---When the Family Court decided the father's application it was aware that the mother had proceeded to a foreign country along with her daughter, even then the Family Judge was of the view that there was no cogent reason to disturb the current setup of the minor hence the restoration of custody to the father was declined, however the father was allowed visitation rights---Admittedly the minor girl was in the custody of her mother since birth and there was no allegation that the mother snatched the custody from father---When the FIR was lodged the age of minor girl was 2-1/2 years---Mother and father both were natural guardians and one natural guardian could not lodge an FIR of kidnapping against the other natural guardian---Mother who was enjoying custody of minor since birth and whose right of Hizanat or custody had been affirmed by the Family Court, First Appellate Court and the High Court could not be held accused of kidnapping her own daughter---Consent of 2-1/2 years old minor for leaving abroad with her real mother was immaterial in the present case for the reason that since birth, daughter was in custody of mother and the age of the minor ward showed that neither she could be asked to offer any consent nor she could show any disagreement or displeasure on moving with her real mother---Main allegation in the FIR against the mother was travelling abroad with the minor girl without permission of father which ultimately culminated into the charge of kidnapping---Circumstances of the present case showed that no offence of kidnapping was made out under S.363, P.P.C.---Letter of law articulated that provision of S.363, P.P.C. was meant to protect and espouse the rights of parents and not to exploit it against each other as a tool of victimization, persecution and oppression after their divorce---Being a natural guardian, father was also entitled for the access and visitation rights to his daughter which right had been affirmed by the Family Court, First Appellate Court and the High Court---Admittedly the order for visitation rights in favour of father was not implemented, thus, the appropriate remedy for the father was to approach the Family Court for the implementation of its orders, which had not been done in the present case---High Court, in the present case, had already directed the Immigration Authorities that as and when the minor reached Pakistan they may take her passport at the airport in their custody for safe deposit of the same with the Nazir of the High Court so that minor would not leave Pakistan in future---High Court accordingly quashed the FIR lodged against the mother under Ss.363 & 34, P.P.C. with all consequential proceedings, and directed that the intervention of INTERPOL could not be ordered for ensuring attendance in the quashed FIR, and that the father may first approach the Family Court for the implementation of visitations rights order and in the event of non-compliance, he may apply to the Family Court for directions to issue INTERPOL red and yellow notice forms for ensuring attendance of the mother in court---Constitutional petition was disposed of accordingly.

Muhammad Shafi alias Papan v. State 2011 PCr.LJ 1424 ref.

(b) Islamic law---

----"Hizanat"---Concept of---Hanafi sect---Status of mother in Islam---Mother was entitled to the custody of female child till the age of puberty while in the case of a son, the period of Hizanat was 7 years of age---Mother was entitled in preference to the father to the custody during Hizanat and she did not lose the guardianship because she was no longer wife of her former husband---All the juristic schools gave first preference to a mother's claim to physical custody of her young child provided that she satisfied all the requirements---Father should have access to his children and he remained financially responsible for their maintenance and education even though they may be under the care of their divorced mother---Prophet Muhammad (Peace Be Upon Him) continually used to remind his followers of the status of the mother and the obligation of being good to one's parents---Honour which the religion of Islam had given to mothers was beyond that found in any other religion, ideology or culture---All the verses of Quran and hadiths on mothers amply demonstrated the importance of the figure of a mother in Islam.

Al-Adab al-Mufrad Bukhari 1/62 and Surah al-Ahqaf, (Al-Quran), Chapter 46, Verse 15 ref.

(c) Constitution of Pakistan---

----Art. 199---Criminal Procedure Code (V of 1898), Ss.154, 249-A, 265-K & 561-A---Constitutional jurisdiction of the High Court --- Quashing of FIR---High Court while exercising jurisdiction under Art.199 of the Constitution and S.561-A, Cr.P.C. could quash an FIR and proceedings in extenuating circumstances---Purpose of quashing an FIR under the constitutional jurisdiction was to save a person from the rigors of an unjustified investigation and proceedings and to prevent the abuse of process of law or court---No absolute bar existed on the powers of the High Court to quash an FIR and it was not always necessary to direct the petitioner-accused to first expend or exhaust the remedy available under Ss.249-A or 265-K, Cr.P.C.---Main considerations to be kept in mind by the court would be whether the continuance of proceedings would be a futile exercise and abuse of process of court---Where the admitted facts and patent on record showed that no offence was made out then it would amount to abuse of process of law to allow the prosecution to continue the trial---To find an "abuse", it would be necessary to see in the proceedings, a perversion of the purpose of law such as to cause harassment to an innocent party, to bring about delay, or where the machinery of justice was engaged in an operation from which no result in furtherance of justice could accrue and similar perverse resulted.

M.S. Khowaja v. State PLD 1965 SC 287 ref.

(d) Guardians and Wards Act (VII of 1890)---

---Ss. 7 & 12---Minor of divorced parents---Custody of minor with mother---Guardianship of father---Scope---Even where the custody of the minor was with the mother, the guardianship of the father did not extinguish and he should have access to his children and he remained financially responsible for their maintenance and education even though they may be under the care of their (divorced) mother.

Khawaja Naveed Ahmed for Petitioners (in Constitutional Petition No.D-3693 of 2013).

Khawaja Naveed Ahmed for Respondent No.4 (in Constitutional Petition No.D-1105 of 2012).

Salahuddin Ahmed for Petitioners (in Constitutional Petition No. D-1105 of 2012).

Salahuddin Ahmed for Respondent No.3 (in Constitutional Petition No. D-3693 of 2013).

Ashfaq Rafiq Janjua, Standing Counsel.

Sharfuddin Mangi for the State.

Date of hearing: 27th October, 2014.

ORDER

MUHAMMAD ALI MAZHAR, J.---This common judgment will dispose of aforementioned Constitution petitions.

I. Brief facts of C.P. No.D-3693 of 2013.

This petition has been brought to quash FIR No.632/2010 lodged by Syed Asad Mustufa Shafqat (respondent No.3) against the petitioners at Police Station Defence, Karachi on 18-12-2010 under sections 363 and 34, P.P.C. The petitioner No.1 was married to the respondent No.3 and out of wedlock Ayla Shafqat was born on 25-5-2008 in Huston, Texas USA. The respondent No.3 divorced the petitioner No.1 and filed an application under section 25 of the Guardians and Wards Act in the family court along with an application for interim custody under section 12 of the above Act. During pendency, the petitioner No.1 was given admission in American university for Post-graduation in Dental Surgery with financial assistance. Since her career was at stake so she opted to join the university on the given date hence she left for USA along with her daughter who was also admitted in School where she is studying being American national by birth. Investigating Officer submitted Charge-sheet under section 512, Cr.P.C. The learned Judicial Magistrate was pleased to acquit the parents of the petitioners under section 249-A, Cr.P.C. The G&W Case No.59 of 2010 was decided by the learned Civil and Family Judge at Karachi South in favour of the petitioner No.1 and she was allowed to retain the custody of baby Ayla. The respondent No.3 preferred family Appeal but the appellate court upheld the judgment of family court. Being aggrieved, the respondent No.3 filed a Constitutional Petition No.131 of 2013 and this court was pleased to uphold the concurrent findings recorded below and the petition was disposed of with some directions to the Immigration Authority.

II. Brief facts of C.P. No.D-1105 of 2012.

The petitioner Syed Asad Mustufa Shafqat, ex-husband of Marium Tariq has prayed for the directions against the official respondents to issue the requisite red notice for arrest of Marium Tariq and Mir Ahmed Ali Tariq with a view to their extradition and yellow notices for search and recovery of minor Ayla Shafqat. The petitioner reiterated the same facts regarding the solemnization of marriage, divorce and filing of Guardian and Wards suit. However it was further contended that Marium Tariq denied the petitioner's access to his daughter and eventually the petitioner compelled to seek custody through Guardian and Ward Application No.59 of 2010. The family Judge was pleased to allow visitation rights to the petitioner vide order dated 3-4-2010. The petitioner had also filed an application to restrain Marium Tariq from taking their daughter abroad and for deposit of their passports in the family court. During the pendency of the said application, Marium Tariq kidnapped the minor, Ayla Shafqat and took her to USA. She was assisted by her parents and her siblings. The petitioner lodged FIR No.632/2010. Mir Tariq

Yaqoob and Azra Tariq obtained bail while non-bailable warrants were issued against the absconding accused namely Marium Tariq, Najia Tariq and Mir Ahmed Ali Tariq but to no avail. It was confirmed by FIA (PISCES database) report that all three had left Pakistan therefore, intervention of the Interpol is required both for producing the accused persons before the trial court and for retrieving the custody of the minor. On 10-5-2011, the learned IVth Judicial Magistrate was pleased to direct the respondent No.3 to cause the arrest of the aforementioned accused persons but no positive action was taken.

2. Khawaja Naveed Ahmed, the learned counsel for the petitioner in C.P. No.D-3693 of 2013 and for respondent No.4 in C.P. No.D-1105 of 2012 argued that no case could be registered under section 363, P.P.C. against a real mother for abducting her minor child. The FIR was lodged with mala fide intention to harass the petitioner so far as other petitioners are concerned, he argued that petitioner No.3 is residing in USA for last 13 years and he was not present in Pakistan at the time of divorce of his sister while the petitioner No.2 is elder sister of petitioner No.1 who has also nothing to do with matrimonial dispute or the guardianship case. The prosecution had submitted charge sheet without proper investigation. No law involves mother for abduction of her own child whom at least three courts have granted custody. The proceedings emanating from aforesaid FIR are nothing but an abuse of process of the court. So far as the petition 1105/2012 is concerned, he argued when the very basis of FIR is defective, illegal and abuse of process of the court then there is no question of asking intervention of Interpol or red and yellow notice forms or the arrest of alleged accused persons. He further argued that since the petitioners are out of Pakistan hence this petition has been moved through special attorney which is maintainable and the attorney can look after and protect the interest of all the petitioners in their absence for the quashing FIR lodged illegally against the charge of kidnapping of real daughter who is in hizanat of her real mother. The copy of Special Power of Attorney executed in favour of the real father of the petitioners duly attested by Lance Jacobsen, Notary Public, State of Washington is available on record. It was further argued that Marium Tariq is very much willing to return back to Pakistan and she has no intention to deprive Syed Asad Mustufa Shafqat from visitation rights granted by family court but the respondent No.3 has complicated the matter by lodging false case of kidnapping against her with mala fide intention and ulterior motives. The learned counsel referred to the following case-law:--

(1) PLD 2008 Lahore 533 (Kausar Parveen v. State). Word "lawful guardian" in section 361, P.P.C. is used in wider sense including any person lawfully interested with the care or custody of the minor. Principle of dual guardianship of minor is by itself not repugnant to Islamic law or law of the land. Under such conception, guardianship of father does not cease while minor is in custody of mother and there is nothing in law to prevent mother to agitate her right of Hizanat (custody of minor) when minor is with father. Father and mother cannot prosecute each other on the charge of kidnapping of their own minor children.

(2) 2013 YLR 2716 (Yasmin Gul Khanani v. Tariq Mehmood). No bar imposed on filing application under section 561-A, Cr.P.C. seeking quashing of FIR and proceedings emanating therefrom at any stage, provided aggrieved party was able to demonstrate by furnishing sufficient material that entire proceedings were false, frivolous, vexatious and had been initiated to abuse process of law and if such proceedings were not quashed, gross injustice, harm and injury might be caused to accused persons nominated therein.

(3) Unreported Order dated 18-12-2012 passed in C.P. No.D-583 of 2006 (Mst. Tasneem Abid Shaikh and another v. SHO Police Station Defence, Karachi and others). This petition was also filed through attorney for quashing FIR No.135/2003 lodged by an ex-husband against his ex-wife. The learned Division Bench of this court while relying upon a dictum of apex court reported in 2008 PSC (Crl.) 959 (Abdul Hafeez v. Usman Farooqui) found the petition maintainable through attorney and quashed the FIR No.135/2003.

3. Mr. Salahuddin Ahmed, the learned counsel for petitioner in C.P. No.D-1105 of 2012 and for respondent No.3 in C.P. No.D-3693 of 2013 argued that the respondent No.4 concealed the pendency of C.P. No.1105 of 2012 in this court. It was further contended that power of Attorney on the basis of which C.P. No.D-3693 of 2013 has been filed is not duly attested by the Embassy of Pakistan in USA. The petition has been filed to subvert the proceedings initiated pursuant to the orders passed in C.P. No.1105 of 2012. The respondent No.4 Marium Tariq has also concealed that the family court rejected her application to leave for USA and to take the minor beyond the jurisdiction but she in violation of her undertaking took the minor out of the jurisdiction of the family court. The learned Family Judge allowed visitation rights to the father but Marium Tariq kidnapped the minor and took her to USA without the permission of petitioner Syed Asad Mustufa Shafqat. All the accused persons in the FIR assisted in this endeavor. It was further averred that this court while dismissing the petition has directed the petitioner No.1 to abide by the orders of visitation and access of father to the minor child and further directed the Immigration Authorities to take minor's passport at the airport as and when she reaches Pakistan and thereafter deposit the same with the Nazir of this court for safe custody so she cannot leave Pakistan in future. Even this court while adjudicating the custody matter recognized the unlawful act of Marium Tariq. In pursuance of orders passed in C.P. No. 1105 of 2012, FIA Interpol was directed to issue Red Warrants and Yellow Notices of the minor. The learned counsel further argued that since Marium Tariq committed an offence of kidnapping her daughter hence Asad Mustufa Shafqat has rightly lodged the FIR and there is no lawful justification or ground available for quashing the FIR or the proceedings. The official respondents have no lawful right to refuse or delay provision of Interpol red and Yellow notice application forms to the petitioner or to the learned IVth Judicial Magistrate. In the peculiar circumstances, the petitioner is entitled to procure the issuance of Interpol red notices and yellow notices through intervention of this court. He further argued that though this court dismissed the petition (C.P. No.S-131 of 2013) filed by Asad Mustufa against the order dated 7-1-2013 passed by VIth Additional District Judge, Karachi South in Family Appeal No.24 of 2012 but against that order C.P.L.A. No.1606 of 2013 is pending in the Supreme Court.

4. The learned State counsel adopted the arguments of Mr.Salahuddin Ahmed Advocate while the learned Standing Counsel argued that the directions if any issued by this court requiring the arrest or presence of Marium Tariq and or ward through Interpol red notices and yellow notices will be complied with.

5. All the learned counsel agreed that aforesaid petitions may be disposed of at katacha peshi stage and they argued their case extensively.

6. Heard the arguments. The preview of FIR makes it obvious that the complainant Syed Asad Mustafa Shafquat in the beginning depicted the entire story of his marriage, birth of child and his divorce afterward he alleged that the petitioner Marium Tariq without his consent fled away to America with his daughter Alya Shafquat aged about 2-1/2 years without his permission however in the latter part, he leveled allegations of kidnapping against a real mother and his ex-wife. The offence of kidnapping under section 363, P.P.C. is punishable for a term which may extend to seven years. This offence has two limbs i.e. kidnapping a person from Pakistan or from lawful guardianship. In order to comprehend the compass and essence of this Section it is necessary to peep into Sections 359 to 361, P.P.C. at the beginning. For ready reference following sections of P.P.C. are reproduced as under:--

359. Kidnapping. Kidnapping is of two kinds: Kidnapping from Pakistan and kidnapping from lawful guardianship.

360. Kidnapping from Pakistan. Whoever conveys any person beyond the limits of Pakistan without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from Pakistan.

361. Kidnapping from lawful guardianship. Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, said to kidnap such minor or person from lawful guardianship.

Explanation. The words lawful guardian in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception. This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody, of such child, unless such act is committed for an immoral or unlawful purpose.

363. Punishments for kidnapping. Whoever kidnaps any person from Pakistan or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

7. If we look into section 359, P.P.C. it provides two kinds of kidnapping one is kidnapping from Pakistan and other is kidnapping from lawful guardianship which is in fact made punishable under section 363, P.P.C. These two kinds of kidnapping have been defined separately under sections 360 and 361, P.P.C. Kidnapping from Pakistan means conveying any person beyond the limits of Pakistan without his consent or the consent of some other person authorized to consent on behalf of that person while kidnapping from lawful guardianship means to take or entice any minor under 14 years of age if a male or under 16 years of age if female or any person of unsound mind out of the keeping of lawful guardian without the consent of such guardian. The explanation of the word lawful guardian includes any person lawfully entrusted with the care or custody of such minor or other person. The Family Court did not disturb the custody with the mother which order was upheld by the appellate court as well as this court. It was contended that the Mariam Tariq was given admission in American university for Post-graduation in Dental Surgery with financial assistance so under the force of circumstances, she left for USA along with her 2-1/2 years daughter who could not be looked after properly in Pakistan in the absence of her real mother therefore, the element of mens rea is also missing. The Guardians Wards Case No.59 of 2010 filed by the father of Ayla Shafqat was decided on 25-4-2012 while the FIR was lodged by him on 18-12-2010. The learned Family Judge observed in the order that since birth Ayla Shafqat is in the custody of her mother. It is also a fact that while this Guardian Wards Suit was decided it was in the knowledge of Family Judge that Mariam Tarique proceeded to U.S.A. along with her daughter even then the learned Family Judge is of the view that there was no cogent reason to disturb the current setup of the minor hence the restoration of custody to the father was declined however being a father, Asad Shafqat was allowed visitation rights. Being aggrieved, this order was challenged by him in Family Appeal No. 24 of 2012 which was also dismissed vide order dated 7th January 2013, thereafter he filed C.P. No.S-131 of 2013 in this court to challenge the concurrent findings recorded by two courts below but vide order dated 12-8-2013, the petition was also dismissed however it was observed that in future the respondent No.1 (Mariam Tarique) will not deny petitioner's access to his daughter. The learned judge also directed the Immigration Authorities that as and when the

minor reaches to Pakistan they may take her passport at the Airport in their custody for safe deposit of the same with the Nazir of this court so that minor will not leave Pakistan in future.

8. The custody of a child is known as "Hizanat", the female entitlement to the custody is called "Hazina" and male entitlement is known as "Hain". In the Guardian Ward case, the father of Ayla Shafqat (respondent No.3) himself stated that he belongs to Hanafi Sect, therefore the concept of Hizanat in Hanafi Sect would be quite noteworthy. Under the Hanafi School of Mohammedan Law mother is entitled to the custody of female child till the age of puberty while in the case of a son, the period of Hizanat is 7 years of age. The mother is entitled in preference to the father to the custody during Hizanat and she does not lose the guardianship because she is no longer wife of her former husband. It is an admitted fact that the minor was in the custody of mother since birth and there was no allegation that the mother snatched the custody from father. It is also an admitted fact that when the FIR was lodged the age of daughter was 2-1/2 years. The learned counsel of the complainant did not argue that Mariam Tarique is disqualified from the right of Hizanat or Hizanat was terminated due to any such act committed which disentitled her from claiming or asserting her right of custody in preference of father. In the case in hand the mother and father both are natural guardians and one natural guardian cannot lodge the FIR of kidnapping against the other natural guardian. In all probability, a mother who is enjoying custody since birth of her daughter and whose right of Hizanat or custody has been affirmed by three courts cannot be held accused of kidnapping her own daughter. However this important aspect cannot be ignored that being a natural guardian, father is also entitled for the access and visitation rights to his daughter which right has been also given by the Family Court and affirmed by the Appellate Court as well as this Court in the aforesaid Constitution Petition. Under section 43 of the Guardians and Wards Act a comprehensive procedure is provided for regulating, conduct or proceedings and enforcement of orders while sections 44 and 45 of the same Act provides penalty for removal of Ward from jurisdiction and penalty for contumacy. It is an admitted fact that the Family Court passed the orders and granted visitation rights to the respondent No.3 but the orders were not implemented so in our view appropriate remedy is to approach Family Judge for the implementation of the orders which has not been done in this case but the father of child has filed C.P. No.D-1105 of 2012 for issuing directions against the F.I.A. and National Central Bureau and Interpol for issuing red and yellow notice forms for ensuring appearance of accused in Crime No. 632 of 2010.

9. All the juristic schools give first preference to a mother's claim to physical custody of her young child provided that she satisfies all the requirements. The father should have access to his children and he remains financially responsible for their maintenance and education even though they may be under the care of their divorced mother. At this juncture we would like to put forward a judgment authored by one of us (Muhammad Ali Mazhar, J.) in the case of "Muhammad Shafi alias Papan v. State" reported in 2011 PCr.LJ 1424 in which the allegation of kidnapping of a son was against a real father and he was convicted by the trial Court, however on appeal to this court, he was acquitted of the charge. We would like to quote paragraph (21) of the judgment which is reproduced as under:--

"21. A father cannot be held liable for kidnapping his own son being a natural guardian. Children are focus of gravity in Islamic Family tradition and law. When spouse are together, upbringing their children is paramount joint responsibility. Not only physical care and health, but emotional, educational and religious welfare and well being are mutual responsibility. When spouses separate by divorce or annulment, these welfare responsibilities get also split according to best abilities of each parent. While fathers are vested with financial burden and legal guardianship roles, mothers are given role of physical care and emotive guardian of children. Inherently, Islamic system balances between multitude levels of children's need. The father should have access to his children and he remains financially responsible for their maintenance and education even though they may be under the care of their divorced mother or one of her relations".

10. Our Prophet Muhammad (peace be upon him) continually used to remind his followers of the status of the mother and the obligation of being good to one's parents. The honor which our religion Islam has given to mothers is beyond that found in any other religion, ideology or culture. All the verses of Quran and hadiths on mothers amply demonstrate the importance of this figure in Islam. The following narrations are most beautiful examples of righteous and noble position of the mother:--

"A man came to the Prophet and said: O Messenger of Allah! Who from amongst mankind warrants the best companionship from me? He replied: "Your mother." The man asked: Then who? So he replied: "Your mother." The man then asked: Then who? So the Prophet replied again: "Your mother." The man then asked: Then who? So he replied: "Then your father." (Sahih Bukhari 5971 and Sahih Muslim 7/2). Commenting on this hadith, Shaykh Muhammad Ali Al-Hashimi notes: This hadith confirms that the Prophet (peace and blessings be upon him) gave precedence to kind treatment of one's mother over kind treatment of one's father (Al-Hashimi, *The Ideal Muslimah*, IIPH 2005, p. 165). Likewise, the late Grand Mufti of Saudi Arabia, Shaykh Abdul-Aziz Ibn Baz (d. 1999) comments on this hadith saying: So this necessitates that the mother is given three times the like of kindness and good treatment than the father. (Majmoo' Fataawaa wa Maqalat Mutanawwi'ah). He also writes: The secret of her importance lies in the tremendous burden and responsibility that is placed upon her, and the difficulties that she has to shoulder responsibilities and difficulties some of which not even a man bears. This is why from the most important obligations upon a person is to show gratitude to the mother, and kindness and good companionship with her. And in this matter, she is to be given precedence over and above the father. The Prophet Muhammad (peace and blessings be upon him) also said in a famous narration: 'Paradise lies at the feet of your mother' [Musnad Ahmad, Sunan An-Nasa'i, Sunan Ibn Majah]. Shaykh Ibrahim Ibn Salih Al-Mahmud writes: Treat your mother with the best companionship, then your father; because paradise is under the mother's feet. It is related from Talhah ibn Mu'awiyah as-Salami who said: I came to the Prophet and said, "O Messenger of Allah, I want to perform Jihad in the way of Allah. He asked, "Is your

mother alive?" I replied, "Yes." The Prophet then said: "Cling to her feet, because paradise is there." (at-Tabarani). Abdullah Ibn Abbas (d. 687CE), a companions of the Prophet and a great scholar of Islam, considered kind treatment of one's mother to be the best deed for strengthening or rectifying one's relation with God. He said: I know of no other deed that brings people closer to Allah than kind treatment and respect towards one's mother. [Al-Adab al-Mufrad Bukhari 1/45]. An even more powerful example is found in the statement of another one of the Prophet's companions, Abdullah Ibn 'Umar (d. 692CE), who was also a great scholar of Islam. It has been related that: Abdullah Ibn 'Umar saw a Yemeni man performing Tawaf (circumambulating the Ka'bah) while carrying his mother on his back. This man said to Abdullah Ibn 'Umar, "I am like a tame camel for her! I have carried her more than she carried me. Do you think I have paid her back, O Ibn 'Umar?" Abdullah Ibn 'Umar replied, "No, not even one contraction!"[Al-Adab al-Mufrad Bukhari 1/62]". Reference: <http://www.islamswomen.com> and <http://insideislam.wisc.edu>

At this moment it would be most advantageous and apt to quote Verse 15, Chapter 46, Surah al-Ahqaf, (Al-Quran):

"15. And We have enjoined on man to be dutiful and kind to his parents. His mother bears him with hardship. And she brings him forth with hardship, and the bearing of him, and the weaning of him [lasts] thirty months, till when he attains full strength and reaches forty years, he says: "My Lord! Grant me the power and ability that I may be grateful for Your Favour which You have bestowed upon me and upon my parents, and that I may do righteous good deeds, such as please You, and make my offspring good. Truly, I have turned to You in repentance, and truly, I am one of the Muslims [submitting to Your Will]".

<http://www.al-islam.org/enlightening-commentary-lightholy-quran-vol-17/surah-al-ahqaf-chapter-46-verses-1-21>

11. The High Court while exercising jurisdiction under Article 199 of the Constitution and section 561-A, Cr.P.C. can quash the FIR and proceedings in the extenuating circumstances. The purpose of quashing FIR under the constitutional jurisdiction is to save a person from the rigors

of an unjustified investigation and proceedings and to prevent the abuse of process of law or court as the ends of justice may require. There is no absolute bar on the powers of High Court to quash an FIR and it is not always necessary to direct the petitioner to first expend or exhaust the remedy available under section 249-A or 265-K, Cr.P.C. It is cardinal principle of law that every criminal case should be adjudged on its own facts. The main considerations to be kept in mind would be whether the continuance of proceedings would be a futile exercise and abuse of process of court. If the facts admitted and patent on record that no offence is made out then it would amount to abuse of process of law to allow the prosecution to continue the trial. According to the dictum laid down in the case of "M.S. Khawaja v. State" reported in PLD 1965 SC 287, the apex court held that to quash a judicial proceeding in order to secure the ends of justice would involve a finding that if permitted to continue that proceedings would defeat the ends of justice or in other words would either operate or perpetuate an injustice. To find an "abuse", it would be necessary to see in the proceedings, a perversion of the purpose of law such as to cause harassment to an innocent party, to bring about delay, or where the machinery of justice is engaged in an operation from which no result in furtherance of justice can accrue and similar perverse results.

12. In the case in hand a real mother is accused of kidnapping of her own daughter during hizanat period which is a divine right. In all conscience, consent of 2-1/2 years' daughter for leaving abroad with her real mother is immaterial in this case especially for the reason that since the birth, daughter was in custody of mother and the age of ward do show that neither she could be asked to offer any consent nor she could show any disagreement or displeasure on moving with her real mother. So far as the consent of father is concerned, the reply is so straightforward that the mother and father both are natural guardians and they cannot sue each other against the charge of kidnapping from lawful guardianship. In the FIR the main allegation against Marium Tariq is traveling abroad with the complainant's daughter without his permission which ultimately culminated into FIR with the charge of kidnapping. By the looks of it, no offence is made out under section 363, P.P.C. The letter of law articulates that provision of section 363, P.P.C. is meant to protect and espouse the rights of parents and not to exploit it against each other as a tool of victimization, persecution and oppression after their divorce. The concept of parental kidnapping in the foreign jurisdiction is altogether different than our country. Here the concept of keep hold of custody is primarily dealt with in view of Islamic jurisprudential inferences of hizanat then the welfare of minor. At the same time an important facet cannot be disregarded that despite having custody of a child by a mother, the guardianship of father does not extinguish and he should have access to his children and he remains financially responsible for their maintenance and education even though they may be under the care of their divorced mother. We also concur the view taken in the case of Kausar Parveen (supra) that the guardianship of father does not cease while minor is in custody of mother and there is nothing in law to prevent mother to agitate her right of Hizanat (custody of minor) when minor is with father.

13. The family judge has already decided the custody matter. The complainant/respondent

No.3 has been given visitation rights and in case of non-implementation of order, the father could approach to the family court for implementation of order and invoke the provisions highlighted above for the redress. In C.P. No.S-131 of 2013, the learned judge of this court has already directed the Immigration Authorities that as and when the minor reaches to Pakistan they may take her passport at the Airport in their custody for safe deposit of the same with the Nazir of this court so that minor will not leave Pakistan in future. The Assistant Registrar of this court was also directed to send a copy of order to Immigration Authorities for necessary action. The intervention of Interpol may be achieved through family court for implementation of visitation rights order rather than ensuring attendance through Interpol in Criminal Case No.395 of 2011 arising from FIR No.632/2010 which is nothing but an abuse of process of court and law and we are sanguine that if proceedings are allowed to continue it would defeat the ends of justice and as a result would perpetuate injustice or miscarriage of justice.

14. In the wake of above discussion, both Constitution Petitions are disposed of in the following terms:--

(a) The FIR No.632/2010, lodged under sections 363 and 34, P.P.C. at Police Station Defence, Karachi is quashed with all consequential proceedings initiated by IVth learned Judicial Magistrate, Karachi South in Criminal Case No.359 of 2011.

(b) Since we have quashed the FIR with consequential proceedings hence the intervention of Interpol cannot be ordered for ensuring attendance in the criminal case. As a result, C.P. No-D-1105 of 2012 is disposed of in the terms that the petitioner may first approach to the family court for the implementation of visitations rights order and in the event of non-compliance, he may apply to the family court for the directions to issue Interpol red and yellow notice forms for ensuring attendance of Ayla Shafqat in court and if any such order is passed by the family judge in accordance with law, the Secretary, Ministry of Interior, Government of Pakistan, Director General F.I.A and Director National Central Bureau, International Criminal Police Organization [Interpol] F.I.A shall make sure the execution of such orders failing which, the petitioner may approach to this court for necessary directions.

(c) All pending applications are also disposed of.

