

Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No. 475 of 2015

Mst. Samina Khattak, etc
Vs
SHO, Police Station Kohsar, etc

PETITIONERS BY: Mian Muhammad Zafar Iqbal, Advocate in W.P.No.475 of 2015.
Mr. Iqbal Khattak, petitioner in CrI. Misc.No.02/H/2014.
Date of hearing: **27-02-2015.**

ATHAR MINALLAH, J.- Through this consolidated judgment this Court intends to decide the instant petition alongwith CrI. Misc. No.02/H/2014.

2. The facts, in brief, are that the petitioner in W.P.No.475/2015 M/s. Samina Khattak (hereinafter referred to as the “**Mother**”) has sought the intervention of this Court, for quashment of a criminal case registered as FIR No.76 dated 08-02-2015, at Police Station Kohsar, Islamabad, hereinafter referred to as the “**FIR**”) . Mr. Iqbal Hussain Khattak (hereinafter referred to as the “**Father**”) petitioner in CrI. Misc. No.02/H/2014, has sought the intervention of this Court, for issuance of a direction to the respondents for handing over the custody of minors/daughters. The Petitioners contracted marriage in 2003. Out of this marriage two daughters were born i.e. Maheen Iqbal Khattak and Benish Iqbal Khattak, presently aged 6-1/2 and 4-1/2 years respectively (hereinafter referred to as the “**Minors**”). Differences arose between the petitioners, which subsequently led to their divorce on 23-03-2014. Both the petitioners contracted second marriages respectively, and

thereafter the custody of the Minors became a dispute between them. It appears from the record that well wishers intervened, but the dispute could not be resolved. The custody of the Minors at some stage remained with the Father and on 08-02-2015, with the consent of the latter, the maternal uncle of the Minors took them for their agreed meeting with the Mother. It is alleged by the Father, as recorded in the FIR, that when the Minors did not return, he was informed that they were with their Mother. It was on account of the refusal of the Mother to return the Minors to the Father which caused the latter to file a complaint with the Police Station Kohsar, Islamabad on 09-02-2015, for registration of a criminal case under Section 363/34 of Pakistan Penal Code, 1860 (hereinafter referred to as the “PPC”). The Police Station Kohsar registered the FIR. On the same date the petition of the Mother was also heard by the learned Guardian Judge at Multan. Hence the instant petitions.

3. In compliance with this Court’s order dated, 16-02-2015, the Minors were produced by their Mother, while the Father appeared in person. It was inquired from the Investigating Officer, whether any other cases were registered under similar circumstances i.e when the minors are admittedly in the custody of the mother and she refuses to return them to the their father? The Investigating Officer was visibly at a loss and conceded that no other FIR had been registered in such a situation. It was further inquired as to why the FIR was registered in this particular case? By remaining silent he preferred not to answer the question. The Mother of the Minors has alleged that the Father, being an officer employed in the august Supreme Court of Pakistan, has been misusing his position by influencing the police officials. She further expressed apprehension that in the given situation she felt that the Courts could also be influenced.

4. It is ironic when innocent minors suffer, while the divorced parents drag them to the courts and are pitted against each other, fighting for their

custody. The Father, who appeared in person, contended that the Minors were in his lawful custody and, therefore, refusal on the part of the Mother to return them constituted an offence under Section 363/34 of PPC. He further contended that his concern was the older daughter's education.

5. On the other hand, Mian Muhammad Zafar Iqbal, Advocate High Court, appearing for the petitioner/Mother, has contended that a criminal case could not have been registered against the Mother, as she is admittedly the natural guardian of the Minors. It was further contended that the ingredients of 363/34 PPC were not made out and that the FIR was registered without application of the mind and in colorable exercise of jurisdiction by the concerned officials. It was also stressed that the criminal case was registered on the same date when the suit for the custody of the children was heard by the competent Court at Multan and, therefore, in order to subvert the lawful proceedings the respondent/Father influenced and pressurized the officials in registering the criminal case, by misusing the name of the august Supreme Court, which also finds mentioned in the FIR. It has, therefore, strenuously been argued that neither is any case made out, nor is the registration bonafide, and that the officials have exceeded their jurisdiction which is floating on the surface of the FIR. It was pointed out that mentioning the name of the august Supreme Court in the FIR was also not justified, as it inevitably raised apprehensions in the mind of the Mother that any fair investigation and trial would be prejudiced, thereby violating the right to a fair trial and access to justice. Relying on "Kausar Parveen vs. The State", *P L D 2008 Lahore 533* it was contended that a criminal case cannot be registered against a natural guardian i.e. the mother. At this stage the Court inquired from the Investigating Officer, as to whether the charge had been framed or any proceedings taken by the Trial Court? The I.O informed that neither charge has been framed nor report under Section 173 of Cr. P. C has been submitted.

6. The petitioners in person, and the learned counsel for the Mother were heard at length and record perused with their able assistance.

7. It is indeed unpleasant for divorced parents to drag minors into the Courts and expose them to an undesirable and hostile environment, rather than settling their differences amicably. This inevitably leaves scars on the impressionable minds of the minors, and many have to live with its psychological effects. As if this is not enough, in some cases the parents go to the extent of registering criminal cases, rather than invoking the jurisdiction of a competent Guardian Court for settling disputes relating to the custody of minors. The instant case is a classic example of a father, who despite being an employee of the apex Court, resorted to registration of a criminal case rather than approaching a competent Court for the custody of the minors. The Minors in this case are two innocent little girls, who have been exposed to the undesirable environment of the Courts. In the instant case the unwarranted reference made to the august Supreme Court further confounds the problem. The right of fair trial and confidence of the parties that neither the officials investigating the case nor the Court would be influenced by the position held by the complainant also becomes relevant. In such cases, the burden is obviously far greater than in a normal case, to ensure that no party leaves the Court having the slightest doubt that justice may be prejudiced. Justice is not only to be done but manifestly seen to be done. There was no justification to have referred to the complainant as an official of the apex Court. This always gives rise to an exceptional situation.

8. This Court will first examine the petition of the Mother to answer whether a case is made out to quash the FIR. It is evident from the complaint, as reproduced in the FIR, that the complainant was fully aware that the custody of the minors was taken by the natural guardian i.e. the mother from their maternal uncle. The father had admittedly not approached a court of

competent jurisdiction to obtain the custody of the minors, nor is there any lawful order giving custody of the minors to the Father, who is not the natural guardian. The Father also did not hesitate in naming several other family members/relatives of the Mother, most obviously to harass them as well. The contents of the FIR leave no doubt whatsoever that, let alone the ingredients of Section 361 of PPC, no criminal case is made out for attracting the punishment under Section 363 of PPC. The Father, not being a natural guardian, has admittedly not been declared as a lawful guardian by any Court having competent jurisdiction in this regard. The definition of kidnapping from 'lawful guardianship' under Section 361 of PPC further affirms that the said provision would certainly not be attracted in the case of a natural guardian i.e. the mother. This Court concurs with the view taken by the Lahore High Court in "Kausar Parveen vs. The State", P L D 2008 Lahore 533, that father and mother cannot prosecute each other on the charge of kidnapping of their own minors/children. Moreover, there is no cavil to the proposition that a trial court, nor the police authorities, are competent forums for the resolution of disputes between parents of minors arising, particularly when the question of custody is involved. This Court further affirms the view that the police authorities have no jurisdiction in interfering with a purely family dispute, relating to the custody of minors between their parents. The relevant observations from the case of "Kausar Parveen vs. State" (supra) are reproduced as follows:-

"The words 'lawful guardian' in section 361, P.P.C are used in a wider sense including any person lawfully interested with the care or custody of the minor. The principle of dual guardianship of the minor is by itself not repugnant to Islamic Law or law of the land. Under this conception the guardianship of the father does not cease while the minor is in the custody of mother. Again there is

nothing in law to prevent the mother to agitate her right of hizanat when the minor is with the father. Father and mother cannot prosecute each other on the charge of kidnapping of their own minor children.”

“The mere fact that at one time the mother herself passed on custody of her minor children to her ex-husband in lieu of dowry effects and maintenance allowance would not make her liable for the charge of kidnapping punishable under section 363, P.P.C.

It would not be out of place to mention here that the criminal Court or the police station are not the competent and proper forums for resolution of any dispute between the parents of the minor arising out of matrimonial life particularly touching hizanat and custody of the minor. I am supported in my view by the case-law laid down in Bashir Ahmad vs. The State 1971 PCr. LJ Lahore 252 and Ahmad Nawaz and three others vs. The State PLD 1968 Lahore 97.”

9. The complainant in the FIR had, admittedly, given the custody of the minors to their maternal uncle, and he knew that they were in the custody of the mother. In such circumstances, by no stretch of the imagination could it be construed that refusal to handover the custody to the Father would constitute an offence punishable under section 363 of PPC. Moreover, the complainant, being an official of the highest Constitutional Court, ought to have known that the law provides for settling disputes relating to custody of minors by approaching a Guardian Court. It is also noted that a suit for the custody of minors was filed by the Mother under the *Guardian and Wards Act, 1890*, in the Court of learned Civil Judge/Guardian Judge, Multan on 09-

02-2015. On the same date an order was also passed granting ad-interim injunction in favour of the Mother. It was on the same date that a complaint was filed by the Father for registration of a criminal case. The Investigating Officer present in the Court also appears to be aware that a criminal case cannot be registered, when it is obvious from the complaint that it relates to a purely family dispute, particularly the custody of minors. In these circumstances, there is force in the argument of the learned counsel for the mother/respondent that it would reasonably give rise to the apprehension that the father, being an employee of the august Supreme Court of Pakistan, is using his influence. This was not a case in which the concerned officials ought to have converted the complaint into a criminal case by registering the FIR. The non application of mind and the officials acting in a mechanical manner is obvious.

10. This Court is conscious of the settled law relating to the scope and extent of the powers to be exercised by this Court under Article 199 of the Constitution by way of quashment of a criminal case. In this regard, the principles of law, as enunciated and laid down by the august Supreme Court, are well settled by now and may be summarized as follows:-

- i) The High Court is not vested with the power to quash an FIR under Section 561-A of Cr.P.C. on the grounds of *malafide* or disclosing a civil liability.
- ii) Resort to the provisions of Section 561-A of Cr.P.C. or Article 199 of the Constitution for quashing a criminal case is an extraordinary remedy, which can only be granted in exceptional circumstances.
- iii) As a general rule powers under Article 199 of the Constitution cannot be substituted for the trial, nor can any deviation be made from the normal course of law.

- iv) The consideration to be kept in view for quashment of a criminal case is whether the continuance of the proceedings before the trial Court would be a futile exercise, wastage of time and abuse of the process of the Court, and whether an offence on the admitted facts is made out or not.
- v) The exercise of powers and jurisdiction under Article 199 of the Constitution is discretionary in nature, however, the same are to be exercised in good faith, fairly, justly and reasonably, having regard to all relevant circumstances.
- vi) While considering quashment of a criminal case in exercise of powers vested under Article 199 of the Constitution, the High Court is required to take into consideration the various alternate remedies available to a petitioner before a trial Court, *inter alia*, under Sections 249-A and 265-K of Cr.P.C.
- vii) Besides the above, the other alternate remedies available under the law have been enumerated by the august Supreme Court in the case of '*Col. Shah Sadiq Vs. Muhammad Ashiq and others*' [**2006 SCMR 276**] as follows.-
 - a. To appear before the Investigating Officer to prove their innocence.
 - b. To approach the competent higher authorities of the Investigation Officer having powers vide section 551 of Cr.P.C.
 - c. After completion of the investigation, the Investigation Officer has to submit the case to the concerned Magistrate, and the concerned Magistrate has the power to discharge

them under section 63 of the Cr.P.C. in case of their innocence.

- d. In case he finds the respondents innocent, he would refuse to take cognizance of the matter.
- e. Rule 24.7 of the Police Rules of 1934 makes a provision for cancellation of cases during the course of investigation under the orders of the concerned Magistrate.
- f. There are then remedies which are available to the accused person who claims to be innocent and who can seek relief without going through the entire length of investigation.
- viii) A criminal case registered cannot be quashed after the trial Court has taken cognizance of a case, as the law has provided an aggrieved person with efficacious remedies for seeking a premature acquittal, if there is no probability of conviction or a case is not made out.
- ix) Prior to exercising jurisdiction under Article 199 of the Constitution, the High Court has to be satisfied that the trial Court has neither passed an order nor any process issued.
- x) Courts exercise utmost restraint in interfering with or quashing investigations already in progress, pursuant to statutory powers vested in the police or other authorities. Courts do not interfere in the matters within the power and jurisdiction of the police, particularly when the law imposes on them the duty to inquire or investigate.

11. The above principles of law have been enunciated and laid down in the cases of *Director General, Anti Corruption Establishment, Lahore and*

others Vs. Muhammad Akram Khan and others’ [PLD 2013 SC 401], *‘Rehmat Ali and others Vs. Ahmad Din and others*’ [1991 SCMR 185], *‘Miraj Khan Vs. Gul Ahmed and 3 others*’ [2000 SCMR 122], *‘Muhammad Mansha Vs. Station House Officer, Police Station City, Chiniot, District Jhang and others*’ [PLD 2006 SC 598] *‘Col. Shah Sadiq Vs. Muhammad Ashiq and others*’ [2006 SCMR 276], *‘Emperor v. Kh. Nazir Ahmad*’ [AIR 1945 PC 18] & *‘Shahnaz Begum Vs. The Hon’ble Judges of the High Court of Sind and Baluchistan and another*’ [PLD 1971 SC 677].

12. In the instant case, the facts are unequivocally admitted, and on this Courts query, it was reiterated by the Father that he had given the custody to the maternal uncle of the minors with consent, and that thereafter they remained with the petitioner/mother. It is further admitted that he has not approached a Court having Competent Jurisdiction to decide his grievance relating to the custody of the children/minors while the petition of the Mother was pending before the learned Guardian Court in Multan.

13. In the light of the above principles enunciated by the august Supreme Court, and the statement of the Investigating Officer that no proceedings by way of framing a charge or submission of report under Section 173 of Cr. P. C have taken place before the Trial Court, this Court has no hesitation in concluding that the instant case comes within the exception to the general rule that courts neither interfere in investigations nor quash a criminal case. The W.P.No.475/2015 is, therefore, allowed and FIR No.93/2015 dated 09-02-2015 is hereby quashed.

14. Next, this Court will take up CrI. Misc. No.02/H/15. The petition has been filed under Section 491 Cr. P. C. The provisions are reproduced as follows:-

“Power to issue direction of the nature of a ‘habeas corpus’ (1)[Any High Court] may, whenever it thinks fit, direct----

- (a) that a person within the limits of its [appellate criminal jurisdiction] be brought up before the Court to be dealt with according to law;*
- (b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;*
- (c) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court;*
- (d) that a prisoner detained as aforesaid be brought before a Court martial or any Commissioners * * *for trial or to be examined touching any matter pending before such Court martial or Commissioners respectively;*
- (e) that a prisoner within such limits be removed from one custody to another for the purpose of trial; and*
- (f) that the body of a defendant within such limits be brought in on the Sheriff's return of cepi corpus to a writ of attachment.*

[(1A) The High Court may, by general or special order published in the official Gazette, direct that all or any of its powers specified in clauses (a) and (b) of subsection (1) shall, subject to such conditions, if any, as may be specified in the order, be exercisable also by-

- (a) a Sessions Judge; or*
- (b) an Additional Sessions Judge,*

within the territorial limits of Sessions Division.]

(2) *[The High Court] may, from time to time, frame rules to regulate the procedure in cases under this section.*

[(3) *Nothing in this section applies to persons detained under any law providing for preventive detention.]]*

15. The perusal of the above provisions clearly shows that the same are attracted in the case of habeas corpus. Habeas corpus petitions are filed when the whereabouts of the person for whom the relief is being sought are not known, and one of the conditions mentioned in the above provision is satisfied. The scope and principles for exercising powers and jurisdiction under section 491 Cr. P.C, when the case involves the custody of minors, have been affirmed by the Supreme Court in “Mst Nadia Parveen versus Mst Almas Noreen” **PLD 2012 SC 758**, and the same may be summarized as follows:-

- (i). The matter of custody of minor children can be brought before a High Court under section 491 Cr.P.C ***only if***, (a) the children are of very tender ages, (b) they have quite recently been snatched away from lawful custody and (c) there is a real urgency in the matter.
- (ii). Even if the above conditions are fulfilled the High Court may ***only regulate the interim custody*** leaving the matter of final custody to be determined by a Guardian Court.
- (iii). The jurisdiction of the High Court in such matters is to be exercised sparingly and in exceptional and extraordinary cases of ***real urgency***, keeping in view that the Guardian Judge is vested with the requisite powers.

For the above principles reference was made to “Nisar Muhammad and another vs. Sultan Zari”, PLD 1997 SC 852, “Muhammad Javed Umrao vs. Miss Uzma Vahid”, 1988 SCMR 1891, “Naziha Ghazali vs. The State and another”, 2001 SCMR 1782 and “Mst. Khalida Perveen vs Muhammad Sultan Mehmood”, PLD 2004 SC 1.

16. On the admitted facts and the averments made in the petition, it is obvious that the conditions are not satisfied. There is no urgency, let alone real urgency. The minors were not snatched from the custody of the Father, nor are the former of such tender ages as would persuade this Court to exercise its powers and jurisdiction under section 491 Cr.P.C. In the instant case the petitioner was fully aware that the minors were in the custody of the natural guardian i.e. the Mother. It is further noted that the prayer sought in the petition is in the nature of seeking custody of the minors from their natural guardian i.e. the Mother. The petitioner, being a responsible official of the Supreme Court, is expected to have known that the proper course was to approach a competent Guardian Court having jurisdiction, rather than invoking the jurisdiction of this Court under Section 491 Cr. P. C. In any case, habeas corpus is neither relevant in the facts and circumstances of the case, nor can Section 491 Cr.P.C substitute the powers of a Competent Guardian Court under the provisions of the Guardian and Wards Act, 1890. There is no merit in the petition nor is it maintainable.

17. The Minors were also produced in compliance with this Court’s order dated 16-2-2015. It was observed that they were comfortable with their natural guardian/mother. It was inquired from them whether they wanted to go with the Father or the Mother, and they vehemently insisted to go with their mother. Both the parents are admittedly remarried. A suit for the custody of the Minors is pending before the Guardian Court at Multan. At one stage the parties agreed before this Court that they shall approach the Guardian Court at

Islamabad. However, as this matter is not before this Court, therefore, the parties are left to decide for themselves and shall be at liberty to proceed in accordance with law. It is expected that both, Mother and the Father, will keep the welfare and interests of the Minors supreme and resolve their disputes in a civilized manner and in accordance with the law. As an interim arrangement the Minors shall remain in the custody of the Mother and shall be subject to an order whether interim or final, passed by a Guardian Court.

18. The Crl. Misc. No.02/H/15 is, therefore, dismissed.

19. On a final note, this Court cannot turn a blind eye to the trend observed in several cases, wherein unwarranted references are made to the courts in the FIRs. In the instant case it was neither appropriate nor justified to have mentioned the name of the august Supreme Court in the FIR. Naming a Court, and holding oneself out as an employee of a Court, certainly raises apprehension in the minds of the affected parties that the right to a fair trial would be denied in the circumstances. Ideally, neither the police officials nor the courts are expected to be influenced. But we live in a real world and not in utopia. Many may not get influenced but some do, and it is enough for a travesty of justice if one person involved in the proceedings is prejudiced. The result is denial of the right to a fair trial and due process, a violation of the fundamental right guaranteed under Article 10-A of the Constitution. It is, therefore, held that unwarranted references in a FIR to a court is likely to cause miscarriages of justice and is therefore illegal.

20. It would be appropriate to direct that in case the name of a Court is to be mentioned in a FIR, unless it is necessary, the permission of the respective Registrar shall be sought in writing before the registration thereof.

21. The office is directed to send a copy of this order to the Inspector General Police, Islamabad and the respective Registrars of the august Supreme Court and the Islamabad High Court.

(ATHAR MINALLAH)
JUDGE

Approved for reporting.

JUDGE

*Asif Mughal**

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