

Journal

1992 SCMR 1273

Court

SUPREME COURT

Date

1992-03-04

Appeal No.

CRIMINAL PETITION FOR LEAVE TO APPEAL NO. 24(S) OF 1991

Judge

**MUHAMMAD RAFIQ TATAR, PIR MUHAMMAD KARAM SHAHAND
MAULANA MUHAMMAD TAQI USMANI**

Parties

**ALLAH DAD (PETITIONER) VERSUS MUKHTAR AND ANOTHER
(RESPONDENTS)**

Statutes

**MUSLIM FAMILY LAWS ORDINANCE (VIII OF 1961) - S. 7
CONSTITUTION OF PAKISTAN (1973) - ART.2-A OFFENCE OF ZINA
(ENFORCEMENT OF HUDOOD) ORDINANCE (VII OF 1979) - S. 4
OFFENCE OF ZINA (ENFORCEMENT OF HUDOOD) ORDINANCE (VII OF
1979) - PREAMBLE MUSLIM FAMILY LAWS ORDINANCE (VIII OF 1961) -
S.7 MOHAMMEDAN LAW**

Judgment

MAULANA MUHAMMAD TAQI USMANI (MEMBER).- The petitioner seeks leave to appeal against the acquittal of Mukhtar son of Sher Khan and Mst. Rashida Akhtar (the respondents) recorded by both the Courts below.

2. The facts of the case briefly stated are that the petitioner filed a private complaint on 13-11-1982 against the respondents under section 10/16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the Ordinance) in the Court of Hlaqa Magistrate, alleging that respondent No.2 was his legally-wedded 'wife and that three children were bom out of their wedlock. She was, however, under the influence of respondent No.1 for quite some time and under this influence, she went away from the house of the petitioner in the company of . Mukhtar (respondent No.1) and was put in Dar-ul-Aman. She filed a suit for dissolution of marriage agaist the petitioner in the Family Court on 22-12-1979, but this suit was withdrawn by her on 2-6-1981. Later on, Mukhtar took away the said wife of the petitioner to his own house. It was alleged by the petitioner in the aforesaid complaint that both the respondents were living there in adultery.

3. On the basis of this complaint, the respondents were tried under section 10(2) of the Ordinance and Mukhtar was also tried under section 16 of.

b the Ordinance, where both of them have taken the plea that they have i contracted marriage between them after the petitioner had divorced respondent No.2 on 17-5-1981. .

4. As mentioned in the complaint, Mst. Rashida Akhtar (respondent No.2) had filed a suit for dissolution of marriage on 22-12- 1979 but on 2-6-1981 the same was withdrawn on the ground that the petitioner had divorced her orally and then through a divorce deed on 17-5-1981.

H p " 5. The petitioner had also filed a suit for restitution of conjugal rights on 5-4-1982 and got ah ex parte decree against respondent No.2, which was set aside on appeal. Thereafter, Mst. Rashida Akhtar filed a revision application before the Federal Shariat Court for staying the proceedings of criminal case against her. The Federal Shariat Court by its judgment dated 11-10- 1984 passed the following order:- '

"Both the learned counsel for the private parties agree that the criminal case under revision be transferred to another Additional - Sessions Judge of Rawalpindi to be nominated by the learned Sessions ' .kb s B , Judge, Rawalpindi, where after the respondent shall move an application ih the light of the observation made by Shariat Appellate Bench of Supreme Court in Muhammad Azam v. Muhammad Iqbal and others PLD 1984 SC 95 for the transfer of the civil case to the same-Additional District and Sessions Judge trying the criminal case who shall first decide the civil matter. Order accordingly..." 6. In pursuance of the above order, the suit for restitution of conjugal rights filed by the petitioner was proceeded first. The learned Family Court held the divorce deed dated 17-5-1981 as valid and dismissed the petitioner's suit for the restitution of conjugal rights on 14-4-1986. The petitioner filed a civil miscellaneous application in the Lahore High Court under section 14 of the Family Courts Act, 1964, which was dismissed for non-prosecution on 10-1-1989. It seems that the petitioner did not proceed further in this respect and the judgment of the Family Court dated 14- 4-1986 attained finality.

7. After the decision of the family suits, the criminal proceedings were restarted and the learned Additional Sessions Judge by his judgment dated 7-7-1990 acquitted both the respondents. The petitioner then filed a revision application in the Federal Shariat Court, which was dismissed on 20-3-1991. Now he has directed this petition for Special Leave to Appeal against the judgment of the Federal Shariat Court.

8. The basic question in this case is, whether the petitioner had divorced Mst. Rashidan Akhtar (respondent No.2) and whether the Nikah of Mst. Rashida Akhtar with Mukhtar (respondent No.1) was valid or not? The Criminal Courts below have held the marriage as valid and have acquitted the respondents from the charge of Zina levelled against them by the petitioner.

9. The learned counsel for the petitioner, Mr. M. Kowkab Iqbal, vehemently argued that the judgments of the Courts below validating the divorce deed, alleged to be written by the petitioner, are dearly illegal and violative of the provisions of the Muslim Family Laws Ordinance (hereinafter referred to as the Family Laws Ordinance). According to section 7 of the Family Laws Ordinance, no divorce can be effective by merely pronouncing the words of Talaq by the husband, but it is a mandatory requirement under the Family Laws Ordinance that a notice of Talaq must be given to the Chairman of the Union Council and the divorce cannot be effective unless 90 days have passed after the Chairman of the Union Council receives the said notice of Talaq.

The learned counsel referred to a number of judgments of this Court whereby it was held consistently that without such a notice to the Chairman of the Union Council, the divorce cannot be held as effective and if the notice of 'i Talaq has not been served to the Chairman, it will be a legal presumption that the husband has revoked the divorce. He referred to the famous case of Syed Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yusuf PLD 1963 SC 51 which was subsequently affirmed by the case of Abdul Mannan v. Safurun Nessa 1970 SCMR 845 and a number of other cases where the notice of Talaq under section 7 of the Family Laws Ordinance has been held as mandatory, without which a divorce cannot be deemed to be effective.

He has also submitted that the petitioner has never served any notice to the Chairman of the Union Council for Talaq, so even if it is proved that the petitioner had divorced Mst. Rashida Akhtar orally or through a divorce deed, the same cannot be held as legally effective divorce because, the mandatory provisions of section 7 of the Family Laws Ordinance have not been complied with. He added that the alleged Nikah between the respondents without the divorce having been effective in the eyes of law cannot be treated as a valid marriage and since both the respondents are still living as husband and wife, it amounts to the commission of Zina and the charge of section 10(2) of the Ordinance has been proved against them, and their acquittal is illegal.

10. We have paid due attention to the arguments advanced by the learned counsel for the petitioner, which seem apparently to have weight, yet a deeper study of the relevant law as has developed during last few years brings out a picture totally different from what appears from the perusal of section 7 of the Family Laws Ordinance. The arguments of the learned counsel, when looked at in this perspective, stand refuted on a number of grounds.

11. Firstly, the question of the effectiveness of the divorce and the validity of the marriage between the respondents has been examined by the Family

Court, the Sessions Court and the Federal Shariat Court. The decisions of all the three Courts are unanimous on the point that the respondents have contracted a valid marriage after the petitioner divorced Mst. Rashida Akhtar. The question of the notice of Talaq to the Chairman under section 7 of the Family Laws Ordinance was also decided by all these Courts in favour of the respondents and it was held that even in the absence of such a notice, the Talaq has become effective.

Reliance, in this respect, was placed on -Article 2-A of the Constitution, as interpreted in the case of *Mirza Qamar Raza v. Mst. Tahira Begum and others* PLD 1988 Kar. 169.

Article 2-A, inserted in the Constitution vide P.O. No.XIV of 1985 and affirmed by the Eighth Amendment of the Constitution, reads as follows:- "2-A. The principles and provisions set out in the Objectives Resolution reproduced in the Annexure are hereby made substantive part of the Constitution and shall have effect accordingly." ' -p r p '12. The legal effects of Article 2-A have been thoroughly examined in the case of *Qamar Raza* referred to above, and it was held therein that since the contents of the Objectives Resolution have been made a substantive part of the Constitution, the superior Courts can declare a law ultra vires the Constitution if it is found to be violative of the Injunctions of Islam. It was further held in the case of *Qamar Raza* that ineffectiveness of Talaq in the absence of a notice to the Chairman, as envisaged by section 7 of the Family Laws Ordinance, is against the Injunctions of Islam.

13. This view of the Karachi High Court was also upheld and affirmed by the Federal Shariat Court in the case of *Muhammad Sarwar and Mst. Shahida Parveen v. The State* PLD 1988 FSC 42, and it was on the basis of these judgments that the learned Trial Court in this case dispensed with the requirements of section 7 of the Family Laws Ordinance. The impugned judgment of the Federal Shariat Court in this case has upheld the decision of the Trial Court and placed its reliance again on the cases of *Mirza Qamar Raza* and *Muhammad Sarwar* referred to above.

14. We have gone through the well-considered judgment of the Karachi High Court in the case of *Mirza Qamar Raza* and have found that the judgment is based on very sound reasoning, and the impugned judgments based on the law laid down by it need no interference by this Court, especially in a case of acquittal like the one in hand.

IS. Secondly, the word 'Zina' for which the petitioner wants the respondents to be punished, has been defined in section 4 of the Ordinance in the following words:-

"A man and a woman are said to commit 'Zina' if they wilfully have sexual intercourse without being validly married to each other." The above definition clearly contemplates that the sexual intercourse in the case of a valid marriage cannot be deemed to be 'Zina'. Now the question arises, what is a valid marriage? As the term of 'valid marriage' has not been defined in the Ordinance, the same shall be construed in the light of the Islamic Injunctions keeping in view the intention of the law-maker as emerges from the title and the preamble of the Ordinance, which read as follows:- "An Ordinance to bring in conformity with the Injunctions of Islam the law relating to the offence of 'Zina'.

Whereas it is necessary to modify the existing law relating to Zina so as to bring it in conformity with the Injunctions of Islam as set out in the Holy Qura'n and Sunnah," 1 , 16. Both the title and the preamble of the Ordinance have disclosed the real intention of the law-maker who wants to 'modify the

law as it existed so as to bring it 'in conformity with the Injunctions of Islam'. All the provisions of the Ordinance, therefore, should be read and interpreted in the light of this title and preamble and terms not defined in the Ordinance itself, must be construed and interpreted in accordance with the 'Injunctions of Islam as set out in the Holy Qura'n and Sunnah'. The words 'validly married' occurring in the definition of 'Zina' in section 4 of the Ordinance have not been defined in the Ordinance. The definition, therefore, will be sought from the Injunctions of Islam because the Ordinance intends to bring the existing law relating to Zina in conformity with them.

i 17. Moreover, section 3 of the Ordinance has given the provisions of the Ordinance an overriding effect on 'any other law for the time being in force'.

18. The logical result of this scheme of the provisions of the Ordinance is that if there is a clash between an existing law and the Injunctions of Islam with regard to the validity of a marriage, the Injunctions of Islam shall prevail for the purpose of this Ordinance. Thus, if a marriage is valid in Shariah, it shall be held valid for the purpose of this Ordinance even though it is not recognised as valid in any other law for the time being in force.

19. Therefore, even if it is assumed that section 7 of the Family Laws Ordinance is a good law, the same cannot affect the validity of a marriage contracted according to Shariah at least to the extent of the criminal liability envisaged in the Ordinance.

(20. It is now evident that a notice of Talaq to the Chairman is not mandatory under the Injunctions of Islam and any divorce pronounced or written by a husband cannot be ineffective or invalid in Shariah merely because its notice has not been given to the Chairman, therefore, if a woman after obtaining a divorce from her husband and after the necessary period of 4Iddat'; contracts a marriage with a third person, their marriage cannot be held as invalid marriage, at least for the purpose of the Ordinance. In the instant case, the respondents have contracted Nikah after the petitioner had divorced Mst. Rashida Akhtar (respondent No.2), so even though the petitioner had not given a notice to the Chairman, the divorce became effective in Shariah and the marriage contracted thereafter is a valid marriage, especially for the purpose of the Ordinance and the cohabitation of the respondents cannot be held as 'Zina\ i 21. There is still another reason for the acquittal of the respondents. According to the definition given in section 4 of the Ordinance, the offence of 'Zina' cannot be made out against a man and woman unless they 'wilfully* have sexual intercourse without being validly married to each other. The word 'wilfully' has been interpreted in an earlier judgment of this Court in the case of Mst. Bashiran and another v. Muhammad Hussain and another PLD 1988 SC 186, where it was held that if a man and a woman have good reasons to believe bona fide that they are husband and wife, the commission of intercourse under this belief cannot be held as 'wilful' commission of 'Zina'.

On this score also the respondents deserve acquittal because they have contracted marriage in accordance with Shariah and they had good reasons to believe that they are husband and wife.

22. The learned counsel has thereafter raised another point and submitted that even if it is conceded that Allah Dad had divorced Mst. Rashida Akhtar on 17-5-1981 as alleged by the respondents, even then the Nikah between the respondents cannot be held as valid because it was admittedly performed on 5-8-1981 when 90 days had not passed after the alleged divorce. Here again the learned counsel referred to section 7 of the Family Laws Ordinance where the period of 'Iddat' has been given as 90 days. As the alleged Nikah, according to the learned counsel, was performed during the period of 'Iddat' of Mst.

Rashida Akhtar, the same cannot be a valid marriage even in the eyes of Shariah. This point was also raised before the Trial Court but was rejected on the ground that Nikah during the 'Iddat' of the former husband is only an irregular Nikah and is not void, but we do not agree with this finding of the Trial Court, because, firstly a marriage contracted during the period of 'Iddat' is not merely an irregular marriage, it has been termed by the Muslim Jurists as Batil (void). See Ibn Abidin: Raddul-Muhtar, Vol. 2, p.482 and secondly, because even if it is held to be irregular, it is still an invalid marriage, for both the irregular (Fasid) and void (Batil) marriages fall in the category of 'invalid marriage'. (See Ibn Abidin Vol. 2, p. 835).

23. However, the point raised by the learned counsel does not still help him in this case. The real period of 'Iddat' according to the Holy Qura'n is mentioned in the Surah Al-Baqara: (2:228): "And the divorced woman shall wait for three periods of menstruations." 24. According to this verse, the period of 'Iddat' laid down by the Holy Qura'n is not 90 days. It is rather three periods of menstruations which do not necessarily extend to 90 days. According to Hanafi Jurists in minimum period of menstruation is 3 days and the minimum period of 'Tuhr' (period of purity) is 15 days (see Al-Fatawa Al-Alamgiriya, Vol.1 at pp.36 and 37, Book I, Chapter 6). 25. In the light of these principles, the minimum period of 'Iddat' may be 39 days because this is the period in which it is possible for a woman to have three menstruations with two intervening periods of purity. It is thus clear that a marriage performed after 39 days from the divorce can be a valid marriage according to Shariah if the woman has passed through three period of menstruations during this period. In the instant case, the respondents married to each other after 79 days from the date of divorce given by Allah Dad, the petitioner. This period is sufficient for the completion of the period of 'Iddat' as mentioned in the Holy Qura'n because it is quite possible that Mst. Rashida Akhtar had passed through three periods of menses within 79 days, and there, is nothing on the record to show that she did not complete three menses during these days. There is no provision whatsoever in the Holy Qura'n or in the Sunnah of the Holy Prophet (Peace be Upon Him) which declares 90 days as 'Iddat' except for those women who either stopped menstruating due to old age, or did not start menstruating on account of their minority, only their 'Iddat' has been mentioned in the Holy Qura'n as three (lunar) months; (See Alqura'n 65:4). Therefore, for the reasons detailed in paras 14 to 24 of this judgment, if the respondents have contracted marriage after the completion of the period of 'Iddat' in accordance with Shariah, their marriage cannot be held as invalid nor can their cohabitation be termed as 'Zina'. Thus, the order of acquittal of

the respondents as recorded by the Additional Sessions Judge or the Federal Shariat Court is fully justified and no interference by this Court is called for.

26. In the light of what has been mentioned above, this petition is without force and is hereby dismissed.

JUDGE
Justice MUALANA TAQI USAMI