IN THE SUPREME COURT OF PAKISTAN
(Shariat Review Jurisdiction)

13/25

Shariat Appellate bench:
Justice Qazi Faez Isa, Chairman
Justice Naeem Akhtar Afghan
Justice Shahid Bilal Hassan
Dr. Muhammad Khalid Masud
Dr. Qibla Ayaz

AD
AFR
DJ

Criminal Shariat Review Petitions No. 2 of 2016
IN
Criminal Shariat Petition No. 24 of 2009

Mst. Saeeda Begum. ... Petitioner

Versus

The State and another ... Respondents

For the Petitioners:	Dr. Muhammad Aslam Khaki, ASC Mr. Tariq Aziz, AOR
For the State:	Ms. Chand Bibi, Deputy Prosecutor-General, Punjab.
For Respondent No. 2:	Syed Rifaqat Hussain Shah, ASC/AOR
Amicus Curiae:	Dr. Muhammad Mushtaq Ahmad, Ex-Director-General, Shariah Academy.
Date of Hearing:	08.08.2024.

JUDGMENT

Dr. Qibla Ayaz: This Criminal Shariat Review Petition has been filed against the Judgment dated 16.06.2016 passed by this Court in Criminal Shariat Petition No. 24 of 2009, wherein the appeal of respondent no. 2 was allowed and, consequently, judgment dated 26.05.2009 passed by Federal Shariat Court in criminal appeal No. 126/1 of 2003 was set aside and respondent no. 2 was acquitted of the charge against him.

2. As per record, the complainant Hamayat Ali Malik lodged F.I.R No. 177/2000, under section 7 of the Offence of Qazf (Enforcement of Hudood) Ordinance 1979 ('**the Ordinance**') at the Police Station Golra, Islamabad. The content of the F.I.R. reveals that the complainant's sister, namely Mst. Saeeda Begum, was married to Jameel Iqbal on 07.05.1990; during the wedlock, three daughters were born; upon the birth of the third daughter on 28.10.1999, respondent no. 2, who was expecting a male issue, became annoyed and on 06.06.2000, he sent *talaqnama* (divorce deed) to the petitioner which also contained denial of paternity to the third female child, on the ground that for a year prior to the birth of the child, the accused was abroad at Saudi Arabia.

3. Respondent No. 2 was tried by the Additional Sessions Judge, Islamabad (**'the trial court'**), but he neither proceeded with the mechanism of Li'an provided for in section 14 of the Ordinance, nor used the provisions of section 7 and/or 11 of the Ordinance regarding punishment for the offence of Qazf and, instead, left the matter "to be placed before Almighty Allah on the Day of Judgment". The petitioner, feeling aggrieved, filed an appeal before the Federal Shariat Court, which partly allowed it by declaring that the allegation of Qazf was established beyond any reasonable doubt against the respondent, however, the punishment of Hadd could not be imposed because *tazkiyat-al-shuhud* was not done for the witnesses. It, therefore, awarded the Ta'zir punishment to respondent no. 2 under section 11 of the Ordinance. The judgment of the Federal Shariat Court was not assailed by the petitioner, but respondent no. 2 challenged it before the Shariat Appellate Bench of this Court, which allowed the petition vide the impugned judgment and, consequently, acquitted the accused on the following ground:

> "The procedure of Li'an provided for in section 14 of the said ordinance was the only mechanism through which the allegation levelled against the petitioner regarding commission of Qazf could have been proceeded with and that was not done in this case."

4. We have heard the learned counsel for the parties and have examined the record with their assistance. We also benefited from the *amicus* brief of learned Dr. Muhammad Mushtaq Ahmad, ex-Director-General of the Shariah Academy.

5. We are cognizant of the fact that the scope of review is very limited and the petitioner had to show "errors apparent on the face of the record".[1] The following questions were raised for our consideration:

i. Whether this Court erred in declaring that *li'an* was the only mechanism through which the allegation levelled against the petitioner regarding commission of *Qazf* could have been proceeded?

ii. Whether denial of paternity to the child by respondent no. 2 in the given circumstances attracted the provisions of sections 3, 5, 6 and 7 of the Ordinance relating to the offence of *qazf* liable to *hadd*?

iii. Whether the Federal Shariat Court erred in declaring that the *had* punishment could not be awarded because *tazkiyat-al-shuhud* of the witnesses was not done?

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[1] Rule 1 of Chapter XXVI of the Supreme Court Rules, 1980, made under Article 188 of the Constitution of the Islamic Republic, 1973.

6. Following are the admitted facts: that marriage between the petitioner and respondent no. 2 took place on 07.05.1990 in accordance with Muslim Rites and *rukhsati* also took place on the said date; that misunderstandings developed between the parties and relations got strained due to the birth of the third female child in October 1999; that respondent No. 2 denied the paternity of his third daughter and called her illegitimate, claiming that he had no marital relations because he remained in Saudi Arabia during the said pregnancy and even a year before that. However, the Assistant Director, Federal Investigation Agency, Emigration check post, Islamabad Airport vide his letter dated 17.02.2021 confirmed on the basis record pertaining to entry and exit, maintained at the check post, that respondent no. 2 had arrived in Pakistan from Saudi Arabia via Saudi Airline on 09.04.1999 and departed to Saudi Arabia on 16.05.1999. In his statement under section 342 of the Code of Criminal Procedure, 1898 (**'the Code'**), before the trial court on 18.06.2002 (i.e., almost two years after the divorce deed), respondent no. 2 admitted that he had visited Pakistan during the said period, but he still denied having matrimonial contact with his wife. He took this somersault when he came to know that the record pertaining to his travel to and from Pakistan was submitted before the trial court. Thus, the allegations of illegitimacy regarding the third daughter, namely Attia Jameel, which finds mention in the divorce deed and statement of respondent under section 342 of the Code is borne on record and is not denied. Respondent no. 2 maintained the same position before the full bench of the Federal Shariat Court during the hearing of the appeal.

7. It is a well-established rule of Islamic law that denial of paternity of child constitutes the offence of *qazf* as it amounts to attribution of *zina* to the child's mother. Imam Kasani, a renowned Hanafi jurist, says: "*Qazf* by way of denying paternity of the child is like a person's saying to his wife: 'this child is a born of *zina*'; or saying to her: 'this child is not mine'.[2] Imam Marghinani, author of the famous *fiqh* manual *al-Hidayah*, states: "When the husband denies paternity the child born by his wife, he commits *qazf* against her."[3] The Qur'an in its *Surat al-Noor* (24), verse 4, has stipulated that the accuser of *zina* must bring four witnesses to prove the allegation or else he would be awarded the punishment of *qazf*.

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[2] *Bada'i' al-Sana'i' fi Tartib al-Shara'i'* (Beirut: Dar al-Kutub al-'Ilmiyyah, 2003), vol. 5, p. 34.

[3] *Al-Hidayah fi Sharh Bidayat al-Mubtadi* (Beirut: Dar Ihya' al-Turath al-'Arabi, n.d.), vol. 2, p. 270.

وَٱلَّذِينَ يَرْمُونَ ٱلْمُحْصَنَٰتِ ثُمَّ لَمْ يَأْتُوا۟ بِأَرْبَعَةِ شُهَدَآءَ فَٱجْلِدُوهُمْ ثَمَٰنِينَ جَلْدَةً وَلَا تَقْبَلُوا۟ لَهُمْ شَهَٰدَةً أَبَدًا ۚ وَأُو۟لَٰٓئِكَ هُمُ ٱلْفَٰسِقُونَ

> Those who accuse chaste women [of *zina*] but do not produce four witnesses, flog them with eighty lashes, and do not admit their testimony ever after; they are indeed rebellious.

However, verses 6 to 9 of the same *Surah* create an exception for the husband by stipulating the procedure of imprecation or *li'an*.

8. Section 14 of the Ordinance, which gives provisions about *li'an*, is reproduced hereunder:

> "(1) When a husband accuses before a Court his wife who is *muhsan* within the meaning of section 5, of the *zina* and the wife does not accept the accusation as true, the following procedure of *li'an* shall apply, namely:
>
> > (a) the husband shall say upon oath before the court: "I swear by Allah the Almighty and say I am surely truthful in my accusation of *zina* against my wife (name of wife)"; and, after he has said so four times, he shall say: 'Allah's curse be Upon me if I am a liar in my accusation of zina against my wife (name of wife)"; and
> >
> > (b) the wife shall, in reply to the husband's statement made in accordance with clause (a), say upon oath before the Court: "I swear by Allah the Almighty a that my husband is surely a liar in his accusation of *zina* against me"; and, after she has said so four times, she shall say: "Allah's wrath be upon me if he is truthful in his accusation of *zina* against me".
>
> (2) When the procedure specified in sub-section(1) has been completed, the Court shall pass an order dissolving the marriage between the husband and wife, which shall operate as a decree for dissolution of marriage and no appeal shall be against it."

An overview of this section reveals that this is applicable when the allegation is made at a time when the marital bond between the couple is intact. Muslim jurists have said this in explicit words. Imam Muhammad, the disciple of Imam Abu Hanifah, says:

> "If a person accuses his wife of *zina* and then her marital bond with him is severed by divorce or some other cause, he is neither given the *hadd* punishment nor is he obliged to do imprecation."[4]

Imam Sarakhsi explains the underlying principles in the following words:

> "Because the ultimate purpose of imprecation is to separate them, which is not needed after the marital bond has been severed; hence, imprecation becomes meaningless after the loss of its purpose; and there is no *hadd* punishment because his

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[4] *Al-Mabsut* (Beirut: Dar al-Ma'rifah, n.d.), vol. 7, p. 49.

> accusation already attracted the rules of imprecation, and one act does not attract two punishments."[5]

On the other hand, if the husband first divorces her and, then, accuses her of *zina*, the rules of *li'an* would not be applicable and this act would attract the rules of *qazf*. To quote Imam Muhammad again:

> "If he says to her: "You are divorced thrice, o adulteress"; he is liable to the *hadd* punishment."[6]

Following is Imam Sarakhsi's explanation of the principle:

> "Because her marital bond with him was severed by the three divorces; so, he accused her of *zina* after the termination of the marital bond; hence, he is liable to the *hadd* punishment."[7]

9. Admittedly, Respondent No.2 levelled the accusation of *zina* not only before the trial court in his statement under section 342 of the Code but also before the full bench of Federal Shariat Court, and this he did long after he had severed the marital bond after pronouncing three divorces. As he no longer remained the husband of Mst. Saeeda Begum, the provisions of section 14 of the Ordinance regarding *li'an* were not attracted. On the contrary, his actions attracted section 6(1) (b) of the Ordinance which reads as under:

> "Proof of *qazf* liable to *hadd* shall be in one of the following forms namely ... the accused commits *qazf* in the presence of the Court."

In the present case, *qazf* liable to *hadd* was committed after divorce in the presence of the court. The question of *tazkiyat-al-shuhud*, therefore, did not arise and the Federal Shariat Court erred in declaring that *hadd* of *qazf* could not be awarded because *tazkiyat-al-shuhud* could not be done.

10. Consequently for the reasons stated above, we have come to the conclusion that respondent no. 2 committed *qazf* liable to *hadd* against the petitioner, his former wife. However, during the course of proceedings, the counsel of the petitioner submitted that the petitioner is not interested in getting the respondent punished for *qazf*, if the legitimacy of the child is established. It is important to note that for enforcing the *hadd* of *qazf*, the Muslim jurists deem it necessary that the complainant must not withdraw the complaint and they hold that even silence on the part of the complainant amounts to *shubhah* (doubt) which becomes an obstacle in the way of enforcing the *hadd* punishment.[8] Therefore, as the petitioner is not pressing the prayer for punishing respondent no. 2, the same cannot be enforced. The respondent has already been released after the impugned

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[5] Ibid.
[6] Ibid.
[7] Ibid.
[8] See for details: *Bada'i' al-Sana'i'*, vol. 9, pp. 241-248.

judgment was announced. The learned Deputy Prosecutor-General also does not press the matter of punishment.

11. As far as the legitimacy of the child, namely Attia Jameel, is concerned, it is conclusively established and she is entitled to all legal rights of a legitimate child under Islamic law and the law of the land. Article 128 of the Qanun-e-Shahadat Order, 1984 ('**the Order**'), stipulates that a child born during the subsistence of a valid marriage or within two years after its dissolution is conclusive proof of legitimacy, provided that the woman remains unmarried after the divorce. As per, Article 2(9) of the Order, the court shall not allow evidence to be given for the purpose of disproving it. This Court in *Ghazala Tehsin Zohra v. Mehr Ghulam Dastagir Khan and another*, PLD 2015 Supreme Court 327, held as under:

> "We, first of all, take up for comment the provisions of Article 128 ibid. The Article is couched in language which is protective of societal cohesion and the values of the community. This appears to be the rationale for stipulating affirmatively that a child who is born within two years after the dissolution of the marriage between his parents (the mother remaining un-married) shall constitute conclusive proof of his legitimacy. Otherwise, neither the classical Islamic jurists nor the framers of the Qanun-e-Shahadat Order could have been oblivious of the scientific fact that the normal period of gestation of the human foetus is around nine months. That they then extended the presumption of legitimacy to two years, in spite of this knowledge, directly points towards the legislative intent as well as the societal imperative of avoiding controversy in matters of paternity."

12. In view of the above, we allow this Shariat review petition to the extent that the act of the respondent attracted the rules of *qazf*, not *li'an*. However, the proceedings for *qazf* could not be allowed to continue after the petitioner withdrew from the case. Hence, the impugned judgment is sustained to the extent of acquittal of respondent no. 2.

13. Before parting, we deem it apposite to appreciate the invaluable assistance rendered by the learned counsel for the parties as well as the learned amicus curiae in understanding the intricacies of the Islamic Injunctions on the issue.

Crl.Sh.R.P No. 2/2016

Justice Qazi Faez Isa,
Chairman

Justice Naeem Akhtar Afghan,
Member

Justice Shahid Bilal Hassan,
Member

Dr. Muhammad Khalid Masud,
Adhoc Member

Dr. Qibla Ayaz
Adhoc Member,

Announced date: Islamabad. 27th January 2025

Approved for Reporting