

HIGH COURT AZAD JAMMU AND KASHMIR

Writ Petition No.984/2020.

0Date of institution 08.08.2020.

Date of decision 10.02.2023.

1. Zubair S/o Noor.
2. Abdul Ghafoor S/o Alam Din.
3. Qamar S/o Muhammad Akbar.
4. Israr S/o Muhammad Saddique.
5. Fayyaz S/o Muhammad Aziz.
6. Abdul Raoof.
7. Sheraz S/o Raham Din.
8. Muhammad Iqbal S/o Feroz Din.
9. Sadaqat S/o Ferooz Din.
10. Jabar S/o Hameed.
11. Shakoor S/o Elam Din.
12. Mehmood Sharaf Din.
13. Akbar S/o Rajwali.
14. Gulzar S/o Feroz Din, caste Gujjar R/o Kopra.
15. Kamal Din S/o Taj Din.
16. Sajjad S/o Mir Naseer.
17. Muhammad Munir S/o Muhammad Saddiq, caste Gujjar R/o Andra Sari Tehsil Chikar District Jhelum Valley, Azad Jammu and Kashmir.

....Petitioners

VERSUS

1. Senior Superintendent Police Jhelum Valley.
2. Deputy Superintendent of Police Jhelum Valley.
3. Station House Officer (SHO) Police Station Chikar District Jhelum Valley, Azad Kashmir.
4. Incharge CIA, Police Station Jhelum Valley, District Jhelum Valley.
5. Muhammad Rustam S/o Rafique, caste Mughal R/o Kopra Tehsil Chikar District Jhelum Valley, AJ&K.

....Real-Non-petitioners

6. Zaheen Bibi D/o Muhammad Yasmeen R/o Kopra Tehsil Chikar District Jhelum Valley.

....Proforma-Respondent

WRIT PETITION

Before:- Justice Syed Shahid Bahar, J.

PRESENT:

Ch. Shoukat Aziz, Advocate for the petitioners.

Raja Saeed Khan, A.A.G for State.

Shahid Ali Awan, Advocate for respondent No.6.

Raja Ayaz Ahmed, Advocate for respondent No.5.

Judgment:

Through the instant writ petition filed under Article 44 of the Azad Jammu and Kashmir Interim Constitution 1974, the petitioners seek quashment of an FIR No.48/2020 registered in offences under sections 11/16, 19 of the **Offence of Zina (Enforcement of Hudood) Act, 1985 (Act V of 1985)**, hereinafter to be referred as “**ZHA**” against the petitioners, at Police Station Chikar on 14.07.2020.

2. Petitioners aver in the petition that on the application of complainant/respondent No.5, a false and fabricated FIR bearing No.48/20 in offences under sections 11/16 and 19 ZHA was registered at Police Station Chikar, district Jhelum Valley against the petitioners. They further aver that the story narrated in the FIR is totally preposterous because no occurrence whatsoever has taken place, but the complainant in connivance with Police Officials got registered the impugned FIR and in order to agonize them, they are implicated in this case. They allege that the impugned F.I.R has been chalked out against law with malafide intent for achieving sordid motives against the petitioners. They contend that, being aggrieved they have got no

alternate or efficacious remedy except to invoke the jurisdiction of this Court, hence this constitutional petition for quashment of the impugned F.I.R.

3. After admission of writ petition, comments already filed on behalf of official respondents No.1 to 4 were treated as written statement on their request vide order dated 04.02.2021, wherein the claim of the petitioners has been gainsaid in toto. It is contended that the impugned F.I.R bearing No.40/2020 has been registered against the petitioners quite in accordance with law, which needs no interference by this Court. Whereas, separate written statement has been filed on behalf of respondent No.5, wherein it is contended that a criminal case under sections 11/16, 19 ZHA has rightly been registered against the petitioners and after registration of the impugned FIR, they moved to this Court by filing instant writ petition. They did not appear before the investigating agency. It is further alleged that the petitioners abducted wife of complainant and committed heinous offence.

4. During proceedings, an application has been filed on behalf of proforma respondent Zaheen Bibi through her counsel on 26.08.2020, whereby her statement was recorded by this Court on the same day, wherein, she stated that her Nikah was contracted with Muhammad Rustam under duress and not of

her own volition on 26.06.2020 which is flagrant violation of Islamic injunction. She deposed that Muhammad Rustam /complainant tortured her abysmally, whereupon, she went to the house of her parents and instituted suit for dissolution of marriage before Family Court Jhelum Valley. She further deposed in her statement that due to life threat, she took to her heels and left her home, thereby shifting to Rawalpindi, where firstly she lived in the Shelter home and later on she started living in the house of her friend, and, after that, also instituted suit for dissolution of marriage in the Family Court Rawalpindi, against Rustam S/o Muhammad Rafique (complainant herein). She further deposed that neither she was abducted by the petitioners nor she had been kept by them in an illegal custody. She prayed that the impugned F.I.R, which has wrongly been registered may be countermanded.

5. During proceedings in the case, this Court vide order dated 16.11.2022 directed respondent No.6 (Zaheen bibi) to appear in propria persona before the Court on next date of hearing. She appeared before the Court on 21.11.2022 and on Court's query stated that she is dwelling at Rawalpindi with her friend and is not agreeing to live with her parents or any other relative at any cost. After hearing her, she was sent to Shelter Home/Dar-ul-Aman, Muzaffarabad vide order dated 21.11.2022.

6. I have heard the learned counsel for the parties at some considerable length and perused the record with due care.

7. **Moot Points:-**

- (i) Whether a person against whom criminal law has been set in motion, can immediately come forward by portraying himself aggrieved invoking extraordinary jurisdiction of this Court under Article 44 of the Interim Constitution seeking annulment of the FIR chalked out against him?
- (ii) Whether a person who seeks indulgence of this Court in writ jurisdiction and deliberately suppresses material facts from Court in order to get desirable relief from Court is entitled for aid of this Court?
- (iii) Whether disputed question of facts, particularly pertaining to validity and legitimacy of contract of marriage between 02 claimants of Nikah can be resolved by this Court in its extra ordinary jurisdiction conferred by Article 44 of the Interim Constitution?
- (iv) Whether majesty of law allows to hold the hands of a person for the purpose of providing an aid who comes with unclean hands?
- (v) Whether criminal proceedings already under way against a person can be terminated at random on mere asking of a person by stepping in the shoes of investigating agency?

8. In vista of the moot points tabulated above in parlance of the factual matrix it reveals the grievance voiced by the petitioner is quo his false implication in the criminal lis.

9. Although it is not a rule to decline interference in an extraordinary jurisdiction by shutting the door of Court qua quashment of an FIR in a mathematical manner, but it varies from case to case, and if facts of the case demands and extraordinary circumstances have been projected and oozing from the record definitely this Court can move ahead to rescue the person from situation. It was held by the august Supreme Court of Pakistan in *Anwar Ahmed Khan v. The State (1996 SCMR 24)* that:-

“It is well settled principle that where investigation is mala-fide or without jurisdiction, the High Court in exercise of its Constitutional jurisdiction under Article 199 is competent to correct such proceedings and pass necessary order to ensure justice and fair play.”

This view has been fortified in umpteen of case law; i.e:

- (a) 2000 SCMR 122; Miraj Khan v. Gul Ahmed and 3 others**
- (b) 2002 P.Cr.L.J 1593; Mst. Parveen Akhtar v. Muhammad Yousaf Zahid and another.**
- (c) 2004 P.Cr.LJ 606; Mst. Shamim v. DPO District Khanewal and 2 others.**
- (d) 2012 P.Cr.L.J 638; Ghulam Qadir Faraz alias Babar v. SHO P.S. Saddar Kamoke and 2 others.**
- (e) PLD 2017 Lahore 889; Mumtaz Hussain v. The State and 2 others.**

10. Now a days it has become fashion to approach the High Court in almost every case seeking annulment of the

criminal lis in order to take refuge from criminal proceeding and to avoid the investigation, if such like practice is allowed to prevail, not only it will frustrate and paralyze the investigating agency but also it will amount to arrest the system of criminal dispensation of justice. It was held by the honorable Supreme Court of Azad Jammu and Kashmir in Mumtaz Hussain v. State and 2 others (2021 SCR 605) that:

“The High Court in exercise of writ jurisdiction is not competent to assume the role of investigating agency or the trial Court to give verdict as to whether an accused has committed an offence or not. The High Court should not embark upon an inquiry into the merits and demerits of the allegations and quash the proceedings without allowing the investigating agency to complete its task at first.”

It was held by the Privy Council (prior to partition of subcontinent) in Emperor V. Khawaja Nazir Ahmed (AIR 1945 PC 18) that:-

“While examining an FIR, quashing of which is sought, the Court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR --- Further held ---- The Power of quashing should be exercised sparingly with circumspection, as it has been observed, in the rarest of rare cases.”

Likewise, this Court in Tahir Saleem Mughal V. State and 3 others (2022 MLD 1209) held:-

“Issuance of writ by setting at naught an FIR in every case amounts to short circuit the normal procedure of law.”

Moreover, this Court in a case titled Yasir Shafique V. Station House Officer (SHO), Police Station City Muzaffarabad, District Muzaffarabad, Azad Kashmir and 3 others reported as **(2022**

MLD 1023) held:

“Where serious allegations have been leveled in the FIR, termination of investigation or probe is not justified----Further held--- Principle of trichotomy of powers which is delicately balanced in the Constitution cannot be disturbed as it grants power to each and every organ to decide the matters in its allotted sphere. Thus, it is not appropriate to divert ordinary course of criminal procedure as it is within the province and allotted sphere of the Investigation Agency to dig out and probe the matter to ascertain veracity or truthfulness of allegations.”

Besides, it has been held in catena of precedents (both vertical and horizontal) that High Court should not interfere with the normal course of trial and quash the criminal proceedings under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 or Section 561-A of the Code of Criminal Procedure, 1898.

Some of the noteworthy precedents, inter alia, are **PLD 1967 SC 317** titled **Ghulam Muhammad V. Muzammal Khan and 3 others**, **1991 SCMR 599** titled **Allied Bank of Pakistan Limited V. Khalid Farooq**; **PLD 1992 SC 353** titled **A.Habib**

Ahmed v. M.K.G. Scot Christian and 5 others and 2006 SCMR 276 titled Col. Shah Sadiq V. Muhammad Ashiq and others.

Eventualities where an FIR can be quashed:-

11. In the case of State of Haryana and others V. Ch. Bhajan Lal and others (AIR 1992 SC 604), certain guidelines regarding quashment of an FIR were divulged i.e:-

- (a) Where the allegations made in the First Information Report do not prima-facie constitute any offence or make out a case against the accused;
- (b) Where the allegations in the First Information Report do not disclose a cognizable offence but constitute only a non-cognizable offence;
- (c) Where the allegations made in an FIR are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;
- (d) Where there is an express bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings;
- (e) Where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party; and
- (f) Where a criminal proceeding is manifestly attended with mala-fide ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

12. Arguments advanced by the learned counsel for the petitioners Mr. Shoukat Aziz Advocate are not taking breath from the contents of the writ petition. It is worth mentioning that the petitioner No.1 has not uttered a single word about his marital ties with **Zaheen Akhtar** and simply alleged that he has been falsely implicated in the criminal case and he has nothing to do with the allegations leveled against him in the FIR, while at arguments stage, he abruptly took a U-turn and came forward with totally a different stance by saying that he is husband of Zaheen Akhtar (who is stated to be pregnant) and also claimed to be father of a daughter aged 02 years from the said wedlock.

13. Nikah/marriage of Zaheen Akhtar with one Rustam (respondent No.5 herein) is an admitted fact while rest of the subsequent story brought on record is shrouded in mystery which requires detailed evidence, probe and investigation which is not a job of this Court to sit over the matter in its extraordinary jurisdiction.

14. In the fabric of Islamic society, marriages take place under the commandment of Sharia with certain conditions and set modalities, likewise a specific mod is provided for separation and reentering in the second contract of marriage.

15. The petitioner has already obtained a decree for restitution of conjugal rights from the Family Court Hattain Bala,

while in juxtaposition the other side is claiming that Zaheen Akhtar has obtained an ex parte decree of dissolution of marriage from the Family Court Rawalpindi (against which lis is pending before the Lahore High Court Rawalpindi Bench).

16. In absence of locus standi and legal grievance, no one can ask for indulgence of this Court in its extra ordinary writ jurisdiction.

17. Expressions 'locus standi' and 'aggrieved person' are interlinked and intertwined¹. The word 'locus standi' has been defined in Black's law dictionary eleventh edition, as under:-

Locus Standi. Place of standing. The right to bring in action or to be heard in a given forum.

Likewise the word '**aggrieved**' has been defined in the Black's law dictionary eleventh edition, as infra:-

Aggrieved; having legal right that are adversely affected; being harmed by an infringement of legal rights, angry or sad on grounds of perceived unfair treatment.

The word 'aggrieved party' is defined in following manner in the supra dictionary:-

Aggrieved party; A party entitled to a remedy, a party whose personal pecuniary or property rights have been adversely affected by another person's actions or by a court's decree or judgment.

¹ 1999 MLD 2418 – Messers Hotel Summer Retreat, Nathiagali v. Govt. of N.W.F.P

18. The allegations made in the FIR taken on their face coupled with dubious conduct of the petitioners (quo suppressing material facts) are liable to be investigated, matter is not a simple one. Boundaries and dictates of Sharia are involved in the matter. Father/Wali of Zaheen Akhtar endorsed the Nikah of Rustam with Zaheen Akhtar and vehemently supported this stance taken in FIR.

19. Let the investigating agency be allowed to probe into the matter in order to dig out the veracity of allegation, however, the petitioners can exhaust multiple statutory remedies available to them to get them exonerated from the charge if prosecution fails to make out a case.

20. Remedy of writ is not meant to circumvent the statutory remedies in wake of the factual panorama of the instant case.

21. **Although a woman in Islam is not bound in all circumstances to live with her husband, but simultaneously she cannot leave the house of her husband in league with her paramour in order to enter in the contract of marriage without adopting proper course qua getting divorce from the husband.**

Marriage among Muslims is in the nature of a civil contract. Such a contract undoubtedly has spiritual and moral overtones and undertones but legally, in essence, it remains a contract

between the parties which can be the subject of dissolution for good cause.²

22. The husband is given the right to divorce his wife, though of course, arbitrary divorces are discountenanced. There is saying of the last Prophet (peace and blessings be upon Him and His Family) to the effect that “the most detestable of lawful things in Allah’s view is divorce” (ابغض الحلال الى الله الطلاق)

Sunan Abu-Daood, Book 6, Hadith No.2173. Similarly, the wife is given the right to ask for Khula in cases of extreme incompatibility.

23. Quran declares that women have rights against men, similar to those that the men have against women according to the well-known rules of equity enunciated in Sura-Al-Baqarah (2:228) (وَأَلْهَنَ مِثْلَ الَّذِي عَلَيْهِنَ بِالْمَعْرُوفِ). The Quran expressly says that the husband should either retain his wife, according to the well-recognized custom ³امساک بالمعروف or release her with grace ⁴تسريح باحسان. The word of Allah enjoined the husband not to cling to the woman, in order to cause her injury as per verse No. 231 of Sura Al-Baqarah ولا تمسکوهن ضرارا تعتدوا. A hadith declares ⁵لا ضرر ولا ضرار which translates as “Let no harm be done, nor harm be suffered.”

² PLD 1967 SC 97 = Mst. Khurshid Bibi v. Baboo Muhammad Amin

³ Al-Baqarah (2:229)

⁴ Ibid.

⁵ Suna Ibn Majah, Hadith # 2341.

24. Exparte decree allegedly obtained by Zaheen bibi from the Family Court Rawalpindi in garb of which the petitioner is claiming Niakh with Zaheen Bibi, even otherwise has not attained finality as the said exparte decree is under challenge before the learned Islamabad High Court, hence, validity of the aforesaid decree and legitimacy of 2nd Nikah of Zaheen Bibi with the petitioner are obviously disputed question of facts and without detailed probe and inquiry, claim of the petitioner can not be entertained.

25. Now coming back to the factum of custody of Zaheen Bibi who is yet living in Daar-ul-Aman/Shelter Home by order of this Court dated 21.11.2022. It is pertinent to mention here that order dated 21.11.2022 was passed in compelling circumstances as Zaheen Bibi who appeared before the Court and made her statement categorically refused to go with her parents or for that matter any of her confidant/ محرم She only insisted to live as per her wishes in Rawalpindi with her friend, while her stance subsequently was belied when petitioner Zubair took a U-Turn and claimed that she is living with him and is in marital tie with him, thus, in such eventuality when the factum of 'nikah' and legitimacy of both the contracts of marriage have yet to be proved, thus, as per injunctions of Islam and dictates of justice, custody of Zaheen bibi cannot be handed

over to any one of the rival claimants i.e. Zubair and respondent No.5 Muhammad Rustam. It is also worthwhile to mention here that I have already directed the learned Addl.A.G Mr. Raja Saeed Ahmed Khan to take necessary measures for providing all the basic necessities and requisite amenities to proforma respondent **Zaheen Bibi** in Shelter Home and in compliance of court's order, a report was also submitted before the Court, which is part of file, wherein it has been stated that she is being looked after in a proper manner over there according to the available funds of the department, as the matter requires to be investigated and ultimately thereafter shall be decided by the Court of competent Jurisdiction i.e. trial Court. Definitely, the petitioners and non-petitioner No.5 will be dealt in accordance with law for the purpose of investigation, therefore, non-petitioner No.5 Zaheen Bibi shall remain in the Shelter Home as per previous order of this Court. However, she is at liberty to go with any one of her confidant/ محرم as per her choice or to apply to the court of competent jurisdiction for grant of bail in accordance with law within 10 days.

26. The findings given in this judgment shall not in any way prejudice the case of the parties in trial Court while adjudicating the matter even for purpose of bail.

27. Before parting with the judgment as I have observed that such like persons, who are given on an interim custody to shelter Home in compelling circumstances, no proper accommodation is provided by the State. In a civilized country, State in such like matter as a caretaker is under legal obligation to safeguard the rights of the citizens. Therefore, the Govt. of Azad Jammu and Kashmir is directed to take necessary steps for establishing Daar-ul-Aman or upgrade the Shelter Home already established, in a proper manner by providing all sorts of available facilities, staff etc. whatsoever may be and also establish "Dispensary" alongwith necessary equipment within premises of Dar-ul-Aman. Office is directed to send a copy of this Judgment to the erudite *Chief Secretary of Azad Government of State of Jammu and Kashmir, Muzaffarabad*, for compliance.

28. In the wake of supra discussion, the instant writ petition is hereby dismissed. No order as to cost.

Circuit Mirpur:
10.02.2023.

JUDGE

Note:-

Judgment is written and duly signed. Deputy Registrar Circuit Mirpur is directed to transmit this file to Muzaffarabad, forthwith and Deputy Registrar Judicial, headquarter Muzaffarabad is directed to intimate the parties or their counsel, after due notices.

Approved for Reporting

JUDGE