IN THE FEDERAL SHARIAT COURT
(REVISIONAL JURISDICTION)

PRESENT

MR. JUSTICE S. A. MANAN
MR. JUSTICE SAEED-UR-REHMAN FARRUKH

Criminal Revision No.82/L of 1995

Muhammad Munawar son of Muhammad Ali,
Caste Arain, resident of Chak No.15/DNB,
Tehsil Yazman, District Bahawalpur

--- Petitioner

Versus

1. Kausar Parveen daughter of Muhammad Nazir, resident of Chak No.114/DNB, Tehsil Yazman District Bahawalpur.
2. The State --- Respondents

Counsel for the petitioner:	---	Qazi Muhammad Salim, Advocate
Counsel for the Respondent:	---	Rana Abdul Hamid Khan, Advocate
Counsel for the State:	---	Raja Abdul Rehman, Assistant Advocate General with Miss Najn Rashid, Advocate.
No.& Date of FIR and police station:	---	Complaint No.4 dt.1-3-1994
Date of decision of trial court:	---	1-8-1995
Date of Institution:	---	23-8-1995
Date of hearing:	---	30-6-2003
Date of decision:	---	4-7-2003

JUDGEMENT

SAEED-UR-REHMAN FARRUKH,J,.-. This case has been lingering on in this court for the last about eight years. From the perusal of the order sheet we find that it was listed, on numerous dates but was adjourned for one reason or the other.

The case was put up before us on 23-6-2003 and Mst.Kausar Parveen, respondent No.1, despite notice, was not present in the court. Her counsel was also not available, We, therefore, directed issuance of notice to him for next date of hearing. Raja Abdul Rehman, Assistant Advocate General (Punjab) was also asked to appear and assist the court. Today, parties are represented by their respective counsel. Raja Abdul Rehman, Assistant Advocate General assisted by Miss Najma Rashid, Advocate is also in attendance.

2. This revision petition is directed against the judgment dated 1-8-1995 passed by the learned Additional Sessions Judge, Bahawalpur, whereby the complaint filed by the petitioner against respondent No.1, under section 7 of Offence of Qazf (Enforcement of Hudood) Ordinance, 1979 " hereinafter called the "Ordinance" was rejected.

3. At the very out set, Raja Abdul Rehman, Assistant Advocate General raised preliminary objection as to the maintainability

of this revision petition. It was urged that respondent No.1 having been acquitted by the learned trial Judge in the private complaint filed by the petitioner against her under section 7 of the "Ordinance" through the impugned judgment, the only remedy available to the petitioner was to file a petition for special leave to appeal and present criminal revision petition under Article 203-DD of the Constitution of Islamic Republic of Pakistan, 1973 is not maintainable. He drew our attention to section 17 of the " Ordinance " which postulates that the provisions of Code of Criminal Procedure shall be applicable Mutatis Mutandis to cases under thc " Ordinance ". He also referred to section 417(2) of Code of Criminal Procedure, as amended by Law Reforms Ordinance VII of 1972, to contend that revision petition against acquittal order in a complaint case is not competent.

Learned counsel for respondent No.1 supported Raja Abdul Rehman, A.A.G. in this regard and prayed for dismissal of revision petition.

4, Qazi Muhammad Salim, Senior Advocate, learned counsel for the petitioner, while opposing the plea raised by learned Assistant Advocate General urged that the revision petition was admitted to regular hearing by a Division Bench of this Court as far as back on 20-2-1998. Thereafter, large number of adjournments were granted in this case for one reason or the

other but no objection about maintainability of the revision petition was ever raised by the respondents and that it was too late in day to seek rejection of the revision petition by raising this objection.

5. After hearing learned counsel for the parties on the preliminary objection, we have reached the conclusion that the revision petition is not maintainable for the reasons detailed in the sequel.

Section 17 of the " Ordinance" reads as under:-

" 17. **Application of the Code of Criminal Procedure,1898**
(1) Unless otherwise expressly provided in this Ordinance(the provisions of the Code of Criminal Procedure, 1898) hereinafter referred to as the said Code shall apply, mutatis Mutandis, in respect of cases under this Ordinance.

Provided that, if it appears in evidence that the offender has committed a different offence under any other law, he may, if the Court is competent to try that offence and award punishment therefor, be convicted and punished for the offence.

Provided further that an offence punishable under section 7 or sub section (4) of Section 14 shall be triable by, and proceedings under sub-sections (1) and (2) of the latter section shall be held before a Court of Sessions and not by or before a Magistrate authorised under section 30 of the said Code and an appeal from an order of the Court of Sessions shall lie to the Federal Shariat Court.

Provided further that a trial by or proceedings before the Court of Sessions under this Ordinance shall ordinarily be held at the headquarters of the Tehsil in which the offence is alleged to have been committed or as the case may be, the husband who has made the accusation ordinarily resides].

(2) The provisions of the said Code relating to the confirmation of the sentence of death shall apply, mutatis mutandis, to the confirmation of a sentence under this Ordinance.

(3) The provisions of sub-section(3) of section 391 or section 393 of the said Code shall not apply in respect of the punishment of whipping awarded under this Ordinance.

(4) The provisions of Chapter XXIX of the said Code shall not apply in respect of a punishment awarded under section 7 of this Ordinance.

Section 417 (2) Code of Criminal Procedure as amended by Law Reforms Ordinance, 1972 is reproduced below in -extensio :-

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417. appeal in case of acquittal (1) Subject to the provisions of sub-section (4) the Provincial Government may, in any case, direct the public prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than High Court.

(2) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal the complainant may present such an appeal to the High Court.

(2-A) A person aggrieved by the order of acquittal passed by any Court, other than a High Court, may, within thrity days, file an appeal against such order].

(3) No application under sub-section (2) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of sixty days from the date of that order.

> (4) If, in any case, the application under sub-section (2) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub section (1).

The above provisions of law, if read together, lead to the irresistable conclusion that if private complaint under the "Ordinance" is rejected then the only remedy for the complainant is to file petition for special leave to appeal before this court to assail the rejection order.

Section 417(2) Cr.P.C. was introduced in the Statute i.e. Code of Criminal Procedure by Law Reforms Ordinance, 1972. Prior to the amendment the Provincial Government had no right of revision against such an order of acquittal (because of its superior right to file appeal), wheras the complainant had the right to file revision petition so as to assail the acquittal order in his complaint. After the amendment his right to file revision petition in complaint case wherein the accused had been acquitted was taken away and both the Provincial Government and the complainant were invested with right to file appeal, though the right of the complainant is subject to leave being obtained from the High Court (In the instant case, Federal Shariat Court).

It is clear that matter for grant of leave to appeal has to be gone into in the first instance. It is only if the Court

is satisfied that matter requires thorough probe, re-evaluation of the entire evidence as well as examination of the relevant law that leave to appeal is granted.

In "Muhammad Nawaz versus Fazil and four others" [1994 P.Cr.L.J. 2288 at 2291], it was laid down:-

> " Thus be reading the section it is clear that the appeal in a complaint case is competent if special leave to appeal is granted by the High Court in accordance with the provisions of section 417(2) against an acquittal order, both passed by the Original Court as well as by the appellate Court."

In " Abdul Latif versus Mst.Bilquees Begum and another" [1983 P.Cr.L.J. 1451 at 1452], it was held:-

> " I have given my anxious consideration to this case. It cannot be denied that against an order of acquittal passed on a private complaint, the complainant has no right of filing a revision petition, but only a petition for leave to appeal under section 417(2) Cr.P.C."

Similar view was expressed in " Subedar (Retd.) Noor Gul, etc. versus The State and Muhammad Hanif" (N.L.R. 1987 Criminal 470].

In " Muhammad Bakhsh versus Iqbal Ahmad alias Ahmad and another" [1980 P.Cr.L.J. 191 at 198] the issue was dealt with in the following manner:-

> " As regards cases instituted upon private complaints, prior to the amendment of 1972, a private complainant aggrieved by an order of acquittal passed by a Magistrate had the remedy, if the Provincial Government did not prefer an appeal, of filing a revision petition against the same, either

before the Sessions Judge or the District Magistrate under sections 435/438, Cr.P.C. or before the High Court under section 439 Cr.P.C., but after the amendment he has none, as in all cases he has now the right of preferring an appeal under subsection (2) of section 417 and sub-section (5) of section 439, Cr.P.C. acts a bar to the entertainment of a revision petition."

Before this court a similar situation arose in criminal appeal No.206/I of 1996 [Mst.Nasreen Akhtar versus Husnain Mehdi and others] and criminal revision No.15/I of 1996 [Kh. Babar Saleem etc. versus Hasnain Mehdi and another].A private complaint under section 10(3) and 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 read with sections 166/167, 165/163, 324/348 and 109 PPC was filed by Mst.Nasreen Akhtar in the Court of Sessions Judge, Chakwal. This complaint was dismissed by the trial court.

The complainant, instead of filing petition for special leave to appeal against the acquittal judgment dated 24-4-1996 by Additional Sessions Judge Chakwal, filed appeal (Cr.A.No.52/I of 2002) in this court. The matter was listed for hearing on 28-5-2002 on which date criminal Misc.application (No.74/I of 2002) was moved to the effect that under a bona fide mistake appeal had been filed. It was prayed thereunder that the appeal may be converted into petition for leave to appeal. This prayer was granted.

Subsequently, the petition for special leave to appeal (Cr.PSLA 2/I of 1996), pursuant to the permission granted vide order

dated 28-5-2002 came up for hearing before a learned Division Bench of this court on 3-11-1996 and leave was granted to the petitioner to file appeal. It is, therefore, that criminal appeal No.206/I of 1996, arising out of the above PSLA, and connected revision petition No.15/I of 1996 was listed for hearing and disposed of vide judgment dated 17-2-2003. Thus this court has already taken the view that direct appeal against acquittal judgment in a complaint case is not competent.

Likewise, in "Bashir Ahmad versus The State" [1990 P.Cr.L.J. 780] it was clearly held that after leave is granted to private complainant, the matter arising therefrom is to be proceeded with as acquittal appeal.

6. Learned counsel for petitioner tried to argue that, in the peculiar circumstances of this case, particularly due to the pendency of matter for more than seven years, the objection about maintainability of the revision petition be discarded as it was merely of hyper-technical nature. We are afraid we cannot agree with this submission. It is well settled that if law mandates doing of an act in a particular manner it has to be done in that manner and no deviation/ departure therefrom is permissible. The petitioner cannot be allowed to put premium on his own lapse and claim exemption from the legal requirement of filing petition for leave to appeal.

Section 417(2) Cr.P.C. is couched in mandatory terms. There is, thus, no escape from the conclusion that the petitioner had failed to comply with the law on the point. His revision petition was mis-conceived in its inception and hence liable to be dismissed summarily. Needless to add that objection about maintainability of a

lis can be raised even at the stage of its final hearing.

7. We have, however, heard the learned counsel for the parties on merit, also, with a view to satisfy our judicial conscience that the impugned judgment has not resulted in grave mis-carriage of justice.

The back-ground of this case is that petitioner and respondent No.1 were married at one time. Marital relations became embittered and they fell apart. Civil litigation ensued between them. The petitioner filed two suits against respondent No.1 i.e. suit for recovery of dower and suit for restitution of conjugal rights while respondent No.1 filed suit for maintenance. All the three suits were decided by the learned Judge, Family Court through a consolidated judgment on 2-1-1994. The two suits filed by the petitioner was dismissed while the suit for by respondent No.1 for maintenance was decreed.

The petitioner, thereafter, pronounced talaq upon respondent No.1 on 20-1-1994 through written deed (available at page 38 to 40 of the paper books).

8. It is on 5-3-1994 that the petitioner filed the private complaint, giving rise to this revision petition, against respondent No.1. She was summoned as accused in the case and made to face the trial for a period of year and a half. She was, as mentioned

herein before, ultimately acquitted on 1-8-1995.

The gist of the allegations levelled by the petitioner against respondent No.1 in his complaint were that she in her plaint for maintenance suit (para 2) levelled allegations against the petitioner that he was not only drunkard but also had illicit liaison with his Bhabi.

It was further alleged that on 11-7-1993, respondent No.1 while appearing before trial Judge as PW-1, made statement that " مدعا علیہ نے اپنی بھابھی سے ناجائز تعلقات استوار کر رکھے ہیں ".

In the complaint, it was asserted that the petitioner had two Bhabis and while levelling allegations of immorality against the petitioner, respondent No.1 had not specifically named as to with which of the two the petitioner was carrying on. It was further averred that respondent No.1 did not produce four witnesses in support of her allegation and it was due to mala-fide intention that respondent No.1 maligned the petitioner and his Bhabi.

9. During the trial the petitioner appeared as PW-1 in support of the allegations in the complaint. In cross-examination, he conceded that he did not move any application before the Judge Family Court for initiating proceedings against respondent No.1.

The testimony of Muhammad Ilyas PW-1 and Muhammad Aslam PW-3 is of little avail to the petitioner as the presence of both

these witnesses in court at the relevant time is doubtful as they were neither parties in the maintenance suit nor cited or produced as witnesses.

Likewise the defence evidence in the shape of deposition of Muhammad Nawaz DW-1 and Muhammad Yousaf DW-2 is also of little consequence for the determination of point involved in the case.

10. On conclusion of oral evidence, the petitioner produced certified copies of (i) plaint of suit for maintenance (Ex-PA) (ii) written statement in the said suit (Ex-PB) (iii) statements of PW-1 and PW-2(Ex-PC) (iv) judgment of Judge Family Court dated 2-1-1994 (Ex-PD) and (v) decree sheet of the suit (Ex-PE).

Mst.Kausar Parveen in her statement under section 342 Cr.P.C. denied the allegation that her statement before the Judge Family Court amounted to Qazf. She claimed that she never meant illicit relations in the sense of adultery (zina) nor she ever charged him falsely in bad sense. She explained that since she had been divorced by the complainant and the suit for recovery of maintenance of her daughter, Mst.Shazia Kausar, was pending and she intended to file another suit for recovery of dowery against the complainant (petitioner herein), therefore, with a view to pressurise her to refrain from pursuing those suits the complaint had been lodged against her.

11. From perusal of the evidence on record many legal flaws in the case of petitioner are high-lighted. While appearing as her own witness on 11-7-1993 in the maintenance suit, respondent No.1 did not level allegation of adultery against the petitioner(Ex-PC). She deposed as under:-

مدعا علیہ کے بھاوج سے تعلقات تھے

" "

(Page 26 of the paper book).

One wonders whether this statement, by any stretch of reasoning, can be treated to be culpable so as to bring it within mischief of section 7 of the " Ordinance". The allegation levelled in the complaint that in the statement dated 11-7-1993 respondent No.1 had accused the petitioner of developing (ناجائز تعلقات) is patently false on the face of the record.

12. Faced with this situation, learned counsel for the petitioner, then, relied heavily on the averment made in the plaint of the maintenance suit(Ex-PA) as under:-

پیرا 2 "---- دراصل واقعات یوں ہیں۔ مدعا علیہ نہ صرف شراب پیتا تھا بلکہ اُس نے اپنی بھابھی سے ناجائز تعلقات استوار کر رکھے ہیں"

(Page 22 of the paper book).

According to him this averment, per se, constituted offence of Qazf against respondent No.1. We do not agree with him. It is well settled that pleadings in a Civil suit do not form substantive piece of evidence. In case petitioner wished to gain benefit from it, he ought to have confronted respondent No.1 with the same during the course of her cross-examination so as to

enable her to offer explanation, if any, with regard thereto. He failed to do so and now he is legally debarred from relying on this averment and claim conviction of respondent No.1 on the basis thereof.

13. Keeping in view the facts and circumstances of the case we are of the considered opinion that the complaint filed by the petitioner was motivated only to malign and intimidate respondent No.1 so as to dissuade her from seeking / enforcing her remedies before civil courts.

When relations between the spouses became sour and respondent No.1 was forced to live apart from the petitioner and filed suit for maintenance, the petitioner brought suit for restitution of conjugal rights and suit for dower against her by way of counter blast.

No sooner than the counter suits were decided, through judgment dated 2-1-1994 against the petitioner, his professed love and desire to live with respondent No.1 as husband and wife immediately vanished. Fearing enforcement of continuing liability to pay maintenance of Rs.300/- per month, under the decree of the Court, he promptly divorced her. He should have, thereafter, allowed the lady to live in peace for rest of her life. Instead, driven by sheer malice, he brought a false and misconceived complaint to persecute h ad-infinitum.

14. The up-shot of the above discussion is that the revision petition is dismissed both on the ground of non-maintainability as well as on merit.

Announced in Open Court

(SAEED-UR-REHMAN FARRUKH)
Judge

(S. A. MANAN)
Judge

Lahore, the 4th, July 2003
Zia

Approved for reporting

4/7/2003