

IN THE FEDERAL SHARIAT COURT  
( REVISIONAL JURISDICTION )

PRESENT

MR. JUSTICE M. MAHBOOB AHMED

CHIEF JUSTICE

Criminal Revision No.11/I of 1998

Mst.Asia Khatoon d/o ..... Petitioner  
Fazal Ellahi, r/o  
Dhoke Navala Dakhli  
Maloot Satian Tehsil  
Kotli Sattian, Distt.  
Rawalpindi

Versus

1. Muhammad Safdar Satti  
s/o Sub (Retd) Muhammad -  
Hafeez Satti

2. Muhammad Hafeez Satti  
Sub (Retd) s/o Nadir Ali -  
Khan

3. The State ..... Respondents

Counsel for petitioner ..... Malik Rab Nawaz Noon,  
Advocate

Counsel for respondents ..... Mr.Shah Khawar, Advocate

Counsel for State ..... Mr.Fazal-ur-Rehman Rana,  
Advocate

Date of complaint ..... 7-2-1996

Date of order of  
trial court ..... 4-5-1998

Date of Institution ..... 17-6-1998

Date of hearing ..... 11-2-1999

Date of decision ..... 11-2-1999

JUDGMENT

M. MAHBOOB AHMED, CHIEF JUSTICE.- This revision under Article 203-DD of the Constitution of the Islamic Republic of Pakistan read with Section 439 Cr.P.C. is directed against order dated 4-5-1998 passed by the learned Additional Sessions Judge, Rawalpindi whereby he directed the taking of proceedings under Section 14 of the Offence of Qazaf (Enforcement of Hudood) Ordinance, 1979.

2. The facts necessary for the purposes of this petition briefly stated are that the petitioner and respondent No.1 were married on 21-10-1988 whereafter they lived as husband and wife but later the relations between the spouses got strained and the dispute between them resulted in the final pronouncement of Talaq by respondent No.1 by a notice dated 4-9-1992. The reason given in the notice of Talaq inter-alia was that the petitioner was unfaithful and that she was indulging in nefarious activities and had also given birth to an illegitimate child namely Usama Safdar who was not from the seed of respondent No.1. That pursuant to the above Talaq pronounced by respondent No.1 on the petitioner a suit for custody of the other son out of the wedlock namely Anees Safdar was filed by respondent No.1 and in para 2 of the

plaint of the said suit he also affirmed his having pronounced Talaq on the petitioner.

3. The petitioner who claims to be a chaste woman and passing her life in accordance with Quran and Sunnah of the Holy Prophet ( S.A.W. ) and is a 'parda nasheen' domestic lady who never indulged in any nefarious activities feeling aggrieved of the allegations levelled against her by respondent No.1 inter-alia in writing filed a complaint under sections 7/11 of the Offence of Qazaf (Enforcement of Hudood) Ordinance, 1979 in the court on which the learned Additional Sessions Judge on 3-10-1997 framed a charge against respondents No.1 & 2 and proceeded with the case. During the proceedings the respondent made an application before the learned trial court for taking proceedings under Section 14 of the Ordinance for lian. On this application the learned trial court passed the impugned order dated 4-5-1998 hence the present revision.

4. The learned counsel for the petitioner has contended that a plain reading of Section 14 of the Ordinance would show that the proceedings under this provision can only be undertaken if the marriage between a husband and wife is subsisting. He contended that in the face of the established and conceded position that the petitioner is no longer the wife of respondent

No.1, there was no occasion for directing the proceedings of lian as provided in the said section.

5. The learned counsel for the contesting respondents only submitted that the proceedings for lian as provided by Section 14 would clinch the controversy in the case before the trial court and should be allowed to be continued. He relied in this regard on HAJI BAKHTIAR SAID MUHAMMAD VS. MST. - DUR-E-SHEHWAR AND ANOTHER, PLD-1986-FSC-187.

6. The learned counsel for the State submitted that Section 14 would not be attracted to the case before the learned trial court as the relationship between the petitioner and respondent No.1 as wife and husband had come to an end long time before the filing of the application on which the impugned order has been made and is intended to only add further agony to the life of the petitioner as also tarnish the future of Usama Safdar the minor child who has been held to be legitimate child out of the wedlock and by the proceedings under Section 14 would again be exposed to the question of legitimacy.

7. I have given anxious consideration to the respective contentions raised on behalf of the parties. The contention raised by the learned counsel for the petitioner has force.

A bare perusal of Section 14 would show that the marriage has to subsist and the relation between the parties as husband and wife existing if the proceedings under the said Section 14 for lian have to be ordered. It would also be seen that sub section 2 of Section 14 provides that if the procedure prescribed by sub section (I) is complied with the court has to pass an order dissolving the marriage between the husband and wife and therefore it strengthens the position that the relationship between the parties as husband and wife should be subsisting if the proceedings are to be taken thereunder. The marriage having been dissolved already long ago there could be no occasion for taking proceedings under Section 14 of the Offence of Qazaf (Enforcement of Hudood ) Ordinance, 1979. The order passed by the learned trial court in the attendant circumstances to say the least was wholly misconceived and highly uncalled for.

8. It may also be observed that the case cited by the learned counsel for the contesting respondent in no manner helps the case of the respondent. To the contrary ~~it lends~~ it lends support to the contention of the learned counsel for the petitioner inasmuch as it has been held in the said case

as under:-

" If the husband divorces his wife on the allegation of unchastity, the question of applicability of sections 7 and 14 will depend upon the fact whether the utterance or act constituting Qazaf preceded or followed the 'Talaq'. This is a question of fact and shall have to be decided in each case according to facts and circumstances of that case".

From the above dictum it clearly emerges that the subsistence of the marriage between the parties is a condition precedent for invoking the provision of section 14 of the Ordinance.

It is worthwhile to notice here that the allegation of adultery and zina were levelled by respondent No.1 in the final notice of Talaq i.e. after the Talaq and the allegations were continued by respondents No.1 and 2 even after the finality of Talaq viz: on 21-10-1992 by filing suit for declaration and Injunction wherein allegations inter-alia of Usama Safdar being an illegitimate child, not out of the seed of respondent No.1 were levelled and not only that the allegations of adultery and giving birth to an illegitimate child were continued to be levelled by word of mouth as also through anonymous letters and further affirmed in the plaint of suit for custody of minor filed on 17-4-1993.

9. In view of the foregoing discussion I would allow this revision and setting aside the impugned order dated 4-5-1998 direct that the trial court shall proceed with the complaint of petitioner without any further delay.

  
CHIEF JUSTICE

Approved for reporting.

  
CHIEF JUSTICE

Islamabad the  
11th February, 1999.

UAMR DRAZ/