IN THE FEDERAL SHARIAT COURT

(Revisional Jurisdiction)

PRESENT

MR.JUSTICE CH. EJAZ YOUSAF, CHIEF JUSTICE

CRIMINAL REVISON NO.24/I OF 2005

Mst. Akhtar Bano daughter of Nazar Muhammad, resident of Ghora Mar, at present in Maula Bhai Street, Attock City	--	Petitioner
	Versus	
1. Umar Baz son of Toti Khan, resident of Mohallah Karbala, Attock City 2. Nematullah son of Gulab Khan, resident of Bajor Agency, presently Sarwar Road, Dhoke Fateh, Attock City	--	Respondents
Counsel for the Petitioner	--	Mr. Jamshed Ahmad, Advocate
Counsel for respondents	--	Mr. Muhammad Farooq, Advocate
Counsel for State	--	Mr. Muhammad Sharif Janjua, Advocate
Dates of orders of trial Court	--	6.4.2005 & 6.6.2005
Date of institution	--	4.7.2005
Date of hearing	--	26.1.2006
Date of decision	--	26.1.2006

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JUDGMENT

CH. EJAZ YOUSAF, CHIEF JUSTICE.- This revision is directed against the orders dated 6.4.2005 and 6.6.2005 passed by the learned Sessions Judge, Attock whereby earlier, the private complaint filed by the petitioner under sections 10 and 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as "the Ordinance") was dismissed due to absence of the complainant and later on, an application filed for restoration thereof was also rejected.

2. Sh. Akhtar Javed, Advocate, learned counsel for the petitioner has stated that the complaint filed by the petitioner was dismissed by the learned trial Judge for non-prosecution vide order dated 6.4.2005 as complainant as well as her counsel could not appear on the said date. Subsequently, an application for restoration of the complaint was also rejected vide order dated 6.6.2005 as it was found by the learned trial Judge that there was no provision for restoration of the complaint. The learned counsel has contended that though under section 247 Cr.P.C. a complaint can be dismissed for non-appearance of the complainant yet,

since both the offences i.e. under sections 10 as well as 11 of "the Ordinance" were cognizable and non-compoundable therefore, it could not have been done, in the instant case, in view of the bar contained in second proviso tagged to section 247 Cr.P.C. Reliance has been placed on the following reported judgments:-

i) Zahoor and another Vs. Said-ul-Ibrar and another 2003 SCMR 59 in which case it was held by the Hon'ble Supreme Court of Pakistan that order of the trial Court dismissing the complaint for non-prosecution under section 247 Cr.P.C. due to the absence of the complainant in a cognizable and non-compoundable case was void ab-initio, patently illegal and utterly without jurisdiction;

ii) Muhammad Nawaz Kasuri, Advocate, Supreme Court Vs. Mian Abdul Hameed and another 1993 SCMR 1902, wherein it was held that second proviso to section 247 Cr.P.C. would not apply where offence of which the accused is charged is either cognizable or non-compoundable; and

iii) Iftikhar Ahmad Chatha Vs. Additional Sessions Judge etc. NLR 1996 Criminal 44 in which case, a single bench of the Lahore High Court was pleased to hold that complaint could not have been dismissed for non-prosecution particularly when offence under section 295A was non-compoundable while offences under sections 501, 502 were cognizable.

3. Mr. Muhammad Sharif Janjua, Advocate, learned counsel for the State has though candidly conceded that since the offences, under which the complaint was filed, were cognizable or non-compoundable therefore, it could not have been dismissed yet, has stated that since the order passed under section 247 Cr.P.C., dismissing the complaint for non-prosecution, tantamounts to acquittal of the accused therefore, the same being an appealable order, the revision was not maintainable.

4. I have given my anxious consideration to the respective contentions of the learned counsel for the parties and have also perused record of the case minutely with their assistance.

5. As regards the objection raised by the learned counsel for the State that since the order passed under section 247 Cr.P.C. dismissing the complaint for non-prosecution was appealable, therefore, it cannot be attacked in revision, is concerned, it may be mentioned here that in the case of Zahoor and another vs. Said-ul-Ibrar and another 2003 SCMR 59, relied upon by the learned counsel for the petitioner, the revision filed by the appellant in that case before the Peshawar High Court was

dismissed on the very ground that since the order passed under section 247 Cr.P.C., was subject to grant of leave to appeal, appealable under section 561-A Cr.P.C, therefore, no revision was maintainable. The Hon'ble Supreme Court of Pakistan while setting the controversy at rest was pleased to observe that though the order passed under section 247 Cr.P.C, was appealable yet, since the power under section 439, Cr.P.C. was not a mere power but a duty which could not have been effectively discharged unless the High Court had seen that subordinate criminal Courts conduct their proceedings strictly in accordance with law and that it would be a startling proposition that the High Court should be disabled from discharging this very necessary duty simply because a party who could and should have appealed, makes mistake of filing a revision or a party who is adversely affected by result of proceedings has had no right to invoke revisional jurisdiction. It would be advantageous to reproduce here-in-below the relevant discussion which reads as follows:-

> "Second proviso to section 247, Cr.P.C. indicates that nothing in this section shall apply where the offence of which the accused is charged is either cognizable or non-compoundable. Meaning thereby, that where the offences, like one in the instant case, are

either cognizable or non-compoundable nothing contained in section 247 shall apply. But in other words, it would mean that under these conditions section 247, Cr.P.C. is almost to be considered non-existed and cannot be resorted to at all. If so resorted to, the order would be patently illegal and without jurisdiction.

Learned counsel for the petitioners vehemently asserted that no doubt a normal order passed under section 247, Cr.P.C. is appealable but an order absolutely perverse as well as without jurisdiction could also be challenged in revision under section 439, Cr.P.C. He relied upon a judgment of Peshawar High Court in Banarus Khan v. The State (PLD 1995 Peshawar 103) wherein it was, inter alia, held that the High Court in exercise of its revisional jurisdiction can, as a duty, rectify every error of trial Court which happens to cause grave injustice. The perusal of the above ruling would indicate that the verdict was based on a judgment of this Court rendered in Syed Manzoor Hussain Shah v. Syed Agha Hussain Naqvi (1983 SCMR 775). This Court had observed that jurisdiction of a High Court under section 439, Cr.P.C. is not a mere power but a duty which cannot be effectively discharged unless the High Court sees to it that subordinate criminal Courts conduct their proceedings strictly in accordance with law and that it would a startling proposition that the High Court should be disabled from discharging this very necessary duty simply because a party who could and should have appealed, makes mistake of filing a revision or a party who is adversely affected by result of proceedings has no right to invoke revisional jurisdiction."

In a number of cases order passed under section 247 Cr.P.C. was interfered with in revision. Reference in this regard, may usefully be made to the following reported judgments:-

1. Abdul Rasheed Janjua v. The State and 2 others PLJ 2004 Cl.C.164;
2. Sahibzada Syed Sikandar Shaheen v. The Stae and other PLD 2002 Lah. 341;
3. Yahya Bakhtiar v. Mir Shakeel-ur-Rehman and 2 others PLD 1998 quetta 37; and
4. Mukhtar alias Mokha v. Waryam and others 1993 P.Cr.L.J. 865.

Hence, the objection raised by the learned counsel for the State, on its face, is misconceived.

5. It would be worthwhile to mention here that, in the complaint, it was stated that on 27.8.2004 the complainant was forcibly abducted by the respondents namely Umar Baz and Nemat Ullah when she was on her way to the house of her uncle alongwith her real brother namely Ahmad Khan and cousin Jamroz. On the report lodged by her father namely Nazar Muhammad, though police had recovered the complainant and had also arrested Nemat Ullah accused but wrongly arrayed her as an accused as well in the case i.e. FIR No.150 dated 30.8.2004 registered under sections 10 and 11 of "the Ordinance", in spite of the fact that she was innocent and was not only abducted but was subjected to Zina-bil-Jabr as well, forcibly. Record reveals that the complaint in question was

presented before the learned Sessions Judge, Attock on 8.11.2004 and was fixed for hearing on 10.11.2004, on which date, it was ordered that the case alongwith challan be presented on 24.11.2004, for further consideration. On 24.11.2004 after recording statement of the complainant it was directed that preliminary evidence be recorded. The case was then adjourned to 6.12.2004. On 6.12.2004, after taking preliminary evidence, the case was adjourned to 16.12.2004 for arguments. On 16.12.2004 the complainant was allowed to array respondent Nemat Ullah as an accused and the case was adjourned to 18.12.2004 on which date, the following order was passed:-

> "I have gone through the preliminary evidence produced by the complainant. She has nominated both the accused in the complaint. According to the complainant and her witnesses Nazar Muhammad and Jamroz, the complainant was abducted on 27.8.2004 at 4/5 p.m. in a Rikshaw by the accused and they committed zina-bil-jabr with her. The police exonerated the respondent Umar Baz and challaned only Nematullah, so the complainant had to file a private complaint. In the light of the statement of the complainant corroborated by PW.2 Nazar Muhamm ad and PW.3 Jamroz prima-facie an offence u/s 10/11 Offence of Zina (Enforcement of Hudood) Ordinance, 1979 is made out. The respondents are ordered to be summoned. Nemat Ullah has already been challaned by the police and is appearing in

the Court, so the summons be issued only to Umar Baz for 24.12.2004."

6. The case was thereafter proceeded with but on 6.4.2005 it was dismissed for non-prosecution as neither the complainant nor her counsel were present on the said date. An application, filed for restoration of the complaint, too, remained unfruitful and was rejected vide order dated 6.6.2005 as it was observed by the learned Sessions Judge that there was no provision in Cr.P.C. for restoration of the complaint. It appears that the complaint was directly filed in the Court of Session and was never presented before a Magistrate whereas, under the law no Court of Session, except otherwise expressly authorized by the Code or any other law, is competent to take "cognizance" of any offence unless the case is sent to it by the Magistrate under section 190(2) Cr.P.C. The provision of section 193 Cr.P.C. is explicit in this regard. However, without touching the question as to whether the learned Sessions Judge himself was competent to entertain the complaint, I am inclined to hold that since both the offences i.e. under sections 10 and 11 of "the Ordinance" where-under the complaint was filed, were cognizable and non-

compoundable, hence, the complaint could not have been dismissed for non-prosecution.

6. There is yet, another aspect of the matter. Though a complaint could be dismissed for non-appearance of the complainant under section 247 Cr.P.C. yet, since the provision in question finds place in Chapter XX of the Cr.P.C. which deals with trial of cases by Magistrates only whereas, trial of cases before High Court and Court of Session is governed by Chapter XXA, which do not contain any such provision i.e. where under a complaint could be dismissed due to absence of the complainant, therefore, the order impugned otherwise, appears to be patently without jurisdiction.

7. It would be pertinent to mention here that prior to repeal of Chapter XXI by Law Reforms Ordinance, 1972, which provided for trial of "warrant cases" by Magistrates, the legal position was that in "summons cases" which were treated as "minor cases" the Magistrates were competent to acquit the accused for non-appearance of the complainant but in "warrant cases" wherein, the offences alleged were

cognizable or non-compoundable they, notwithstanding absence of the complainant, were duty bound to proceed with trial of the case, meaning thereby that recourse to a provision of section 247 Cr.P.C. was available to the Magistrates in "summons case" only and rightly so because if the offence was compoundable and non-cognizable in which case, it could have been said that interest of general public was subordinate to the interest of the person directly injured, the Magistrate was competent to dismiss the complaint due to non-appearance of the complainant before framing of the charge but once the charge was framed or if the case was non-compoundable and cognizable then the Magistrate was regarded duty bound, in the interest of general public to see whether the offence was committed and to punish the offender as well. However, since after repeal of Chapter XXI, the power to try "warrant cases" was entrusted to the Courts of Session, by inserting Chapter XX-A in the Criminal Procedure Code, and subsequent thereto the Session Judges were not supposed to try "summons cases" and it was vice versa in the case of Magistrates, hence, power to dismiss the complaint in non-prosecution,

akin to section 247 Cr.P.C was neither made available to Sessions Judges in Chapter XXA, nor was it required.

8. The upshot of the above discussion is that this revision petition is accepted. Orders dated 6.4.2005 and 6.6.2005 passed by the learned Sessions Judge, Attock are set aside and the case is remanded to the trial Court for its decision in accordance with law.

(CH. EJAZ YOUSAF)
Chief Justice

Islamabad, dated the
26th January, 2006.
ABDUL RAHMAN/** **FIT FOR REPORTING**

CHIEF JUSTICE