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IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Aftab Hussain Chief Justice

Mr. Justice Zahoorul Haq

Mr. Justice Ch. Muhammad Siddique

Mr. Justice Maulana Malik Ghulam Ali

Mr. Justice Pir Muhammad Karam Shah.

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SHARIAT PETITION NO. 15/L OF 1981

Zaheer Ahmed ----- Petitioner

Versus

Federation of ----- Respondent
Pakistan

Counsel for the ----- Mr. Shamim Abbas Bokhari,
petitioner Advocate.

Counsel for the ----- Syed Riazul Hassan,
Federation of Gilani, Advocate.
Pakistan

Date of hearing ----- 30 - 3 - 1982

JUDGEMENT:

Mr. JUSTICE AFTAB HUSSAIN, CHIEF JUSTICE:

By this petition provisions of Sections 3, 5, and 6(b) of the Offence of Qazf (Enforcement of Hadd) Ordinance, VIII of 1979 have been challenged by the petitioner. Section 3 defines Qazf:

"Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes an imputation of zina concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation, or hurt the feelings. of such person is said, except in the cases hereinafter excepted, to commit qazf".

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By virtue of explanation one to this definition, such an imputation of zina against a dead person also may amount to Qazf.

2. Section 5 provides that whoever, being an adult, intentionally and without ambiguity commits qazf of zina liable to hadd against a particular person who is a muhsan and capable of performing sexual intercourse is, subject to the provisions of this Ordinance, said to commit qazf liable to hadd. The term muhsan is explained as a sane and adult Muslim who either has had no sexual intercourse or has had such intercourse only with his or her lawfully wedded spouse.

3. Section 6 deals with proof of qazf liable to hadd. Clauses (a) and (c) deal with the two conventional methods i.e., by the confession of the accused or alternatively by the evidence of two Muslims adult male witnesses. But the controversy is about clause (b), according to which no other proof of qazf is required, if the accused commits qazf in the presence of the Court.

4. The arguments of the learned counsel are that Section 3 is bad for two reasons--firstly that it makes imputation against a male person as well as a deceased person punishable, although according to the Quranic Verse (Q 24:4) only those persons can be punished who "accuse honourable women".

5. The learned counsel raised an objection to the inclusion of capability of performance of sexual intercourse in the definition of muhsan.

6. Regarding clause 6(b) he submitted that the position of a Qazi being that of a witness if the qazf is committed before him, he cannot render judgment in the matter. Moreover no proceedings in Qazf can be taken unless there is a complaint before the Court on behalf of the person aggrieved.

7. The objection against Section 5 and 6(b) was not pressed. The learned counsel stressed during his argument only his objection regarding the inclusion of male among those against whom imputation of zina is made punishable.

8. The learned counsel referred to verses 4 and 23 of Sura-e-Noor (chapter 24) in support of his argument. The English translation of these verses is as follows:-

Verse 4. "And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterward) accept their testimony--They indeed are evildoers--".

Verse 23. "Lo! as for those who traduce virtuous, believing women (who are) careless, cursed are they in the world and the Hereafter. Theirs will be an awful doom".

9. He elaborated his argument by making a reference to the incident of Ifk and submitted that although Safwan son of Moattal Salmee was also blamed with Hazrat Aiysha but Mistah, Hamna Bint-e-Jahash and Hassan Bin Sabit were punished with regard to the imputation made by them against Hazrat Aiysha and for this reason the two verses referred to above also contain a reference to female only and not to male.

10. There was an incident during the time of Hazrat Umer in which imputation of zina was made against Mogheera bin Shaba. Four~~ty~~ witnesses were produced in support of this charge but one of the witnesses was not able to identify whether the woman with whom he saw the sexual act being performed was a stranger or the wife of the accused. The 3 witnesses were punished for Qazf (Kitabul Fiqh Alal Muzahibil Arbaa Vol:V page 143).

11. In early Islam slander, even though in the form of innocuous abuse was discour^aged, obviously in order to protect the Umma from mutual strife or mischief. According to Juraij and Ibn-e-Abi Sabra, Hazrat Umer

punished for calling name to other. (Kanzul Ummal Vol:V page 561). Ibn-e-Umer said that Hazrat Umer used to give a beating for calling another Fahisha(may mean simply shameless or even a whore) (ibid). There is another Hadis that Hazrat Umer punished with stripes, a person who made a general imputation of this type against Muslim women(Assunanul Kubra Baihaki Vol:VIII page 253). Hazrat Ali said that if someone calls another يا خبيث (wicked) or يا فاسق(a sinner, a worthless fellow and may also mean a fornicator) he should be punished according to the opinion of the wali (ruler). The same is the opinion of Hazrat Ali about one who called another يا حمار (O, ass) (Kanzul Ummal Vol:V page 567).

12. There is a report from ابو رجاء العطاردي that Hazrat Umer and Hazrat Usman used to punish for slander. Hazrat Usman punished with 80 stripes. When a person said to another "يا ابن شاة الزر" which is an abuse among the Arabs. (Kanzul Ummal Vol:V page 565).

13. It is reported from Amrata Bint-e-Abdul Rahman that two men abused one another during the reign of Hazrat Umer. One of them said by God "neither my mother nor my father were adulterers." Hazrat Umer consulted other men, some of whom said that there was nothing in it, he has described only virtues of his parents while others said that "their parents might have other virtues too. In our opinion he should be punished for qazf" and accordingly he was punished with 80 stripes. (Kanzul Ummal Vol:V page 563). Moatta with commentary by Allama Waheed-uzzaman page 603, Assunnanal Kubra by Baihaki Vol:VIII page 252).

14. It will be noticed that this is at most implied imputation without naming any body but even then the punishment of qazf was administered.

15. It appears that verse 4 of Sura-e-Noor is only illustrative in character. The general injunction in

the Quran is in verse 19 of Sura-e-Noor which is as follows:-

"Lo! those who love that slander should be spread concerning those who believe, theirs will be a painful punishment in the world and, the hereafter. Allah Knoweth. Ye know not".

The verse is applicable to male and female slanderer and slandered alike. It puts a slandered person belonging to another sex in the same category and promises a painful punishment not only in the hereafter but also in this World. This verse thus makes punishable in this World such imputation against any one irrespective of whether the slandered is male or female. The punishment in verse 4 of Sura-e-Noor was described with reference to woman only because of the particular incident of Ifk which does not mean that it excludes from punishments those who slander males.

16. In fact when imputation of zina is made against a male it also involves the same imputation against a female, though unnamed, who is always a second party to such offence. This makes the provision of verse 4 directly applicable even though a person against whom the imputation is specifically made is a male. If Hazrat Umer had passed an order of punishment for slander against the women in general there is no reason why this implied slander against a woman though unnamed should go unpunished.

17. There is another verse No.58 of Sura-e-Alahzab (chapter XXXIII). In this verse slander is defined as maligning believing men and believing women undeservedly. It does not therefore stand to reason that although slander is condemned irrespective of whether the person slandered ^a by male or a female but the punishment in this _b World should be given on an offence committed with regard to female only.

18. While commenting on the word "الَّذِينَ" in the opening part of verse 4 of Sura-e-Noor i.e., 'وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ', it is said in Tadabburul Quran that this word which refers to male only includes women also on the principle of Taghlib. Now Taghlib is defined as applying the rule of one type of a thing over another or to prefer (for the purpose of description), an object, if the description can apply equally to the other (object) also, or to apply the same word to both (on the principle of interpretation) or to consider two different things like two similar things. (Al-Burhan fi Ulumil Quran Zarkashi Vol:III page 302). The root word of Taghlib is Ghallaba which means to overcome, to conquer, to subdue, to master, surpass, predominate. The phrase Ghallaba "غلب لفظاً على لفظ آخر" means 'he made a word to predominate over another word'. Similarly the sentence "فيه تغليب القمر على الشمس" -in it is the attribution of predominance to the moon over the sun or "فيه تغليب الليل على النهار" -in it is the attribution of predominance to the night over the day (Arabic English Lexicon by E.W.Lane, Book I, part 6 page 2280). If therefore on account of this attribution of predominance the name of one is given, though qualitatively the other cannot be excluded from it, the inclusion of that other in it will be presumed on the principle of Taghlib.

19. It is on this principle that the commentator in Tadabburul Quran treats the word "الَّذِينَ" (who) which is referred to a male only as inclusive of a female slanderer since there is no reason why a female should be excluded from the doom or punishment.

20. Even otherwise the inclusion of a female into a word which is in regard to male only is an established principle of interpretation of the Holy Quran also. There is no reason why on the principle of Taghlib the punishment should not be the same if the person slandered is a male.

21. The principle of Taghlib can be applied for interpretation of the word muhsanat (chaste women) in verse 4 of Sura-e-Noor. In Ahkamul Quran by Ibn-e-Arbi Vol:III page 1335 is recorded the opinion of Imamul Harmain that man is included in the female though the majority view is that this is on the basis of Qias. The view of Imamul Harmain is preferable since as stated above verse 4 is only illustrative.

22. In this connection reference may also be made to the principle of Dalalatunnas i.e., something which emanates directly from the verse. (Usulul Fiqh by Abu Zahra pages 247 and 248). While dealing with Qias, Abu Zahra writes that Quran provides for the punishment of slave girl as being half of what is permissible for free women. It has been held that it is also proved from this that a male adulterer if slave would also be likewise punished. There are some (Jurists) who say that the male can be included by application of the principle of Qias but some of the learned apply the principle of Dalalatunnas to it which means that male is included in the verse though only a female slave is mentioned there.

23. As a ^{matter of fact} the second opinion which applies the principle of Dalalatunnas is preferable. If verse 4 of Sura-e-Noor is read in the light of verse 19 of the same Surah and verse 58 of Surah Al-ahzab, the applicability of verse 4 ⁱⁿ _L case of imputation against males will emerge from and flow out of Nas (Quranic Verse) itself. This would justify the applicability of Dalalatunnas. But it would lead to the same conclusion whether the principle of Qias or of Dalalatunnas is applied. Qias is a method of finding out the applicability of injunctions to all matters in which similar rationale is to be found. It is a means of discovering ~~of~~ the scope of a verse. Even the discovery of Haram or Halal (Prohibited or permitted) is made by applying the principle of Qias. If Qias is applied for discovery of the scope of verse 4 of Sura-e-Noor and the same rule is obtained,

there is no reason why it should not be treated as within the scope of the Holy Quran.

24. The petition fails and is accordingly dismissed.

Ahmed Khan

CHIEF JUSTICE

Zaboorul Haq

JUDGE-II.

M. Siddiq

JUDGE-III.

[Signature]

JUDGE-IV

[Signature]

JUDGE-V

Announced Ahmed Khan

Dated: Islamabad, the 28.7.1982.

A. RAHMAN/***

with the Reporting

Ahmed Khan

Mr. Nisar Mahmood J/A

DR 28/7/82