

IN THE FEDERAL SHARIAT COURT
(original Jurisdiction)

PRESENT

MR. JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE SALAHUDDIN MIRZA
MR. JUSTICE MUHAMMAD ZAFAR YASIN

SHARIAT PETITION NO. 7/I OF 1998

Capt. (Retd) Mukhtar Ahmad Shaikh --- Petitioner
124-Hina Garden, Gulistan-e-Johar,
Block No.19, Rashid Minhas Road,
Karachi

Versus

Government of Pakistan --- Respondent

For the Petitioner --- Petitioner in person

For Federal/Provincial Governments --- Sardar Abdul Majeed, Standing
Counsel for Federal Government
Mr. Shafqat Munir Malik, Additional
Advocate-General, Punjab
Mr. Farid-ul-Hassan, Assistant
Advocate-General, Sindh
Mr. Muhammad Sharif Janjua,
Advocate for A.G. NWFP
Mr. Salahuddin Mengal, Advocate-
General, Baluchistan

Dates of Hearing --- 23.6.1998, 19.11.1998, 25.4.2002,
6.2.2007, 13.2.2007, 14.3.2007,
3.5.2007, 30.5.2007, 6.9.2007,
18.9.2007, 25.10.2007, 14.2.2008,
13.3.2008, 1.4.2008, 5.1.2009 and
6.1.2009

Date of Decision --- 11.02.2009

JUDGMENT

HAZIOUL KHAIRI, CHIEF JUSTICE:- The petitioner Capt. (Retd) Mukhtar Ahmed Sheikh has challenged sub Article 4 of Article 151 of Qanun-e-Shahadat Order 1984 under Article 203-D of the Constitution of Islamic Republic of Pakistan being repugnant to the Holy Quran and Sunnah of the Holy prophet (PBUH). The sub-Article states that "When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix is generally of immoral character." The respondents in the petition are the State of Pakistan and its four provinces to whom notices were issued to file comments on the petition in response to which the Government of Pakistan filed its comments opposing the petition which were adopted verbatim by the Governments of Punjab, Sindh and Baluchistan. The Government of N.W.F.P. has, however, taken entirely a different stand fully supporting the petition.

2. The contention of the petitioner is that the impugned sub-Article (4) of Article 151 of Qanun-e-Shahadat would give right to a

man to impeach the credit of a woman by adducing evidence which right is denied to a woman. This provision purports to give protection to a man accused of rape to impeach the character of a woman while depriving similar right to a woman. It is thus discriminatory and against the dictates of justice and equality as ordained by Quran and Sunnah. This tantamount to giving free license to an accused to commit Qazf without producing four male witnesses in clear violation of Holy Quran. The petitioner Capt. (Retd) Mukhtar Ahmed in support of his petition has placed reliance on Sura-e-Noor and Sura-e-Mariam without quoting them. However, we find it advantageous to reproduce relevant verses therefrom for our purposes as under:

“And those who accuse honourable women and bring not four witnesses, scourge them with eighty stripes and never (afterward) accept their testimony. They indeed are evil doers.”
(Al-Noor 24:4).

“For those who accuse their wives but have no witnesses except themselves; let the testimony of one of them be four testimonies (swearing) by Allah that he is of those who speak truth.

And yet a fifth, invoking the curse of Allah on him if he is of those who lie.

And it shall avert the punishment from her if she bear witness before Allah four times that the thing he saith, is indeed false.

And a fifth (time) that the wrath of Allah be on her if he speak truth.” (Al-Noor 24:6-9)

3. Before we proceed further, it will be advantageous to reproduce section 151 of Qanun-e-Shahadat Order 1984 as under:

“Article 151: Impeaching credit of witness: The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the Court by the party, who calls him.

(1) By the evidence of persons, who testify that they from their knowledge of the witness believe him to be unworthy of credit.

(2) By proof that the witness, has been bribed or has accepted the offer of a bribe or has received any other corrupt inducement to give his evidence.

(3) By proof of former statements inconsistent with any part of his evidence, which is liable to be contradicted.

(4) When a man is prosecuted for rape or an attempt to ravish it may be shown that the prosecutrix was of generally immoral character.”

4. The Government of Pakistan and the three provincial Governments at the very outset called in question the maintainability of the petition as the petitioner has not indicated any specific verse of Holy Quran and Sunnah which renders sub-Article (4) of Qanun-e-Shahadat repugnant to Islam. It was pointed out that said sub-Article (4) of Article 151 of Qanun-e- Shahadat cannot be read in isolation from the other provisions of the Article and also from Article 17 (competence and number of witnesses) and Article 3 (who may testify). The only purpose of Article 151 is to provide an opportunity to a party to test the credibility of a witness adduced by the prosecution. As regard Qazf, separate law namely Offence of Qazf (Enforcement of Hadd) Order, 1979, deals with it under which an action may if taken under section 6 thereof for which the punishment shall be eighty stripes. No un-Islamic character is attributed to section 151 (4) as it is strictly in accordance with the injunctions of Islam.

5. The Government of N.W.F.P. took a different view from the Government of Pakistan and other provinces, rather supporting the

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petition stating that "Section 151 (4) of Qanun-e-Shahdat Order, 1984, does not afford full protection to a lady whose credibility is being impeached. An element of discrimination is also apparent because the section does not say anything about the generally immoral character of a male witness. The character of prosecutrix or a lady witness is damaged or injured at the moment of impeaching the credit of the witness and some safeguards have to be evolved to remedy the questions put with mala fide intention. The damage and injury caused to a prosecutrix offender required due consideration in the light of Quran and Sunnah. The provision under attack offends the principles of normal justice and is in violation of Article 25 of the Constitution.

6. We are of the view that a woman is placed in a more exalted and respected position than a man in Islam and for this reason the punishment of Qazf has been ordained in the Holy Quran as victims thereof are mostly women. Even a husband who has falsely made allegations of zina paves way to a decree for dissolution of marriage in favour of his wife.

7. We have failed to comprehend what tide of wisdom had prevailed upon our law makers to add sub-Article (4) to Article 151 of Qanun-e-Shahadat Order, 1984, as it shall serve no useful purpose. Assuming that the prosecutrix was of generally immoral character, will a man accused of rape or attempt to ravish her be exonerated of the crime or will a rape cease to be a rape if the prosecutrix happened to be a prostitute or a woman of easy virtue? Again will the element of rape or attempt to ravish vanish away or convert into a lesser crime or punishment on the consideration of her being so. Our well considered reply is "No". Islam makes no distinction whether the subject of crime was of generally immoral character or not. Learned counsel for the State and the said three provinces have failed to justify inclusion of sub-Article (4) in Article 151 of Qanun-e-Shahadat Order 1984 whereas we clearly see the same being in violation of Quran and Sunnah. It is pertinent to note that under Article 67 of Qanun-e-Shahadat previous good character of accused is relevant but bad

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character becomes relevant only when evidence has been given that accused has a good character (Article 68)

8. We agree with the Government of NWFP that the character of prosecutrix shall be greatly damaged once she stands in the witness box and her credit impeached by a man accused of rape or an attempt to ravish her. The Holy Quran places women on a much higher pedestal than ever known in any society. She is not considered as an agent of devil nor treated as a chattel in Islam. She has all the property rights. She has similar rights as of man in matters of marriage and divorce. The penal laws of Islam treat her equally with man. She has lesser responsibilities in worldly affairs. She is bestowed with greater respect and kindness. The Holy Prophet in his last sermon had said:

“Treat the women kindly, since they are your helpers and are not in a position to manage their affairs themselves. Fear Allah concerning women, for verily you have taken them on the security of Allah and have made their persons lawful unto you by words of Allah”

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9. Again the Holy Prophet had said: Had I prefer someone over other, I would have preferred women over men. (Kanzul Ummal Page 42 Volume 22 published in Hyderabad Daccan).

10. We are also of the view that Article 151 (4) of Qanun-e-Shahadat Order 1984 is discriminatory on the basis of sex and violates Article 25 (2) of the Constitution as it purports to impeach the credit of a woman, and above all it negates the concept of "gender equality" as enshrined in the Holy Quran as under:-

"He it is who created you from a single being and therefrom did make his mate" (7:139).

"They are raiment for you and you are raiment for them." (2:187)

"And the women have rights similar to those (of men) over them in kindness". (2:28).

"Indeed we created men out of the essence of clay (23:12). Verily we create man in the best of moulds" (95:4)

11. Lastly we may refer to the decision of this Court in suo moto case on gender discrimination reported in PLD 2008 Federal Shariat Court I as under:-

"In our view of the matter, the position in Islam is somewhat different. Islam is a universal religion. The last sermon of Holy Prophet is the first Charter of Human Rights wherein all human

beings are equal. Mankind is one. Allah says in Holy Quran that "He created man and woman from a single being (7:189) and for HIM "who doeth good work, whether male or female and he (or she) is a believer, such will enter paradise. (4:124)."

12. Resultantly in exercise of our powers under clause (3) (a) of Article 203-D of the Constitution of Islamic Republic of Pakistan we declare that sub-Article 4 of Article 151 of Qanun-e-Shahadat Order 1984 is repugnant to Quran and Sunnah and accordingly we direct the President of Pakistan to take appropriate steps for repeal of sub-Article 4 of Article 151 of Qanun-e-Shahadat Order within a period of six months hereof, failing which the said provision of law shall cease to have effect whatsoever.

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JUSTICE HAZIQUL KHAIRI
Chief Justice

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JUSTICE DR. FIDA MUHAMMAD KHAN

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JUSTICE SALSHUDDIN MURZA

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JUSTICE MUHAMMAD ZAFAR YASIN

*Approved for
repealing
12/2/09*

Announced on 11-2-2009

at Lahore

Daud/**