

IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)

PRESENT

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

SHARIAT PETITION NO.13/I OF 1995

Syed Muhammad Jamaluddin Kazmi, --- Petitioner,
Muntazim-e-Ala, Qamerul Uloom,
Mauripur Road, Karachi

Versus

1. Federation of Pakistan through --- Respondents
the President of Pakistan
2. Province of Sindh through the
Governor of Sindh, Karachi

For Petitioner --- Nemo

For Federal Government --- Sardar Abdul Majeed, Standing
Counsel

For Provincial Governments --- Peer Liaqat Ali, A.G. N.W.F.P.
Mr. Muhammad Muzammal Khan,
Addl. A.G. N.W.F.P.
Mr. Aziz-ur-Rehman, Mr. Muhammad
Sharif Janjua & Qari Abdul Rasheed,
Advocates on behalf of A.G, N.W.F.P.
Mr. Shafqat Munir Malik, Addl.
A.G. Punjab
Mr. Faridul Hassan, Assistant
Advocate-General Sindh alongwith
Mr. Muhammad Shoaib Abbasi,
Advocate for A.G. Sindh
Mr. Salah-ud-Din Mengal, A.G,
Balochistan
Mr. Mehmood Raza and Mr. Azam
Khattak, Addl.A.Gs. Balochistan

Date of Institution --- 11.6.1995

Date of Admission --- 10.12.1995

Dates of Hearing --- 25.1.2007, 15.3.2007, 3.4.2007,
23.4.2007, 23.1.2008, 22.5.2008,
27.8.2008, 9.1.2009, 28.1.2009,
17.2.2009 and 2.3.2009

Date of Decision --- 08.05.2009

JUDGMENT:

HAZIQUL KHAIRI, CHIEF JUSTICE.- The petitioner Syed Muhammad Jamaluddin Shah Kazmi has established a Darool 'Uloom under the name and style of QAMRUL 'ULOOM, imparting religious education to students for the last over a decade. According to him the present form of oath under the OATHS ACT, 1873 (hereinafter called "the Act"), is repugnant to the Holy Quran and Sunnah of the Holy Prophet (peace be upon him) under Article 203D of the Constitution of the Islamic Republic of Pakistan and is liable to be set aside.

2. Under section 7 of the Act "All oaths and affirmations shall be administered under section 5 of the Act according to such forms as the High Court may from time to time prescribe and till any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use". The petitioner states that the form of oath prescribed and in practice in all the High Courts and subordinate Courts is as follows:-

13/1/95

اللہ کی قسم جو کچھ کہو نگا سچ کہو نگا - اگر میں جھوٹ بولوں تو اللہ کا

غضب اور قہر نازل ہو۔

3. According to the petitioner, a witness or Shahid (**شہید**) is a respectable 'invitee' or 'guest' of the Court and deserves a befitting treatment. Under no circumstances, he should be taxed or burdened with any incriminating treatment. Reliance was placed on Quranic Verse:

وَلَا يُضَارُّ كَاتِبٌ وَلَا شَهِيدٌ

(And let no harm be done to scribe or witness (2:282).

4. The petitioner submitted that in Qur'anic language oath is called *Yameen*. In its primitive sense it means strength or power. In the language of the law it signifies an obligation by means of which the resolution of a vower is strengthened in the performance or the avoidance of any thing, and the man who swears or vows is termed the *Haliff* and the thing sworn to or vowed the *Mahloof 'alihec*. The

سید

petitioner proposed the following text of oath in place of present form

of oath:-

"بِسْمِ اللّٰهِ الرَّحْمٰنِ الرَّحِیْمِ : میں اللہ کی خوشنودی کے لیے گواہی دیتا ہوں"

5. The petition was admitted for hearing and it was ordered that notices be issued to the Federal as well as the Provincial Governments with direction to file their comments.

6. The Federal Government at the outset raised the plea that the verse of the Holy Quran relied upon by the petitioner has no relevancy and the petition is misconceived. It was further stated:

"The provisions of the Quran and Sunnah have not fixed any form, procedure, space, time and occasion for an oath. The companions of the Prophet (S.A.W.S.), Muslim Jurists and Muslim Judges had adopted different forms and procedure according to different occasions and circumstances. A Judge is at liberty to adopt any form and procedure to make an oath effective and helpful in the administration of justice.

12/1/95

7. The ~~Hon'ble Lahore High in its letter~~ confirmed that the form of oath under Chapter 12-A High Court Rules and Orders, Volume IV through Notification No.339/Rules X.B. 9(a) dated 26.11.1992 was as under:-

“I swear by Almighty Allah that I shall state the truth and if I lie or conceal anything, the wrath of Allah Almighty may fall on me.”

8. Similar form of oath was prescribed by the Baluchistan High Court, Sindh High Court and Peshawar High Court. The difference between the form of oath referred to by the petitioner in Urdu and prescribed by the Provincial High Courts in English is, that the words “conceal anything” are missing in Urdu translation. However, under Section 14 of the Act “Every person giving evidence on any subject before any Court or person authorized to administer oath and affirmation shall be bound to state the truth on such subject.”

9. In the case of Muhammad Tahir Versus The State PLD 1984 Peshawar 56, the form of Oath prescribed by the High Court in Chapter 12 A of the High Court Rules and Orders was not found in a

proper form to be used by Courts for a Muslim witness. Accordingly a workable solution was proposed that form of oath commonly used by Muslims in area concerned may be used for resolving disputes or differences before the Courts until appropriate form is prescribed by the High Court. It was found that the forms of solemn affirmations and oaths prescribed by the High Court relate to jurors and not witnesses which was "On my honour, I shall state the truth, nothing but the truth". The form of oath for Muslim witnesses in vogue was "I swear by Allah that I shall state the truth, nothing but the truth". In Khan Sher Versus Mst. Kabla and another PLD 1988 Peshawar 65, it was held that "in Holy Quran and Sunnah the general oath was one to swear by Allah only".

10. We are in full agreement with the learned Judges of the Peshawar High Court. The following verses of the Holy Quran reveal that oaths are to be sworn in by Muslim witnesses in the name of Allah only.

وَيَقُولُ الَّذِينَ آمَنُوا أَهَؤُلَاءِ الَّذِينَ أَقْسَمُوا بِاللَّهِ جَهْدَ أَيْمَانِهِمْ إِنَّهُمْ لَمَعَكُمْ حَبِطَتْ
أَعْمَالُهُمْ فَاصْبَحُوا خَاسِرِينَ-

“Then will the believers say (unto the people of the scripture): Are these they who swore by Allah their most binding oaths that they were surely with you? Their works have failed, and they have become the losers.” (5:53)

وَأَقْسَمُوا بِاللَّهِ جَهْدَ أَيْمَانِهِمْ لَئِن جَاءَتْهُمْ آيَةٌ لَيُؤْمِنُنَّ بِهَا قُلْ إِنَّمَا الْآيَاتُ
عِنْدَ اللَّهِ وَمَا يُشْعِرُكُمْ أَنَّهَا إِذَا جَاءَتْ لَا يُؤْمِنُونَ -

“And they swear a solemn oath by Allah that if there come unto them a portent they will believe therein. Say: Portents are with Allah and (so is that with telleth you that if such came unto them they would not believe).” (6:110)

وَأَقْسَمُوا بِاللَّهِ جَهْدَ أَيْمَانِهِمْ لَا يَبْعَثُ اللَّهُ مَن يَمُوتُ بَلَى وَعَدَا عَلَيْهِ حَقًّا وَلَكِن
أَكْثَرَ النَّاسِ لَا يَعْلَمُونَ-

“And they swear by Allah their most binding oaths (that Allah will not raise up him who dieth. Nay, but it is a promise (binding) upon Him in truth but most of mankind know not.” (16:38)

وَأَقْسَمُوا بِاللَّهِ جَهْدَ أَيْمَانِهِمْ لَئِن أَمَرْتَهُمْ لَيَخْرُجُنَّ قُلْ لَّا تُقْسِمُوا طَاعَةً مَّعْرُوفَةً إِنَّ
اللَّهَ خَبِيرٌ بِمَا تَعْمَلُونَ -

ل
ن
ا

“And they swear by Allah solemnly that if thou order them, they will go forth. Say: swear not; known obedience (is better). Lo! Allah is informed of what ye do.” (24:53)

وَأَقْسَمُوا بِاللَّهِ جَهْدَ أَيْمَانِهِمْ لَئِن جَاءَهُمْ نَذِيرٌ لَّيَكُونُنَّ أَهْدَىٰ مِنَ الْإِنْمَانِ فَلَمَّا جَاءَهُمْ نَذِيرٌ مَّا زَادَهُمْ إِلَّا تَفُورًا.

“And they swore by Allah, their most binding oath, that if a Warner came unto them they would be more tractable than any of the nations; yet, when a Warner came unto them, it aroused in them naught save repugnance.” (35:42)

يَا أَيُّهَا الَّذِينَ آمَنُوا شَهَادَةٌ بَيْنَكُمْ إِذَا حَضَرَ أَحَدَكُمْ الْمَوْتُ حِينَ الْوَصِيَّةِ اثْنَانِ ذَوَا عَدْلٍ مِّنكُمْ أَوْ آخَرَانِ مِنْ غَيْرِكُمْ إِنْ أَنْتُمْ ضَرَبْتُمْ فِي الْأَرْضِ فَأَصَابَتْكُمْ مُصِيبَةٌ الْمَوْتِ تَحْسِبُونَهُمَا مِنْ بَعْدِ الصَّلَاةِ فَيُقْسِمَانِ بِاللَّهِ إِنْ ارْتَبْتُمْ لَا تَشْتَرِي بِهِ ثَمَنًا وَلَوْ كَانَ ذَا قُرْبَىٰ وَلَا تَكْتُمُ شَهَادَةَ اللَّهِ إِنَّا إِذَا لَمِنَ الْإِيمِينِ-

“O ye who believe! Let there be witnesses between you when death draweth nigh unto one of you, at the time of bequest – two witnesses, just men from among you, or two others from another tribe in case ye are campaigning in the land and the calamity of death befall you. Ye shall empanel them both after the prayer, and, if ye doubt, they shall be made to swear by Allah (saying): We will not take a bribe, even though it were (on behalf of) a near kinsman nor will we hide the testimony of Allah, for then indeed we should be of the sinful.” (5:106)

12/1

فَإِنْ عَثَرَ عَلَىٰ أَنَّهُمَا اسْتَحَقَّا إِثْمًا فَأَخْرَانِ يَفُومَانِ مَقَامَهُمَا مِنَ الَّذِينَ اسْتَحَقَّ عَلَيْهِمُ الْأَوْلِيَانِ فَيُقْسِمَانِ بِاللَّهِ لَشَهَادَتُنَا أَحَقُّ مِنْ شَهَادَتِهِمَا وَمَا اعْتَدَيْنَا إِنَّا إِذَا لَمِنَ الظَّالِمِينَ -

“But then, if it is afterwards ascertained that both of them merit (the suspicion of) sin, let two others take their place of those nearly concerned, and let them swear by Allah, (saying): Verily our testimony is truer than their testimony and we have not transgressed (the bounds of duty), for then indeed we should be of the evil-doers” (5:107)

Almighty Allah has commanded the believers to fulfill all their agreements. Allah says:

وَأَوْفُوا بِعَهْدِ اللَّهِ إِذَا عَاهَدْتُمْ وَلَا تَنْفُضُوا الْأَيْمَانَ بَعْدَ تَوْكِيدِهَا وَقَدْ جَعَلْتُمُ اللَّهَ عَلَيْكُمْ كَفِيلًا إِنَّ اللَّهَ يَعْلَمُ مَا تَفْعَلُونَ -

“Fulfill the covenant of Allah when ye have covenanted, and break not your oaths after the asseveration of them, and after ye have made Allah surety over you. Lo! Allah knoweth that ye do”. (16:91)

وَلَا تَكُونُوا كَالَّذِينَ نَقَضَتْ غَزْلَهَا مِنْ بَعْدِ قُوَّةٍ أَنْكَاثًا تَتَّخِذُونَ أَيْمَانَكُمْ دَخَلًا بَيْنَكُمْ أَنْ تَكُونَ أُمَّةٌ هِيَ أَرْبَىٰ مِنْ أُمَّةٍ إِنَّمَا يَبْلُوكُمُ اللَّهُ بِهِ وَلِيُبَيِّنَ لَكُمْ يَوْمَ الْقِيَامَةِ مَا كُنْتُمْ فِيهِ تَخْتَلِفُونَ -

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

“And be not like unto her who unravelleth the thread, after she hath made it strong to tin filaments making your oaths a deceit between you.” (16:92)

وَلَا تَجْعَلُوا اللَّهَ عُرْضَةً لِأَيْمَانِكُمْ أَنْ تَبَرُّوا وَتَتَّقُوا وَتُصْلِحُوا بَيْنَ النَّاسِ وَاللَّهُ سَمِيعٌ عَلِيمٌ -

“Do not use Allah’s name for such oaths which are taken to keep back from virtue, piety and the welfare of the mankind. Allah hears everything you utter and knows everything.”
(2:224)

لَا يُؤَاخِذُكُمُ اللَّهُ بِاللَّغْوِ فِي أَيْمَانِكُمْ وَلَكِنْ يُؤَاخِذُكُمْ بِمَا كَسَبْتُمْ قُلُوبِكُمْ وَاللَّهُ عَفُورٌ

حَلِيمٌ -

“Allah does not call you to account for unintentional and meaningless oaths, but will surely take you to task for oaths taken deliberately and in earnest. Allah is Forgiving and Forbearing.” (2:225)

لَا يُؤَاخِذُكُمُ اللَّهُ بِاللَّغْوِ فِي أَيْمَانِكُمْ وَلَكِنْ يُؤَاخِذُكُمْ بِمَا عَقَدْتُمُ الْأَيْمَانَ فَكَفَّارَتُهُ إِطْعَامُ عَشْرَةِ مَسَاكِينَ مِنْ أَوْسَطِ مَا تُطْعَمُونَ أَوْ هَلْيَكُمْ أَوْ كِسْوَتُهُمْ أَوْ تَحْرِيرُ رَقَبَةٍ فَمَنْ لَمْ يَجِدْ فَصِيَامُ ثَلَاثَةِ أَيَّامٍ ذَلِكَ كَفَّارَةُ أَيْمَانِكُمْ إِذَا حَلَفْتُمْ وَاحْفَظُوا أَيْمَانَكُمْ كَذَلِكَ يُبَيِّنُ اللَّهُ لَكُمْ آيَاتِهِ لَعَلَّكُمْ تَشْكُرُونَ

“Allah does not take you to task for the inadvertent oaths you swear, but He will call you to account for the intentional and deliberate oaths you make. The expiation (of breaking such an oath) is to feed ten indigent persons with the normal food you

serve in your own family or to give them cloths or to free one slave, or to fast for three days if one cannot afford any of them this is the expiation of breaking the solemn oaths you have taken, be mindful of your oaths.” (5:89) *

This issue is more elaborately discussed in the following Hadiths:

“Abu Muad narrated that he came to Allah’s Messenger (may peace be upon Him) alongwith a group of people belonging to the tribe of Ash’ari, asking him to provide them with riding camels. He (the Holy Prophet) said: By Allah, I cannot provide you with riding animals. And there is nothing with me with which I can provide you a mount. We stayed (for some time) there as Allah willed, and there was brought to Allah’s Messenger (may peace be upon Him) booty of camels. He called us and commanded that we should be given five white humped camels. As we were about to go back, some of us said to the other: As we made Allah’s Messenger (may peace be upon him) forget oath, there would be no blessing for us (in his gift). We went back to him and said: “Allah’s Messenger, we came to you to provide us with riding animals and you took an oath that you would never equip us with mounts and then you have provided us with the riding beasts. Allah’s Messenger! Have you forgotten”? There upon he said: “I swear by Allah that if Allah so wills, I shall not swear an oath, and then consider something else to be better than it without making atonement

for my oath and doing the thing that is better. So you go"; Allah, the Exalted and Glorious, has given you riding animals. (Muslim Ibn al-Haijjaj: Al Jami'al Sahih; the Book of Oaths (Kitab Al-Aiman): Book 15: Hadith 4046.

11. Ibn 'Umar heard Allah's Messenger (may peace be upon Him) as saying: He who has to take an oath, he must not take oath but by Allah. The Quraish used to take oath by their fathers. So He (the Holy Prophet) said: Do not take oath by your fathers. (Muslim Ibn al-Haijjaj: Al Jami'al Sahih; Book 15: Hadith 4040). 'Abdullah (b. Umar) reported that Allah's Messenger (may peace be upon Him) found, 'Umar b. al-Khattab amongst the riders and he was taking oath by his father. Allah's Messenger (may peace be upon Him) called them (saying); Our Allah, the Exalted and Majestic, has forbidden you that you take oath by your father. He who has to take an oath, he must take it by Allah or keep quiet. (Muslim Ibn al-Haijjaj: Al Jami'al Sahih; Book 15 The Book of Oaths (Kitab Al-Aiman).

12. We do not agree with the petitioner that a witness is a guest of the Court. No doubt, Islam accords due respect to witnesses, litigants

and even accused in the matter of dispensation of justice. The Almighty Allah has ordained: "O believers! Stand firm for justice and bear true witness for the sake of Allah even though it is against yourselves, your parents or your relatives (4:135)" What further follows from the dictates of Holy Quran and Sunnah is that a witness is (a) duty bound to depose what he knows and what he knows not; (b) the oath might be in the row of Allah; (c) he should not transgress the limit as witness; (d) in case he transgresses the limits prescribed by Allah, he will be an evil doer; and (e) hiding testimony should be sinful.

13. In the end, we may add that parties may offer and accept special oath under sections 8 and 9 of the Oaths Act 1873 and evidence as given there under may be conclusive in terms of section 10 thereof. However, even an Oath on the Holy Quran has no greater sanctity than an oath on its creator, Allah, the Almighty, the benevolent, the merciful.

14. In view of the foregoing, we do not find any substance in the petition and further state that the present form of oath is not at all repugnant to Quran and Sunnah *and is hereby dismissed*

1/2/09

JUSTICE HAZIQUL KHAIRI
Chief Justice

[Signature]

JUSTICE DR. FIDA MUHAMMAD KHAN

[Signature]

JUSTICE SALAHUDDIN MIRZA

M. Z. Yasui

JUSTICE MUHAMMAD ZAFAR YASIN

Announced at Islamabad
on 8-5-2009
Bashir/*

*1/2/09
8/5/09*

*Approved in substance
1/2/09
8/5/09*