

IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)

PRESENT

MR. JUSTICE DR. AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MRS. JUSTICE ASHRAF JAHAN

SHARIAT PETITION NO.01/K OF 2008

Muhammad Zoonoon Khan, Advocate
S/o Muhammad Aman Khan,
Room No.604, 6th Floor,
Paradise Chamber, Adjacent Passport Office,
Saddar Karachi

Petitioner

Versus

Federation of Pakistan through Secretary Ministry of Law Justice Human
Rights & Parliaments Affairs, Islamabad

.... Respondent

Counsel for petitioner In person

Counsel for Federal Govt. Mr. M Aslam Butt,
Deputy Attorney General

Date of Institution .. 05.04.2008

Date of hearing 28.01.2014

Date of decision 04.02.2014

 Date of judgment 05.03.2014

JUDGMENT

DR. FIDA MUHAMMAD KHAN, Judge.- Muhammad

Zoonoon Khan, Advocate has filed this petition wherein he has challenged section 497 Cr.P.C, as amended on the ground that the concession of granting bail exclusively to women accused is not only violative of Injunctions of Islam but is also against the universal principle of equity and justice. The impugned section, as amended, reads as under:-

“In the Code of Criminal Procedure, 1898 (V of 1898), in subsection (1), in the first proviso, the words “or any woman” shall be omitted and after the first proviso amended as aforesaid, the following new provisos shall be inserted, namely----

Provided further that woman accused of such an offence shall be released on bail, as if the offence is bailable, notwithstanding anything contained in Schedule II to this Code or any other law for the time being in force;

Provided further that a woman may not be so released if there appear reasonable grounds for believing that she has been guilty of an offence relating to terrorism, financial corruption and murder and such offence is punishable with death or imprisonment for life or imprisonment for ten years, unless having regard to the facts and circumstances of the case, the Court directs that she may be released on bail;

Provided further that where a woman accused of an offence is refused bail under the foregoing proviso, she shall be released on bail if she has been detained for a continuous period of six months and whose trial for such offence has not been concluded, unless the Court is of the opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other persons acting on her behalf”.



2. We have heard the petitioner in person. He submitted that the impugned amendment in the above Section is entirely repugnant to the Injunctions of Holy Quran and Sunnah of the Holy Prophet (ﷺ) as it is confined only to the women accused on the basis of sex. He submitted that.-

- * the Holy Quran with regard to the reward or punishment has given its open and clear verdicts in all matters, on the basis of equity and not on the basis of sex.
- * the law maker lost sight of the fact that Holy Quran has clearly declared that the rights of women and men are based on equity and their rights and duties are at par with each other;
- * there is no discrimination on the basis of sex in relation to any concession or reward in all matters granting rights concession,
- * refusing concession of bail to the male accused obviously tantamount to denial of the principle of equality and justice as laid down in the Holy Quran,
- * confining the bail concession to women/female accused only, this Section has deprived male accused of their right on the basis of sex and this has clearly resulted in gross



injustice even to the thousands suffering families who depend on male accused who are confined in similar offences and are equally entitled to bail concession on the basis of equality;

- * this Section is against the principle provided under Article 25 of the Constitution of Islamic Republic of Pakistan, and
- * on the basis of above, the petitioner prayed, that the word “woman” used in the impugned amendment of section 497 Cr.P.C being discriminative be declared repugnant and the concession of bail be extended to the male accused as well in the interest of justice.
- * He placed reliance on the following Verses of the Holy Quran i.e 32:4, 124:3, Verse 97 of Sura 16, Verse 35 of Sura 33, Verse 71 of Sura 9, Verse 70 of Sura 17, Verses 58 and 59 of Surah 16, Verse 17 of Sura 47 and Verse 1 of Sura 4 He has also relied on several books and a few Ahadith as well.

3. Comments received from Federal Government are reproduced as under:-

- * The Ordinance No.XXXV is no more in the field
- * Due to the social responsibilities of women towards their children and other family members bail concession of women is provided, hence it is not discriminatory to any class of the society.

- * Allah has bestowed some special responsibilities upon women relating to children which man cannot do, hence the amendment is not repugnant to the Injunctions of Islam.
- * In order to mitigate the hardship being faced by the women, the Code of Criminal Procedure, 1898 is proposed to be amended so as to extend the concession of bail to the women, while under clause (3) of Article 25 of the Constitution of Pakistan, 1973 the State is empowered to make any special provision for the protection of women and children
- * The amendment is made due to social set up of the country and keeping in view the increase in injustice being done to the women folk at different level.
- * Even the amendment does not favour women in certain cases, hence it no discriminatory.
- * Under the provisions of the Ordinance, the women accused should be released on bail only in bailable offences and shall not release if she has been guilty of offences relating to terrorism, financial corruption and murder.

4. We have thoroughly examined the contentions made by learned counsel and have also perused the comments submitted by Federal Government We have critically evaluated the contents of impugned Section in the light of Holy Quran and Sunnah of the Holy

Prophet (صلی اللہ علیہ وآلہ وسلم) as well and have found that the petition is misconceived. Before dealing with the points raised in the petition, we would, however, like at the outset to mention that the petitioner has referred to Article 25 of the Constitution of Islamic Republic of Pakistan which provides that all citizens are equal before law, and are entitled to equal protection of law and that there shall be no discrimination on the basis of sex alone. The petitioner contended that this Article has been violated by the impugned Section. In this connection it is pertinent to point out that in view of the jurisdiction conferred upon this Court, interpretation or explanation of Article 25 of the Constitution by this Bench would amount to out-stretch our jurisdiction because of the fact that interpretation of the Constitution falls in the exclusive domain of Hon'ble Supreme Court of Pakistan. It would, however, be sufficient to refer here to a Judgment of the Hon'ble Supreme Court of Pakistan titled "Government of Balochistan Vs. Azizullah Memon", reported as PLD 1993 SC 341, wherein, after thorough discussion regarding Article 25, the Hon'ble Supreme Court has laid down the following principles:-

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- “(1) That equal protection of law does not envisage that every citizen is to be treated alike in all circumstances, but it contemplates that persons similarly situated or similarly placed are to be treated alike,
- (ii) That reasonable classifications is permissible but it must be founded on reasonable distinction or reasonable basis,
- (iii) That different laws can validly be enacted for different sexes, persons in different age groups, persons having different financial standings and persons accused of heinous crimes;
- (iv) That no standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances, may be unreasonable in the other set of circumstances;
- (v) That a law applying to one person or one class of persons may be constitutionally valid if there is sufficient basis or reason, for it, but classification which is arbitrary and is not founded on any rational basis is not classification as to warrant its exclusion from the mischief of Article 25,
- (vi) That equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed; and
- (vii) That in order to make a classification reasonable, it should be based:
- (a) On an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out,
- (b) That the differentia must have rationale nexus to the object



sought to be achieved by such classification”.

In a nutshell it has been held that reasonable classification among the citizens based on reasonable distinction is permissible and is not at all against the intent and purpose of Article 25 of the Constitution


5. We have thoroughly examined the contents of this petition in the light of Islamic Injunctions also and have observed that the Petitioner has relied on several Verses of the Holy Quran and Ahadith in support of his contentions but a bare perusal of the same reveals that these citations are misconceived by the petitioner as the question raised by him is somewhat different from the general import of these Verses/Ahadith as understood by him, for the reason that these pertain to the mutual rights and responsibilities of each sex in respect of one or the other. Further detailed reasons are summed up in the subsequent paras.

6. The Holy Quran and Sunnah of the Holy Prophet (S.A.W) contain basic guidelines to be followed as principles in individual, social and collective life. In changed circumstances however, the institution of Ijtihad, is enforced for the welfare of public at large, to meet the required objectives, mainly pertaining to the protection of life, honour, property, liberty etc. in the light of guidelines provided by Islamic Injunctions.


7. So far as submissions of the petitioner in respect of equality between male and female are concerned, we fully agree that all persons irrespective of their colour, creed and gender, equally placed in identical circumstances, are to be treated alike both in privileges conferred and liabilities imposed. In fact this is an essential ingredient of justice that all people, regardless of their gender, must enjoy equal rights without discrimination on any count. All citizens of an Islamic State are equal before law and are entitled to equal protection of law with no discrimination. Every one is entitled to enjoy fundamental rights and allowed to enjoy his/her rights, freely without any checks and restrictions, except as required by the law. Rich and poor and man and woman are all alike in this respect. As a natural corollary to this comes absolutely equal treatment of all citizens in similar circumstances, without any preference or reservation, in all sectors of life. It entails equality in protection of life, liberty, property, honour and dignity and freedom of expression, equal opportunity for freedom of trade or profession—with equal protection of employment and promotion—equal treatment in all sectors without any discrimination, between big and

small, workers and employers, equal rights of livelihood of every member of Muslim State, equitable distribution of wealth between all citizens on merits, on the principles of equity and maximum circulation of the total wealth of the nation, equal opportunities for consultation in matters of national interest and State affairs. Discrimination or inequitable division and gradation of the society according to Islamic Injunctions is, therefore, strongly discouraged because like a cancer in the body, it destroys the main structure of society and endangers the life of Muslim Ummah.

8. However, it is highly pertinent to mention that there are differences amongst people in their physique, capability, mental and physical abilities, intensity of sentiments, delicacy of emotions, general appearance, height and weight and many other internal and other external factors. These differences mark the status and rank of each individual in society. All human being themselves are different from each other and every one has particularly unique characteristics. No two persons are alike in all respects.



9. In this background, we observe that with regard to man and woman there are some obvious differences which make both of them distinctly separate from each other and call for special preferences and status, in one or other area of life, for each of them. As an undeniable matter of fact, both man and woman from point of view of physical structure, biological and psychological make up, have many differences and, resultantly, each of them has particular limitations or special privileges. Consequently, no hard and fast rule/law can be enacted which is similarly applicable to both sexes in each and every circumstance. Therefore, there are, always some reasonable differences in special circumstances which, at times, are incompatible or inconsistent with the social status of either of them. While generally the male on average is endowed with stronger nerves and physical structure which indicates that apparently he has been designed for hard and difficult jobs, a female's body is equipped with delicate sentiments and acute perceptions indicating that she has been blessed with most commendable, exceptional and exclusive capabilities and special qualities necessary for specially significant responsibilities, including



conceiving, bearing and upbringing her children with extreme love, care and unprecedented self sacrifice and, thereby, contributing to provide firm foundation for a cultured society. It is her tender sentiments as compared with man that inspite of countless difficulties and unimaginable inconvenience she is ever-ready, day and night, to fulfill continuous demands of her child. Every man owes a lot to her mother who bears and rears him at the cost of her rest and health and, at times, even at the cost of her life. Hence a mother's lap is always considered the best place for a child to be naturally nourished and brought up. It shows that having been equipped with different physique and sentiments, man and woman have not been entrusted with equal responsibilities by nature. Therefore it will not be just and fair to demand her to also shoulder all social responsibilities equally with man, besides those of her own, of which she has been absolved by countless injunctions.

10. Keeping in view the nature of obligations and duties of each sex, the Holy Quran and Sunnah of the Holy Prophet

(صلى الله عليه وآله وسلم) has provided to the women some concessions

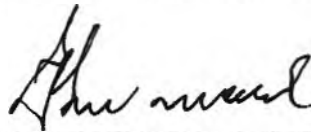
which are not allowed to the men. In her case, the Injunctions pertaining to ritual prayers and fasting during certain days are different as compared to those of men. The Islamic Injunctions have also taken due care in this respect and therefore, regarding maintenance, divorce, inheritance, guardianship, custody, evidence, jehad, hijab etc. these Injunctions are not at all identical. Both sexes are required to perform various functions which are not uniform in nature. So equality and uniformity does not mean one and the same in varying circumstances.

11. The grant of concession of bail to women and its denial to them in some other cases is based on reasonable justification. It is obvious that as a class, all women accused of certain offences are treated alike, according to the provision, and there is no discrimination among them. Since duties and social responsibilities of men and women are different, they can not be equated with one another in all circumstances. As stated above, even Islamic Injunctions have taken care of the same. The whole household matters including the custody, care, feeding of minor children etc. necessarily require the presence and attention of women accused in her house much more than that of the

men accused and in such matters both can not be placed at par with each other. As stated above, there is nothing in the Holy Quran or Ahadith that debar women from such reasonable concession.

12. In this view of the matter, this petition challenging Section 497 Cr. P.C., as amended, in Second amendment Ordinance, 2006 is found misconceived and is dismissed accordingly.

13 These are the reasons for our short Order dated 04.02 2014.



JUSTICE ALLAMA DR. FIDA MUHAMMAD KHAN



JUSTICE DR. AGHA RAFIQ AHMED KHAN
Chief Justice



JUSTICE ASHRAF JAHAN

Islamabad the 05th March, 2014

Umar Daraz Sial/*

File for reporting

