

IN THE FEDERAL SHARIAT COURT OF PAKISTAN

(ORIGINAL JURISDICTION)

PRESENT

MR. JUSTICE IQBAL HAMEEDUR RAHMAN, CHIEF JUSTICE

MR. JUSTICE KHADIM HUSSAIN M. SHAIKH

MR. JUSTICE DR. SYED MUHAMMAD ANWER

MR. JUSTICE AMEER MUHAMMAD KHAN

SHARIAT PETITION NO. 12/I OF 2020

Dr. Mohammad Aslam Khaki, Advocate Supreme Court of Pakistan, Chairman Insaaf Welfare Trust, Office No.4, 1st Floor, Pak Plaza, F-10 Markaz, Islamabad.

.....PETITIONER

VERSUS

1. Federation of Pakistan through Secretary, Ministry of Law and Justice, Pak Secretariat, Islamabad.
2. Ministry of Interior through Secretary, Pak Secretariat, Islamabad.

.....RESPONDENTS

LINKED WITH

SHARIAT PETITION NO. 17/I OF 2022

Irum Malik daughter of Umar Hayat, resident of House No.391, Street No.12, Sector B, Askari 14, Rawalpindi.

.....PETITIONER

VERSUS

Federation of Pakistan through Secretary, Ministry of Law and Justice, 3rd Floor, S Block, Pak Secretariat, Islamabad.

.....RESPONDENT

Counsel for Petitioners: Dr. Mohammad Aslam Khaki, Advocate, Petitioner in-person in S.P. No.12-I/2020
Irum Malik, Petitioner in-person in S.P.No.17-I/2022

Counsel for Respondent: Mian Muhammad Faisal Irfan, DAG for Federation
Ch. Muhammad Usman Mirza, Law Officer on behalf of AG Islamabad
Mr. Sana Ullah Zahid, Addl. AG Punjab
Mrs. Imrana Baloch, State Counsel / AOR on behalf of AG Punjab
Mr. Ahsan Hameed Dogar, Advocate on behalf of AG Sindh
Mr. Anees Muhammad Shahzad, State Counsel on behalf of AG KP
Mr. Muhammad Fareed Dogar, Asst. AG, Balochistan

Dates of Institution: 08.10.2020 (Shariat Petition No.12/I of 2020)
24.10.2022 (Shariat Petition No.17/I of 2022)

Date of Hearing: 16.04.2024

Date of Judgment: 02.05.2024

JUDGMENT

DR. SYED MUHAMMAD ANWER, J: Through this single judgment, we intend to decide the captioned Shariat Petitions as similar question of law is involved therein.

2. In Shariat Petition No.12-I of 2020, the petitioner Dr. Mohammad Aslam Khaki, Advocate has prayed that Sections 496-B and 496-C of the Pakistan Penal Code, 1860 (*hereinafter referred to as "PPC"*) be declared un-Islamic and void being repugnant to Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (ﷺ). Whereas, in Shariat Petition No.17-I of 2020, the petitioner Irum Malik has prayed as follow:

اندریں حالات استدعا ہے کہ متنازعہ قانون کی دفعہ 5 ایکٹ 45 بابت 1860 میں نئی دفعہ کا اضافہ 376 ریپ کیلئے سزا (Punishment of Rape) اور دفعہ 7 ایکٹ 45 بابت 1860 میں نئی دفعہ کا اضافہ 496B، Fornication، (زن غیر منکوحہ کے ساتھ زنا کرنا) غیر اسلامی اور قرآن پاک کے منافی ہیں لہذا انہیں کالعدم قرار دیا جائے اور قرآن کے مطابق اصلاح کی جائے۔

3. In response to Shariat Petition No.17-I of 2022, the Ministry of Law submitted detailed parawise reply along with the following report:

"Through the instant petition, the petitioner has called in question the provisions of Section 5 and Section 7 of the Protection of Women (Criminal Law Amendment) Act, 2006, whereby Section 376 and Section 496-B were incorporated in the PPC,1860, contending that the said provisions are repugnant to the Quran and Sunnah and prayed for declaring these provisions/sections void being repugnant to the Injunctions of Islam.

02. It is submitted that the provisions under challenge pertain to rape & fornication which have been inserted through the above said Act No.VI of 2006 in the Pakistan Penal Code, 1860. The said Act was passed by the Majlis-e-Shura on completion of the requisite legal formalities and published in the Gazette of Pakistan after receiving assent of the President of the Islamic Republic of Pakistan. The Constitution of Islamic Republic of Pakistan empowers Majlis-e-Shura / Parliament to legislate on subject. **Article 227(1) of the Constitution of Pakistan** prescribes that all existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah and further that no law in future shall be enacted repugnant to these injunctions. The contention of the petitioner is that section 376 and section 496-B incorporated in PPC under section 5 and 7 of the Protection of Women (Criminal Law Amendment) Act, 2006 are repugnant to the Quran and Sunnah. It is submitted that at the outset sections 5 and 7 of the Protection of Women (Criminal Laws Amendment) Act, 2006 through which the sections 496-B and 496-C were added in the PPC, have already been discussed by this Hon'ble Court in the case of **Mian Abdul Razzaq Aamir and others vs. Federal Government of Islamic Republic of Pakistan and others**, reported as **PLD 2011 FSC 1** and have not been declared as repugnant to the Injunctions of Islam whereas, the other provisions of the Act ibid were declared repugnant to the Injunctions of Islam. However, it is worth mentioning that the Council of Islamic Ideology has conveyed to Ministry of Interior on 08/04/2022 (**Annex-A**) that Section 496-B and 496-C was made part of the Protection of Women (Criminal Laws Amendment) Act, 2006 and that the said Council in its Session No.192 held on 18-19.09.2013 and recommended as under.

“The Council by rejecting the Protection of Women (Criminal Laws Amendment) Act, 2006 declared that this Act was contrary to the Injunctions of Islam and recommended that Hadood Ordinance 1979 must be kept restored”.

It is further submitted that the answering respondent requested the Secretary, Council of Islamic Ideology, Islamabad to share all recommendations issued for declaring the impugned laws repugnant to the Injunctions of Quran and Sunnah vide Office

Memorandum dated 11/05/2022 (Annex-B). Even otherwise the provisions under challenged relate to the criminal law which is the mandate of Ministry of Interior, under the Rules of Business, 1973.”

4. In addition to that, in response to Para 2 to 4 of the same petition, the Ministry of Law replied as follow:

*“In reply to this para it is submitted that the court has classified the punishments into **two categories i.e. Hadd and Tazir**. The Hon’ble court further observed that the **“classification of punishments cannot be separated administratively or dissociated at academic level. This is because punishments are interrelated and provisions dealing with one crime and its consequent punishment is dove-tailed with other punishments related to the same matter or same transaction”**. Keeping in view of the said observation, offence of Zina is punishable under the Hudood laws if proved as per requisite criteria entails in the Holy Quran otherwise it falls under the term Tazir for which the penal punishments are imposed under sections 376, 496-B and 496-C of PPC. **Article 227(1) of the Constitution** prescribes that all existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah and further that no law in future shall be enacted repugnant to these injunctions.”*

5. Through its parawise comments, the Law Division sought dismissal of the petitions at hand on the ground that this Court has already dealt with similar issue vide judgments reported as **PLD 2011 FSC 1** (Mian Abdur Razzaq Aamir, etc. vs. Federal Government of Islamic Republic of Pakistan, etc.) and **PLD 2017 FSC 63** (*Shahid Orakzai vs. Pakistan through Secretary Ministry of Law, Islamabad*). Furthermore, the respondents have also raised the following serious and relevant preliminary objections to the instant petitions:

I. *That the instant Shariat is liable to be dismissed on the ground that the petitioner has failed to rely on any Quranic verse or Sunnah of the Holy Prophet (PBUH) to substantiate*

his claim. Even otherwise, this Honorable Federal Shariat Court has already held the provisions of Protection of Woman Act 2006 in line with the injunctions of Islam and Sunnah in its judgment reported in **PLD-2011-FSC-1**.

- II. That the instant Petition is liable to be dismissed on the ground that this Honorable Federal Shariat Court has already dealt with a similar question vide judgment reported in **2017-PLD-FSC-63**, whereby it was held that for proof required for Zina is provided in the Holy Quran, whereas the proof required for Zina as Tazir is not fixed and the same may be awarded on any reliable credible evidence. Operative part of the said judgment is reproduced herein below for kind perusal:

“11. To understand the exact position regarding the impugned Section which pertains to the commission of we have to find out what is the meaning of zina as this term is also not defined in the Holy Quran. Literally the word zina (الزنا) means both fornication and adultery. While the punishment of zina liable to Hadd is different for both, as provided in Section 5(2) of the said Ordinance, the proof of zina liable to Hadd, for both, is one and the same as mentioned in the impugned Section. The proof required for zina as Ta'zir is, however, not fixed and it may be awarded on any reliable credible evidence, even on a solitary statement of the prosecutrix if that is confidence-inspiring and duly corroborated. The Holy Quran has used the word zina as well as the word fahishah (فاحشه) in the following Verse:

وَلَا تَقْرُبُوا الزَّانِيَ إِنَّمَا كَانَ فَاحِشَةً طُوسَاءً سَبِيلاً

Do not draw near any unlawful sexual intercourse; surely it is a shameful indecent thing and an evil way (leading to individual, social and moral corruption). (17:32)

- III. That the instant Shariat Petition is not maintainable on the ground that the offense of Zina and Rape are two distinct crimes, which are required to be proven under two different set of standards of proof and different quantum of

*punishments. For reference, Section 375 of Pakistan Penal Code 1806, which defines **Rape**, states: **A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the following descriptions:***

- i. **Against her will,***
- ii. **Without her consent,***
- iii. **With her consent, when the consent has been obtained by putting her in fear of death or of hurt,***
- iv. **With her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or***
- v. **With or without her consent when she is under sixteen years of age.***

[Explanation-Penetration is sufficient to constitute the sexual intercourse necessary to the offense of Rape]

*It is pertinent to mention here that for the offense of **Rape**, the standard of proof is not high as required under the Hadd. Thus, there is no requirement under **Section 375 or Section 376 PPC** that standard of proof, which is applicable to the offense of Zina, also applies to the offense of Rape, rather the offense of Rape requires to be proved through ordinary standard of proof i.e. beyond any reasonable doubt.*

*The offense of Zina is defined under the **Offense of Zina (Enforcement of Hudood) Ordinance 1979** is defined by virtue of Section 4, which states: **A man and a woman are said to commit "zina" if they willfully have sexual intercourse without being married to each other.***

*From the bare perusal of the above-mentioned Sections, it is clearly transpired that both the law(s) i.e. Offense of **Zina** and the **Rape** are two different set of crimes, having different definitions and requirements. For the offense of **Zina**, there has to be willful sexual intercourse between a*

man and woman. Thus, the consent of both the accused is required and must be present. However, for the offense of Rape, the consent of woman is absent, or it is obtained without her free-will i.e. through fear of death or hurt or misrepresentation or fraud or when victim is under-age.

Since the offense(s) of Rape and Zina are two distinct crimes, the standard of proof required to establish any of such crime is different from each other. Similarly, the punishment for both crime(s) are also distinct and different from each other.

- IV. *That the instant Shariat Petition is also liable to be dismissed on the ground that the **Islamic State of Pakistan** has the power and jurisdiction to promulgate the appropriate laws for the offenses, which are committed within its jurisdiction. Such power is to be exercised through its chosen representatives by its people. Undeniably, it was difficult in old times to trace-out crimes, which have now become easier due to advancement of technology and modernization of society. To cope with the increase in crime(s), the State has to maintain law and order.*

In normal circumstances, the proof required for enforcement of Hadd / Qasis is usually not available on record. Thus, it is the State's obligation to legislate laws for protection of life, property, family and dignity of its citizens. If the standard of proof for committing Zina or fornication or adultery is not proven under the Offense of zina (Enforcement of Hudood) Ordinance 1979, despite that the guilt of the accused is established beyond any reasonable doubt through other reliable evidence to the satisfaction of the Court, the offender cannot be allowed to leave free. There can be strong evidence in the shape of DNA tests, medical test, chemical examiner's reports, security cameras, devices, and other circumstantial evidence to establish and corroborate with the crime that the guilt of accused is proven beyond any reasonable doubt. Thus, justice requires the accused to be punished, so that society can be protected

*from the spread of evil and crimes. In such eventuality, Section 496-B of Pakistan Penal Code 1806 defines **Fornication** as:*

- 1) "A man, and a woman not married to each other are said to commit fornication if they willfully have sexual intercourse with one another.*
- 2) Whoever commits fornication shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine not exceeding ten thousand rupees."*

*For the offense of **Fornication**, the standard of proof is not high as required for the offense of Zina or Qazf under the Enforcement of Hudood Ordinance, 1979. Thus, the State can promulgate laws to punish the accused under a Tazir. Where the requisite evidence prescribed for the proof of Hadd is not available on record, the Court can award the lesser punishment by way of Tazir, which is not against the injunctions of Islam and Sunnah, if a guilt of accused is proven beyond any reasonable doubt in the circumstances.*

The offense of Zina requires at-least four Muslim adult male eye-witnesses or there has to be a confession of the accused before the competent court of law. In the absence of these evidential proofs, the accused cannot be punished under the prescribed Hadd. In such an eventuality, the Court is empowered to punish the accused by way of Tazir for committing the offense of Fornication under Section 496-B PPC and award a lesser punishment under Section 496-C PPC, if the guilt is proven beyond any reasonable doubt.

Section 496-C of PPC, which defines Punishment for False Accusation Or Fornication: *"Whoever brings or levels or gives evidence of false of fornication against any person, shall be punished with imprisonment for a term which extend to five years and shall also be liable to fine not exceeding ten thousand rupees; Provided that a Presiding Officer of a Court dismissing a complaint under Section 203-C of the Code of*

Criminal Procedure, 1898 and after providing the accused and opportunity to show cause if satisfied that an offense under this Section has been committed shall not require any further proof and shall forthwith proceed to pass the sentence.

V. *That the instant Shariat Petition is liable to be dismissed on the ground that under the Islamic law, it is not permissible to punish anyone for the provisions of Hadd when there is no definite evidence on record. Reliance is placed on the judgment reported in **PLD-2017-FSC-63**. Operative part of the said judgment is reproduced herein below for kind perusal:*

“22. We may also add that, in an Islamic State, no one can be subjected to any punishment for committing unlawful sexual intercourse unless that charge is fully established by due evidence. Unless there is definite evidence against someone that he/she was guilty of unlawful sexual intercourse, he/she may not be subjected to the Hadd punishment regardless of all other external sources wherefrom information about the commission of that offence is gathered but not duly proved in the Court of Competent Jurisdiction, as is required by the Injunctions of Islam- laid down in the Holy Quran and Sunnah. Here we may refer to the case of a woman in Madina about whom it was generally said that her sexual immorality was widely known. According to a tradition, she made a display of her wickedness even after embracing Islam. (See Sahi Bokhari Chapter Mayjoz). In another tradition, it is said that she made her immorality known publicly. (See Kitab ul Hadood - Sahi Bokhari). According to these traditions, suspicion was attached to her because of her way of talking, her demeanour and because of the kind of people who frequented her. Nevertheless, since there was no definite proof of her being guilty of

this act, she was not punished. This despite the fact that the Prophet (PBUH) said about her: 'If I had to stone someone to death without proof, I would certainly have had her stoned.' (See Kitab ul Hudood - Sanan Abn Maja)

6. When the petitioners, who were appearing in-person, had been confronted regarding this Court's earlier judgment on similar issue passed in the case reported as ***PLD 2011 FSC 1*** (*Mian Abdur Razzaq Aamir, etc. vs. Federal Government of Islamic Republic of Pakistan, etc.*), as the same point was vehemently raised by the Law Division being the respondent, the petitioners argued that in the said judgment only the Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006) was declared as violative of Article 203DD of the Constitution of the Islamic Republic of Pakistan, 1973 (*hereinafter referred to as the "Constitution"*) and this Court has not declared whether the impugned sections, which were added in the PPC by virtue of the Protection of Women (Criminal Laws Amendment) Act, 2006, are Islamic or un-Islamic according to the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (ﷺ). Whereas, the respondents *ad infinitum* reiterated their point of view that these sections were duly analyzed by this Court vide the above referred judgment, against which an appeal is pending in the Shariat Appellate Bench of the Supreme Court. Hence, the instant petitions are not proceedable and liable to be dismissed on this sole ground.

7. We have heard the arguments of the parties at length and gone through the reported judgment passed in the case of *Mian Abdur Razzaq Aamir supra*, and we are of the view that similar matter was thoroughly discussed and

decided upon by this Court in those three Shariat Petitions, which were deliberated upon vide judgment passed in the case of "Mian Abdul Razzaq Aamir and others vs. Federal Government of Islamic Republic of Pakistan and others". The points in issue raised in those Shariat Petitions, *inter alia*, included exactly the same points which are raised in the instant Shariat Petitions. For the purpose of clarity and reference, the crux of the relief sought in the earlier three Shariat Petitions are reproduced as follow:

(a) Shariat Petition No.1/I of 2007

Mian Abdur Razzaq Aamer, has through this petition, challenged sections 5 and 7 of the Act which have added three new provisions i.e. sections 376, 496-B and 496-C relating to Rape and Fornication, in Pakistan Penal Code. It is contented that the impugned provisions are violative of the injunctions of Islam.

(b) Shariat Petition No.3/I of 2007

Ch. Muhammad Aslam Ghuman has, through this petition impugned sections 5, 6, 7 of the Protection of Women (Criminal Laws Amendment) Act, 2006 as being repugnant to the injunctions of Islam.

(c) Shariat Petition No.1/I of 2010

Mr. Abdul Latif Sufi through this petition has also assailed sections 5, 6, 7 of the Protection of Women (Criminal Laws Amendment) Act, 2006 and prayed that the same be declared to be repugnant to the injunctions of Islam and ultra vires the Constitution of the Islamic Republic of Pakistan, 1973.

8. To decide the above referred three Shariat Petitions, issues were duly framed, which were adjudicated upon after lengthy deliberation by this Court. The question which is being raised by the present petitioners through their petitions was decided vide Para-1 of the declaration of the earlier judgment of

this Court, which is very much relevant and is being reproduced below for clarity and ready reference:

i. That all those offences whose punishments are either prescribed or left undermined, relating to acts forbidden or disapproved by Holy Quran, Sunnah, including all such acts which are akin, auxiliary, analogous, or supplementary to or germane with Hudood offences as well as preparation or abetment or attempt to commit such an offence and as such made culpable by legislative instruments would without fail be covered by the meaning and scope of the term Hudood.

[emphasis added]

9. It is evident from the above referred paragraph that all those sections, which are introduced in the PPC by virtue of the Protection of Women (Criminals Law Amendment) Act, 2006, are primarily considered as Islamic being either akin, auxiliary, analogous or supplementary to or germane with Hudood offences, hence were declared to be and included within the scope of the term “Hudood”. As a consequence of this declaration, it was decided that the appeal to the decision / judgment of any case by the Trial Court involving the impugned sections shall lie to the Federal Shariat Court under Article 203DD of the Constitution.

10. As a conclusion the previous judgment of this Court clearly defined the term “Hudood”, which includes those offences which are introduced by the Protection of Women (Criminal Laws Amendment) Act, 2006 in PPC and which are challenged in these instant Shariat Petitions. The relevant portion of that judgment where the term “Hudood” is defined is reproduced as follow:

“B. OFFENCES COVERED BY THE TERM HUDOOD

59. It is therefore time to recapitulate the scope of the term Hudood. In the light of the foregoing discussion the following categories of offences are therefore covered by the term Hudood:

*(i) **Zina = Adultery, Fornication and Rape.***

- (ii) *Lawatat= Sexual intercourse against the order of nature;*
- (iii) *Qazaf = Imputation of Zina;*
- (iv) *Shurb = Alcoholic drinks/Intoxicants/Narcotics etc;*
- (v) *Sarqa = Theft simplicitor;*
- (vi) *Haraba = Robbery, Highway Robbery, Dacoity. All categories of offences against property as mentioned in Chapter XVII of Pakistan Penal Code.*
- (vii) *Irtadad = Apostacy;*
- (viii) *Baghy =Treason, waging war against State; All categories of offences mentioned in Chapter VI of the Pakistan Penal Code and*
- (ix) *Qisas = Right of retaliation in offences against human body. All these offences are covered by definition Hadd because penalty therein has been prescribed by Nass/Ijma.*

Abdul Qadir Audah, has discussed to some extent the scope of Hadd .in his treatise Tashree ul Janai al Islam, Volume 1 at page 119.

- (x) *Human Trafficking.*

Reference Ayah 90 Surah 16 of Holy Quran where Fhashaa, Munkar and Baghee have been forbidden.

[emphasis added]

11. In the light of above, the subject matter of both the instant Shariat Petitions has already been deliberated upon and dealt with by this Court while deciding Shariat Petition No.01-I of 2007 titled "*Mian Abdur Razzaq Aamir vs. Federal Government of Islamic Republic of Pakistan*", Shariat Petition No.3-I of 2007 titled "*Ch. Muhammad Aslam Ghuman vs. Federation of Pakistan and others*" and Shariat Petition No.1-I of 2010 titled "*Abdul Latif Safi vs. Federation of Pakistan and others*" vide judgment dated 22.12.2010, reported as **PLD 2011 FSC 1** "*Mian Abdur Razzaq Aamir and*

others vs. Federal Government of Islamic Republic of Pakistan and others”, which had also arisen on account of the enactment of the Protection of Women (Criminal Laws Amendment) Act, 2006 and had been expounded by this Court in the judgment referred *supra*. Contention of the petitioners that the earlier decision of this Court related only to the jurisdiction of this Court against the decisions/judgments passed by the learned Courts in criminal cases is untenable. The petitioners have also not been able to satisfy the Court as to how these petitions agitating the same subject matter, which is now pending before the Hon’ble Shariat Appellate Bench of Supreme Court, is entertainable by this Court. Accordingly, both the instant Shariat Petitions being not maintainable are hereby **dismissed**.

(JUSTICE DR. SYED MUHAMMAD ANWER)
JUDGE

(JUSTICE IQBAL HAMEEDUR RAHMAN)
CHIEF JUSTICE

(JUSTICE KHADIM HUSSAIN M. SHAIKH)
JUDGE

(JUSTICE AMEER MUHAMMAD KHAN)
JUDGE

Announced in Open Court
on 02.05.2024, at Islamabad.

*Khalid/**

APPROVED FOR REPORTING.