SUPREME COURT OF AZAD JAMMU & KASHMIR
[Appellate Jurisdiction]

PRESENT:

Ch. Muhammad Ibrahim Zia, C.J.
Ghulam Mustafa Mughal, J.

1. Criminal Appeal No.19 of 2016
2. Criminal Misc. No.13 of 2016
(Filed on 30.8.2016)

1. Qamar Pervaiz s/o Muhammad Pervaiz r/o Keyat Kalaan, Pak Gali, Tehsil Rawalakot, District Poonch.

2. Samra Sajawal w/o Qamar Pervaiz r/o Keyat Kalaan, Pak Gali, Tehsil Rawalakot, District Poonch.

..... APPELLANTS

v e r s u s

1. The State through Advocate-General of Azad Jammu & Kashmir, Muzaffarabad.

2. SHO Police Station Bagh, Tehsil & District Bagh.

3. Sh. Sajawal s/o Ghulam Hassan Sheikh r/o Bani Pasari, District Bagh.

…… RESPONDENTS

(On appeal from the judgment of the Shariat Court, dated 30.6.2016 in Cri. Misc. No.73 of 2016)

Application for grant of interim relief.

FOR THE APPELLANT: Mr. Amjad Hamid Siddiqui, advocate.

FOR THE RESPONDENT: Mr. Raza Ali Khan, Advocate-General.

Date of hearing: 5.12.2016

JUDGMENT:

Ghulam Mustafa Mughal, J.—This appeal under section 25 of the AJ&K Islamic Penal Laws Enforcement Act, 1974, has been filed against the judgment passed by the Shariat Court on 20.6.2016.

2. The facts forming background of the captioned appeal are that Qamar Pervaiz and another, appellants, herein, moved an application under section 561-A, Cr. P.C., for quashment of FIR No.173/16, dated 6.5.2016, registered at Police Station Bagh under sections 10/11 and 19, ZHA. The case of the applicants before the Shariat Court was that Qamar Pervaiz, appellant No.1 herein, contracted marriage with Samra Sajawal, appellant No.2, resident of district Poonch on 4.5.2016 according to Shariah. In support of their version, the appellants have placed on record a copy of *Nikahnama* along with the application. They challenged the registration of case against them under the abovementioned sections on the ground that they have not committed any offence rather have contracted marriage according to Shariah on 4.5.2016 at Keyat Kalan, Pak Gali, Rawalakot. As the parents of appellant No.2 want to get her married with someone else against her freewill, therefore, she has contracted marriage with appellant No.1, with her own choice. It was further stated that registration of the case under the abovementioned sections, in the presence of valid *Nikah* of the parties, is *mala fide* and an abuse of the process of law. The Shariat Court vide judgment and order

dated 30.6.2016, granted bail to the appellants, herein, but passed no order on the application filed under section 561-A, Cr. P.C.

3. Mr. Amjad Hamid Siddique, advocate, counsel for the appellants, vehemently argued that Mst. Samra Sajawal was *sui juris* lady and has a right to contract the marriage with her freewill. He submitted that while exercising her right, she has contracted marriage with appellant No.1 at Keyat Kalan, Pak Gali, Rawalakot. Both the appellants are living as husband and wife, therefore, registration of case on behest of the complainant against them under sections 10/11 and 19, ZHA, was misuse of the authority by the police and is also against law. The learned counsel argued that the learned single judge in the Shariat Court, through, has allowed bail to the appellants but has not passed ay order on the application filed under section 561-A, Cr. P.C. The learned counsel contended that as nobody else was claiming the hand of appellant No.2, therefore, in the presence of valid *Nikah* and their statements, the continuation of criminal proceedings against them is unjustified and without lawful authority. The learned counsel argued that the right of security of a person, which includes the family life, is a constitutionally guaranteed right and no person can be deprived of the right without genuine cause.

4. Mr. Raza Ali Khan, the learned Advocate-General, while controverting the arguments, submitted that as a case has been registered against the appellants, therefore, the Police may be allowed to complete the investigation. He submitted that the police cannot be

restrained from performing its statutory duty of investigation of the case, which has duly been registered.

5. We have heard the learned counsel for the parties and gone through the relevant record.

6. The stand of the appellants before the Shariat Court was that they are husband and wife and have duly contracted *Nikah* with their freewill and consent and registration of the case in the presence of *Nikah* was a misuse of the authority on behalf of police and was *mala fide*. The learned single judge in the Shariat Court has not considered the application rather bail has been allowed to them. A perusal of the FIR as well as the other record reveals that no one else is claiming the hand of appellant No.2 and in the presence of a valid *Nikah*, which is admitted by both the appellants, registration of the case under the provisions of Zina Ordinance was not justified. It is the duty of the Court to protect the family life in genuine cases. We are conscious of the fact that police cannot be restrained from performing its statutory duty of investigation of the cases registered in cognizable offences but the fact remains that when the parties are husband and wife, their version is supported by duly registered *Nikahnama* and there is no counter version regarding *Nikah*, then in such circumstances, the offence of zina cannot be said to have been committed and registration of the case as well as continuation of investigation in such circumstances can safely be termed as *mala fide* and without lawful authority.

In view of the above, by accepting the appeal, the application filed by the appellants before the Shariat Court is accepted and the judgment passed by the Shariat Court stands modified in the terms that FIR No.173/2016, registered at Police Station Bagh, against the appellants, stands quashed.

JUDGE **CHIEF JUSTICE**

Muzaffarabad

Date of announcement: 17.04.2017