

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
C.P. No.D-1659/2008

Date	ORDER WITH SIGNATURE
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1. For Orders on Office Objection a/w Reply.
2. For Katcha Peshi.

07.04.2009.

Mr. Muhammad Ibrahim Sahto, Advocate for Petitioners along with Petitioners.

Mr. Muhammad Nawaz Shaikh, Advocate for Respondent No.8.

Mr. Miran Muhammad Shah, Addl. Advocate General Sindh along with SI Ghulam Mustafa, Investigating Officer of Crime No.54/2008.

S.I. Ghulam Mustafa, I.O. of the Crime has submitted his report accompanied with the copy of the interim challan and certain documents, which are taken on record.

The statement of Petitioner No.2 has been recorded in Court.

Heard learned counsel. For the reasons to be recorded later on separately, the proceedings arising out of Crime No.54/2008, P.S. Gudu, are quashed. The Petitioners are at liberty to go wherever they like.



CHIEF JUSTICE



JUDGE

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IN THE HIGH COURT OF SINDH, KARACHI

C.P.No.D-1659/2008

Date	Order with signature of Judge
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8.4.2009.

Mr. Muhammad Ibrahim Sahto, Advocate for the Petitioner alongwith Petitioners.

Mr. Muhammad Nawaz Shaikh, Advocate for Respondent No.8.

Mr. Miran Muhammad Shah, Addl. Advocate General Sindh alongwith SI Ghulam Mustafa, Investigating Officer of Crime No.54/2008.

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MUHAMMED KARIM KHAN AGHA J : According to Petitioner No2 (Ms Farzana) her father (Respondent No.8) intended to marry her against her will which compelled her to leave her home and seek assistance of an advocate.

2. On 18.01.08 the advocate brought her before a Justice of the Peace/Judicial Magistrate where she swore an affidavit of freewill. Thereafter Petitioner No 2 contracted marriage with Petitioner No 1 (Mr Hakim Ali) and Nikah was performed. The Nakahnama was registered by Registrar Lyari Town Karachi.

3. In retaliation and as a matter of revenge according to the Petitioners Respondent No 8, allegedly in collusion with police officials, on 19.07.08 lodged a false F.I.R No 54/08 U/S 365-B, 344, 346/34 PPC against Petitioner No.1 and his relations for abduction of Petitioner No 2 on 07.01.08 at PS Guddu Taluka Kashmore.

4. As a result of this allegedly false F.I.R police officials in collusion with Respondent No 8 arrested a relative of Petitioner No 1 and refused to release him unless Petitioner No 1 surrendered to the Police. According to the Petitioners they also came to know that Respondent No 8 and other relatives had declared them Kari and Karo and intended to kill them both.

5. Under these circumstances the Petitioners have approached this honorable court with the following prayer:

- a) To declare the petitioners being legally married husband and wife in exercise of their right conferred upon them by the law, constitution and Sharia, have a right to pass their marital life according to their wish and the private respondents have no right to interfere with such rights. The filling of FIR is therefore malafide, illegal, motivated to harass the petitioner, hence liable to be quashed.
- b) To declare further that the threats of murder of petitioner as Karo and Kari issued by the private respondent and other relations are not only illegal but amount to cause harassment to the petitioners and in violation of their fundamental right of liberty.
- c) To direct the respondents No.2 to 7 to provide full protection to the persons and properties of the petitioners against private respondents enabling them to perform their daily pursuits and move freely with further direction to the respondent No.1 & 2 to ensure compliance of such directions by the police.
- d) To quash the FIR No 54/08 lodged by respondent No.8 against petitioner No.1 and his relations, being false, in collusion with the respondent No.7 to harass and blackmail the petitioner No.1 and his relations by putting them in fear through respondent No.7.
- e) To award cost of petition.
- f) To grant any other relief, which the Hon'ble Court deems fit and proper in view of the above facts for protection of petitioners and in the interest of justice.

6. Respondent No 8 on the other hand strongly refutes the contents of the petition and claims that Petitioner No 2 is a minor who has been kidnapped by Petitioner No 1 and is being kept in unlawful confinement. As such his F.I.R is based on the truth and is neither false nor fabricated.

7. He claims that his daughter's affidavit of free will is false and that she is not 19 years as claimed but instead is a minor who is unable to exercise her right of free will. Furthermore, the Nikahnama is also false and that his daughter is being kept under duress.

8. Learned counsel for Respondent No 8 has submitted that the F.I.R has been filed, the case has now been challoned and that this Hon'ble Court in its

writ jurisdiction is precluded from quashing the F.I.R. According to him the proper approach is for a quashment application to be made before the Trial Court where the matter is now pending.

9. In support of his contention learned counsel has placed reliance on Col. Shah Sadiq V Muhammad Ashiq and Others (SCMR 2006 page 276) and Dr. Ghulam Mustafa V the State and Others (SCMR 2008 page 76). It is true that the above authorities support the contention that normally the High Court in its writ jurisdiction should not quash an F.I.R. however as mentioned in Ghulam Mustafa's case as referred to above the Supreme Court held that this rule is not absolute.

10. Furthermore, Section 561(A) Cr.P.C provides as under:

"561-A. Saving of inherent power of High Court. – Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code; or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

11. In the instant case the key sentence is, "to prevent abuse of the process of any Court or otherwise to secure the ends of justice". This position concerning the inherent power of the High Court under S.561-A Cr.P.C., was set out by the Supreme Court in Choudhry Munir v. Mst. Surriya and others (PLD 2007 S.C. page 189) as under:

"Power as conferred upon High Court under S.561 Cr.P.C is required to be exercised in exceptional cases, where it is satisfied that continuation of proceedings complained of would amount to gross abuse of process of Court or that it is absolutely necessary to exercise inherent powers to secure the ends of justice."

12. In the case of Ch. Pervez Ellahi v. Federation of Pakistan (MLD 1995 page 615) it has been held as under:

"Powers under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, read with section 561-A, Cr.P.C. can be invoked to quash the proceedings in exceptional cases where trial of an accused would amount to unnecessary harassment but the Court ought not to resort to said provisions of law if on the basis of any allegation made by the prosecution, a prima facie case is made out against the accused. The procedure laid down by Criminal Procedure

Code, the authority vested in the High Court under Article 199 of the Constitution and under such like other provisions of law, are meant to prevent harassment of an accused but within the premises to secure the ends of justice and not to defeat”.

13. The case of Muhammad Hanif Pathan v. the State (PLD 1999 Kar. Page 123) set out the object of S.561-A Cr.P.C in the following terms:

“Object of S.561-Cr.P.C. whereby inherent powers were conferred on High Court to secure ends of justice, powers of High Court were very wide for invoking jurisdiction of High Court under S.561-A, Cr.P.C. it was not a condition precedent that Trial Court must be moved in each and every case in first instance in absence of any evidence against accused no useful purpose would be served by dragging accused in case before Trial Court and accused was bound to be let off.”

14. In a similar case concerning free will marriage the Lahore High Court (Multan Bench) (PLJ 2003 Lahore page 959) held as under:

“If this portion of the allegation is ousted from then contents of the FIR then Mst. Naureen Akhtar being sui juris was entitled to contract marriage with her free will and consent and she has exercised her right by marrying with the petitioner. No offence in such circumstances has been committed by the petitioner. As this petition remained pending in this Court since 17.7.2000, the sending of the petitioner again to the learned trial Court for filing an application under Section 265-K Cr.P.C. will not be in the interest of justice and it is a fit case where this Court can exercise powers under Section 199 of the Constitution as also under Section 561.A Cr.P.C. for the quashment of proceedings proved to be abuse of process of law”.

15. In this case both the Petitioners are present as well as Respondent No 8. The matter involves a short controversy namely whether the petitioner No 2 is old enough to give her consent and whether that consent was freely given. The Petitioner can give a statement under oath before this court and the Respondent No 8 will have the opportunity to cross examine his daughter. Documents on the courts file can also assist in determining this matter. As such this Court is in a position to determine the matter now.

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16. On the other hand the court can hand over custody of Petitioner No 1 to the police where he can face trial in Kashmore. Petitioner No.2 can also be asked to return home to Kashmore with her father.

17. As indicated in the above cited authorities on which this court places reliance this court in its writ jurisdiction has an overriding duty to prevent the abuse of process of any court or otherwise secure the ends of Justice.

18. Based on the facts and circumstances of this case where there is a serious apprehension that harm may be caused to the Petitioners if the court were to dismiss there petition the court considers that the circumstances of this case dictate that it would serve the ends of justice if it takes up this petition as an exception to the general rule preventing high courts from quashing F.I.R's. Furthermore, to use the courts as a means for harassing and persecuting the Petitioners with a view to putting their lives at serious risk can be viewed not only an as abuse of the process of the court but also of the criminal justice system.

19. Accordingly, Petitioner No 2 gave sworn testimony before this Hon'ble court that although she does not know the exact date of her birth she knows that she is 19 .She has stated that before marriage she appeared before a magistrate and swore an affidavit of free will. That she is happily married to Petitioner No 1 with whom she lives and that they have had a son together. She further stated that she was not abducted by the Petitioner or Dani Bux and that she left with the Petitioner on her own free will. During cross-examination by Respondent No 8 petitioner No 2 stuck to her evidence.

20. The court record shows that on 17.09.08 the police surgeon reported that the age of the petitioner was 19. The petitioner has also now reached the age of puberty, which is evidenced by the birth of her son. Her statement under oath before this court that she married out of free will is corroborated by her affidavit of free will dated 18.01.2008 on the courts record. The F.I.R itself was

registered after a delay of 7 months after the alleged incident of abduction. The challan was prepared on 28.08.08 and reveals that the investigation has found hardly anything to support the allegations in the F.I.R against the accused. In fact, the challan seems merely to repeat the allegations contained in the F.I.R without shedding any further light on the alleged crimes.

21. Based on the above the court finds that there is no probability of conviction of the accused in this case arising out of F.I.R No 54/08 registered at PS Guddu Kashmore.

22. Mindful of the fact that at the time of institution of this petition, quashment of the FIR was sought by the Petitioners, but during its pendency on 28.08.08, a challan has been submitted, the relief claimed is required to be amended as per changed circumstance, we have therefore, treated this petition as a petition for quashment of proceedings u/s 561-A Cr.P.C. and accordingly, ordered quashment of the proceedings in connection with the crimes arising out of FIR 54/08 dated 07.01.08 registered at PS Guddu Taluka Kashmore.

23. Furthermore, we declare that the petitioners are legally married as husband and wife based on there own free will.

These are the reason of short order dated 07.4.2009.

10/4/09