ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P. No.171-2024
Bushra Bibi
Vs.
The State etc.

Crl. Misc. No.99-2024
Imran Ahmad Khan Niazi
Vs.
The State & Another

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	31.01.2024	Mr. Salman Akram Raja, Mr. Usman Riaz Gill, Mr. Farrukh Shahzad Kamboh, Mr. Muhammad Shakeel Mughal, Malik Ghulam Sabir and Ramsha Banori, Advocates for petitioners in both the petitions. Raja Rizwan Abbasi, Advocate for respondent No.2 in both petitions. Mr. Zohaib Hassan Gondal, State Counsel. This order shall dispose of present writ petition as well as Crl. Misc. No.99-2024, as both petitions arise out of decision dated 11.12.2023 passed by respondent No.4 and decision dated 11.01.2024 passed by respondent No.3. 2. The facts, in brief, are that Khawar Farid Maneka/respondent No.2, filed a complaint against Bushra Bibi (the petitioner in W.P. No.171-2024) and Imran Ahmad Khan Niazi (the petitioner in Crl. Misc. No.99-2024) before Judicial Magistrate, Islamabad-East. The gist of the allegations, leveled against the petitioners, was that they underwent ceremony of Nikah on 01.01.2018, whereas respondent No.2 had pronounced divorce to the petitioner, in the instant petition, on 14.11.2017, hence since period of ninety days had not lapsed, Nikah took place within the

Iddat period, was invalid and constituted offence under section 496 PPC as well as 496B PPC. The learned Magistrate, seized of the matter, after recording cursory statements of the complainant as well as Muhammad Saeed Khan Nikah Khawan (CW-2), Aun Saqlain, witness of Nikah (CW-3) and Muhammad Latif (domestic servant of Maneka Family) CW-4, issued summons to the petitioners. Feeling aggrieved, the petitioners challenged the decision dated 11.12.2023 by way of filing of Criminal Revision petition, which was dismissed, hence the present petitions.

3. Mr. Salman Akram Raja, Advocate/learned counsel for the petitioner in W.P. No.171-2024 *inter alia* contended that bare reading of the complaint and cursory statements shows that no offence under section 496B PPC is made out. It was contended that one of the basic elements of the offence under section 496 PPC is the *mens rea*, which in the instant case, is 'dishonesty' and 'fraudulent intention', whereas no such assertion has been made, either in the complaint or in the statements of witnesses. Learned counsel took the Court through definition of 'dishonesty' as provided in section 24 PPC as well as 'fraud' in section 25 PPC to substantiate that the referred ingredients are missing in the contents of complaint. It was argued that if a court has to take cognizance and issue summons in a private complaint under section 200 Cr.P.C., it has to keep in view section 190 as well as 198 Cr.P.C. and it is to be seen that complaint discloses offence and that complaint has to be made by some 'aggrieved person'. It was submitted that bare

perusal of the decision shows that same was not done. Learned counsel further argued that in light of the judgment of the Supreme Court in case reported as Allah Dad Vs. Mukhtar and another (1992 SCMR 1273), the time period for Iddat has been provided as thirty nine days, which in this case, is not attracted inasmuch as Nikah was solemnized after about forty eight days, even if the divorce date of 14.11.2017 is accepted as correct. Learned counsel also argued that for a court to take cognizance in an offence under section 496B, procedure as provided in section 203C Cr.P.C., is to be followed and under the same, a complaint is required to be filed in writing and the court has to record testimony on oath of the complainant and at least two eye-witnesses to the act of fornication, which was not done. Learned counsel submitted that complaint has been filed with a delay of almost six years, which in itself, goes on to show that it is based on malafide and is tainted with ulterior motives, as one of the petitioners is a leading political figure of the country. Learned counsel submitted that Nikah was solemnized at Lahore, hence Magistrate in Islamabad, did not have territorial jurisdiction in the matter. Reference was made to Mst. Haseena alias Munni and 3 others Vs. Muhamamd Ismail and another (1980 P. Cr.LJ 118) & Mst. Ghulam Zohra Vs. The State and another (1969 P. Cr. LJ 67). It was contended that even-otherwise, offence under section 496 PPC is only attracted, where one of the parties to the marriage, had deceived the other through fraud and dishonest intention and no third person can take advantage of

the same. Reference is made to Rajammal Vs. Gopalakrishnan (2007 Indialaw MAD 56).

4. Learned counsel for the petitioner in Crl. Misc. No.99-2024 adopted the arguments made by learned counsel for the petitioner in W.P. No.171-2024.

5. Raja Rizwan Abbasi, Advocate, appearing for the complainant/respondent No.2 contended *inter alia* that issuance of summons is not justiciable and the court is not required to evaluate the issues involved. Reference was made to case reported as Noor Muhammad Vs. The State and others (PLD 2007 Supreme Court 9). It was contended that the period of Iddat generally is taken as ninety days and not thirty nine days. It was submitted that even-otherwise, in the judgment relied upon by learned counsel for the petitioner viz 1992 SCMR 1273, it has been held that marriage taking place during the period of Iddat is either void or irregular, but is not a valid marriage in any case. Learned counsel further contended that since Nikah took place within the Iddat period, the same was not valid. It was argued that period of thirty nine days, as provided in the judgment of Supreme Court, is only based on *FATAWA* and no cogent reason has been provided. It was submitted that actual law on the subject is Quran as per provisions of the Constitution and therein, in Surah Al-Baqarah, it is clearly provided that Iddat period is three menstrual cycles. It was submitted that the fact that the referred period has lapsed or not is a question of fact, which cannot be taken into account at this stage. Learned counsel submitted that delay, in lodging of the complaint, *per*

se does not defeat the criminal proceedings, as the offence does not disappear. Reference was made to cases reported as Muhammad Yar and 4 others Vs. Ghulam Haider and 2 others (2023 P.Cr.LJ 93) and Pir Ally Immrawan Sahar Essaphel Vs. Judge, Anti-Terrorism Court and others (2012 P. Cr.LJ 498). Learned counsel contended that under the law i.e. section 7 of Muslim Family Law Ordinance, 1961, period of dissolution of marriage, is provided as ninety days. It was further contended that the element of *mens rea* has been clearly mentioned in the complaint. It was further submitted that in the complaint, dishonesty or fraudulent intention has been clearly mentioned. It was submitted that in any case, determination of *mens rea* is a question of fact and cannot be taken into account without recording of evidence. Learned counsel contended that questions raised can only be determined through recording of evidence. It was submitted that the court had territorial jurisdiction in light of section 179 Cr.P.C. Reference was made to case reported as Basharat Iqbal Vs. The State and another (1993 P.Cr. LJ 2151).

6. In rebuttal, learned counsel for the petitioner submitted that observations of the Supreme Court in case reported as 1992 SCMR 1273 supra cannot be brushed aside arbitrarily. It was further contended that Constitution of the country provides for the privacy and such like matters ought not come to the courts.

7. Submissions made by the parties have been heard and the documents, placed on record, examined with their able assistance.

8. As noted above, respondent No.2 had filed a complaint against the petitioners on the basis that they underwent ceremony of marriage/Nikah while the petitioner in W.P. No.171-2024 was still in Iddat.

9. The court, after recording of cursory statements of the witnesses mentioned above, decided to issue summons to the petitioners, which is the subject matter of challenge. It is pertinent to note that after challenge to the summons, the court has framed charge against the petitioners and the case is at the stage of recording evidence; the effect whereof, shall be discussed subsequently.

10. The complaint is under section 200 Cr.P.C. In order for a Magistrate to proceed with any matter and take cognizance, it has to keep in view the provisions of section 190(a) of the Code, which provides that upon receiving a complaint, the Magistrate shall take cognizance of a matter, which constitutes such offence. Under section 198 Cr.P.C., where the nature of allegations is such that it attracts offences falling under Chapter XIX or Chapter XXI including offences under sections 493 to 496, a complaint is to be made by an aggrieved person.

11. The case, as noted above, is at the stage of recording of evidence and only issuance of process has been challenged. The nature of determination, which can be made at this juncture, with respect to issuance of summons, was taken up for consideration by the Supreme Court in case reported as Noor Muhammad Vs. The State and others (PLD 2007 Supreme Court 9). The Supreme Court of Pakistan, in the referred judgment, discussed the law

on the subject. The relevant paragraphs of the judgment are 4, 5 & 6, which are reproduced below:-

> *"4. The procedure in a complaint case has been provided in Chapter-XVI of Cr.P.C. On presentation of a complaint the Magistrate while taking cognizance under section 200, shall examine the complainant upon oath and the substance of the examination reduced to writing and to be signed by the complainant and by the Magistrate. Section 201, which is not relevant for the purpose of the question involved in the case, deals with the situation when the Court is not competent to take cognizance of the case then the same shall be returned to the complainant for its proper representation to the competent Court. According to section 202, the Court on receipt of the complaint of an offence of which it is authorized to take cognizance, or which has been sent to it under section 190, subsection (3) or transferred to it under section 191 or section 192 may if it thinks fit for the reasons to be recorded postpone the issuance of process for compelling the attendance of the person complained against for the purpose of ascertaining the truth or falsehood of the complaint. Section 203 empowers the Court to dismiss the complaint after considering the statement on oath of the complainant and the result of an inquiry, if any, under section 202 there is in his judgment no sufficient ground for proceeding for the reasons to be recorded for so doing. Section 204, which is in Chapter-VII, Cr.P.C. deals with the issuance of process. According to this section the Court shall issue the process if in its opinion there is sufficient ground for proceeding and an appropriate process may be issued in the form of summons or warrants to the person complained against.*
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> *5. The scheme of the aforesaid provisions of law envisages that after making a complaint, the Court shall examine the complainant on oath and the substance of the examination shall be reduced to writing and shall be signed by both the complainant and the Presiding Officer and if the complaint is made in writing, the Court may examine the complainant on oath. The Court, then, if found sufficient ground for proceeding then the process is issued under section 204 and if there is no sufficient ground for proceeding the complaint, then, is dismissed under section 203 for which reasons will have to be recorded. However, the Court if not certain about the truthfulness or otherwise of the complaint, then on postponement of the issuance of process, for which reasons will .have to be recorded, it may*

direct investigation/inquiry to be conducted in order to ascertain the truth or falsehood of the complaint and after arriving at a conclusion in either way, the Court then, may proceed either under section 204 for the issuance of process or under section 203 dismiss the complaint. The proceeding under section 204 or 203 depends upon the existence or non-existence of sufficient ground which have been taken by the Courts as the existence of prima facie case, the two expressions i.e., the existence of sufficient ground and prima-facie case have been construed by the Courts interchangeably. In the case of "Sher Singh v. Jatendranath Sen" (AIR 1931 Cal. 607), it was held "a prima facie case only means that there is ground for proceeding. It is not the same thing as proof which comes later when the Court has to find whether the accused is guilty or not guilty". There is a marked distinction as to the approach of appraisal of material on record i.e. averments made in the complaint and the statement made on oath by the complainant, at the time of holding of a preliminary inquiry for determining as to whether the process to be issued against the accused or not and at the regular hearing of the criminal case leading to determining the guilt or innocence of the accused. The Court is not expected to examine the material minutely whereas at the stage of trial it appraise the evidence thoroughly and record its findings on the basis of such appraisal and that any benefit of doubt arising out of such inquiry should be given to the accused. It is not the stage where a material available on the record is assessed in depth but a prima facie case has to be made out to proceed further with the matter for issuance of the process. The burden of proof in a preliminary inquiry for the issuance of process is quite lighter on the complainant as compared to the burden of proof on prosecution at the trial of an offence as the prosecution is to prove the case beyond reasonable doubt and at the preliminary stage the complainant is not required to discharge above heavy burden of proof. The Court cannot overstretch the proceedings as to convert the preliminary inquiry or the averments made in the complaint to a stage of full-fledged trial of the case. It is quite an initial stage whereafter the accused is having the opportunity, apart from showing his innocence in the case at the final stage, to have a recourse of an intermediatory remedy by moving the Court showing the complaint to be false and frivolous one and requesting the Court for his acquittal under section 249-A or 265-K, Cr.P.C. prior to further proceeding in the case

to be taken. Mere summoning of an accused by the Court to answer the charges levelled against him does not tantamount to any infringement of any right of a person but rather an opportunity afforded to him to explain his position. During the investigation of a F.I.R. case, where the police is empowered to arrest without warrant i.e., in cognizable case, such a process i.e., arrest etc. is resorted to by the police, even in a case where the person accused of the charge pleads innocence before the police and he succeeds in his efforts to some extent and the police agrees with him, yet before any recommendation by the police for his discharge an insistence is made on his surrender before the authorities/Courts. The possibility of accusation turning out to be false or frivolous at the trial should not overbear the Court from issuing the process if the material available, prima facie discloses the case against the accused. At this stage a protracted inquiry or full dress rehearsal of trial is not required.

Moreover, section 250, Cr.P.C. also provides sufficient safeguard to an accused against a false and frivolous accusation by the complainant, which envisages that the Court while acquitting an accused at the trial stage, holding the charge brought against him, was false, frivolous or vexatious has sufficient power to award adequate compensation. If a complaint is made before the Court, it is only to see the existence of a prima facie case either on the basis of averments made in the complaint and the statement of the complainant on oath or on the basis of an inquiry if the Court thinks fit to hold and inquiry in order to ascertain the truth or falsehood of the complaint. The order of the trial Court in the instant case has fully met the requirements of law by holding the existence of a prima facie case after which the processes were issued.

6. After answering the first question in affirmative now we have been left with the second question relating to the power of the High Court while exercising the revisional jurisdiction in such like matters. In the present case the High Court for arriving at the impugned conclusion has taken note of the detailed reasoning advanced by the learned counsel for the parties touching the merits of the case on the ,basis of the appreciation of material on record very minutely, which was construed as evidence duly recorded in a trial of a case and also the reasoning advanced by the Court itself for reaching such a conclusion by discussing in detail the material in depth conveying an impression as deciding a case

> *which is at its final stages determining the guilt or innocence of the accused on the criteria of evaluating the evidence as to whether the prosecution has been able to prove its case beyond reasonable doubt or not and while giving such a benefit the accused ought to be acquitted, which is beyond the scope of the proceedings at the stage for issuance of process after making a complaint visualizing under sections 200, 202, 203 and 204, Cr.P.C. The High Court has scrutinized the evidence very minutely and has gone to the extent that even inference has also been drawn, about the impossibility of presence of witnesses to overhear the accused/respondent No.2 while hatching the conspiracy and to discredit the evidence/material on record, detailed comments have been made, which is beyond the scope of the proceedings in question necessary for the issuance of the process. The High Court instead of correcting any illegality or irregularity committed by the Courts below while exercising the revisional jurisdiction has rather committed illegality itself by going beyond the scope of the proceedings. It is the stage of only summoning of the accused and interference in the order of the trial Court while issuing process against the accused tantamount to stifling of the proceedings/trial of the case, depriving the Court to adjudge the evidence to be produced by the complainant and the right of the accused to cross-examine the witnesses and to explain any incriminating evidence against him and enable the Court to arrive at a conclusion determining truth of the matter. The order, interfered with by the High Court, was neither perverse nor arbitrary or suffers from any illegality or irregularity but quite in consonance with law and the principles laid down by the Courts".*

In light of the above judgment, the burden on the complainant for issuance of process is much less than the one, which is required at the time of trial. The Supreme Court, in the above judgment, had observed that issuance of summons does not amount to determination of guilt or acquittal of the accused rather only prima facie makes up its mind to proceed further in the matter and that does not amount to infringement of the rights of the accused. It was also observed that if the case is frivolous or

false, the petitioner always has the remedy by an appropriate application under section 249-A or 265-K Cr.P.C. The Supreme Court went on to observe regarding the powers of the High Court or revisional court where challenge is made to the issuance of process by the trial court. It was observe that at this stage, the detailed merits of the case are not to be discussed, which amounts to decision of the mater in entirety. The High Court, in a petition under Article 199 or revisional jurisdiction, is to correct any illegality or irregularity while issuing process.

12. Similar observations were made by the Larger Bench of Lahore High Court in case reported as Muhammad Jawad Hamid and another Vs. Mian Muhammad Nawaz Sharif and others (2019 P.Cr.LJ 665). It was also observed in the referred case that at the stage of issuance of process, trial court was not bound to examine the material minutely or in depth, but has merely to see that prima facie a case had been made out to proceed further with the matter for issuance of warrant or summons (as the case may be) under section 204 Cr.P.C.

13. In case reported as Imtiaz Rabbani alias Billu Vs. The State and another (PLD 2008 Lahore 441), Lahore High Court examined the concept of 'prima facie case' and it was observed that prima facie case does not mean a case proved to the hilt, but a case which can be said to be established if the evidence led in support of the same is believed. It was also observed that delay by itself in filing the complaint may not be fatal to reject the evidence in support thereof.

14. Similar observations were made in case reported as Iqbal Hussain Shah and another Vs. The State and 3 others (2012 P.Cr,LJ 848).

15. In view of above case law, it is clear that issuance of process or summons by the trial court, in a complaint case, does not *per se* infringes rights of any person and is only subject to challenge, if any illegality or jurisdictional error is made out with respect to the issuance of process.

16. Learned counsel for the petitioners has addressed elaborate arguments pointing out flaws in the complaint, however, despite challenge to issuance of notice, they did appear before trial court pursuant to issuance of summons and did not file any application under section 249-A or 265-K Cr.P.C. The major objections of the petitioners are that there is no allegation of dishonesty or fraud, which are *sine qua non* for attracting section 496 PPC. The referred concept viz 'dishonestly' and 'fraudulently' has been defined in sections 24 & 25 PPC. 'Dishonesty' generally means intention of causing wrongful gain to one person or wrongful loss to another person and 'fraudulently' means doing of an act with an intention to defraud but not otherwise. The contents of the complaint does show that allegations of fraud and dishonesty have been leveled therein (paragraphs-10 & 11); naturally, at this stage, the complainant/prosecution was not required to prove the same elaborately, even-otherwise, the *mens rea* (which in the instant case is dishonesty and fraud), is a matter of evidence. Reference is made to case reported as Dr. Sher

Afghan Khan Niazi Vs. Ali. S. Habib and others (2011 SCMR 1813).

17. In so far as period of Iddat is concerned, that generally is taken to be ninety days, however, precise period or time, as such, is not provided in any law, however, in Surah Al-Baqra (2:228), it is provided that a divorced woman shall wait for three period of menstruation. The Supreme Court, on the basis of 'Fatawa Al-Alamgiria', declared that it could be a period of thirty nine days. The Supreme Court, in paragraph-25 of the judgment, laid down parameters for determination of period of Iddat, which does not necessarily have to be thirty nine days in all cases. The referred paragraph is reproduced below:-

> *"25. In the light of these principles, the minimum period of `Iddat' may be 39 days because this is the period in which it is possible for a woman to have three menstruations with two intervening periods of purity. It is thus clear that a marriage performed after 39 days from the divorce can be a valid marriage according to Shariah if the woman has passed through three period of menstruations during this period. In the instant case, the respondents married to each other after 79 days from the date of divorce given by Allah Dad, the petitioner. This period is sufficient for the completion of the period of `Iddat' as mentioned in the Holy Qura'n because it is quite possible that Mst. Rashida Akhtar had passed through three periods of menses within 79 days, and there is nothing on the record to show that she did not complete three menses during these days. There is no provision whatsoever in the Holy Qura'n or in the Sunnah of the Holy Prophet (Peace be Upon Him) which declares 90 days as `Iddat' except for those women who either stopped menstruating due to old age, or did not start menstruating on account of their minority, only their `Iddat' has been mentioned in the Holy Qura'n as three (lunar) months; (See Alqura'n 65:4). Therefore; for- the reasons detailed in paras 14 to 24 of this judgment, if the respondents have contracted marriage after the completion of the period of `Iddat' in*

accordance with Shariah, their marriage cannot be held as invalid nor can their cohabitation be termed as `Zina'. Thus, the order of acquittal of the respondents as recorded by the Additional Sessions Judge or the Federal Shariat Court is fully justified and no interference by this Court is called for".

18. In so far as question of jurisdiction is concerned, no objection, with respect to the same, was taken before trial court or revisional court.

19. The petitioners rightly pointed out that for an offence under section 496B PPC, procedure under section 203C has to be followed, which was not done and issuance of summons, to the extent of section 496B PPC, is in violation of law. Realizing its mistake, trial court did not proceed to frame charge under section 496B PPC and only charge under section 496 PPC has been framed. As noted in the preceding paragraphs that after issuance of summons, charge has been framed and the case is ripe for recording of evidence of the prosecution. The petitioners, if are aggrieved of merits of the matter, have remedy of filing an appropriate application. The petitioners also claim that complaint be dismissed as not maintainable; taking analogy of the judgment of the Supreme Court in cases of FIR, where once report under section 173 Cr.P.C. is filed, FIR cannot be quashed and appropriate application can be filed for discharge of the accused or dismissal of the complaint. Likewise, petitioners too have the referred remedy of making an appropriate application. Reference is made to cases reported as Director General Anti-Corruption Establishment, Lahore and others Vs. Muhammad Akram Khan and others (PLD 2013 SC 401) & Fazal and 2 others Vs. The State

(2010 P. Cr.LJ 360). In case reported as Shamim Vs. The State and another (PLD 1966 Supreme Court 178), the Supreme Court refused to quash proceedings, where charge had been framed, in a criminal complaint case, and recording of prosecution's evidence was underway.

20. In so far as the objection regarding 'aggrieved person' is concerned as provided in section 198 Cr.P.C., the same is to be looked into by the trial court.

21. It is reiterated that Supreme Court as well as Larger Bench of Lahore High Court has categorically held that issuance of summons does not *per se* infringe rights of any person, as it does not determine guilt of the accused. If there is any illegality or irregularity with respect to process, that is to be cured, the same could be challenged and qua the merits of the matter and the accused can appear and contest the case and seek dismissal of complaint either by contesting it on merit or by moving appropriate application.

22. Apart from taking objections as to the merits of the matter, the petitioners did not highlight any illegality or irregularity in issuance of process, rather the case was solely argued on the merits of the matter, which is not tenable at this stage.

23. For the above reasons, instant petitions are partially allowed to the extent that decision by the trial court as well as revisional court for issuance of summons/process to the extent of section 496B PPC is concerned as requisite procedure was not followed; with respect to the procedure for offence under section 496 PPC, no illegality or irregularity in

issuance of process was found, hence petitions, to the said extent, stand dismissed. Consequently, with respect to offence under section 496 PPC, the trial shall continue and the petitioners shall be within their rights to contest it on merits by taking all legal and factual objections

(CHIEF JUSTICE)

Zawar