2001 P Cr. L J 685

[Lahore]

Before Riaz Kayani, J

NASREEN and another---Petitioners

versus

STATION HOUSE OFFICER, POLICE STATION BATALA COLONY, FAISALABAD and 10 others---Respondents

Writ Petition No.4637 of 2000, heard on 20th October, 2000.

(a) Offence of Zina (Enforcement of Hudood) Ordinance (VII of 1979)---

----Ss. 13/14---Criminal Procedure Code (V of 1898), Ss.52 & 103-- Constitution of Pakistan (1973), Art. 199---Constitutional petition---Quashing of F.I.R.---Police Officer who was head of the patrol party had received an information through an informer that the accused were running a brothel and the prostitutes alongwith their clients could be recovered from there---Said Police Officer after having obtained search warrants from a Magistrate raided the house and arrested the accused and registered the impugned F.I.R.-- Neither Code of Criminal Procedure, 1898 nor the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, had any provision authorising the Police Officer to make a search, register a cognizable offence and thereafter to commence investigation on spy information and absence of such provision was in consonance with the Injunctions of Islam---No lady police official having accompanied the police party, search of the lady accused and recovery of the tainted amount from her person was in violation of the provisions of S.52, Cr.P.C.---Provisions of S.103, Cr.P.C. had also been grossly violated while conducting the raid in the house of the accused, for which no explanation .had been furnished---Magistrate had granted permission to the police to search the house in a mechanical manner without application of mind---Search conducted in the case and the F.I.R. registered against the accused in pursuance thereof were declared to be illegal and without lawful authority in circumstances and the same were quashed accordingly.

Riaz v. Station House Officer, Police Station, Jhang City and 2 others PLD 1998 Lah. 35; Noor Muhammad v. S.H.O., Police Station Klurkot, District Bhakkar and 4 others 2000 YLR 85 and Abdul Majeed v. Superintendent of Police and others PLI 1998 Lah. 1158 ref.

(b) Offence of Qazf (Enforcement of Hadd) Ordinance (VIII of 1979)--

----Preamble---Offence of Zina (Enforcement of Hudood) Ordinance (VII of 1979), Preamble---Spy information---Incognito or anonymous information is totally and completely excluded to be used as a ploy or means of information to rake up cases of promiscuity, immorality or prostitution, allegedly practised in homes belonging to private individuals, being in direct conflict with the provisions of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979.

(c) Criminal Procedure Code (V of 1898)--

----S. 103---Search to be made in presence of witnesses---Section 103, Cr.P.C. is not a decoration piece appearing in the Code of Criminal Procedure, but is a safeguard against the police excesses by intervention of two respectables of the locality to be associated in the search.

(d) Criminal Procedure Code (V of 1898)---

----Ss. 98 & 165---Search---Sections 98 & 165, Cr.P.C. have no application whatsoever to a search made before any inquiry, investigation, trial or before recording of F.I.R.

Riaz v. Station House Officer, Police Station, Mang City and 2 others PLD 1998 Lah. 35 ref.

(e) Criminal Procedure Code (V of 1898)---

----Ss. 52, 98, 103 & 16----Search---Guidelines for Magistrates in granting permission to search---Whatever the purpose of search may be, Magistrate should always keep in mind that the search conducted should be strictly in accordance with the provisions of the Code of Criminal Procedure specifically when womenfolk reside in the premises---Search being a visitation on the rights of privacy of the owner or possessor of the house, Magistrate should be reticent in granting permission to search the house in a mechanical manner .without application of mind.

Before obtaining search warrant the Magistrate is under a bounden duty to apply his mind to allow permission or to refuse it. He should at least examine the Police Officer making the request and if possible put him questions to satisfy his mind. There should be some semblance of an inquiry to be made by the Magistrate before permission is accorded to search the house of an individual, were it be to search the house to find out if the premises are being used as a brothel house or to recover stolen property or Narcotics or illegal arms. Whatever the purpose of search is, the Magistrate should always keep in mind that the search conducted should be strictly in accordance with the provisions of Code of Criminal Procedure specially when womenfolk reside in the premises. Search always is visitation on the rights of privacy of the owner or possessor of the house and, therefore, he should be reticent in granting permission to search the house in a mechanical manner without application of mind. Law has conferred powers on the Magistrates and these powers have only to be exercised carefully being very wary of the powers of the Police Officer which may not be exercised to satiate personal vendetta or when information is provided by a spy keeping in mind that such information is always motivated by lust for money, which has been refused, and out of ill-will personal score has to be settled. In the present case permission to search in case was accorded as if the search warrants were for illegal confinement, the same having been issued under section 100, Cr.P.C. If this was the state of absent mindedness of a Magistrate who has been invested with so many powers under the Code of Criminal Procedure, the police official definitely will get encouraged to indulge in activities which are aimed to secure their own motivated desires.

Nazeer Ahmad Ghazi for Petitioners.

A.H. Masood for the State.

Date of hearing: 20th October, 2000.

JUDGMENT

Nasreen and her husband have assailed the validity of F.I.R. No.434 registered under sections 13/14 of the Offence of Zina (Enforcement of Hudood) Ordinance (VII of 1979) with Police Station Batala Colony, Faisalabad on, 25-9-1999.

2. The prosecution version divulged in the referred to F.I.R., Authored by Khalid Mahmood, Inspector/S.H.O., Police Station Batala Colony, Faisalabad, is that on the night of 25-9-1999 at about 10-20 p.m. he alongwith Waheed Shahid, S.I. and Police

Constables arrayed as respondents Nos.3 to 9 were on patrol duty in official van No.4532/FDU, when they reached Babar Chowk an informer informed him that Nasreen wife of Muhammad Akbar and Muhammad Akbar son of Muhammad Ali residents of House No.140-A, Garden Colony, Faisalabad had opened a brothel at their house and send women with various people for immoral activities after receiving befty amounts. Consequent upon' the spy information Abdul Waheed, Head Constable in private clothes was given three currency notes of the denomination of Rs.1,000 each having initialled by the first informant, thereafter, was sent as a dummy to the house of Nasreen for booking of a girl, where having paid Rs.3,000 to petitioner No. I he was promised that after some time a girl by the name of Asia would be sent with him for seeking pleasure through fornication. It is stated that after obtaining search warrant from a Magistrate he in the company of police posse raided the house of the petitioners at 140-A, Garden Colony and found Asia daughter of Zafar, Shamim daughter of Tariq and Shazia daughter of Ahmad all assembled and present there for prostitution. The pimps Nasreen and Muhammad Akbar alongwith Sultan son of Ghulam Rasool and three girls were taken in custody. After the personal search of Nasreen a sum of Rs.3,000 in the form of currency notes in the denomination of Rs.1,000 each initialled by the first informant were recovered which were taken-. in possession vide memo. It is stated that Nasreen and others committed an offence under sections 13/14 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 (hereinafter called the Ordinance).

3. Learned counsel at the very inception contended that Sultan who is dubbed by the first informant as a customer on visit to the house of the petitioners to procure a girl for prostitution was, as a matter of fact brother of Nasreen petitioner No. 1 as it, is obvious from the Nikahnama of Muhammad Akbar with Nasreen where father's name of Nasreen is stated to be Ghulam Rasool and Annexure "D" is the photo copy of identity card of Sultan whose father's name is also Ghulam Rasool. Learned counsel went on to add that Shameem was a maid-servant and the other two girls by the name of Asia and Shazia were guests. The contention raised is primarily a question of fact requiring investigation which I am not called upon to enter in the exercise of my Constitutional jurisdiction. However, the argument of the learned counsel on legal plinth carries considerable force and I must say so at the very outset that learned counsel rendered valuable assistance by not only quoting the law but also referring to numerous passages from Holy Quran and Sunnah of Holy Prophet (peace be upon him). Detailed arguments spreading over 35 pages were also submitted at the end of hearing of the case.

4. The main brunt of the argument of the learned counsel was two fold, firstly, that the house was illegally searched leading to flagrant violation of not only of privacy, solace and liberty of the inmates of the house but also being violative of the Fundamental Right No. 14 which protected dignity of man and the privacy of home to be inviolable. Second phase of the argument was that in no case a search of a house can be made incognito or on anonymous information.

5. Learned counsel for the State mainly tried to defend the action of the Police Officer in registering the case but admitted that the search was absolutely illegal and did not conform to the provisions of the Code of Criminal Procedure.

6. After serious considerations, a detailed study of the case-law and thorough perusal of the record I am in full agreement with the arguments of the learned counsel for the petitioners for the reasons given in the ensuing paragraphs.

7. The information given to the Police Officer who was head of patrol party was through an informer that the petitioners are allegedly running a brothel house and if a raid is made the prostitutes used for flesh business alongwith clients would be recovered. I have studied the Code of Criminal Procedure minutely and also the provisions of the Ordinance. There is no provision whatsoever, in either the general or

special law which authorises the Police Officer to set in motion the machinery of search, registration of a cognizable offence and thereafter to commence the investigation on spy information. The absence of such provision is very well-understandable and is in consonance with the tenants of Injunctions of Islam. At this juncture, before I proceed further it should be kept in mind that no Police Officer can be compelled or persuaded to disclose the name of spy who laid information before him. This being the position anything done in the present case violates the provisions of Offence of Qazf (Enforcement of Hadd) Ordinance (VIII of 1979). Qazf is defined in section 3 of the Qazf Ordinance according to which any person by words spoken or intended to be written ... "makes or publishes an imputation of Zina concerning any person intending to harm, or having reason to believe that such imputation will harm the reputation, or hurt the feelings, of such person, is said, to commit Qazf". Section 4 ordains punishment for Qazf which may be liable to Hadd or Ta'zir. Now when the identity of a person giving spy information can be legally kept secret how can the petitioners or any other person in their place in case the information is found to be false proceed against such a person. In other words the reputation of a person, against whom spy information is given may become totally shattered in the society, as a result of the false information, and the lingering trauma continues unabated, rendering him helpless just because the identity of a person remains secret. Law particularly defined and elaborated in the Qazf Ordinance does not countenance such a situation, therefore, incognito of anonymous information is totally and completely excluded to be a used as a ploy or means of information to rake up cases of promiscuity, immorality or prostitution being allegedly practised in homes belonging, to private individuals being in direct conflict with provisions of Qazf Ordinance.

8. The validity of the F.I.R. shall be squarely examined on the touch stone of the validity of search conducted by the Police Officer. I called for the judicial record to satisfy myself that the search warrants claimed to have been obtained by the first informant were in accordance with law. After perusal of the request of the Police Officer, dated 24-9-1999, permission was granted in the following words:--

"As per request Inspector/S.H.O. Police Station Batala Colony the search is allowed exclusively for the purpose mentioned above under section 100, Cr.P.C."

9. The helpless Magistrate did not even bother to see as to what was section 100, Cr.P.C. and whether it was relatable to the request made to him by the Inspector. Section 100 deals with confinement of such person, which the Magistrate believes to amount an offence, he shall issue a search warrant enabling search of the person confined. The warrant, therefore, issued is illegal and struck down for this simple reason alone. Moreover, section 52 requires search of a female in presence of another woman with strict regard to decency. Admittedly no woman Police Officer or official accompanied the police party when petitioner No. 1 was searched and from her person allegedly Rs.3,000 were recovered. Apart from this, provisions of section 103, Cr.P.C. were also grossly violated. Section 103, Cr.P.C. is not decoration piece appearing in the Code of Criminal Procedure. It is a safeguard against the police excesses by intervention of two respectables of the locality to be associated in the search. This section becomes more applicable in the instant case as per allegations the petitioners were running a brothel house and it is only two respectable witnesses of the locality who can throw sufficient light and information on this aspect as they, in the capacity of neighbours would know each and every activity about the immoral and unlawful act if it was being practised in the house belonging to the petitioners. No reason whatsoever has been given for this gross omission of not associating two respectable witnesses of the locality. The argument that during these days of deteriorating law and order situation, interference by way of witnessing a recovery or a happening is frequently loathed as it is bound to invite rancour is not very apt in situations where a brothel house is being run in a locality inhabited by respectables. In such-like situations the whole locality join hands to oust immorality as there is genuine apprehension that

glamour of beauty, charm and money may not creep into their own house holds. People who stand united is a more fearsome force than the police.

10. The other provisions relating to search are contained in sections 98 and 165 of the Code of Criminal Procedure. Both these provisions of law came under discussion in the case of Riaz v. Station House Officer, Police Station, Jhang City and 2 others reported in PLD 1998 Lah. 35. After a detailed' discussion the learned Judge who had the benefit of attending to the views expressed by Mr. Rafiq Ahmad Bajwa, Advocate as amicus curiae came to try conclusion that both the above quoted provisions of law have no application whatsoever to a search made before any inquiry, investigation or trial and further section 103, Cr.P.C. was rendered mandatory by virtue of subsection (4) of section 165, Cr.P.C. in a search made by a Police Officer under the said provisions of law. The precedent case is a judgment written by a learned Single Judge of this Court and I am in full agreement with the views expressed therein. Therefore, no further dilation regarding sections 98 and 165, Cr.P.C. is called for, suffice it to say that the same does not apply to a search made before recording of F.I.R. There is no corresponding provision of search of the nature envisaged in the instant case in the special law i.e. the Ordinance.

11. Even otherwise before obtaining search warrant the Magistrate is under a bounden duty to apply his mind to allow permission or to refuse it. He should at least examine the Police Officer making the request and if possible put him questions to satisfy his mind. There should be some semblance of an inquiry to be made by the Magistrate before permission is accorded to search the house of an individual were it to be search the house to find out if the premises are being used as a brothel house or to recover stolen property or Narcotics or illegal arms. Whatever the purpose of search is, the Magistrate should always keep in mind that the search conducted should be strictly in accordance with the provisions of Code of Criminal Procedure specially when women-folk reside in the premises. Search always is visitation on the rights of privacy of the owner or possessor of the house and, therefore, he should be reticent in granting permission to search the house in a mechanical manner without application of mind. Law has conferred powers on the Magistrates and these powers have only to be exercised carefully being very wary of the powers of the Police Officer which may not be exercised to satiate personal vendetta or when information is provided by a spy keeping in mind that such information is always motivated by lust for money, which has been refused, and out of ill-will personal score has to be settled. To my utter amazement permission to search in this case was accorded as if the search warrants were for illegal confinement, the same having been issued under section 100, Cr.P.C. If this is the state of absent mindedness of a Magistrate who has been invested with so many powers under the Code of Criminal Procedure, the police official definitely will get encouraged to indulge in activities which are aimed to secure their own motivated desires. In conclusion the search conducted in law rather this case is declared as totally illegal being contrary to inapplicable to the facts of the case.

12. Learned counsel desired that a lengthy judgment dealing with the Islamic aspects be rendered so as to settle the issue of search made in such like cases once for all. After going through the law I find that this aspect has been dealt in detail in the case of Riaz v. Station House Officer, Police Station, Jhang City and 2 others PLD 1998 Lah. 35, Noor Muhammad v. S.H.O. Police Station Klurkot, District Bhakkar and 4 others 2000 YLR 85 and Abdul Majeed v. Superintendent of Police and others PLJ 1998 Lah. 1158 and many decisions of the Federal Shariat Court appearing in Law Journals from time to time. I, therefore, do not find it necessary to dilate upon this issue any further as it would amount to repetition of case-law decided in so many precedent cases and leave this aspect to be considered in any other case at an appropriate time.

13. The upshot of the discussion, therefore, is that F.I.R. No.434 registered with Police Station Batala Colony, Faisalabad on 25-9-1999 under sections 13/14 of the Ordinance

is quashed being without lawful authority and against the provisions of law of search embodied in the Code of Criminal Procedure.

N.H.Q./N-58/L F.I.R. quashed.

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