

P L D 1972 Supreme Court 6

**Present: Muhammad Yaqub Ali, Sajjad Ahmad and
Waheeduddin Ahmad, JJ**

**MUHAMMAD RAFIQUE-Appellant
versus
MUHAMMAD GHAFUOR-Respondent**

Criminal Appeal No. 42 of 1970, decided on 3rd October 1971.

(On appeal from the judgment and order of the High Court of West Pakistan, Lahore, dated the 13th March 1970, in Criminal Miscellaneous Petition No. 1351-H of 1970).

Criminal Procedure Code (V of 1898), Ss. 491 & 561-A-Habeas corpus petition-Court finding that person brought before it not confined or detained illegally or improperly-Order that can be passed, in habeas corpus petition regarding custody of such person.

In habeas corpus petition, a woman alleged to have been detained was brought before the High Court. The detenu supported the allegation when produced in Court and claimed that she was forcibly given in marriage to the respondent by her parents. The parents, present in the Court, argued that she was lawfully married to the respondent. The Court, thereupon, directed that she should be removed to the house of the respondent and be given into his custody. This order of the High Court was challenged in the Supreme Court. The question which fell for decision was as to what kind of order could be passed regarding custody of detenu in such circumstances.

Held: Taking into consideration, the provisions of sections 491 and 561-A, Cr. P. C. as well as that of the Fundamental Right No. 1 in the Constitution of Pakistan (1962) that "No person shall be deprived of life or liberty save in accordance with law" there was no warrant in law for the direction passed by the High Court regarding the custody of the woman in the case.

The High Court has two-fold jurisdiction under section 491, Cr. P. C. : (i) to deal with a person within its appellate criminal jurisdiction according to law; and (ii) to set him at liberty if he is illegally or improperly detained. If the Court find that the person brought before it was not being illegally or improperly confined or detained then if the person is a minor, the Court may make over his custody to the guardian which will be dealing with him in accordance with law, but if the person is major, the only jurisdiction which the Court can exercise is to set him at liberty whether illegally or improperly detained in public or private custody or not. The Court may "set at liberty", but cannot restore status quo ante against the wishes of the person brought before it. Such a course will lead to curtailment of liberty for which there is no warrant under section 491 nor can such an order be sustained under section 561-A of the Code as it cannot be said that allowing a person freedom of movement is an abuse of the process of the Court.

Muhammad Rafique Khan Chauhan, Advocate Supreme Court instructed by Abdul Karim Sheikh, Advocate-on-Record for Appellant.

Abdur Razzaq Raja, Advocate-on-Record for Respondent.

Date of hearing: 28th May 1970.