

Form No.HCID/C-121
ORDER SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

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Examiner
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Lahore High Court, Lahore

Crl. Misc. No.5151/B/2023

Imran Hameed etc. Vs The State etc.

S.No. of Order/ Proceeding	Date of order/ proceeding	Order with the signature of the Judge and that of parties or counsel where necessary
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10.04.2023 Sh. Usman Karim-ud-Din, Advocate, with the
Petitioners.
Mr Muhammad Mustafa Chaudhry, Deputy Prosecutor
General, with Usman/ASI.
Ch. Waris Ali Saroya, Advocate, for the Complainant.

Tariq Saleem Sheikh, J. – On 11.11.2022, Irfan Ilyas (the “Complainant”) filed a written complaint with the SHO, Police Station City Wazirabad, stating that the Qadianis had built a worship place near Hakim Bakers in Moti Bazar consisting of a room with a minaret, which is an architectural feature and a religious symbol important to Islam. According to him, it was an insult to the religious feelings of the Muslim population of the locality and a perpetual source of pain and anguish for them. Since the Petitioners were managing the affairs of that worship place, they were liable under the law. Based on this complaint, the SHO registered FIR No.699/2022 dated 11.11.2022 against the Petitioners for offences under sections 298-B and 298-C of the Pakistan Penal Code, 1908 (PPC). The Petitioners have applied for pre-arrest bail in that case by this application under section 498 Cr.P.C.

2. The learned counsel for the Petitioners contends that the contents of FIR No.699/2022 *supra* do not constitute any offence under the Pakistan Penal Code, 1860, including sections 298-B and 298-C. He further submits that the worship site (known as *Bait-ul-Zikar*) was constructed in 1922, while sections 298-B and 298-C were inserted in the Penal Code through Ordinance XX of 1984. The Petitioners are just the members of the Management Committee of *Bait-ul-Zikar*. Even if constructing a mosque-like structure is illegal,

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they cannot be prosecuted on the facts of the instant case. Sections 295-B and 295-C PPC do not apply retroactively.

3. The learned Deputy Prosecutor General and the Complainant's counsel have vehemently opposed this application. They contend that it is illegal for Qadianis to build their place of worship in the traditional Muslim mosque style. Even though Bait-ul-Zikar was established in 1922, the Petitioners were obligated to change its outlook and pull down the minaret, which is identified with a Muslim mosque, following the promulgation of Ordinance XX of 1984. Since this has not been done, it constitutes a continuing offence and the Petitioners, as the current custodians, can be prosecuted.

4. In rebuttal, the Petitioners' counsel submits that there is no allegation in the FIR that the Petitioners have ever posed themselves as Muslims or called the disputed place of worship a Masjid (mosque). The words "Bait-ul-Zikar" have been clearly written in Urdu at its main entrance, so no Muslim mistakenly takes it as a mosque.

5. I have heard the learned counsel and gone through the record. In Zaheeruddin and others v. The State and others (1993 SCMR 1718), the Supreme Court of Pakistan held that sections 298-B and 298-C PPC, which were enacted by Ordinance XX of 1984, are *intra vires* the Constitution of 1973 and do not offend Article 20 thereof. In this case, the primary question that requires consideration is whether the contents of the FIR and the evidence gathered during the investigation attract sections 298-B and 298-C PPC.

6. The Complainant has lodged FIR No.699/2022 under sections 298-B and 298-C PPC. Section 298-B forbids the members of the Qadiani Group or the Lahori Group (who call themselves Ahmadis) from using epithets, descriptions and titles designated for certain holy personages. It also prohibits them from referring to, naming or calling their place of worship as Masjid, or by oral or written words or by visible representation referring to the call to prayers as "Azan" or reciting it like Muslims. Section 298-C criminalizes public propagation of the Qadiani/Ahmadi religion by

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any member of that community posing himself as Muslim or referring to his faith as Islam, thereby outraging the religious sensitivities of Muslims.

7. There are two reported cases which considered the application of sections 298-B and 298-C PPC where Qadianis were arrested for designing their worship place resembling a mosque. The decisions, however, are inconsistent. In Muhammad Aslam v. The State (1998 PCr.LJ 522), the accused, who were Qadianis, were booked under sections 298-B & 295-C PPC for inscribing *Kalima Tayyaba* and Quranic Verses on the walls of their prayer place. It was argued that the mosque-like design of the Qadianis' place of worship tends to deceive the general body of the Muslims. This Court held: "This statement, however, seems to have little substance, the reason being that Qadianis seldom conceal the identity of their worship place, and it is publicly known to all those around that a particular place is the centre of worship of the Qadianis and not that of the Muslims, called a mosque in its familiar term. No question of the Muslims falling prey to any confusion about the identity of such a building arises." As a result, the Court admitted the accused to post-arrest bail. In Ata Ullah v. The State (PLD 2000 Lahore 364), the accused, a Qadiani, had constructed a worship place with minarets, arches (Mehrab) and a crest, similar to what the Muslims have for their mosques but had inscribed the words "Baitul Ahmedia" at its main gate. Police searched the building, recovered several books of the Qadiani religion and the Holy Quran, and booked them under sections 298-B and 298-C PPC. The Court held that by erecting minarets, arches, and a crest, the accused made visible representation to the public that the building in question was a Muslim mosque, which is culpable under section 298-B(1)(d) PPC. Writing "Baitul Ahmedia" atop the entrance would not absolve him of the charge. The Court observed that the said writing does not completely exclude the possibility of deception of Muslims because illiterate people cannot read those words, while others may not either notice them or understand their significance. Regarding section 298-C PPC, the Court stated that it was also attracted *prima facie* because the accused had harmed the sensibilities of Muslims by erecting a structure that

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looked like a typical Muslim mosque. The Court declined the accused's application for post-arrest bail.

8. It is settled law that when there are conflicting views of two Benches of equal strength, the matter should be referred to a larger Bench. I would have followed that path in the normal course, but this case has a distinguishing feature. Admittedly, Bait-ul-Zikar, the subject of FIR No.699/2022, was constructed in 1922, when the Petitioners were not even born. The prosecution invokes the doctrine of continuing offence to hold them liable.

9. Black's Law Dictionary, Fifth Edition (Special Deluxe) states:

"Continuing" means enduring, not terminated by a single act or fact; subsisting for a definite period or intended to cover or apply to successive similar obligations or occurrences. "Continuing offence" means the type of crime which is committed over a span of time. As to the period of the statute of limitation in a continuing offence, the last act of the offence controls for the commencement of the period. A "continuing offence" may consist of separate acts or a course of conduct but which arises from that singleness of thought, purpose or action which may be deemed a single impulse. A "continuous crime" consists of a continuous series of acts which endures after the period of consummation, such as, the offence of carrying concealed weapons. In the case of "instantaneous crimes", the statute of limitation begins to run with the consummation. In contrast, in the case of continuous crimes, it only begins with the cessation of the criminal conduct or act."¹

10. A research article defines "continuous crime" as that specific form of legal unity of offence in which a crime is committed through multiple actions or inactions at different times based on a unique criminal intent and against a unique passive subject.² Thus, to qualify as a continuous offence, a penal act must meet the following conditions: "the presence of a unit of a passive subject, the unit of an active subject, the performance of multiple actions or inactions that represent the contents of the same crime, at different periods of time and, last but not least, the condition that these actions or inactions be performed with a unique criminal intent ... The continuous form of legal unity of offence necessitates thoroughly examining each element of its content as a whole (as a unique crime) and of every deed that

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¹ The Supreme Court of India also cited Black's Law Dictionary in *Gokak Patel Volkart Ltd. v. Dundayya Gurushiddaiah Hiremath & others* [(1991) 2 SCC 141].

² Mari-Claudia Ivan, 'Features of Continuous Offence' (2016), 2016 *Analele Universitatii din Bucuresti: Seria Drept* 154

enters into its composition (as the plurality of acts).”³ The scholar further states that the causal relationship must be proven or follow from the very materiality of the deed, depending on the classification of the crime into one of the categories: material and formal crimes; or crimes of danger and violence.

11. Let's examine some judicial decisions to see how the courts have dealt with the concept of a continuing offence. In Balkrishna Savalram Pujari and others v. Dnyaneshwar Maharajsansthan and others (AIR 1959 SC 798), the Supreme Court of India observed that a continuing offence is an act which creates a continuing source of injury and holds the perpetrator liable for the continuation of that injury. If a wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the offending act continues. If the wrongful act is of such a kind that the injury caused by it continues, then the said act constitutes a continuing wrong. As a result, the distinction between the two wrongs depends upon the effect of the injury. In State of Bihar v. Deokaran Nenshi [(1972) 2 SCC 890 : AIR 1973 SC 908], the Supreme Court held that a continuing offence is distinguishable from the one committed once and for all because it is susceptible to continuance. It results from a failure to obey or comply with a rule or its requirement. It entails a punishment, the liability for which continues until the rule is obeyed or complied with. The offence is committed each time such disobedience or non-compliance happens. The element of continuity is lacking in an offence that occurs when an act or omission is committed once and for all. In Bhagirath Kanoria and others v. State of M.P. (AIR 1984 SC 1688), the Supreme Court stated that a continuing offence does not have a fixed connotation and added that the question of whether a particular offence is a continuing offence must necessarily depend upon the language of the statute which creates that offence, the nature of the offence and, most importantly, the purpose which is intended to be achieved by designating the specific act as an offence. In Udai Shankar Awasthi v. State of U.P. [2013 (2) SCC 435], the Supreme Court observed that

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the term “continuing offence” is not defined in the Indian Code of Criminal Procedure because it cannot be given a fixed meaning. The Court held that for a continuing offence to take place, the ingredients of the crime must persist even after the period of consummation. In Trilok Chand v. C.N. Srivastava and others (AIR 1961 All. 88), the High Court stated that “continuing offence” continues from moment to moment without interruption or break. The phrase “continuing offence” should be understood in the same way as “continuing breach of contract” and “continuing the wrong independent of contract” in section 23 of the Limitation Act, 1908.

12. In Amir Khan v. The State (PLD 1963 Dacca 92), a Full Bench of the Dacca High Court explained that the expression “when an offence is a continuing one” does not mean that a new offence is committed every day. The phrase means “when the same offence is continued.” For example, in dishonestly retaining stolen property (section 411 PPC), the same offence continues so long as the property is kept. It does not imply that a fresh offence is repeated daily while the property is retained. Similarly, the offence of wrongful restraint or wrongful confinement is a continuing offence; but it does not mean that a distinct offence is being repeated every day, hour or minute. The emphasis is upon the same offence, and the continuance is that of the same offence – and not on its repetition. The offence is completed when a person is convicted of keeping stolen property, knowing it was stolen. It is not true to state that if a man keeps stolen stuff for thirty days, he has committed thirty new offences, one for each day he keeps such property. The concept of continuation is, by definition, implied in the very connotation of the offence of retention, but it is the continuation of the same offence for which he can be convicted only once and tried in any of the local areas where the offence was continued.

13. According to some authorities, there are two types of continuing offences: (a) crimes in which some acts material and essential to the crime occur in one area or province and some in another, (b) crimes in which all of the elements required for its completion may have occurred in a single place, but the violation of

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the law is deemed to be continuing due to the very nature of the offence committed. Examples of the first class are malversation and abduction, and libel is an example of the second category when a libellous matter is published or circulated from one place to another. The crime of jailbreak may also be included in the second class. The act of the escaped prisoner is a continuous or series of acts initiated by a single impulse and operated by an uninterrupted force, regardless of how long it lasts. It may not be correct to say that once a convict has escaped from the place of his confinement, the crime is consummated because as long as he continues to evade the service of his sentence, he is deemed to continue committing the crime, and may be arrested without a warrant, at any location where he may be found.

14. To illustrate the practical application of the concept of a continuing offence, I may now refer to some judicial decisions. In Best v. Butler [1932 (2) KB 108], the English Trade Union Act of 1871 penalized an officer or a trade union member who willfully withheld any money, books, etc., of the trade union. The Court ruled that withholding the money was a continuing offence because the infraction occurred every day that the moneys were deliberately withheld. In Fagan v. Metropolitan Police Commissioner, [1969] 1 QB 439, Fagan accidentally drove his car onto a police officer's foot. The cop asked him to move but he delayed doing so. He was convicted of assaulting an officer while on duty. It was apparent that when Fagan drove upon the officer's foot, he lacked the essential *mens rea* for the charge. However, the court decided that the assault involved a battery which continued after the car came to rest. Thus, there was a continuing act of assault (*actus reus*), and Fagan had the necessary *mens rea* at some point over its course. The offence continued until the car was removed. The court further stated that once an act is complete, even though the consequences continue to flow from it, the subsequent emergence of *mens rea* cannot turn it into an offence. In State of Bombay v. A.H. Bhiwandiwalla (AIR 1955 Bombay 161), the High Court held that using the premises as a factory without a licence was a continuing offence. In State of Bihar v. J.P. Singh (1963 BLJR 782), the High Court of Patna held that operating a restaurant without registering it and failing to keep the

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requisite records were continuing offences. In Mukesh and another v. State for NCT of Delhi and others (AIR 2017 SC 2161), the Supreme Court observed that conspiracy is a continuing offence that goes on until it is executed, retracted, or frustrated by necessity. The courts in India have applied the concept of continuing offence in many domestic violence cases because they generally occur over a long period. In Omprakash Devanand Shukla v. Sau. Aruna Omprakash Shukla (2021 Latest Caselaw 10751 Bombay), the husband's counsel claimed that the complaint was barred by limitation under the Domestic Violence Act, specifically sections 28 and 31, read with section 468 of the Indian Code of Criminal Procedure 1973. The High Court rejected the argument, holding that a continuing offence is susceptible to continuance and is distinguishable from one committed once and for all. The retention of Stridhan by the husband and his family members was a continuing offence so long as it fell under the definition of "economic abuse" as given in section 3 of the Domestic Violence Act. In Shahida Faisal v. Federation of Pakistan and others (PLD 2000 Lahore 508), this Court ruled that non-payment of the loan was a continuing offence.

15. In the present case, the gravamen of the complaint against the Petitioners is the Islamic-style minaret of their worship place. True, the minaret is a religious symbol for Muslims, but it is also an architectural feature. The earliest mosques lacked minarets. At the time of the Holy Prophet Muhammad (PBUH), the call to prayer (Azan) was made from the highest roof near the mosque. Varying theories exist about the origin of minarets. Some scholars think that early Muslims adopted Greek watch towers to call people to prayer, which Muslims used for their own purposes before deciding to create their own architectural structure. Others believe that the Ziggurat towers of the Babylonian empire inspired the minaret.

16. I do not need to determine in these proceedings whether sections 298-B and 298-C PPC prohibit and criminalize the construction of a worship place by Qadianis resembling a mosque. However, in my opinion, they do not mandate that the structures built

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before the promulgation of Ordinance XX of 1984, by which these provisions were introduced, should be razed or altered.

17. As adumbrated, Qadianis built the worship place in question way back in 1922 and have inscribed Bait-ul-Zikar at its doorway. The Petitioners are just its caretakers. I wonder if they can be punished for an architecture crafted a hundred years ago. Admittedly, there is no allegation that they call the aforementioned worship place a mosque or have otherwise done anything that may hurt the feelings of Muslims within the contemplation of section 298-C PPC. The Complainant has not explained why he kept mum for about 38 years after the promulgation of Ordinance XX of 1984 and what prompted him to lodge FIR No.699/2022. The Petitioners allege that he is attempting to score political points.

18. I cannot understand how the doctrine of continuing offence is attracted to the facts and circumstances of the instant case. It is a settled principle that the prosecution must prove that the accused possessed *mens rea* when he committed the act which caused the *actus reus*. However, as the case of *Fagan* explained, where an *actus reus* may be brought about by a continuing action, it is sufficient that the accused had *mens rea* during its continuance, albeit he did not have *mens rea* at its inception. When Qadianis built their worship place, its architectural design did not violate any law then in force. They have not committed any continuing act to bring about *actus reus* now. Even if sections 298-B and 298-C PPC are assumed as strict liability offences, the prosecution must show that the Petitioners did something to constitute *actus reus*. It has not done so.

19. In Tahir Naqash and others v. The State others (PLD 2022 SC 385), the Supreme Court of Pakistan stated:

“Article 260(3) of the Constitution, though declares the Ahmadis/Qadianis as non-Muslim, it neither disowns them as citizens of Pakistan nor deprives them of their entitlement to the fundamental rights guaranteed under the Constitution. The Constitution treats, safeguards and protects all its citizens equally, whether they are Muslims or non-Muslims. Article 4 of the Constitution is an inalienable right of every citizen, including minority citizens of Pakistan, which guarantees the right to enjoy the protection of law and to be treated in accordance with law.”

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20. I have accepted this application and admitted the Petitioners to pre-arrest bail by short order of even date. These are the reasons for it.

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(Tariq Saleem Sheikh)
Judge

Naeem

Approved for reporting

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(TARIQ SALEEM SHEIKH)
Judge

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Copy Petition no:	160441
Case No:	19.4.23
Submission Date:	31
No of Pages:	
Fee per Page:	
Urgent Fee (if any):	31.8.23
Total Fee (Rs.):	
Date of Completion:	
Date of Delivery:	31/8/23