

Federal Court: No remedy against Muslim adulterer or adulteress in civil courts

Introduction

1. On 01 December 2021, the Federal Court in the case of AJS v. JMH & Another Appeal [2022] 1 CLJ 331 had ruled, by a 2-1 majority decision, that a Muslim adulterer or adulteress cannot be made a party, and cannot be condemned in damages for adultery in the civil courts.

Background

2. These appeals stems from a matrimonial dispute concerning a non-Muslim couple whereby in July 2019, the wife ("**AJS**") filed a petition for judicial separation ("**petition**") in the High Court naming her husband as the respondent and pursuant to rule 11 of the Divorce and Matrimonial Proceedings Rules 198, a third party ("**JMH**"), who is a Muslim, as the co-respondent. In her petition, AJS pleaded, *inter alia*, that her husband was having an adulterous relationship with JMH and accordingly, pursuant to section 58 Law Reform (Marriage and Divorce) Act 1976 ("**LRA**"), sought a relief that JMH be condemned in damages for the adultery.
3. In August 2019, JMH filed an application to strike out the petition against her ("**application**"), and to expunge certain paragraphs in the petition containing allegations of adultery on the grounds that (i) in view of section 3(3), the LRA does not apply to a Muslim, and (ii) that an alleged adulteress may only be cited in a petition for divorce and not in a petition for judicial separation. On 27 November 2019, the High Court allowed JMH's application and held that:
 - 3.1. It is only in a petition for divorce can individual(s), Muslim or otherwise, be named as a co-respondent and the court can order the co-respondent to pay damages if the petitioner successfully proves adultery between the respondent and the co-respondent;

- 3.2. However, a co-respondent, whether a Muslim or otherwise, cannot be named as a co-respondent in a petition for judicial separation as section 58 LRA does not empower the court to condemn a co-respondent for damages in a judicial separation.
4. In a nutshell, the High Court ruled that when there are allegations of adultery against a Muslim, he / she can be made a co-respondent in the civil courts, and can be condemned in damages if the petitioner succeeds in proving the adultery. However, this can only be done in divorce proceedings under section 54 of the LRA and not in proceedings for judicial separation under section 64 of the LRA.
5. AJS and JMH both being dissatisfied with part of the decision of the High Court appealed to the Court of Appeal, AJS appealed on the ground that the High Court erred in holding that a co-respondent cannot be named in a petition for judicial separation whereas JMH appealed on the ground that the High Court erred in holding that a Muslim may be named as a co-respondent in divorce proceedings. On 06 July 2020, the Court of Appeal unanimously dismissed AJS's appeal and allowed JMH's appeal by deciding that pursuant to Section 3(3) of the LRA, including the provision on condemning an adulterer or adulteress for damages, the LRA is not applicable to Muslims.
6. AJS was dissatisfied with the decision of the Court of Appeal and obtained leave to appeal to the Federal Court on the following two (2) questions of law:
 - 6.1. Whether section 3(3) of the Law Reform (Marriage and Divorce) Act 1967 precludes a non-Muslim petitioner from citing a Muslim as a co-respondent on an allegation, *inter alia*, of adultery to a petitioner for judicial separation under section 64 of the LRA, having regard to the decision of the Malaysian Supreme Court in Tang Sung Mooi v Too Miew Kim [1994] 3 MLJ 117; and
 - 6.2. Whether a Court when interpreting section 3(3) of the LRA should have regard to the presumption that Parliament does not intend to legislate in

violation of Articles 5(1) and 8(1) of the Federal Constitution, having regard to the cases of *ML Kamra v New India Assurance* AIR 1992 SC 1072 and *Durga Parshad v Custodian of Evacuee Property* AIR 1960 Punjab 341.

Majority Decision of the Federal Court

7. The principal issue before the Federal Court was on the interpretation of the words in Section 3(3) of the LRA which reads as follows:

“3(3) This Act shall not apply to a Muslim or to any person who is married under Islamic law and no marriage of one of the parties which professes the religion of Islam shall be solemnized or registered under this Act; but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under section 51 from granting a decree of divorce on the petition of one party to a marriage where the other party has converted to Islam, and such decree shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam.”

8. The Federal Court in answering the 1st question in the affirmative, thus dismissing AJS's appeal held that:

8.1. The literal interpretation being the first and foremost rule of construction must be applied when interpreting the words *“This Act shall not apply to a Muslim”* and when such interpretation is applied, even when construed in light of the object and purpose, and legislative history of the LRA, clearly excludes a Muslim in *toto* from the application of the LRA.

8.2. The object of the LRA is also to clearly separate the personal laws of a Muslim and non-Muslim in Malaysia and allowing AJS to cite JMH in the civil courts could impact JMH's personal laws as she could be charged in the Syariah Court for the offence of *khalwat* and for instigating the

husband to neglect his duties to AJS, which will in turn lead to double jeopardy.

- 8.3. The court's power under section 58 LRA to condemn a co-respondent in damages for adultery is a power conferred unto the court as part of a non-Muslim personal law and a Muslim cannot be cited and condemned in damages as it will tantamount to enforcing non-Muslim personal laws on a Muslim, just like how a non-Muslim cannot be cited in the matrimonial proceedings of a Muslim in the Syariah courts by virtue of the clear demarcation of jurisdiction under article 121(1A) of the Federal Constitution. Instead, the non-Muslim party can lodge a complaint with the religious authority against the Muslim adulterer or adulteress as intercourse out of wedlock and *khalwat* is a Syariah criminal offence.
- 8.4. There was no reason to answer the 2nd question in view of the distinct demarcation of the personal laws of a Muslim and non-Muslim as well as the literal interpretation of the words in section 3(3) LRA which does not violate article 5(1) and 8(1) of the Federal Constitution.

Dissenting Judgment of the Federal Court

9. Nallini Pathmanathan FCJ in delivering the dissenting judgment of the Federal Court held that:
 - 9.1. When interpreting a statutory provision, the Court must first apply section 17A of the Interpretation Acts 1948 and 1967, even when it appears that there is no ambiguity in the provision, so as to interpret such provision in its full and proper context, rather than *in vacuo*, and at the same time, taking into account the purpose and object of the act. It is insufficient to apply the literal rule and conclude that as there is no ambiguity, there is no necessity to look further into the purpose and object of the Act.
 - 9.2. When the words "*shall not apply to a Muslim*" are considered in the context of the meaning and purpose of the LRA, it means that

monogamy or the registration and dissolution of non-Muslim marriages under the LRA cannot be applied to a Muslim. However, if the LRA or any of its provisions are not being applied to a Muslim for the purposes of registering or dissolving a marriage, or matters ancillary to such marriage, then, the application of other collateral matters to a Muslim is not precluded or prohibited, including citing JMH as a co-respondent as she is merely incidental to the dissolution of the marriage between AJS and her husband.

- 9.3. JMH was not being made to comply with the monogamous provisions nor any other provisions relating to the registration or dissolution of marriage in the LRA because she was not privy to the marriage in issue. Instead, she was merely a third party cited to prove the breakdown of the non-Muslim marriage which in no manner contravenes article 121(1A) of the Federal Constitution.
- 9.4. There is also no issue of double jeopardy in relation to JMH's personal law as the Syariah Court does not act on the findings of adultery by the civil courts. Instead, an independent investigation is undertaken and stringent evidence is required to establish *zina* including, *inter alia*, the confession of both parties to the act, and / or eyewitness testimony of four (4) males who are of justifiable and credible character. Similarly, the issue of double jeopardy also does not arise when damages are awarded, if any, as it is compensatory and not punitive, for the loss of spouse as a result of the adultery. On the contrary, not being able to name JMH precluded AJS from seeking any remedy on the allegations of adultery.
- 9.5. The crux of the appeal was whether a literal and grammarian interpretation or a contextual and purposive approach is to be applied when interpreting the words "*shall not apply to a Muslim*" within section 3(3) LRA and in this case, the latter was applicable.

Conclusion

10. In view of the majority decision of the Federal Court, the law is now settled in that the LRA does not apply to Muslims in *toto*, including on allegations of adultery. Therefore, when the alleged adulterer or adulteress is a Muslim, the petitioner, either in a petition for divorce or judicial separation, can only particularise the allegation of adultery without citing the alleged Muslim adulterer or adulteress as a co-respondent. The petitioner cannot also seek damages against the alleged Muslim adulterer or adulteress even if the adultery can be proven beyond reasonable doubt. Nevertheless, it does not preclude the alleged Muslim adulterer or adulteress from being subpoenaed to attend the trial of a petition as a witness.

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