IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Misc. Application No.617 of 2025

Applicant	:	Mst. Shagufta w/o Abdul Hafeez through Mr. Zafarul Haq, Advocate
		versus
Respondent No.1	:	Abdul Hafeez s/o Deen Muhammad Malik through Mr. Masood Ahmed, Advocate
Respondent No.2	:	SHO PS Korangi No.4, Karachi Through Ms. Amna Ansari, APG
Date of Hearing	:	29.08.2025
Date of Decision	:	29.08.2025

O R D E R

Jawad Akbar Sarwana, J.: This Criminal Miscellaneous Application has been filed by the applicant-Mst. Shagufta against the impugned Order dated 12.06.2025 passed by learned Vth Additional District Judge Karachi East in Habeas Corpus Petition No.259 of 2025.

2. The lis filed under the garb of Section 491 Cr. P.C. before the District Court, and this bench, essentially, remains a family dispute between a couple, a husband and wife, who remain legally married to each other (although this is their second marriage) over matters of guardianship/custody of the minor children, and maintenance of applicant-Shagufta. Additionally, the issue of paternity of one [Rukhsar] of the four (4) minor children is also in dispute. The applicant is aggrieved about the District Court handing over the custody of the detenues to the respondent no.1. Thus, as this bench takes up and passes this Order, it is well aware of the limited scope of interference in the ancillary subject-matter involved in the lis, given the statutory contours of Section 561 Cr. P.C. when considering an appeal against an order concerning a habeas corpus petition.

3. According to Counsel submissions and confirmation to this Court by the spouses, the applicant-Mst. Shagufta is currently employed in Karachi as a housemaid, whereas respondent no. 1, Abdul-Hafeez, who permanently resides in Ghotki Village, is a traffic constable stationed in Karachi and assigned to duties in the city. The four (4) minor detenues were brought from Ghotki Village today, where they are/were residing with the mother of respondent no.1, the grandmother/Dadi of the children, who was/is looking after them in Ghotki, along with the assistance and help of the first wife of respondent no.1, who resides at the same residence as the children in Ghotki. The first wife of respondent no.1, who is/was also present in Court today, and respondent no.1, have no children of their own.[1]

4. A perusal of the record available in this lis indicates that, as per the title of the application filed under Section 491 Cr. P.C., the applicant-Shagufta sought production of five (5) detenues, but after it's filing, it was/has been observed in paragraph 5 of the impugned Order dated 12.06.2025, that one of the detenues, Ahtesham, was found to be already in the custody of the applicant-Shagufta, and additionally, was confirmed as the eldest born child, a son, from the first marriage of the applicant with Muihammad Amjad, therefore, this application under Section 561 Cr.P.C., lists only four (4) detenues in the title of the application, namely:

(i.) Shayan, aged about 03 years,
(ii.) Noor Fatima, aged about 02 years,
(iii.) Muhammad Rehan, aged about 01 year, and
(iv.) Rukhsar is about 05 years old.

5. During the course of arguments on 21.08.2025, counsels had submitted that it was common ground that the applicant's first marriage was with one Muhammad Amjad, out of which

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[1] As recorded by this bench in its Orders dated 06.08.2025 and 21.08.2025.

wedlock they had two children, namely one son Ahtesham (seven years old) and another child. They were at ad idem, that Ahtesham was inadvertently reflected as the son of Abdul Hafeez (respondent No.1). Counsels accepted the contents of paragraph 5 of the impugned Order to the extent that Ahtesham is/was the son of the applicant's first husband Muhammad Amjad. With regard to the detenue, five years old, Rukhsar, based on the certificate of Rukhsar available on page 37, it was initially argued on the last hearing date that she was the daughter of Abdul Hafeez (respondent No.1). However, on further probe, Counsels conceded then, as this bench reviewed the documents available on record, that the applicant-Mst. Shagufta got khula from her first husband on 04.08.2021 and got married with her second husband, respondent no.1-Abdul Hafeez on 07.12.2021; that Rukhsar is/was the daughter of Muhammad Amjad and not Abdul Hafeez (respondent No.1). Rukhsar was born on 04.11.2020, before the second marriage of the applicant, when she was still married to her first husband, and even before she filed her khula application in the year 2021. These observations are/were part of the Court's Order dated 21.08.2025, when the bench directed respondent no.1 to obtain the NADRA Family Registration Certificate ("FRC").

6. Today, 29.08.2025, on the very next hearing date, Counsel for the respondent no.1-Abdul Hafeez has reneged from his submissions as recorded on the previous hearing date. He submits today that the applicant, Shagufta, had two children from her first marriage, and that both were sons. The daughter, Rukhsar, is not the daughter of applicant-Shagufta and her first husband, Muhammad Amjad. Rukhsar is the firstborn of the applicant and respondent no.1 – born before the wedlock of the present couple. Counsel for respondent no.1 submits that the document with regard to the birth of the child available on page 37 of the application is, in fact, a Polio Vaccination Card, which is not a public document that this bench can rely upon, and, further, the date of birth mentioned therein is also not correct. The applicant-mother of Rukhsar, present in person and the Counsel for the applicant vehemently deny the assertions made by respondent no.1

and his Counsel. They contend that respondent no.1, Abdul Hafeez, is not the father of Rukhsar, and she is being illegally detained by respondent no.1.

7. This bench has perused the impugned Order passed by the District Court and Para-6 of the said Order records that the applicant has two children from her first marraige, but it does not state the gender of the children, except that Ahtesham is one of the two children. The paternity of Rukhsar has not been challenged by respondent no.1 since her birth. Article 128 of the Qanun-e-Shahadat Order, 1984, states that where a child is born during the continuance of a valid marriage between his mother and any man and not earlier than the expiration of six lunar months from the date of the marriage or within two years after its dissolution, while the mother remains unmarried, it shall be the conclusive proof that s/he is the legitimate child of that man. In the present case, Rukhsar was born in the year 2020, when the applicant was married to her first husband, Muhammad Amjad. Thus, she was born more than 12 months before her biological mother's second marriage with the respondent no.1. It is a trite principle of Muslim law that the paternity of a child born in lawful wedlock carries the presumption of truth. It cannot be refuted by simple denial.[2] The law tends to favour the presumption of paternity over that of illegitimacy.[3] Accordingly, a child born during wedlock has the father's parentage. There is no need for an express acknowledgement or an affirmation.[4] The legitimacy of a child cannot be questioned merely because of the father's claim without any evidence to substantiate the same.[5] This entire controversy may well require DNA testing, but, even otherwise, the Supreme Court of Pakistan in *Muhammad Nawaz v. Additional District and Sessions Judge and Others*, PLD 2023 SC 461, has held that resort to DNA testing may be made depending on the facts and circumstances of the case where the evidence produced by both parties is

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[2] *Muhammad Arshat v. Sughran Bibi*, PLD 2008 Lah 302.
[3] *Muhammad Nazir v. Ali Muhammad*, 2003 SCMR 1183.
[4] *Abdul Rashid v. Safia Bibi*, PLD 1986 FSC 10.
[5] *Sharafat Ali Ashraf v. Additional District Judge, Bahawalpur*, 2008 SCMR 1707.

evenly balanced that no conclusion can be drawn or where the party upon whom the onus lies has not produced any evidence. In the circumstances brought on record, respondent no.1 cannot question the paternity of Rukhsar by asking for a DNA test after more than 5 years of her birth[6] and, that too before this bench, exercising jurisdiction under Section 561 Cr.P.C. Suffice to say this entire matter may require resolution before the proper forum, which this bench is not, except that based on the material available, and looking at the welfare of the child, the tentative provisional view of this bench is that, five years old, Rukhsar, is the applicant-Shagufta's daughter born during her wedlock with her first husband, Muhammad Amjad. Earlier, the bench also ordered respondent no.1 to submit his NADRA-verified FRC to show that he is the father of Rukhsar, but he has not submitted it. Yet, at the time, he confirmed to the bench that Rukhsar was five years old. Therefore, until the proper forum finally decides Rukhsar's paternity, Rukhsar's custody shall remain with her biological mother, and she cannot reside with the present husband of the applicant respondent no.1, Abdul Hafeez.

8. This bench now turns to the remaining detenues, namely:

(i.) Shayan, aged about 03 years,
(ii.) Noor Fatima, aged about 02 years,
(iii.) Muhammad Rehan, aged about 01 year, and

9. During the arguments, both Counsels conceded that Noor Fatima (girl) and Muhammad Rehan (boy) are twins. Furthermore, it is common ground that the parties are married, and there is no allegation of immoral turpitude against either of them in the pleadings. These admissions are critical, as they demonstrate, albeit prima facie and perhaps tentatively for the time being, the parents' motivation to keep the doors of reconciliation open. Further, as the couple remains married, the responsibility of a husband and father to support his wife and children cannot be ignored. Given this background and the

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[6] See *Ghazala Tehsin Zohra v. Mehr Ghulam Dastagir Khan*, PLD 2015 SC 327.

observations made above, this bench now turns to the impugned Order passed by the learned District Judge, viz. Shayan (3 years old), and the 2 years old, twins, Noor Fatima and Muhammad Rehan.

10. The learned District Judge in the impugned order ordered the continuation of custody of the minors to remain undisturbed and with the respondent no.1, as it was when the applicant filed application under section 491 Cr.P.C. and found that looking at the welfare of the minors, the Guardian Court, is/was the appropriate forum to decide the issue of custody of minors ultimately. However, it is apparent from the impugned Order that the District Court has made certain assertions that require review until the matter is taken up by the competent Court and finally resolved. First, for the reasons already discussed above, based on the documents and the parties' contentions, Rukhsar cannot remain with the respondent no.1. Second, it is an admitted position that the detenues are not living with their biological father in Karachi but are residing with their Dadi and stepmother in Gothki Village. Therefore, between the biological mother and the Dadi, the mother takes precedence over the Dadi in terms of custody. Thus, legally, the applicant and respondent no.1's children, on this ground, should be residing with the applicant. Third, even if the mother is working as a housemaid and is separated from her husband, respondent no.1, she remains legally married to him. As such, the respondent no.1 is legally bound to support his wife and children, which is also a matter of importance, and the proper forum should decide this subject matter. Meanwhile, the applicant-mother cannot be penalised for her current financial position, and handing the detenues to respondent no.1, is not justified on this ground, as the actions of respondent no.1, her husband, not to support his wife and children, may well have apparently led to her current financial predicament. The presumption in favour of the wife-mother is that she is entitled to support from her husband and the father of her children, and respondent no.1 has not shown that the applicant's current condition is inspite of the support extended to her by her husband (the respondent no.1). Indeed, the Court also has to be aware that if, in fact, the applicant was looking

weak, it may be because her legally married spouse has stopped providing financial support to her. In the circumstances, even if the applicant was looking weak, this may not be a fair consideration to hand over the custody of all the detenues to the respondent no.1.

11. The District Court also observed that the applicant-mother looked “depressed”. This was apparently one of the factors to hand custody of the detenues to the respondent no.1. The Court should exercise caution when making observations based on the demeanour of the parties, considering only what the Court can hear and see. The word “depression” has an ordinary meaning and is also a clinical term. In the ordinary sense, “depression” could mean a range of emotions from suffering (agony and hurt), sadness (depressed and sorrow), disappointed (dismayed and displeased), shameful (regretful and guilty), neglected (isolated and lonely), and despair (grief and powerless). As a medical term, according to the current, authoritative manual for classifying mental disorders, published by the American Psychiatric Association (APA) in 2022, that is, the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision (DSM-5-TR), the term “depressed” state isn't a standalone diagnosis but is a core feature of depressive disorders, which are characterized by a persistent feeling of sadness or emptiness and a loss of interest or pleasure in activities, along with somatic and cognitive changes that impair functioning. Key symptoms also include changes in appetite/weight, sleep disturbances, fatigue, psychomotor changes, feelings of worthlessness or guilt, and difficulty concentrating. As Judges and judicial officers, it is safe to say that most of us possess neither the skills nor the competency to make a finding on a depressed state of a litigant, either in the ordinary sense of the word or in a clinical sense, based on purely visual identification and a brief conversation with the parent on one or two hearing date(s). Nor does the courtroom provide a calm and peaceful atmosphere, creating an environment conducive to making such a determination based on demeanour. In the backdrop of such a setting, for those unfamiliar with a courtroom, the state of emotions of litigants inside a courtroom may be closer to fear, anger, sadness, or surprise, making them feel depressed.

Therefore, the District Court's observation concerning the demeanour of the applicant being "depressed" in the courtroom and to hand the detenues to respondent no.1 on this basis, needs reconsideration in the context of the environment inside the courtroom and the range of emotions a litigant experiences inside the courtroom as discussed hereinabove.

12. Finally, Para 352 of the Muhammadan Law provides the mother is entitled to the custody (Hizanat) of her male child until he has completed the age of 7 years and of her female child until she has attained puberty, etc. While it has been construed by the Courts in Pakistan that this may not be an absolute rule, and it may be departed from, if there are exceptional circumstances to justify such departure, yet, in making such a departure, the only fact that the Court has to see is where the welfare of the minor lies. In this connection, this bench has already gone through multiple factors considered by the District Court, and none appear to support the complete surrender and handing over of all the detenues to the respondent no.1, alone.

13. Thus, the District Court's observation that the minors are appearing to be happy and healthy in the Court Room and that the applicant is appearing to be weak and depressed, and because of the job of the respondent no.1, are misconcieved, viz., the ancillary matter of handing over all the detenues to the respondent no.1 while deciding an application under Section 491. Cr. P.C. Indeed, this bench, while considering the welfare of the minor and notwithstanding the father's right for custody under Muslim personal law, is inclined to split the four children down the middle along gender lines, such that the applicant-mother gets custody of the two girls and the respondent no.1-father retains custody of the two boys. This division of custody between the parents, based on a 50:50 split, aims to partially satisfy the emotional needs of each parent and child, as the case may be, while also triggering practical issues to prompt the parents to approach the proper forum, for guardianship/custody and/or maintenance, sooner rather than later, to secure the welfare of the children.

14. Given the above, the impugned Order passed by the District Court is upheld subject to the issues of guardianship/custody to be decided by the Guardianship Court/Family Court and, for the reasons discussed hereinabove, and until such time, the impugned Order is modified to the extent of the guardianship/custody of the detenues as follows:

(a) the minor daughter of the applicant and respondent no.1, Noor Fatima (2 years old), and the minor daughter of the applicant and her first husband, Rukhsar (5 years old), are handed over to the applicant Shagufta, who will retain custody of the two; and,

(b) the minor boys, of the applicant and respondent no.1, Shayan (3 years old) and Muhammad Rehan (2 years old), will remain in the custody of the respondent no.1 father in Karachi.

15. Since the matter of custody, including paternity, requires the recording of evidence and findings of fact to be recorded by a Court of competent jurisdiction, the observations of this bench shall be treated as tentative and confined only to the impugned order and will not in any manner whatsoever influence the Guardian Court/Family Court, who shall decide the matter by independent application of mind to the facts, circumstances and the evidence before the same.

16. The application is disposed of in the above terms.

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