

ORDER SHEET
HIGH COURT OF SINDH, CIRCUIT
COURT, HYDERABAD

Cr. Bail Application No. S- 510 of 2021

DATE	ORDER WITH SIGNATURE OF JUDGE
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Applicants: Abdul Rehman and others
Through Mr. Nazeer Ahmed Bhatti, Advocate

Complainant Nazeer Ahmed
through Mr. Ashar Majeed Khokhar, Advocate
who is reportedly unwell.

The State: Ms. Safa Hisbani, Assistant P.G Sindh

Date of hearing & Decision: 01.11.2021

O R D E R

ADNAN-UL-KARIM MEMON, J :- The Applicants through the captioned bail application has called in question the rejection of his Anticipatory Bail Application by the learned Additional Sessions Judge-IV, Dadu vide order dated 12.06.2021.

2. Facts in brief are that on 27.03.2021 complainant Nazeer Ahmed lodged FIR at Police Station Johi, alleging therein that his brother Qurban has gone to Saudi Arabia, who was married with Mst. Benazir (aged about 30/31 years), about 14 years ago and his brother has three children. On 22.03.2021, he, his cousin Ghulam Shabir, his brother-in-law Abdul Sattar, Mst. Benazir and other house inmates were present in the house, when at 1:30 p.m, accused Ashique, Gulsher, Shoukat, Sher Muhammad and Abdul Rehman all armed with pistols entered into their house. Accused Abdul Rehman, Shoukat and Sher Muhammad aimed their weapons upon complainant party, while Ashique and Gulsher dragged Mst. Benazir outside the house, who raised cries. However, accused persons sat Mst. Benazir in black colour car and went away. Complainant party approached the Nekmards, who gave hope for faisla and ultimately refused, hence the FIR bearing Crime No. 26 of 2021 was registered at police station Johi under Section 365-B, 496-A & 376 PPC.

3. Learned counsel for applicants contended that the applicants / accused are innocent and have been booked falsely by the complainant, the FIR is delayed for five days and such delay has not been explained cogently. He has further contended that no specific role is attributed to the applicants. All the prosecution witnesses are in kith and kin and they are inimical to the applicants / accused. He prayed that case against applicants/accused is one of further enquiry; therefore, his bail may be confirmed. In support he relied upon case law reported in 2019 MLD 786, 2009 P. Cr. L J 855 and 2009 P. Cr. L J 312.

4. Learned A.P.G. opposed the confirmation of bail of applicants/ accused and argued that applicants/accused were identified on spot and they are named in the FIR. He argued that applicants/ accused have committed offence which comes within the prohibitory clause of section 497 Cr.P.C, therefore, they are not entitled for confirmation of bail.

5. I have heard learned counsel for the parties and gone through the record.

6. Section 365-B P.P.C signifies the carrying away of a woman by any means with an aim that she may be compelled to marriage or forced or made to illicit intercourse, against her will. The plain reading of the section indicates two main components, firstly, there must be kidnapping or abduction of a woman, and secondly, the first act of abduction and kidnapping must be with the intent that she may be compelled to marriage or be forced or seduced to illicit intercourse.

7. In the instant case, prima-facie the abductee has given two versions of the incident, one before the Police voluntarily on 29.3.2021 and the second one after a considerable period before the learned Magistrate K. N. Shah, which makes the case of the applicants that of further inquiry. On the aforesaid proposition, I seek guidance from the decision of Honorable Supreme Court in the case of Ehsan Ullah vs. The State (2012 SCMR 1137) wherein it has been held by the Hon'ble Supreme Court of Pakistan as under:-

“This shows that in the present case the prosecution itself has two versions vis-à-vis the petitioner, first of the complainant party according to which the petitioner was present at the spot and had

resorted to firing and second of the investigating agency according to which the petitioner was not present at the spot and he was abetting his co-accused from behind the scene. All these considerations surely render the case against the petitioner one of further inquiry into his guilt.”

8. In this regard, guidance can also be sought from the pronouncement of Hon'ble Supreme Court of Pakistan in case of *Zaigham Ashraf versus State, etc.* (PLJ 2016 SC 14), wherein the Honorable Supreme Court has been pleased to observe as under:-

“Keeping in view the two conflicting versions; one given by the complainant in the FIR and the other by the Investigating Agency based on documentary evidence with regard to the plea of alibi, the case of the present petitioner has become certainly one of further inquiry, falling within the ambit of sub-section (2) of Section 497, Cr.P.C., where the grant of bail becomes the right of accused and it is not a grace or concession, to be given by the Court. In the absence of any exceptional ground or reason, denial of bail in such a case would amount to exercise a discretion in a manner, not warranted by law and principle of justice.”

9. Before parting with this order, it is important to note that the Honorable Supreme Court in its recent pronouncement has held that the courts below have not been exercising their discretion while declining bail to the accused, under subsection (1) of Section 497 Cr. P.C, under the principle of law enunciated by the Honorable Supreme Court regarding grant of bail in offenses not falling within the prohibitory clause of that subsection. It is further held that the learned courts below simply relied, for declining bail, on the incriminating material available on the record to connect the accused with the commission of the offenses alleged. Though it is well-settled law that if the offenses alleged against the accused do not fall within the prohibitory clause of subsection (1) of Section 497 Cr. P.C and thus attract the principle that grant of bail in such offenses is a rule and refusal an exception; and, as authoritatively enunciated by the Honorable Supreme Court in its several cases.

10. Besides the above the main purpose of keeping an under-trial accused in detention is to secure his attendance at the trial so that the trial is conducted and concluded expeditiously or to protect and safeguard the society if there is an apprehension of repetition of offense or commission of any other untoward act by the accused. Therefore, to make the case of an accused person fall under the exception to the rule of grant of bail in offenses not covered by the prohibitory clause of Section 497 (1) Cr. P.C, the prosecution has to

essentially show from the material available on the record, such circumstances that may frustrate any of the said purposes, if the accused person is released on bail. On the aforesaid proposition the Hon'ble Supreme Court has decided the issue in the case of Shahzada Qaiser Arfat alias Qaiser v. The State and another (PLD 2021 SC 708).

11. The basic principle in bail matters in such circumstances or such conduct of the accused person that may bring his case under the exceptions to the rule of granting bail. They include the likelihood of:

- (a) his absconding to escape trial;
- (b) his tampering with the prosecution evidence or influencing the prosecution witnesses to obstruct the course of justice; or
- (c) his repeating the offense keeping in view his previous criminal record or the desperate manner in which he has prima facie acted in the commission of offense alleged.

12. In view of the above, it is also essential to note that a court which deals with an application for grant of bail in an offense not falling within the prohibitory clause of Section 497(1) Cr. P.C must apply its judicious mind to the facts and circumstances of the case and the conduct of the accused person, and decline to exercise the discretion of granting bail to him in such offense only when it finds any of the above-noted circumstances or some other striking circumstance that impinges on the proceedings of the trial or poses a threat or danger to the society, justifying his case within the exception to the rule, as the circumstances mentioned above are not exhaustive and the facts and circumstances of each case are to be evaluated for application of the said principle.

13. The Honorable Supreme Court has already cautioned the learned courts below in Muhammad Tanveer v. State PLD 2017 SC 733, in the following terms:

"Once this Court has held in categorical terms that grant of bail in offenses not falling within the prohibitory limb of section 497, Cr.P.C. shall be a rule and refusal shall be an exception, then the Courts of the country should follow this principle in its letter and spirit because principles of law enunciated by this Court are constitutionally binding [under Article 189] on all Courts throughout the country including the Special Tribunals and Special Courts."

14. In the present case, the learned trial Court has failed to adhere to the principle of law enunciated by the Honorable Supreme Court, as discussed supra, for the exercise of discretion to grant pre-arrest bail.

15. In the light of the principles set forth by the Honorable Supreme Court in pre-arrest bail matters, as discussed supra, the impugned order passed by learned trial Court is thus not sustainable under the law and liable to be reversed on the aforesaid analogy. On the aforesaid proposition, I am fortified with the decisions of Honorable Supreme Court rendered in the cases of Tariq Bashir v. State PLD 1995 SC 34; Imtiaz Ahmad v. State PLD 1997 SC 545; Subhan Khan v. State 2002 SCMR 1797; Zafar Iqbal v. Muhammad Anwar 2009 SCMR 1488.

16. Keeping in view the facts and circumstances narrated above and law on the subject, I am of the considered view that the case of the applicants is of further inquiry fully covered by section 497(2) Cr. P.C entitling for concession of pre-arrest bail.

17. For the aforesaid reasons the interim bail granted to the applicants vide order dated 23.6.2021 is confirmed on the same terms and conditions.

18. The observations made hereinabove are tentative in nature which shall not prejudice the case of either party at trial.

JUDGE

Sajjad Ali Jessar