

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No.1376 of 2023
Criminal Bail Application No.2250 of 2023

Date	Order with signature of Judge
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For hearing of bail application

22.12.2023

Mr. Irshad Ali Shar advocate for the applicant in Criminal Bail Application No.1376/2023

Mr. Arshad Hussain Bhutta advocate for the applicant in Criminal Bail Application No.2250/2023

Mr. Talib Ali Memon, Assistant PG alongwith IO/Inspector Naseem Farooqui PS Gulshan-e-Iqbal Karachi

Through these Criminal Bail Applications, the applicant Deen Muhammad and Mst Safia seek post-arrest bail in FIR No.257/2023 registered under Sections 371-A/371/B read with Section 496-B 109/511 PPC at PS Mubeena Town Karachi. Their earlier bail pleas have been declined by the trial Court vide order dated 15.06.2023 in Criminal Bail Application No.3152 of 2023 on the premise that they were arrested from the spot and the F.I.R was lodged promptly. The private witnesses also witnessed the alleged incident and pointed out the incident to the police party. Accused persons are nominated in the F.I.R.

2. Brief facts of the case as narrated in the FIR are that on 04.6.2023 at 9:10 p.m., complainant/ASI Dur Muhammad was busy in patrolling duty in the area and during patrolling when he reached Ayoub Goth BYCO Pump, where he came to know that at the back side of the street one women namely Nasreen wife of Nazakat Ali with the collusion of the owner of the house namely Irtiza Siddiqui has kept the girls in her flat and they are doing immoral activities against the handsome amount with different people in daily routine. On such information, at about 2110 hours, he along with subordinate staff reached the street of the area and on the pointation of Abdul Wahab Bhutto and Qurban Ali, entered inside the building, wherefrom after seeing police party three persons made their escape good, while some other persons including present applicants have been apprehended. After arresting the applicants, the complainant came back to the police station and registered the case against the applicants.

3. Learned counsel for the applicants / accused has contended that the applicants/accused are innocent and have falsely been implicated in this case by the Police with malafide intentions and ulterior motives. Learned

counsel further stated that it was alleged that the offense took place in broad daylight in a thickly populated area, however, no private *mashir* was associated which is a violation of Section 103, Cr.P.C. He further stated that no warrants were taken for conducting the said raid inside the Flat, a household which is protected by law. He stated that the alleged confessional statements before the police are false and there is a plethora of case law that makes such a confession illegal in the eyes of law and not permissible under the Evidence Act. Learned counsel for the applicant in Criminal Bail Application No.1376/2023 has submitted that the applicant is suffering from liver disease, which is at the final stage, and in support of his contentions he has relied upon the medical report of the applicant. He further submitted that the trial Court has examined two witnesses out of thirteen prosecution witnesses; however, two witnesses have been given up by the prosecution. Learned counsel submits that the witnesses have not supported the prosecution case in their depositions recorded on 20.12.2023, 29.11.2023, and 16.11.2023. Learned counsel representing the applicant in Criminal Bail Application No.2250/2023 submits that there is no specific role of the applicant in the FIR and the applicant is only a maid and has nothing to do with the alleged offense; that there is a dispute between the owner of the subject house and the union; that the alleged offenses are not attracted in the case; Learned counsel emphasized that the alleged offense against the applicant-lady accused does not fall within the prohibitory clause of section 497(1) of the Code of Criminal Procedure, 1898 ("Cr.P.C.") but being a woman, the applicant's case is covered by the first proviso to section 497(1), Cr.P.C. He added that in cases of women accused, etc. as mentioned in the first proviso to section 497(1), irrespective of the category of the offense, the bail is to be granted as a rule and refused only as an exception in the same manner as it is granted or refused in offenses that do not fall within the prohibitory clause of section 497(1), Cr.P.C. He asserted that the exceptions that justify the refusal of bail are also well settled by several judgments of the Supreme Court. It is further contended that the prosecution has added Sections 294/496-B/109/34 and 511 PPC in the Charge Sheet dated 07.7.2023 without evidence. In support of their contentions, they placed reliance upon cases reported in 2014 YLR 1462, 2009 YLR 60, 2008 P.Cr.L.J 856 and 2012 P.Cr.L.J 638. They lastly prayed for a grant of bail to the applicants/accused.

4. Learned APG for the State assisted by IO/Inspector Naseem Farooqui PS Gulshan-e-Iqbal Karachi has opposed this bail application and supported the order passed by the learned Trial Court; that the

applicants failed to show any enmity with police. He next stated that the offenses fall within the prohibitory clause of Section 497, Cr.P.C. He prayed for the dismissal of the instant Criminal Bail Applications.

5. I have heard the arguments of the parties and perused the record and case law cited at the bar.

6. Record reveals that the prosecution has examined three witnesses, which admitted that they did not recover money from the place of the incident and they did not secure incriminating material from the place of the incident about rape, and the area is thickly populated. The Investigating Officer admitted that he did not obtain a search warrant. He admitted that they did not associate any independent person as a witness / *mashir*. He admitted that no incriminating material was secured from the place of the incident except mobile phones and CNIC from the personal search of the accused persons. He admitted that the FIR does not contain the signature of the duty officer. If this is the position of the case coupled with the medical record of the applicant Deen Muhammad, besides the applicant Mst. Safia being the lady accused her case falls within the ambit of *Tahira Batool v. The State* (PLD 2022 SC 7648). It is well-settled law that in the case where the accused is either a minor under the age of 16 years or a woman or a sick or infirm person, even in a non-bailable offense of prohibitory clause in the same manner as bail is granted or refused in offenses of non-prohibitory clause of Section 497(1) Cr.P.C. In such circumstances, this Court is left with no option but to apply the ratio of the case of *Tahira Batool* (supra) and *Mst. Karamat Bibi v. The State* (2022 SCMR 609) and *Mst. Ghazala v. The State* (2023 SCMR 887).

7. Primarily, to decide the prayer for the grant of bail in the exercise of the discretionary power of the Court under section 497(1), Cr.P.C., the availability of sufficient incriminating material to connect the accused with the commission of the offense alleged against his/her is not a relevant consideration. It has been held that "the liberty of a person is a precious right which has been guaranteed under the Constitution of Islamic Republic of Pakistan, 1973. The denial of the same should be such which can establish the guilt of the accused without a second thought". In terms of law laid down by the Supreme Court in the case of *Abbas Raza v. The State through P.G. Punjab and others* (2020 SCMR 1859) and *Mst. Ghazala v. The State* (2023 SCMR 887),

8. The very ingredient of Sections 371-A and 371-B, P.P.C. is that there has to be an intention that the person would be used for

prostitution or illicit intercourse. On perusal of the record, I did not find any written complaint from the public or any oral statement of any independent person of the locality recorded by the complainant to support his version. Nobody from the locality has been associated with the alleged raid proceedings on the information of two persons. Similarly, none from surrounding houses has been examined by the complainant in support of his version. No material evidence is available to show that applicants are involved in buying and selling persons for prostitution, and even the witness in his deposition has admitted that no incriminating material was found except cell phones, therefore, in the circumstances, application of sections 371-A and 371-B, P.P.C. is a matter which requires further probe. Provisions of Sections 371-A and 371-B, P.P.C. only apply to persons who sell or purchase any person with the intent that such person would be used for prostitution or illicit intercourse. When APG was asked about the ingredients of the above two offenses, he had no answer. Besides, neither any search warrant has been obtained nor any notables of the locality have been associated with the alleged. No doubt, the evidence of police officials is as good as private persons but here in this case when the availability of private persons is not denied at the place of arrest and recovery, therefore, the non-joining of private person to witness the event, creates doubt.

9. There is no legal or moral compulsion to keep people in jail merely on the allegation that they have committed such offenses unless reasonable grounds appear to exist to disclose their complicity. The ultimate conviction and incarceration of a guilty person can repair the wrong caused by a mistaken relief of bail granted to him, but no satisfactory reparation can be offered to an innocent man/woman for his/her unjustified incarceration at any stage of the case albeit his acquittal in the long run. The prosecution has the uphill task to prove that in premises where female were present, they indulged in the act of offering their body for promiscuous sexual intercourse for hire to persons who hardly have any reasonable sums in their pockets.

10. Perusal of the FIR also shows that the personal search of the lady accused in this case did not show recovery of any monies. Under these circumstances, in my tentative view, many aspects of the case require further probe. It is settled law of the criminal justice that every accused should be presumed innocent until and unless he/she is found guilty of the alleged charge. It is also settled law that if any doubt is created in a prosecution case, its benefit must be extended to the accused, even at the bail stage.

11. While at the stage of the bail, no deeper appreciation of the fact is permissible, but at the face of it, in my humble view, the case requires further inquiry into the guilt of the accused persons, and for such reasons, I am inclined to exercise the discretion of bail in favor of the applicants and allowed their such bail applications by each one of them furnishing a bail bond in the sum of Rs.50,000/- each with one surety in the like amount to the satisfaction of the trial Court.

12. The trial Court is directed to examine the remaining witnesses on the date of hearing so fixed by the trial Court and conclude the trial within one month. MIT-II is directed to seek compliance of this order within time.

13. It is clarified that the observations made herein are tentative which shall not prejudice the case of either party nor shall they influence the learned trial Court in any manner in deciding the case strictly on merits under law.

JUDGE

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