

ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANO

Crl. Misc. Application No. S-221 of 2023

Date of hearing	Order with signature of Judge
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1. For order on M.A No. 3060/2023. (Urgency Application)
2. For order on office objection.
3. For order on M.A No. 3061/2023. (Exemption Application)
4. For order on M.A No. 3062/2023. (Stay Application)
5. For hearing of main case.

Mr. Muhammad Afzal Jagirani, advocate for the applicant.

Mr. Aitbar Ali Bullo, Deputy Prosecutor General for the State.

Date of hearing : 13-07-2023
Date of order : 13-07-2023

ORDER

KHADIM HUSSAIN SOOMRO, J; Through listed Crl. Misc. Application, applicant Riaz Ahmed Hajwani has assailed the order dated 27.06.2023, whereby learned 1st Civil Judge & Judicial Magistrate, Jacobabad, while taking cognizance of the offence, has joined him as an accused in the proceedings of F.I.R. bearing Crime No.55/2022, for offence under Section 302, 311, 34 P.P.C., registered at P.S Civil Lines, Jacobabad with issuance of non-bailable warrant against him.

2. Brief facts of the prosecution case are that on 01.07.2022 at about 1215 hours, the police party of P.S. Civil Lines, Jacobabad, headed by complainant HC Rasool Bux Buledi, along with his staff, were boarded on government vehicle No.SPE-325 for patrolling purposes. During patrolling, they heard the sounds of gun fire in the street Railway at Jafarabad Muhallah. They reached there, and they identified the accused, namely Riaz Ahmed s/o Imamuddin by caste Hajwani R/o Jaffarabad Muhallah and three unknown persons by open face; they will be identified if they are seen again, who came out from his home along with three unknown persons and had pistols at their hands. The accused, Riaz Ahmed, said to the police party that do not come forward as he had killed his mother, Mst. Abida Parveen on the pretext of Honour killing/Karo Kari with Waheed Murad. Then all accused succeeded and fled away, taking advantage of the narrow streets. The police party got inside the house and saw Mst Abida Perveen, who sustained an injury on the left side of her abdomen; after that

police party shifted the injured to the hospital, where she could not succumb to the injuries. Thereafter police registered the FIR on behalf of the state against the accused person.

3. After the registration of FIR, the investigation was made, and JIT was constituted to conduct an investigation and statements of DWS were recorded and further statements of the complainant. FIR was recommended for its disposal under 'A' class; hence the investigation agency submitted the final charge sheet before the concerned court of law against unknown culprits under "A" class; the learned magistrate passed the impugned order by taking cognizable of the offence U/S 302, 311 PPC against all accused persons including present applicant and ordered NBW to be issued against them, which given to rise to instant application.

4. Learned counsel for the applicant mainly contended that the applicant is innocent and has falsely been implicated; that the police, in order to save the real/actual culprits, have given the name of the applicant; that the impugned order is against the law to the extent of issuance of non-bailable warrants (**NBWs**) instead of issuance of bailable warrants (**BWs**); that the impugned order passed by learned Magistrate was in a hasty manner, who issued coercive process by issuing NBWs against the applicant/accused, which is unwarranted in the eyes of the law, as it is settled principle of law that at a first instance in such like matters BWs are to be issued by the Magistrate; that the applicant is ready to surrender before learned trial Court if the non-bailable warrant is converted into a bailable warrant and he is also ready to execute the bond for his future appearance in case/proceedings within the meaning of Section 91 Cr.P.C. With all these submissions, learned counsel for the applicant/accused urged that the impugned order is not sustainable at law and is liable to be set aside.

5. The learned Additional P.G present in the court in another matter submits that he has got no objection if the non-bailable warrant is to be converted into the bailable one.

6. Heard learned counsel for the applicant and perused the material made available on record with their able assistance.

7. The careful perusal of the record reflects that on 01.07.2022, the present FIR was lodged by complainant, namely, H.C Rasool Bux Buledi, for offence punishable under Section 302, 311, 34 PPC at Police Station Civil Lines,

Jacobabad against the applicant/accused and other unknown co-accused persons, wherein the complainant nominated two unknown accused persons with specific allegation that they all duly armed with deadly weapons committed murder of woman, namely, Mst. Abida, who is real mother of applicant/accused, in the name of honour killing.

8. The precise role allocated to the applicant/accused Riaz Ahmed, who had opened fire on her mother, Mst. Abida Parveen, causing firearm injuries on her abdomen resultantly she passed away. Witnesses are the independent and material who recognized the accused at the crime scene. Furthermore, the medical report of the deceased available on the record, establishes that she was killed by a firearm. The recovery of empty bullets, and blood stained earth from the crime scene was accomplished, proving that death of Abida Parveen was unnatural. The crime scene is located in a densely populated area, at Jafarabad Muhalla in Jacobabad, and the time of the offence is said to be 12:15 pm on a bright sunny day, there is no chance mistake of misidentification. Furthermore, the chemical examiner report on file reveals a positive result of a test done on blood samples from the dead Abida Parveen.

9. A Joint Investigation Team (JIT) was also formed to carry out the investigation, record the statements of DWS and further statements of the complainant, and recommend the FIR for its disposal under 'A' class, for which the statements of DWS have no evidentiary value, and the statements of DWS with affidavit will be decided during the time of trial. Any information regarding a witness or victim recanting their statements during the investigation cannot be relied upon.

10. The tentative appraisal of the material brought on record entails that the present case was registered on behalf of the State. It is also very much evident that the applicant accused, after declaring his mother Mst. Abida as "Kari" with one Waheed Murad, and she was done to death. Such horrific crime is typically expanding like wild wind and contagious fire throughout all of Pakistan, and particularly in the province of Sindh, where one innocent life was recently lost under the excuse of honour killing, which affects society at large. According to data provided by international organizations, one thousand women are murdered every year in this area, pointing to a preponderance of male power. The number of women assassinated in an immoral culture in the name of honour has climbed

by leaps and bounds, with the Human Rights Commission of Pakistan reporting that 900 women were killed in the name of honour in 2012.

11. The Quran words of Allah provide a complete code to human life from cradle to grave. The Quran says "affectionate behaviour for dwelling the couple in tranquility" (Quran 30:21). The Holy Qur'an in Sura XXIV in Sura (NUUR) Verses 4 says: "And those who launch a charge against chaste women and produce not four witnesses, (To support their allegation),--- Flog them with eight stripes; and reject their evidence even after: for such men are wicked transgressors;---". The Allah orders to the respect parents " For your Lord has decreed that you worship none but Him. And honor your parents. If one or both of them reach old age in your care, never say to them 'even' 'ugh,' nor yell at them. Rather, address them respectfully." [17:23]

12. Prophet Muhammad (peace be upon him) teaches, mercy and compassion, the Prophet Muhammad (PBUH) says that "fear God and respect woman" and "the best among you is the one who has best attitude to the women". The Prophet Muhammad (PBUH) stated that "whosoever has a daughter and does not bury her alive, does not insult her, does not favour his son over her, Allah will enter him into Paradise". I would like to cite another beautiful Hadith 837 Book 48 (Sahih Bukhari), narrated by Ibn Abbas reproduce as under:-

": Hilal bin Umaiya accused his wife before the Prophet of committing illegal sexual intercourse with Sharik bin Sahma. The Prophet said, "Produce a proof or else you would get the legal punishment (by being lashed) on your back" Hilal Said, "O Allah's Apostle! If any one of us saw another man over his wife, would he go to search for a proof" The Prophet went on saying, "Produce a proof or else you would get the legal punishment (by being lashed) on your back".

The horrible crimes of Karo and Kari are still being committed in our country despite clear cut commands from Allah and His Rasool, and they are likely to be treated with iron hands just to root them out of our society.

13. Taking a life in the name of "Ghairat" is illegal and unethical, as noted by our Apex court of the country, and no one should be granted the power to do so. The law, religious precepts, and the highest law of the state, all condemn so-called honour killings since they are just murder (Qatl-i-Amd). In the case of

Muhammad Akram Khan v. The State", PLD 2001 SC 96, and the apex court observed as under:-

"Legally and morally speaking, no body has any right nor can any body be allowed to take law in his own hands to take the life of anybody in the name of "Ghairat". Neither the law of the land nor religion permits so-called honour killing which amounts to murder (Qatl-i-Amd) simpliciter. Such iniquitous and vile act is violative of fundamental right as enshrined in Article 9 of the Constitution of Islamic Republic of Pakistan which provides that no person would be deprived of life or liberty except in accordance with law and any custom or usage in that respect is void under Article 8(1) of the Constitution."

14. Reverting to investigation, the I.O determines that the evidence against the accused is insufficient or that there are insufficient reasons to link the applicant to the commission of an offence, the accused may be released under Section 169 of the Criminal Procedure Code. In cases when the Investigating officer has already reached a conclusion concerning guilt or innocence, this Section focuses on whether or not that conclusion can be supported by the facts at hand. For purposes of this Section, the Investigating officer may release the accused only if the Court determines that the evidence recorded by the officer is insufficient to connect the accused to the commission of an offence; otherwise, the officer has no authority to release the accused. In addition, the Court is not bound by the police report submitted according to Section 173 Cr.P.C; rather, the learned magistrate must use his own discretion in evaluating the evidence before him before and pass an order in accordance with the law.

15. Once the Court has "taken cognizance" of a crime, it has the authority to issue process against anybody who was even remotely connected to the act, regardless of whether or not they were identified in the police report or exonerated. In a criminal case, the police do not have the last say. The Magistrate's decision to proceed with a trial after taking cognizance does not indicate guilt or innocence on the part of the accused. When deciding whether or not an offence has been committed, the Magistrate's authority is restricted. The learned Magistrate in this case can issue, summon, warrants in accordance with the facts and nature of the case, despite the fact that the police officer or I.O. had submitted a report that was negative.

16. In response to the learned counsel for the applicant's argument that the NBWs may be converted into BWs so the applicant can surrender to the trial court, it should be noted that the law only requires him to execute the bond for

his future appearance in the case, as defined by Section 91 of the Criminal Procedure Code. The applicant's counsel further argument is not one I concur with. Although the applicant has been charged with a cognizable crime, which provides the punishment under the law is either the death penalty or a life sentence in prison. In this regard, I would like to reproduce Section 91 Cr.PC for the sake of convenience, which reads as under:-

"91. Power to take bond for appearance. When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summon or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court."

17. Now, the only question before me is whether, in response to a case, the accused person should apply for bail under Sections 496, 497, and 498 of the Criminal Procedure Code or whether, in such a case, he should ask to execute the bond for his future appearance before the learned trial Court under Section 91 of the Criminal Procedure Code. In a Summons/bailable warrant/non-bailable warrant issued by a learned trial Court, It is generally assumed that the provisions of section 91 Cr.P.C apply when a complainant or witness responds to the process by appearing in court, but their testimony is not taken down for whatever reason, the case is adjourned, and a bond with or without sureties is taken from them with an undertaking to appear on the next date of hearing. But I must add that this is an incorrect consideration that goes against the letter of this law. In my view, "any person" encompasses not just the accused in a criminal case but also the complainant, any witnesses, and anybody else whose presence is required in court. The purposes of this provision appear to be twofold: first, to allow the court to secure a promise of future appearance from a party present by way of a bond, and second, to apply this scheme uniformly to all parties, including witnesses, accused, and others, who are ordered to appear before the court. Section 91 of Part III, Chapter VI of the Code deals with the basic powers given to the court to persuade the appearance of any person before it and related matters and contains no specific or detailed provisions relating to procedure.

18. However, the fact that an accused and a witness/complainant, who is in court for quite different reasons, are considered the same is puzzling, and Section 91 Cr.PC does not explain this. This led me to believe that an explanation must exist. In my research, I looked again at the Code and found

sections that were added with the intention of making other laws that need elaboration or clarification more effective.

19. Under Section 91, a comparable "bond" is used to assure a person's future appearance in court and can be executed with or without sureties. There is no information on the bond amount, the method of execution and forfeiture, if another recognizance may be performed in place of a bond, etc. It is not made clear that an accused person is included in the term "any person" used in this subsection. At what point in the trial would the accused be required to execute a bond, if at all and whether or not this procedure is limited to the accused's initial appearance in court in response to process issued U/S.204 Cr.P.C. Furthermore, whether this scheme shall release the accused charged with a non-bailable offence from applying for bail, and whether this requirement meant for regulating the appearance of an accused is independent of bail, which too entails the condition of execution of a bond by the accused for his appearance in the court. Unfortunately, it does not appear that a straightforward application of this section will advance my understanding of issues like these. A reading of Chapter XLII of Part IX, Supplemental Provisions, which deals with Bond Provisions, clarifies the ambiguities of Section 91 of the Criminal Procedure Code. Chapter-XXXIX of the same Part, encompassing Sections 496 to 502 of the Cr.PC, addresses all relevant issues pertaining to bail, such as the discharge of sureties, the procedure to be followed in determining whether an offence is bailable or nonbailable, and the necessary procedures in the event of the surety's insolvency, death, or the issuance of a bond by a minor. Therefore, sections 90 and 496–502 Cr.PC must be studied together in order to comprehend the essential components of a bond, its execution, etc. If this clause is given greater weight than the relevant parts of the Code, it follows that they are null and void.

20. As a result of this situation, I have been reading Section 496 of the Criminal Procedure Code, which states that if a person is arrested or detained without a warrant by the Officer in Charge of a police station, or if that person appears or is brought before the court, and if the court is willing to grant bail, then the accused person shall be released on bail. The usage of the phrase "shall be released" in this clause implies that a person accused of a bailable offence will be granted bail as a matter of course. In addition, the court may release an accused upon the execution of a bond for his attendance with or without sureties if it deems this to be in the best interests of justice. But section 497 Cr.PC foresees a different situation in this regard, and reads that a person accused of a

non-bailable offence may be released on bail but shall not be so released if there appears reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for more than ten year. In this provision, the law has been brought into harmony with regard to the release of the accused on bail, and the court's option to discharge the accused on his execution of a bond (available in bailable offences) has been removed. The first proposition is activated when an accused appears in Court or is brought before the Court for a crime that carries a maximum sentence of 10 years or more. The court has an almost unrestrained power to grant bail in such a situation. However, the Court has no such discretion where there are reasonable reasons to suspect his involvement in such an offence (within the scope of the prohibition). Although it is generally accepted that courts have the authority to give bail in such situations, it is a distinct subject on which I do not wish to expand here. Whether the case falls into the first or second category, it is abundantly clear that the accused will not be released from custody until the court exercises its discretion in his favour by granting bail through a judicial order issued under the aforementioned provision of law.

21. The right of an accused to be released on bail, as defined in two ways in the Criminal Procedure Code, Sections 496 and 497. However, the Court has the power to grant bail to him when he either comes voluntarily or is brought before the Court. When a crime is considered bailable under Section 496 of the Criminal Procedure Code, the Court has the authority to release the offender on bail. In the case of a non-bailable offence, however, whether the Court's discretion falls into the first or second category depends on the fulfilment of certain conditions, including, among others, a mandatory notice to the prosecution, a subsequent adjudication to determine the existence or lack thereof of reasonable material/grounds against him, and the exercise of discretion.

22. The presence and release of an accused person in instances involving bailable and non-bailable offences are governed by special provisions in Sections 496 and 497 of the Criminal Procedure Code. Everyone with a stake in a criminal case must appear before a court, according to Criminal Procedure Code Section 91. The more detailed provisions of the law will take precedence over the more broad ones if they address the same topic. The foregoing laws, namely Sections 496 and 497 Cr.PC has a preference over Section 91 Cr.PC, which deals with the identical condition and makes no distinction between a

person required to execute a bond for his appearance in Court. It is only when this section is read in connection with CrPC sections 496, 497 (and 498) that the full scope of the domain is revealed. From this detailed explanation of the Court's expectations, I learn that the accused will not be required to execute a bond to ensure his continued Court appearance unless the Court conducts a formal review to determine the accused's right to remain present in Court without restraint based on the presence or absence of reasonable material against him.

23. Chapter VI, which includes the method for compelling an appearance, is divided into five appendices (A-E). Service inside Pakistan is discussed in Chapter A, service outside of Pakistan in Chapter D, and basic principles for service of process in Chapter E. General provisions regarding the issuance of process to cause the appearance of persons by means of summons, warrants, issuance of proclamations, and attachment of property of the accused if he is untraceable are outlined in this chapter, as is the procedure for service outside Pakistan or a process received from abroad. The many forms of summonses and warrants, the officers with authority to issue them, and the method for serving them were all spelt out in this chapter. Sections 90–93 of Subchapter D are relevant here. The issuance of warrants in lieu of or in addition to summonses is addressed in Section 90, and the court has the authority to require the execution of a bond for the attendance of any person against whom it may issue a summons or warrant in Section 91.

24. If the Court determines that issuing a summons is essential to ensure the presence of the accused, then there is no question that it will do so. However, the Court has the authority to issue a warrant for this purpose if it deems it necessary. Chapter XVII is the starting point for each court case since it is where the necessary paperwork to initiate the case is filed. If the accused failed to appear in Court on the day given in the summons, police would be required to apprehend and bring him before the court immediately. In both cases, the processes will begin once he appears in Court. Even after receiving service of process, the accused is not required to show up in Court. If he obtains bail (with or without sureties) under Section 496, Section 497, or Section 498 of the Criminal Procedure Code, then the trial can formally commence. If he is already in custody, the Court will issue a production order to secure his appearance before it, at which point the proceedings will officially begin. At the commencement of each trial, a charge is framed against the accused that details the allegations and violations against which he will be prosecuted.

25. In a similar situation, in the unreported case bearing Petition Nos.4552, 4563, 4571 to 6237 of 2021, the Hon'able Supreme Court of Pakistan has held that:

"The learned counsel for the respondents have no cavil with the said assertion in view of the fact that the order in question has been passed by this Court. In this view of the matter, the petitions in Schedule-A are converted into appeals and allowed. Consequently, the judgments of the learned High Court of Sindh relating to matters mentioned in Schedule-A are set aside and the petitions are converted into appeals and allowed. All these matters are accordingly remanded to the trial Court with a direction to issue notices to the parties and decide each case on its own merits, in accordance with law, through separate judgments. The accused shall appear before the trial Court and the question of their custody shall be decided by the trial Court on case to case basis through reasoned orders. The petitioners shall continue to remain on bail subject to orders of the trial Court in post remained proceedings.

The learned counsel for the petitioner has also submitted a list of cases, which are mentioned in Schedule-B to this order. In the said cases, learned High Court of Sindh had issued an order directing the accused to furnish bail bonds under Section 91 of the Cr.P.C irrespective of the nature of offence. He maintains that the said order has also been set aside by this Court and it has been held that in cases involving non-bailable offence (Section 91 Cr.P.C) is inapplicable and an accused cannot seek relief merely by furnishing bail bonds. In view of the fact that the judgment of Five Member Bench of this Court is in field, the learned counsel for the respondents do not contest this assertion either. In this view of the matter, the petitions mentioned in Schedule-B are converted into appeals and allowed. Consequently, the judgments of the High Court of Sindh, referred in Schedule-B, are also set aside and petitions are converted into appeals and allowed. All these matters are remanded to the trial Court with a direction to issue notice to the parties and thereafter decide each case on its own merits, in accordance with law.

With the consent of the learned counsel for both sides, it is directed that notices shall be issued by the trial Court within a maximum period of 45 days from the date of this order. Till such time, all those persons who have been admitted to bail shall continue to remain on bail, and the question of their liberty/custody shall be subject to order of the trial Court(s) in post remain proceedings."

26. In view of above, the non-bailable warrant issued by learned Magistrate against the applicant is converted into a bailable warrant in sum of rupees 50000/ ,enabling him to surrender before learned trial Court. However, since the

applicant is nominated in the non-bailable offence, the question of custody of the applicant on his appearance before the Court shall be decided by learned trial Court. The case law which is relied upon by learned counsel for the complainant being on distinguishable facts and circumstances of the case is not helpful to his case.

27. The instant Crl. Misc. Application is disposed of in above terms alongwith listed applications.

Judge