

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

(1)Cr. Bail Appln. No. S- **372** of **2024**.

Applicant : Rustam Magsi present in person(on interim bail).
The State : Through Mr. Ghulam Asghar Khichi, DAG and
Mr. Oshaque Ali Sangi, Asst. Attorney General.

(2)Cr. Bail Appln. No. S- **376** of **2024**.

Applicant : Rameez Ali Jamali present (on interim bail).
through Ms. Faiza Khursheed Chandio, Advocate.
The State : Through Mr. Ghulam Asghar Khichi, DAG and
Mr. Oshaque Ali Sangi, Asst. Attorney General.

(3)Cr. Bail Appln. No. S- **390** of **2024**.

Applicant : Mst. Hidan Khatoon Brohi,
through Mr. Mehboob Ali Thaheem, Advocate.
The State : Through Mr. Ghulam Asghar Khichi, DAG and
Mr. Oshaque Ali Sangi, Asst. Attorney General.

Date of hearing : **20.11.2024**.
Date of Order : **20.11.2024**.

O R D E R

Arbab Ali Hakro, J.- By this common order, I intend to dispose of Cr.B.As. No.S-372/2024 and S-376/2024, moved on behalf of applicants/accused Rustam and Rameez respectively, for bail before arrest and Cr.B.A. No.S-390/2024, moved on behalf of the applicant/accused Mst.Hidan Khatoon for bail after arrest, as they have arisen out of one and same crime bearing No.47/2024, registered at P.S FIA Composite Circle, Larkana, for offence under Sections 34, 420, 468, 471, 109, PPC r/w Sections 13 & 14 of Foreigners Act, 1946.

2. Having been declined the prayer for grant of pre-arrest bail to applicants Rustam Magsi and Rameez Ali Jamali vide order dated 25.06.2024 and the plea for grant of post-arrest bail of applicant Mst. Hidan Khatoon vide order dated 14.6.2024 by the Court of learned VI-Additional Sessions Judge, Larkana, they have approached this Court with the same pleas.

3. Facts of the prosecution are mentioned in detail in the memo of bail applications, therefore, the same need not to be reproduced hereunder.

4. Learned Counsel for the applicants submit that the offence under Sections 13 & 14 of the Foreigners Act carrying a punishment of 05 years does not fall within the prohibitory clause of section 497, Cr.P.C. The roles of applicants Rustam Magsi and Rameez Ali Jamali, who are not nominated in the FIR, have not been described, and they have not committed any offence. Learned counsel for the applicant Mst.Hidan Khatoon submits that she was arrested on 6.6.2024; to date, no final challan has been submitted. Reliance is placed on the cases reported in **2003 MLD 165, 2002 PCr.LJ 168** and **2003 PCr.LJ 1903**.

5. The learned DAG, assisted by the learned Assistant Attorney General, does not dispute that the applicants Rustam and Rameez Ali are not nominated in the FIR, and no role has been assigned to them. As far as applicant Mst.Hidan Khatoon is concerned, they submit that she is nominated in the FIR with the specific role of facilitating foreigners; therefore, she is not entitled for concession of bail.

6. It appears that applicants Rustam and Rameez Ali are not nominated in the FIR; however, during the investigation, they were implicated in the instant case on the basis of statement of co-accused Suleman and Wahab (both Afghan citizens), who stated that they had come from Afghanistan via Taftan Border and met with applicants Rameez Ali and Rustam, being their alleged handlers, who then introduced them to applicant/accused Mst. Hidan Khatoon and she acted as their mother in obtaining the Pakistani Passport. Apparently, such statement of co-accused before the police/FIA *prima facie* is inadmissible in terms of Articles 38 & 39 of the Qanoon-e-Shahdat Order, 1984. For the purpose of facilitation, Articles 38 and 39 of the Order *ibid* are reproduced as under:-

38. Confession to police-officer not to be proved. No confession made to a police-officer shall be proved as against a person accused of any offence.

39. Confession by accused while in custody of police not to be proved against him. Subject to Article 40, no confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

7. Bare reading of the above provisions of law it manifests that Article 38 of the Order prohibits the admissibility of a confession made to a police officer if proven against the accused. Similarly, Article 39 states that a confession made by an accused to a police officer is not admissible as evidence against that accused. This principle is rooted in the concern that confessions obtained by police may be coerced or unreliable, and therefore, they cannot be used to establish guilt. Given these provisions, *prima facie*, the statements of co-accused Suleman and Wahab at this stage cannot be considered admissible evidence against present applicants Mst. Hidan, Rameez Ali and Rustam, thus, the case against applicants requires further enquiry to ascertain their involvement in the alleged offence. Reliance in this regard is placed on the case law reported as **"Raja Muhammad Younas v. The State" (2013 SCMR 669)**, wherein the Hon'ble Supreme Court of Pakistan has held as under:-

"After hearing the counsel for the parties and going through the record, we have noted that the only material implicating the petitioner is the statement of co-accused Anjad Mahmood, Constable. Under Article 38 of Qanun-e-Shahadat Order, 1984, admission of an accused before police cannot be used as evidence against the co-accused."

8. Similarly, in the case tilted as **"Muhammad Sarfraz Ansari vs. The State and others " (PLD 2021 SC 738)** Hon'ble Supreme Court of Pakistan has observed as under:-

"3. We have heard the learned counsel for the parties and have gone through the record of the case. We have noticed that the petitioner is not nominated in FIR; he has rather been implicated in the case by the co-accused Waqar Aslam, the prima facie beneficiary of the alleged fraud, in his confessional statement during investigation, which has been relied upon by the learned counsel for the State to oppose the prayer of the petitioner for bail. No doubt, as per Article 43 of the Qanun-e-Shahadat Order, 1984 when more persons than one are being jointly tried for the same offence and a confession made by one of such persons admitting that the offence was committed by them jointly, is proved, the Court may take into consideration the confessional statement of that co-accused as circumstantial evidence against the other co-accused(s). However, this Court has, in several cases, held that

conviction of a co-accused cannot be recorded solely on the basis of confessional statement of one accused unless there is also some other independent evidence corroborating such confessional statement. The principle ingrained in Article 43 of the Qanun-e-Shahadat is applied at the bail stage and the confessional statement of an accused can lead the Court to form a tentative view about prima facie involvement of his co-accused in the commission of the alleged offence; but as in the trial, at the bail stage also, the prima facie involvement of the co-accused cannot be determined merely on the basis of confessional statement of other accused without any other independent incriminating material corroborating the confessional statement.

9. The case of prosecution is based on documentary evidence; hence, its genuineness or falsehood would be determined by the trial Court after recording the evidence at the time of trial. Furthermore, the prosecution has not demonstrated that the applicants are likely to abscond or tamper with evidence if released on bail. Even otherwise, the alleged offence does not fall within the prohibitory clause of Section 497, Cr.PC and the case against the applicants require further enquiry in terms of sub-section (2) of Section 497, Cr.PC and the final challan has not yet been submitted.

10. Accordingly, these bail applications are allowed. The interim pre-arrest bail granted to applicants Rustam Magsi on 02.07.2024 and Rameez Ali Jamali on 04.07.2024 is hereby confirmed on the same terms and conditions, whereas applicant Mst. Hidan Khatoon is granted post-arrest bail, and she is directed to be released on bail on her furnishing solvent surety in the sum of Rs.50,000/- (rupees fifty thousand only) and P.R. Bond in the like amount to the satisfaction of trial Court.

JUDGE

Qazi Tahir PA/*