

ORDER SHEET
IN THE HIGH COURT OF SINDH KARACHI

Cr. Bail Application No. 697 of 2022

DATE	ORDER WITH SIGNATURE OF JUDGES
<u>For hearing of bail application.</u>	
<u>28th April, 2022</u>	
<p style="text-align: center;">Mr. Mehmood A. Qureshi, Advocate for applicant. Mr. Abdul Wahab advocate holds brief for Mr. Amanullah Khan Yousufzai, Advocate a/w complainant. Mr. Talib Ali Memon, A.P.G. a/w SIP Khurram Hasan of CTD, I.O. of case.</p> <p style="text-align: center;">=====</p> <p><u>Omar Sial, J.:</u> Dania Nathwani has sought post arrest bail in crime number 1032 of 2021 registered under section 302 and 34 P.P.C. at the Sachal police station in Karachi. Earlier, her application seeking bail was dismissed on 24-3-2022 by the learned 1st Additional Sessions Judge, Malir, Karachi.</p> <p>2. A background to the case is that the aforementioned F.I.R. was registered on the complaint of Shabbir Nathwani on 8-6-2021. Nathwani recorded that he has 3 children out of whom his younger son Shahbaz married the applicant Dania about 7 to 8 years ago. A week before Nathwani came to lodge the F.I.R., Dania had gone to see her family. On 6-6-2021 at about 10.00 p.m. Shahbaz went to his in-law's house to bring Dania back home. On 7-6-2021 Shahbaz's brother in law, namely Shahrukh, informed Nathwani's other son, Saif, at about 5.45 a.m. that someone had shot Shahbaz. When the family reached the hospital Shahbaz had already expired. Nathwani made some inquiries and found that Shahbaz with his wife and little daughter were coming back from Shahbaz's in-laws house when one unknown person had shot and killed Shahbaz. Jamshed was arrested on 1.12.2021 whereas Dania was arrested on 2-12-2021.</p> <p>3. Mr. Mehmood A. Qureshi, learned counsel appearing on behalf of the applicant, has broadly argued that the entire case against Dania is based on circumstantial evidence and that the same is a figment of imagination of the investigating officer. He submitted that at a later stage, the learned magistrate had ordered that section 120-B P.P.C. be also added to the array of offences for which Jamshed and Dania were accused, however, the learned judge had erred in so doing because the requisite sanction required pursuant to section 196-C</p>	

Cr.P.C. had not been obtained. He was also of the view that the entire case against Dania was based on call data records and that the same was of not much use in light of the judgment of the Hon'ble Supreme Court of Pakistan in the case of **Mian Khalid Perviz v. The State** reported at **2021 SCMR 522**. Mr. Qureshi argued that the Honorable Supreme Court in **The State v. Ahmed Omar Shaikh** reported at **2021 SCMR 873** had laid down a stringent criteria for audio and video materials to be admitted in evidence thus the video and photos which the prosecution relied upon in order to show the linkage between Dania and Jamshed was an issue which simply could not be relied upon at this bail stage. Mr. Qureshi further argued that even by the prosecution's own stance, Dania's role in the alleged offence is restricted to aiding and abetting Jamshed and hence whether she has shared a common intention with Jamshed, who is said to have pulled the trigger, can only be decided after evidence is led at trial in accordance with the dictates of the Honorable Supreme Court in the case of **Wajid Ali v. The State** reported at **2017 SCMR 116**. For common intention he has also relied upon **Ishtiaq Ahmed Mirza & others v. Federation of Pakistan** reported at **PLD 2017 SC 675** and **The State v. Ahmed Omar Shaikh** reported at **2021 SCMR 873**.

4. The learned A.P.G., who was assisted by the learned counsel for the complainant as well as the investigating officer of the case, argued that none of the cases relied upon by the learned counsel for the applicant is applicable as this is a bail stage. He placed reliance on a judgment of the Hon'ble Supreme Court in the case of **Muhammad Faiz v. The State** reported at **2015 SCMR 65** which has observed that precedents, in bail matter are of no help to a party as circumstances of each case varied. The learned A.P.G. has further argued that substantial evidence i.e. (i) there is a watchman by the name of Aurangzaib who saw the incident; (ii) that it is unusual if a person comes to commit robbery he would straight away shoot through a car window and kill his target and even then not take away his valuables and instead take away the valuables of the lady accompanying him, as was the situation in the present case; (iii) that Dania's involvement in the case is fortified by the fact that even though she knew the killer Jamshed, she did not disclose this fact to the police and finally, (iv) that an amount of Rs. 4.8 million was transferred by Dania into Jamshed's bank account on 15-11-2021.

5. I have heard the learned counsels for the applicant as well as the learned A.P.G. and the learned counsel for the complainant. The record in the case is voluminous so I have tentatively assessed the material shown to me by both sides. My findings and observations are as follows.

6. The prosecution has laid great emphasis on the relationship between Dania and Jamshed and it is this aspect which has been extensively argued by both the learned A.P.G. and the learned counsel for the complainant. There appear to be some photographs and videos (recovered from the phone of the accused Jamshed) which are relied upon to show that an intimate relationship existed between Jamshed and Dania and, in addition, there is a photo of a quarter of a nikahnama which, the prosecution is of the view, establishes that Dania married Jamshed subsequently. Quite unnecessarily imputations have been made on the character of the applicant in an attempt to establish Dania's role in the murder without really arguing as to how that has a bearing on the case. The genuineness of the photos, videos and nikahnama have been challenged by the defence. Be that as it may, I am of the view that even if there was the existence of a relationship or an extra marital affair between Jamshed and Dania and even if that relationship ended in marriage, it would not *ipso facto* mean that Dania colluded with Jamshed to kill her husband. Not every acquaintance, friend, lover or spouse could automatically be held vicariously liable for the acts of his or her partner. Whether Dania shared a common intention with Jamshed who allegedly shot and killed Shahrukh, in the circumstances of the case, will have to be decided after evidence is led at trial.

7. The prosecution has also relied heavily on call data records to establish Dania's role in the murder. It has been alleged by the prosecution that the phone that Dania used to contact Jamshed and the call data record of which is being used to implicate her was bought and given to her by Jamshed. There appear to be three phones in the saga, the call data records of which are relied upon by the prosecution. The numbers of these phones are 0344-2648176, 0340-830717 and 0342-2648176. None of the phone sets (traced through IMEI numbers) was owned by Dania nor were any of the three SIMs used in these phone sets issued in the name of Dania. Two of the three SIMs were issued in the name of two friends of Jamshed, namely, Huzaiifa and Usama, whereas the third SIM was

issued to Jamshed himself. Neither Huzaifa nor Usama have been made accused in this case. The prosecution while not denying this fact, alleges that both Huzaifa and Usman had procured and provided the SIMs as Jamshed, being their employer had used undue influence on them. Be that as it may there is no evidence at this stage which would upon a tentative assessment show that the phones or the SIMs were being used by Dania. The investigating agency, on its own has made, what appears to be presumptions at this stage, that the phones and SIMs were being used by Dania. The learned A.P.G. argued that the *modus operandi* was that Dania would call Jamshed from one of these phones and without hanging up on the call would put the phone in her handbag so that Jamshed could listen to the conversation between Shahrukh and Dania. This is how, the prosecution believes, Dania co-ordinated with Jamshed on the fateful day so that Jamshed could be aware of the location of the couple. How the prosecution has deciphered this, apart from the finding of the investigating officer, which finding is based on his own thoughts, was not explained to me.

8. The prosecution's argument that there was a watchman by the name of Aurangzaib who saw the incident and later identified Jamshed, is not of much use to the prosecution case as far as Dania is concerned as though Aurangzaib claims he saw the killer shoot at Shahrukh, he does not say anything about Dania. Similarly, the learned A.P.G.'s argument that Dania's involvement in the offence is certain as she declined to identify Jamshed as the killer even though she knew him is a little pre-mature at this stage. It must not be forgotten that the prosecution's case against Jamshed is yet to be proved and it cannot be said with absolute certainty at this stage that Jamshed was the murderer. If he was not the person who shot Shahrukh, then why would Dania say that he was the shooter? In the circumstances of the case, the star witness would have been Shahrukh and Dania's little girl who was present on the scene. However, her statement has not been recorded perhaps due to her young age. In the absence of the little girl's statement, the entire evidence against Dania is circumstantial and will need to be proved at trial. I also have in mind the wisdom of the Honorable Supreme Court in the case of **Chairman, NAB through PG, NAB vs Nisar Ahmed Pathan and others** (in Civil Petitions No. 1628 of 2020, still unreported) that:

“Where two opinions can reasonably be formed on the basis of the same material, the courts should prefer and act upon that which favours the accused person and actualizes his fundamental rights to liberty, dignity, fair trial and protection against arbitrary detention. To err in granting bail is better than to err in declining; for the ultimate conviction and sentence of a guilty person can repair the wrong caused by a mistaken relief of bail, but no satisfactory reparation can be offered to an innocent person on his acquittal for his unjustified imprisonment during the trial.”

9. To conclude, I am of the view that the nexus between Dania and the offence for which she is charged requires further inquiry. Her being a female also tilts the balance for grant of bail in her favour. She is accordingly admitted to bail subject to her furnishing a solvent surety in the sum of Rs. 200,000 and a P.R. Bond in the like amount to the satisfaction of the learned trial court.

JUDGE