

**ORDER SHEET**  
**IN THE HIGH COURT OF SINDH KARACHI**

Crl. Bail Application No. 184 of 2023

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**DATE**

**ORDER WITH SIGNATURE OF JUDGES**

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1. For orders on office objection
2. For hearing of bail application.

**14-02-2023**

Mr. Liaquat Ali Khan, Advocate for applicant.

Mr. Muhammad Ahmed, Assistant Attorney General a/w Aijaz Ali Kalwar, Assistant Director/Law, FIA Cybercrime, Karachi and Inspector Arifa Saeed. I.O. of the case.

Ms. Bushra Bibi, mother of complainant present in person.

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**Omar Sial, J.:** Dania Shah is accused of recording intimate moments with her then husband and subsequently, when things went bad in the relationship, disseminating the video clips on public online forums. The complaint against Ms. Shah was made by the daughter of the deceased, from a former wife. She is charged with the commission of offences under sections 20 (offences against dignity of a natural person) 21 (offences against modesty of a natural person) and 24 (cyber stalking) of the Prevention or Electronic Crime Act, 2016 ('PECA').

2. Ms. Shah was arrested some time in November 2022 and her application seeking bail dismissed by the learned Judicial Magistrate on 23.12.2022 through a very well written and reasoned opinion. The bail refusal was challenged before the learned Sessions Judge, Karachi East, who too dismissed the bail application on 18.01.2023. Not being very happy with the denial of bail, Ms. Shah has now approached this Court praying that she be released on bail pending trial.

3. The learned counsel for the applicant stresses that the case registered against Ms. Shah is completely a false one and filed due to nothing but malice originating due to inheritance claims. The learned

Assistant Attorney General assisted by the learned law officer of F.I.A., has very passionately and forcefully resisted the grant of bail primarily on moralistic grounds.

4. After hearing the parties, my observations and findings are as follows.

5. I agree with the learned Magistrate that making a video clip of a private moment is not barred by law; what is barred is its illegal dissemination. Offences under sections 20 and 24 are both bailable ones pursuant to section 43 of the PECA. The one under section 21 is not; though it carries a potential punishment of 5 years prison and hence falls within the non-prohibitory clause of section 497 Cr.P.C.

6. I am cognizant of the principles enunciated by the Honorable Supreme Court in the case of **Tariq Bashir and 5 others vs The State (PLD 1995 SC 34)** regarding grant of bail in cases where punishments fall within the non-prohibitory clause of section 497 Cr.P.C. I am also cognizant of the fact that in cases of offences under section 21 PECA, I have treated this offence as an exceptional ground, as permitted in the Tariq Bashir case, to deny bail in cases where punishments fall within the non-prohibitory clause of section 497 Cr.P.C. I am however, not inclined to treat the present case at par with those precedents as far as the concession of bail is concerned. There are 2 reasons for this. In the previous cases F.I.A. was in possession of watertight evidence, electronically linking the whole process i.e. from creation to the dissemination of material. In the present case, it seems that there is little doubt that the creator of the videos may very well be Ms. Shah, but evidence regarding dissemination, in my opinion, requires further inquiry. What I have been explained by the learned AAG and the F.I.A. is that the case is that Ms. Shah gave an interview to a person on a social forum in which she acknowledged that she had these clips. Censored versions of these clips were shown on that interview. It is therefore alleged that she is the person who must have necessarily disseminated the videos. There are 2 witnesses in the shape of the person who interviewed Ms. Shah

and the person who acted as cameraman. What these 2 witnesses testify at trial will put the learned trial judge in a better position to conclude the truth. On her part Ms. Shah acknowledges that she made the clips but denies any hand in their dissemination. She says that she had sold the phone on which the clips were stored and hence she is not the disseminator. Quite surprisingly, F.I.A. never found the phone or the person it was sold to. The dissemination aspect therefore will be proved at trial.

7. My second reason for drifting from precedent is that in all the precedent cases, the perpetrator was a man disseminating material of his intimate partner. In this case, at the end of the day, Ms. Shah is, irrespective of her doings, a woman. This fact in itself entitles her to more concessions than a man in a similar situation. Such concession is not made out of sympathy for the woman but as a tiny step to bring her closer to equality with men and to honor the concessions which law itself gives to a woman. Indeed our constitution tacitly recognizes that women are at a higher pedestal when in Article 25, which states that all citizens are equal before law and are entitled to equal protection of law, it permits that nothing in that Article shall prevent the State from making any special provision for the protection of women and children. Section 497 Cr.P.C. also provides a different benchmark for women, children under the age of 16 and old and infirm persons for the grant of bail. The Supreme Court of Pakistan in (what appears to be still an unreported case) **Fursan vs The State (Crl.P. 994 of 2022)** has observed that *“Under the first proviso to Section 497(1) CrPC, grant of bail is a rule and refusal an exception, as held in Tahira Batool case, in a case where the accused is a minor under the age of sixteen years, a woman, or a sick or infirm person, even in a non-bailable offence of prohibitory clause, in the same manner as bail is granted or refused in offences of non- prohibitory clause of Section 497(1) CrPC. Thus, we are to only examine, whether the case of the petitioner falls within any of the three settled exceptions to the rule of granting bail, which are the likelihood of the accused: (a) to abscond to escape the trial; (b) to tamper with the prosecution evidence, which includes influencing the prosecution*

*witnesses; or (c) to repeat the offence.* The wisdom of the Honorable Supreme Court in the aforementioned case cannot be encapsulated in a few words. The judgment must be read in whole in order to appreciate its spirit.

8. During the hearing of this bail application, the learned AAG expressed apprehension that the applicant may be a flight risk. Thus he pleaded the exception, as referred to by the Honorable Supreme Court in the Fursan case, i.e. the applicant may escape during trial. If this is the risk the State sees the State is sufficiently empowered under law to take the necessary steps to prevent such an escape. While no threat of the applicant tampering with evidence or repeating the offence has been raised by the State, I have still taken it into consideration while laying out the conditions of bail. The applicant is a young girl and has not been involved previously in any crime and has been in jail for nearly 5 months in an offence that carries a maximum punishment of 5 years.

9. It would be naïve to deny that the impact on a woman of her privacy being violated is far greater than its impact on a man who is violated in this manner. It does not make the violation right in either case. The guilty must be punished. But, at this bail stage it will not be unfair if a woman is given more concession than that given to a man. In addition, one cannot ignore that the accused is an 18 year old young girl who was married off when she was a child. The learned law officer from F.I.A. argued that the law should be the same for a man or a woman. It would be unfair and unjust for the State to ask for equal treatment between man and woman only in penal provisions, when in every other way a woman is not given the equality she deserves.

10. One also gets the sense that the F.I.A's probe into the matter has been superficial, not because of the lack of ability in their officers but because of perhaps lack of resources and manpower. Perhaps they have missed out on probing deep. At the very least it should have been probed

whether Ms. Shah is a helpless player in a bigger game. Be that as it may, that is an area that falls in the domain of the executive.

11. On the one hand is the humiliation of a person and his family and friends and on the other is the evidence shown to me. I will, with much respect though, do what I believe the law directs me to do. Whether Ms. Shah is guilty of the offences charged with is a matter for the learned trial to decide after it has had an opportunity to evaluate the evidence produced, I however, find myself unconvinced, to decline bail to Ms. Shah pending trial.

12. For the reason that dissemination requires further inquiry and that the punishment falls within the non-prohibitory clause of section 497 Cr.P.C., Ms. Shah is admitted to post arrest bail subject to her furnishing a solvent surety in the sum of Rs. 2 million and a P.R. Bond in the like amount to the satisfaction of learned trial court. As a condition of bail, Ms. Shah is also directed to not post anything on the internet or to give interviews or make public statements or to directly or indirectly contact in any manner any witness in this case. Any breach of this condition will result in a recall of the concession given to her.

JUDGE