

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No.1648 of 2023

Date	Order with signature of Judge
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For hearing of bail application

28.8.2023

Mr. Ammad Ghaffar and Muhammad Shoaib Rajput advocate for the applicant.

Mr. Abrar Khichi Addl. P.G along with /IO Naeem Khan of PS Defence Karachi.

Through this bail application under Section 497 Cr.P.C., the applicant has sought admission to post-arrest bail in F.I.R No.368/2023, registered under Section 322/34 PPC at P.S Defence, Karachi.

2. The accusation against the applicant according to the prosecution story narrated in the FIR No.368/2023 registered at P.S. Defence under section 322/34 PPC is that he brought one dead lady namely Mst. Aisha at Jinnah Post Medical Centre (JPMC), who was alleged to have taken intoxicating material and died. Such a report of the incident was lodged at P.S Defence, Karachi under Section 322/34 PPC. The applicant was arrested for the aforesaid crime. His bail plea has been declined by the learned X-Additional Sessions Judge (South) Karachi vide order dated 18.07.2023 in Cr. Bail Application No.2309/2023 on the premise that the alleged offense is against society.

3. Learned counsel for the applicant submitted that according to FIR the deceased was married in Karachi and her in-laws lived in Gulistan-e-Jouhar and she was residing with them, but neither his husband nor her in-laws lodged any complaint regarding the disappearance of the deceased nor any action was taken but all of a sudden the father of the deceased came to lodge the F.I.R on the ground that excess had been committed with her daughter, without any proof. He further submitted that the police fabricated the whole story in connivance with the complainant just to harass the applicant without any attribution on the part of the applicant, except for bringing the patient to JPMC for treatment, which is not an offense under the law as portrayed by the police. Per learned counsel, there is nothing on record to show that there was a background of any enmity between the parties, or the incident was the result of some provocation or the applicant had the intention to cause the death of the deceased lady. He emphasized that the investigating officer in his report under Section 173 Cr.P.C., has disclosed that an offense of *qatl* -

bis-sabab punishable under Section 322 P.P.C. was/is made out other than *qatl-i-amd* under Section 302; however, he intends to insert Section 201 and 202 PPC in the charge sheet, which is apathy on the part of investigating officer. Learned counsel has further submitted that Section 322 P.P.C. falls outside the Prohibitory Clause of Section 497(1), Cr.P.C., therefore the detention of the applicant pending trial can only be justified if this case falls within the scope of any of the exceptions stated in the case of Zafar Iqbal v. Muhammad Anwar (2009 SCMR 1488), there is, however, nothing on record that may attract any of the said exceptions and justify denial of post-arrest bail to the applicant. He lastly submitted that the trial Court had not exercised its discretion judiciously in denying the relief of post-arrest bail to the applicant. He prayed for allowing the bail application.

4. Learned Addl. PG has submitted that the tentative assessment of the material available on record, prima facie leads to a conclusion that there are no reasonable grounds to believe that it is a case of further inquiry. Learned Addl. PG also submitted that there is sufficient material available against the applicant to connect him to the subject crime. He prayed for the dismissal of the bail application.

5. I have heard learned counsel for the parties and perused the material available on record.

6. Notice was issued to the complainant to be served through the Investigating officer, however, he has chosen to remain absent and Investigating officer Naeem Khan of PS Defence has put his appearance and apprised this Court about the non-availability of the complainant on the premise that he also failed to appear before the trial Court though notices were served upon him. Be that as it may, since the learned APG has covered the case of the complainant by putting forward the prosecution case, in such circumstances of the case, no further assistance of the complainant is required as prima facie he is reluctant to come forward to defend his case.

7. Tentative assessment of record reflects the following aspects of the case:-

- a. *The alleged offense occurred on 24.06.2023 and was reported to police on 26.06.2023 after a delay of two days.*
- b. *The MLO vide report dated 24.06.2023 has opined the final cause of death of deceased lady Mst. Aisha daughter of Kashif.*
- c. *Police has submitted an interim challan in Section 322/34 PPC which is punishable for diyat amount.*

- d. No injury marks on the body of the deceased have been found by MLO vide report dated 24.06.2023.*
- e. Applicant was arrested on 27.06.2023.*
- f. No DNA report has been placed on record, however as per MLO report deceased died due to drug overdose and alcohol intoxication*

8. Prima facie, there is a delay of 2 days in lodging the FIR of the alleged incident, and further the name of the present applicant is also appearing in the FIR with the role of dropping and bringing the dead body of deceased Mst. Aisha at Jinnah Postgraduate Medical Centre, for treatment, and now he has been charged with an offense of Section 322 PPC. Before going into any further discussion on the subject bail issue, it would be advantageous to reproduce Section 322 of the Pakistan Penal Code, here under:

“322. Punishment for Qatl-bis-Sabab.--Whoever commits Qatl-bissabab shall be liable to Diyat.”

9. Section 322 P.P.C. though non-bailable is not punishable with any period of imprisonment except the payment of *Diyat*. The offenses punishable with death or life imprisonment or ten years fall within the Prohibitory Clause as contemplated under Section 497 Cr.P.C. Thus, where the criminal liability of an accused of an offense is *Diyat*, only the offense does not fall within the prohibitory clause. It is well-settled that where an offense does not fall within the prohibitory clause, the acceptance of bail is the rule and the rejection is an exception.

10. As in that view of the matter the bail plea of the applicant ought to have been considered by the trial Court in terms of section 497 Cr.P.C., for the reason that an offense punishable with ten (10) years imprisonment or more only falls within prohibitory clause of this Section. In principle, the provision of Section 497(2) Cr.P.C confers powers upon the Court to grant bail during the investigation, inquiry, or trial subject to an opinion formed by the Court that material placed before it is not sufficient to establish guilt and it still requires further inquiry into his guilt. The contention of the learned counsel that the case of the applicant squarely falls within the ambit of Section 497(2), Cr.P.C. is concerned, the said provision reveals the intent of the legislature disclosing pre-condition to establishing the word "guilt" against whom an accusation is leveled has to be established based on reasonable ground, however, if there exists any possibility to have a second view of the material available on the record then the case advanced against whom the allegation is leveled is entitled for the relief in the spirit of Section 497(2) Cr.P.C. On the aforesaid

principle, I am supported by the view of the Supreme Court in the case of Muhammad Tanveer vs. the State (PLD 2017 S.C. 733).

11. The facts and circumstances narrated above and the judgment pronounced by the Supreme Court on the subject issue, the Courts of law are under a bounded duty to entertain a broader interpretation of the “law of bail” while interpreting material placed before it more liberally to arrive at a conclusion which is badly required due to the apparent downfall in the standard of investigation. Otherwise, the liberty of a person is a precious right that has been guaranteed under the Constitution of the Islamic Republic of Pakistan, 1973. To abridge or curtail liberty merely on the grounds of being involved in a criminal case without adjudging it on merits would certainly encroach upon the right against free life. This right should not be infringed, rather it has to be protected by the act of the Court otherwise it may frustrate the concept of safe administration of criminal justice.

12. Once the Supreme Court has held in categorical terms that grant of bail in offenses not falling within the prohibitory limb of Section 497 Cr.P.C. shall be a rule and refusal shall be an exception then, the subordinate Courts should follow this principle in its letter and spirit because principles of law enunciated by the Supreme Court under Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973 has binding effect on all subordinate Courts. On the aforesaid proposition, I seek guidance from the decisions rendered by the Supreme Court in the cases of The State v. Syed Qaim Ali Shah (1992 SCMR 2192), Tariq Bashir v. The State (PLD 1995 SC 34), and Khan Asfandyar Wali and others v. Federation of Pakistan (PLD 2001 SC 607). I expect the Courts below to adhere to these binding principles in the future and not to act mechanically in the matter of granting or refusal of bail because the liberty of a citizen is involved in such matters; therefore, the same should not be decided in a vacuum and without proper judicial approach.

13. This Court is not oblivious to the fact that unfortunately, one young lady has lost his life due to the consumption of intoxicant material as opined by the Medico-Legal Officer vide his report dated 24.6.2023, however, the fate of bail application is also to be decided within the framework of section 497, Cr.P.C. and under the guidelines on the subject laid down by the Supreme Court of Pakistan. Besides the above, the liability of the present applicant or charges leveled against him could only be determined by the trial Court after recording and evaluating the evidence. It is also a settled principle of law that at the bail stage deeper

appreciation of the merit of the case cannot be undertaken and only a tentative assessment of the material available is to be made.

14. The applicant has been behind the bars since his arrest and concession of bail could not be withheld by way of premature punishment for the reason that the Investigating officer has not collected sufficient material to prima facie connect the applicant to the present crime at this stage, however, if any material is brought by the I.O the same shall be added in the report under Section 173 Cr. P.C., if he intends to do so and the learned trial Court will take care of the material after recording the evidence. The reliance is also placed upon the case of Abid Ali alias Ali vs. The State (2011 SCMR 161) and Husnain Mustafa Vs. The State and another (2019 SCMR 1914). There are also various pronouncements in support of this principle. As a consequence, the applicant has made a case for a grant of relief of post-arrest bail and, hence is entitled to the same. The record shows that the applicant/accused is not a previous convict or hardened criminal. Moreover, he is no longer required for any investigation nor the prosecution has claimed any exceptional circumstance.

15. The grounds agitated by the learned Addl.PG cannot be assessed at the bail stage without recording the evidence.

16. In view of the facts and circumstances narrated above, I am of the tentative view that the learned Court below has erred in appreciation of the law on the subject while rejecting the bail of the applicant in the subject FIR, hence, the same is set at naught, as such this bail application is accepted subject to his furnishing solvent surety in the sum of Rs.200,000/- (Rupees two hundred thousand) and PR Bond in the like amount to the satisfaction of learned trial court.

17. Needless to mention here that any observation made in this order is tentative and shall not affect the determination of the facts at the trial or influence the trial Court in reaching its decision on the merits of the case. It is, however, made clear that if, during proceedings, the applicant/accused misuses the bail, then the trial Court would be competent to cancel his bail without making any reference to this Court.

JUDGE