

ORDER SHEET  
THE HIGH COURT OF SINDH AT KARACHI

**CrI. Bail Application No. 2455 of 2023**

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Date:                      Order with signature(s) of the Judge(s)  
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For hearing of bail application.

**06<sup>th</sup> May 2024**

Mr. Khair Muhammad, advocate for applicant/accused.  
Mr. Abrar Ali Khichi, Additional Prosecutor General.

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**SALAHUDDIN PANHWAR, J:-** The applicant/accused through instant bail application seeks post-arrest bail in a murder case. Mainly it is contended that material witnesses have failed to appear before the trial court, hence delay in conclusion of trial is being caused by the prosecution. In light of this critical issue, the Court's attention is drawn to the following developments:

- By virtue of an order dated 2nd April 2024, the Senior Superintendent of Police (SSP), District Malir, was specifically directed to ensure complete protection of the witnesses until their evidence is duly recorded. Simultaneously, the trial Court received corresponding instructions. Instead of resorting to the issuance of Non-Bailable Warrants (NBWs), the prosecution was advised to approach the witnesses with the assurance that their testimony could be recorded through any legally permissible means.
2. It has come to the Court's attention that certain Criminal Courts invoke the provisions of Sections 87 and 88, of the Criminal Procedure Code (Cr.P.C.) against witnesses, who do not appear before the court despite adopting coercive measures and declared *proclaimed persons* in pursuance of sections 87 & 88 Cr.P.C followed by the procedure provided in **Chapter-VI** of Code of Criminal Procedure, which provides *mechanism* to **summon a person** for procuring his attendance in proceedings before a court either as a **accused** or **witness** as prescribed procedure U/Section 68 to 93-C Cr.P.C. Particularly, provided in section 69 of Cr.P.C, which speaks as follows:-

“69. **Summons how served.** (1) The **summons shall**, if practicable be served personally on **the person summoned**, by delivering or tendering to him one of the duplicates of the summons.

- (2).....
- (3).....

3. The sections 87 & 88 Cr.P.C though provides procedure to declare proclaimed to a **person** who failed to appear before court despite summoning by the court in trial or proceeding, who may not be an **accused**, but any **person** become *fugitive* from the law or fail to appear in pursuance of process issued by the court. For the sake of better understandings subject provisions are referred as under:-

“87. **Proclamation for person absconding.** (1) If any Court [is satisfied after taking evidence] that **any person against whom a warrant has been issued** by it has **absconded** or is **concealing himself** so that such **warrant** cannot be **executed**, such Court may **publish** a written **proclamation** requiring him to **appear** at a **specified place** and at a **specified time** not less than thirty days from the date of publishing such proclamation.

- (2).....
- (3) .....

88. **Attachment of property of person absconding.** (1) The Court issuing a **proclamation** under **section 87** may at any time order the attachment of any **property**, movable or immovable or both, belonging to the **proclaimed person**.

- (2) .....
- (3).....
- (4).....
- (5).....
- (6).....
- (7).....

[Emphasize Added]

4. Needless to add, the above procedure is discretionary in nature, to procure presence of either complainant, witnesses or accused as the case may be, as observed in the case of **Satender Kumar Antil**<sup>1</sup> that “*Section 88 Cr.P.C does not confer any right on any person, who is present in a court. **Discretionary power given to the court is for the purpose and object of ensuring appearance of such person in that court** or to any other court into which the case may be*

<sup>1</sup> Satender Kumar Antil Vs Central Bureau of Investigation, [https://main.sci.gov.in/supremecourt/2021/27955/27955\\_2021\\_5\\_1505\\_36261\\_Judgement\\_11-Jul-2022.pdf](https://main.sci.gov.in/supremecourt/2021/27955/27955_2021_5_1505_36261_Judgement_11-Jul-2022.pdf)

transferred for trial. Discretion given under Section 88 to the court does not confer any right on a person, who is present in the court rather it is the power given to the court to facilitate his appearance, which clearly indicates that use of the word "may" is discretionary and it is for the court to exercise its discretion when situation so demands. It is further relevant to note that the word used in Section 88 "any person" has to be given wide meaning, which may include persons, who are not even accused in a case and appeared as witnesses."

[Emphasis added]

5. As per record provided by the Registrar's office in six hundred thirty-five (635) cases of heinous nature, proceedings under Sections 87/88 Cr.P.C. have been initiated against the witnesses; district-wise details are reproduced herewith:-

Court	Number of cases in which proceedings U/s 87 & 88 Cr. P.C. against witnesses
Karachi South	1
Dadu	6
Jamshoro	5
Tharparkar	1
Sanghar	12
Shaheed Benazirabad	35
Sukkur	42
Khairpur	96
Ghotki	48
Larkana	122
Kamber Shahdadkot	60
Shikarpur	93
Jacobabad	70
Kashmore @ Kandhkot	19
Matiali	7
ATC-VI	3
ATC-XV	4
ATC-XVI	2
ATC-XX	2
ATC-I Hyderabad	1
ATC-I Sukkur	2
ATC-Shikarpur	4
<b>Total</b>	<b>635</b>

6. A perusal of the above shows an alarming situation, indicating a need to examine the reasons as to why grieved families are not pursuing the cases to seek justice. This suggests a failure of the Criminal Justice System. It appears that these families, who have lost their loved ones and/or valuable properties, are either in fear, under threats, or lack trust in our criminal justice system (courts) to secure the justice that is their due right.

7. Nonetheless, such actions are in contravention the Sindh **Witness Protection Act, 2013**, to the extent of proclamation of witness, it also inflicts undue distress upon the witnesses. **Section 87**, which addresses the “**Proclamation for person absconding**”, mandates that a Court, upon **satisfactory evidence** of a person’s **evasion** or **concealment**, “**may**” issue a written proclamation commanding their appearance at a designated place and time, no sooner than thirty days post-proclamation. It is imperative that Sections **87 & 88**, Cr.P.C. are not employed against witnesses to engender harassment, but to procure their attendance to bring the guilt of accused at home or otherwise. Furthermore, **Section 173(5)** of the Criminal Procedure Code, 1898, obliges the officer in charge of a police station, upon forwarding a report under **subsection (1)**, to also present the witnesses involved in the case, with the exception of public servants. The Magistrate shall then legally compel these witnesses to appear before the appropriate Court on the scheduled trial date, ensuring their availability to testify. The Investigating Officer bears the solemn duty to escort the witnesses to the Trial Courts in a manner that is both safe and secure. Should an officer flout the legal directives regarding his conduct, with intent to cause or with knowledge of likely resultant injury, he shall expose himself liable to prosecution under **Section 166** of the Pakistan Penal Code, 1860.

8. Furthermore, it is the prime duty of the state to ensure the witnesses that no harm would be caused to them even they apprehend any threat. Despite the coercive measures taken by the trial Court, including the issuance of **NBWs**, the witnesses have persistently failed to appear. This recurring pattern of non-appearance has raised serious concerns regarding the efficacy of the existing legal mechanisms. It is pertinent to observed that the Sindh Witness Protection Act, 2013 was promulgated with the noble objective of

safeguarding witnesses and enabling them to provide evidence in criminal proceedings without fear or intimidation. **The Act, 2013** recognizes the paramount importance of witness protection and seeks to create a conducive environment for **truth-telling** within our judicial system. In light of the above, this court must reiterate its commitment to upholding the principles enshrined in the Sindh Witness Protection Act, 2013. The issuance of arrest warrants against witnesses due to their non-appearance runs counter to the spirit of this legislation. The Court shall continue to monitor the situation closely and take necessary steps to ensure the safety and cooperation of witnesses. For the sake of legal clarity, it would be conducive to reproduce the definitions of “**serious offence**”, and “**threatened witness**” provided under **Sections 2(l) & 2(o)**, of The Act, 2013, which resonate thus:

- (l) **serious offence:-** means an offence against a provision of-
  - (i) any law in force in the Province of Sindh, for which the maximum penalty is death, or imprisonment for a period of not less than twelve months;
  - (ii) offences under Pakistan Penal Code, 1860; and
  - (iii) offences as specified in the Schedule;
- (o) “**threatened witness**” means any witness in respect of whom, there is likelihood of danger to the safety of his or her life or life of his or her close relatives; or serious danger to his or her property or property of his or her close relatives, by reason of his or her being a witness.

9. Pursuant to **Section 5** of the Sindh Witness Protection Act, 2013 (hereinafter referred to as “the Act, 2013”), the Government of Sindh is mandated to establish a **statutory body** known as the “**Witness Protection Advisory Board**”. This Board is to be comprised of designated officials, including, but not limited to the Secretary of the Home Department, who shall preside as Chairman, and other key **stakeholders** from the legal and law enforcement sectors. Furthermore, in accordance with **Section 6** of the Act, 2013, it is incumbent upon the Sindh Government to establish a “**Witness Protection Unit**” within the Home Department. This Unit is tasked with the operationalization of the witness protection program as delineated in the Act. The essence and intent of **Sections 5** and **6** of the Act are to provide a legal framework for the safeguarding of witnesses. The Witness Protection

Advisory Board is entrusted with the responsibility of advising on policy formulation, overseeing the administrative functions of the Witness Protection Unit, approving budgetary allocations, and executing other powers as conferred by **the Act** or as delegated by the Government. The Witness Protection Unit, on the other hand, is the executive arm responsible for the practical implementation of the witness protection measures. These provisions collectively aim to fortify the criminal justice system by ensuring that witnesses can testify without fear of retribution or harm, thereby upholding the principles of justice and rule of law within the province of Sindh. The purpose and objectives of Sections 5 and 6 of the Sindh Witness Protection Act, 2013, can be summarized as follows:

- **Section 5:** Constitution of the Witness Protection Advisory Board.
- The government is mandated to establish a board known as the Witness Protection Advisory Board.
- The Board consists of high-ranking officials from various departments, including the Home, Law, Finance Departments, the Advocate General, the Inspector General of Police and Prisons, the Prosecutor General, a representative of the Provincial Commission on Human Rights, and the Additional Inspector General, CID.
- The Additional Inspector General, CID, also serves as the Secretary of the Board.
- The Board's primary role is to:
  - Advise on the creation of witness protection policies aligned with current laws and international standards.
  - Oversee the administration of the Witness Protection Unit.
  - Approve the budgetary estimates of the Unit.
  - Perform any additional powers and functions as provided by the Act or assigned by the government.

**Section 6:** Establishment of the Witness Protection Unit:

- A Witness Protection Unit is to be established within the Home Department to support the Witness Protection Programme.
- The government has the authority to:

- Set up branch offices of the Unit in specified areas for better administration of the Act.
- Abolish or merge branch offices and make necessary administrative arrangements as required.

10. These provisions of law essentially outline the framework for the establishment and functioning of the Witness Protection Advisory Board and the Witness Protection Unit, which are crucial for the implementation of the witness protection programme in Sindh. The Board advises and oversees the Unit, which is responsible for executing witness protection policies and ensuring the safety of witnesses. It has come to the attention of this Court that the Witness Protection Advisory Board, as stipulated by the Act of 2013, has yet to be constituted, and the Witness Protection Unit remains unestablished by the Government till to date. In the adjudication of grave criminal matters, particularly those involving offences of **robbery/murder/rape**, it is imperative, that witnesses be queried regarding any potential threats to their safety, and that appropriate security measures be taken.

11. The issuance of Non-Bailable Warrants (NBWs) against witnesses without inquiring in depth their reason of invasion, not only exacerbates their plight, but also causes harassment to the victims/witnesses, who are already victimized by the loss of kin and property rather than being afforded assurance of their safety until their evidence is duly recorded. The edicts of justice unequivocally necessitate the safeguarding and protection of persons who are witnesses of heinous crimes; absent such protection, the elicitation of testimony is jeopardized, thereby obstructing the dispensation of justice.

12. In light of these considerations, this Court hereby exercises its judicial cognizance and issues directives to all Criminal Courts within the Province of Sindh to refrain from issuing NBWs against prosecution witnesses (PWs). Instead, the Courts are enjoined to ascertain the following

1. The gravity of the offence, as delineated within the Sindh Witness Protection Act, 2013;
2. The existence of any threat to the witness, or any undue influence compelling testimony in favor of the accused.

3. The provision of protective measures by the relevant police or protection units, with the understanding that the issuance of NBWs shall be suspended unless the witness in question is implicated in heinous offences and is evading capture.

13. Of course, the utilization of **digital means** and **modern devices** for recording witness testimony is a prudent approach. It ensures that the evidence is captured in a secure and protected manner, minimizing the risk to witnesses. This method aligns with contemporary judicial practices, that prioritize the safety of individuals while maintaining the integrity of the legal process. The incorporation of technology in the justice system can enhance efficiency and provide a safeguard for the valuable testimony of witnesses. Indeed, recording witness evidence through digital and modern devices, such as video conferencing, offers a multitude of benefits:

**Safety and Security:** Witnesses can provide their testimony from a secure location, reducing the risk of intimidation or harm.

**Convenience:** It eliminates the need for witnesses to be physically present in the courtroom, which can be particularly beneficial for those who are vulnerable or have mobility issues.

**Efficiency:** Digital recording can streamline the process of evidence collection, making it faster and more reliable.

**Cost-Effective:** It saves on the expenses and logistical complexities associated with travel, especially for witnesses who may reside far from the court.

**Accessibility:** Allows for the participation of witnesses who might otherwise be unable to attend due to distance or health concerns.

14. This approach not only enhances the protection and comfort of witnesses, but also aligns with modern judicial practices, that embrace technology to improve the legal process. Article 164 of the Qanun-e-Shahadat Order, 1984, holds significant legal importance as it acknowledges the evolution of technology and its integration into the judicial process. The main objective of this article is to:

**Embrace Modernity:** It allows Courts to consider evidence that has become available through modern devices or techniques, reflecting a progressive approach to evidence law.



**Judicial Discretion:** The article vests the Court with the discretion to determine the appropriateness of such evidence, ensuring that the introduction of new forms of evidence does not compromise the integrity of the judicial process.

**Adaptability:** It demonstrates the legal system's adaptability to technological advancements, ensuring that the law remains relevant and effective in a rapidly changing world.

15. In essence, Article 164, of Qanun-e-Shahadat Order, 1984 empowers Courts to utilize evidence obtained from contemporary technological sources, provided that such evidence is deemed appropriate and meets the standards of admissibility set forth by the Court. This provision ensures that the legal framework is capable of accommodating new forms of evidence that were not previously contemplated, thereby enhancing the efficacy of the judicial process.

16. Accordingly, the **Chief Secretary and Home Secretary of Sindh** are hereby directed to notify the **Witness Protection Advisory Board** and the Witness Protection Unit forthwith, as stipulated by the **Sindh Witness Protection Act, 2013**, within the span of a fortnight.

17. Moreover, all Senior Superintendents of Police (**SSPs**) are directed to compile a list of serious offences and to establish Board and Units for witness protection, ensuring the security of witnesses until their evidence is recorded. Any dereliction in adherence to these directives shall be construed as a contravention of the Sindh Witness Protection Act, 2013, and the Orders of this Court.

18. Registrar of this Court is directed to circulate copy of this order to all Criminal Courts within the Province of Sindh as well as to Chief Secretary Sindh, Home Secretary Sindh, Inspector General of Police and Prosecutor General Sindh for compliance.

JUDGE