Form No.HCJD/C-121

ORDER SHEET

IN THE LAHORE HIGH COURT, LAHORE.

JUDICIAL DEPARTMENT.

Crl. Misc. No. 46363-B/2023.

Imran Ahmad Khan Niazi Versus. The State, etc.

S.No. of order/ Proceedings	Date of order/ Proceedings	Order with signature of Judge, and that of parties of counsel, where necessary.
	13.05.2024.	Barrister Salman Safdar, Advocate for the petitioner. Rana Muhammad Imran Anjum, Deputy Prosecutor General with Rafaqat, SI.

Petitioner while invoking concurrent jurisdiction of this Court under section 498 of the Code of Criminal Procedure 1898 (Cr.P.C.) sought pre-arrest bail in case FIR No.365/23 dated 05.03.2023 under sections 186, 353, 148, 149, 212, 506ii, 172, 173 & 174 PPC, Police Station Race Course, Lahore on the ground that being ex-Prime Minister of Pakistan, he is facing serious security threats, therefore, cannot approach to the Court of Sessions without proper safety measures. Learned Counsel for the Petitioner stated that in a similar situation petitioner has succeeded to obtain an order from the Chief Commissioner Islamabad Capital Territory for an arrangement of fixation of his eight pre-arrest bail petitions with one time representation at a secured premises in Federal Judicial Complex G-11/4, Islamabad and is also making efforts for like arrangement in the Punjab, therefore, at least till then interim pre arrest bail may be granted. While relying on cases reported as "Sh. ZAHOOR AHMAD versus THE STATE" **(PLD 1974 Lahore 256);** *"ABDUL MAJID AFRIDI versus The STATE"* **(2022 SCMR 676);** *"RAIS WAZIR AHMAD Versus THE STATE"* **(2004 SCMR 1167)** &*"THE STATE versus Malik MUKHTAR AWAN"* **(1991 SCMR 322)**, request of the petitioner was acceded to and ad interim pre arrest bail was granted to the petitioner on 11.07.20023.

2. Learned Counsel for the petitioner while highlighting a changed scenario responded that the petitioner now being convicted prisoner is serving out his sentence in Adyla Jail, Rawalpindi, therefore, cannot

appear before this Court nor can seek bail in absentia before the Sessions Court; therefore, it is well within the legal framework to ask for decision of his bail petition on merits by this Court. He suggested in the course of arguments that appearance of accused before the Court for pre-arrest bail is essential only on the first date of hearing and thereafter, petition must be decided on merits even in his absence. Reliance he placed on cases reported as "*Mst. SALIMA BIBI and others Versus THE STATE"* **(2000 P Cr. L J 138)** & *"SUBEDAR (RTD.) ABDUL REHMAN AND ANOTHER Versus THE STATE"* **(1981 P Cr. L J 61)** in this respect. While referring case reported as *"Sahibzada AHMAD RAZA KHAN QASURI AND 4 OTHERS Versus THE STATE"* **(1974 P Cr. L J 482)**; submitted that it is only discretionary with the Court to insist on presence of accused at the time of confirmation of bail. The right course he suggested should be the forfeiture of bail bonds but Court cannot decline to decide the bail petition on merits in the absence of accused. Case reported as *"Maulana FATEH MUHAMMAD Versus The STATE"* **(PLD 1973 Lahore 874)** was referred in this respect. Finally relied on case reported as *"MUHAMMAD SHAFIQUE Versus The STATE and another"* **(2018 YLR 323)** wherein accused was under arrest in another case but his pre-arrest bail petition was decided on merits while touching the principle of fair trial based on access to justice. His submissions continued with the solicitation that if above request is not acceded to then case reported as *"FARHAN MASOOD KHAN versus STATE etc."* **(PLJ 2021 Cr. C Lahore 550)** comes into rescue of the petitioner with a settled legal premise that arrested in another case, accused shall not be deprived of decision of his bail petition on merits and his presence can be secured by his summoning from the police/judicial custody.

3. Learned Deputy Prosecutor General on the other hand opposed the above contentions on the ground that attendance of accused for pre-arrest bail on each and every date is the requirement of law and in his absence, petition cannot be decided on merits. Further states that only under trial prisoners (UTPs) can be summoned for their appearance in other cases but this facility is not available to the convicted prisoners,

like the present petitioner. Upon which, learned Counsel for the petitioner switched over to his alternate prayer of securing the presence of petitioner through video link and in this respect referred the judgment dated: 21.09.2023 passed by Division Bench of Islamabad High Court, Islamabad in *Criminal Revision No.127-2023* titled as **"Imran Ahmad Khan Niazi versus The State, etc.** & judgment of Lahore High Court in *Criminal Revision No.54056/2023* titled as **Imran Ahmad Khan Niazi vs Spl. Judge, A.T.C, etc.** Learned Deputy Prosecutor General, however, stated at bar that the petitioner is serving out his sentence as convicted prisoner in Adyla jail, Rawalpindi.

4. By the statement of Learned Deputy Prosecutor General who is standing in representation of State/Government, the whereabouts of the petitioner has been brought into the notice of this Court, therefore, the very purpose of securing the presence of petitioner stands resolved because the wisdom of legislature for requiring the presence of petitioner before the Court for seeking pre-arrest bail of course is the assurance that accused being alive is within the country and has not absconded. Another reason for requiring presence of accused is providing of an opportunity to effect his arrest, though not in Court premises, after dismissal of his petition for pre-arrest bail. In a case reported as *"SHAHZAIB and others Versus The STATE"* **(PLD 2021 Supreme Court 886)**, Supreme Court of Pakistan deprecated the practice of dismissing the petitions for pre-arrest bail due to non-prosecution when counsel seeks dispensing with the attendance of accused; Court must provide an opportunity to explain reasons of his non-appearance on the date fixed in the petition. Similar principle was already breathing in our jurisprudence as laid down by Full Bench of this Court in case reported as *"SHABBIR AHMAD versus THE STATE"* **(PLD 1981 Lahore 599)**. Though presence of the accused is essential on all subsequent dates including on stage of confirmation of his bail yet Court is authorized to dispense with his attendance; reliance is on *"NOOR AHMAD AND ANOTHER versus THE STATE"* **(PLD 1982 Lahore 214)**.

5. While hearing divergent views and arguments of the parties, section 498-A Cr.P.C. needs to be read and examined again which is as under;

> **498-A. No bail to be granted to a person not in custody, in Court or against whom no case is registered, etc.**: Nothing in Section 497, or Section 498 shall be deemed to require or authorise a Court to release on bail, or to direct to be admitted to bail, any person who is not in custody or is not present in Court or against whom no case stands registered for the time being and an order for the release of a person on bail, or a direction that a person be admitted to bail, shall be effective only in respect of the case that so stands registered against him and is specified in the order or direction.

The section commands three essentials for grant of bail; which are (i) accused must be in custody or (ii) present before the court, and (iii) a case must be registered. Though above section uses two expressions for grant of bail i.e., 'to release on bail' or ' to be admitted to bail', probably for grant of bail under sections 497 & 498 of Cr.P.C. respectively, therefore, it is usually read that expression 'to release on bail' relates to custody and is used for post arrest bail while 'to be admitted to bail' connotes presence of accused in Court and is used for pre-arrest bail, yet it is a misconception which has already been clarified by the Supreme Court of Pakistan. The words "admitted to bail" are used both in sections 498 & 498-A Cr.P.C., therefore, Supreme Court of Pakistan while interpreting words "admitted to bail" used in section 498 of Cr.P.C. observed in case reported as "*MUHAMMAD AYUB versus (1) MUHAMMAD YAQUB AND (2) THE STATE"* **(P L D 1966 Supreme Court 1003),** as under;

> "In Hidayatullah Khan's case, which was a Full Bench decision of the Lahore High Court, the view was undoubtedly expressed that the words "admitted to bail", do not bear the same connotation as "released on bail". This interpretation, however, was not accepted by the Federal Court in Khushi Muhammad's case and again, recently by this Court in Sadiq Ali's appeal. ***It was observed that these two expressions are synonymous as was borne out by their being used in the same sense in several sections of the Code***. Reference in this section may be made to the language of sections 51, 62, 426, 427, 500 and 563(2) of the Code. The two expressions appear to have been used interchangeably in the Code and I do not see any reason to revise the opinion which I expressed in Sadiq Ali's case on this point, even after hearing the arguments advanced at the Bar in this case."
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> (Emphasis supplied)

In Sadiq Ali's case referred supra reported as *"SADIQ ALI Versus THE STATE"* (**PLD 1966 Supreme Court 589)**, the Supreme Court of Pakistan in an unequivocal term explained that the words "admitted to bail" is used for any accused who is in custody or, not in custody; which is as follows;

> "The words occurring in section 498 "direct that any person be admitted to bail" were emphasized and the opinion was expressed that the power of the Court extended not only to the grant of bail to persons who are in the custody of the High Court, or of an inferior Court or a police officer, but also includes a power to give directions in exceptional cases that persons should be admitted to bail, who are not in custody."

It is clear from the above dictum that an accused who being on interim pre-arrest bail is either present before the Court or in custody in another case can seek decision of his petition on merits.

6. Thus, it is clear that an accused who is granted interim pre arrest bail by the Court and directed to remain incessant in appearing before the Court on each and every date of hearing in the petition, becomes Custodia legis as declared in case reported as *"SHABBIR AHMAD versus THE STATE"* **(PLD 1981 Lahore 599)**, which means that his custody in that case now would be regulated only by the Court until decision of his bail petition; therefore, in the interregnum if he is arrested in another case, the Court while considering him in custody as mentioned in section 498-A Cr.P.C., is authorized to grant or refuse him bail in his absence, or ask for his production before the Court as held in *"FARHAN MASOOD KHAN versus STATE etc.*" **(PLJ 2021 Cr. C. Lahore 550)** or secure his attendance through video link as directed in case reported as *Criminal Revision No.54056/2023* titled as **Imran Ahmad Khan Niazi vs Spl. Judge, A.T.C, etc.** Similar expression is embedded in following case reported as "*ZEESHAN KAZMI versus THE STATE"* **(1997 M L D 273)**;

> "Now with the addition of section 498-A in the Code, in my view, it has become necessary ***that an accused who is not in custody should surrender himself before the Court*** when his bail application is taken up for hearing."
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> (Emphasis supplied)

On the same analogy, in a case reported as *"MUHAMMAD SHAFIQUE Versus The STATE and another"* **(2018 YLR 323)**

wherein accused was under arrest in another case, this Court had decided his pre-arrest bail petition in his absence on merits while touching the principles of natural justice, fair trial and access to justice.

7. Every accused as Custodia legis, pending his bail petition, sometimes faces unavoidable situations which could restrict his appearance before the Court on subsequent dates; like if he fells ill, becomes busy in wedding of his children or due to death of his near and dears, or is abducted or kept in illegal confinement, or under threats to life, or his easy and free access to the Court is restricted in any manner, then Court must grant him an opportunity to justify his absence, or if request is made for his recovery from the illegal custody, the Court must help prevent abuse of process by issuing an appropriate direction to know his whereabouts. The logic behind exercise of such powers, of course, is to save the dignity of a person from rigors of illegal arrest as guaranteed under the Constitution because arrest always brings humiliation, sufferings and also lowers the person in the estimation of others. Police should not arrest an accused who wants to approach to the Court of law for seeking protection. If police or any other person extend any such threat as not to move to the Court or make a legal application for protection, such act is an offence under section 190 of Pakistan Penal Code, 1860 which is reproduced below for reference;

> **190: Threat of injury to induce person to refrain from applying for protection to public servant:** Whoever holds out any threat of injury to any person for the purpose of inducing that person to refrain or desist from making a legal application for protection against any injury to any public servant legally empowered as such to give such protection, or to cause such protection to be given, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

8. As an additional note, this Court is not only a criminal Court as per section 6 of the Cr.P.C. but also a Constitutional Court under the Constitution of the Islamic Republic of Pakistan, 1973, therefore, unlike subordinate/inferior criminal Courts can pass appropriate order to protect the fundamental rights of a person with respect to life or liberty which does include to grant or decline pre-arrest bail in the

absence of accused if he on subsequent dates in the petition is found to be in Police/judicial custody in another case. In the light of above legal position, the present petition for pre-arrest bail is being decided in the absence of accused/petitioner keeping in view the statement of learned Deputy Prosecutor General that petitioner at this moment of time is confined in Adyla jail, Rawalpindi as convicted prisoner in other case, and has not been arrested so far in this case.

9. Gist of allegations in FIR transpires that Nadeem Tahir SI/SHO Police Station Secretariat Islamabad along with police contingent approached to the residence of the petitioner in order to effect his arrest in execution of arrest warrants issued by Additional Sessions Judge, West Islamabad in a complaint dated 03.11.2022 under sections 167/173 of Election Act, but faced a resistance offered by a mob of 100/150 persons present at zaman park outside the residence of the petitioner and thereby used criminal force with intent to prevent or deter him in discharging his duty as such public servant. In such situation of chaos, Senator Shibli Faraz appeared before him, kept him in wait for a long time and finally on the back of warrants wrote a note that *"Received on 05.03.2023 @ 12.58 PM Chairman Imran Khan is not available. However, we will comply with all legal processes. Senator Shibli Faraz COS to Chairman",* but he was not allowed to effect arrest of the petitioner.

10. Prosecution had a say that it was done on the direction and instigation of the petitioner as reflected from the fact of making a live press conference by him in this respect later in the day. Learned Deputy Prosecutor General has submitted that accused had deliberately avoided the execution of warrants of arrest, therefore, committed offences mentioned in the FIR; however, conceded that he had no information as to grant of bail to Senator Shibli Faraz in this case.

11. Learned Counsel for the petitioner states that present case was registered by the police with malafide intention in order to humiliate the petitioner who being a law abiding citizen was pursuing his cases personally before the Courts in each nook and corner of the country

and so far during investigation nothing incriminating was collected against the petitioner like proof of live conference which is also bereft of record, because its digital copy or transcript has not been obtained from PEMRA or any other agency; which fact was conceded by learned Deputy Prosecutor General, however attempted to justify such default with the stance that learned Magistrate has declined the request of police for association of petitioner into investigation. It is observed that for collection of above material, participation of accused/petitioner into investigation was not sine qua non. Learned counsel for the petitioner stated that offences primarily against the petitioner under section 172, 173, 174 & 186 PPC are non-cognizable and bailable which are punishable maximum up to six months; though harbouring of offender, an offence under section 212 PPC is not against the petitioner as per FIR yet it is also bailable. Further stated that as in non-cognizable offences FIR could not be registered but with malafide intention of police, story of resistance at the site was crafted in order to apply cognizable offences under sections 212, 353 & 506ii PPC.

12. Attending to the contentions of proponents, it is apparent that sufficient material is not available on the record in support of allegations against the petitioner at this stage of the proceedings and propensity of police to take a shortcut by registering an FIR instead of following the legal process is reflective of malafide on their part, when law permits them to file a report before the concerned judge with a complaint under sections 172, 173, 174 PPC against the petitioner for alleged disobedience to order of the Court. It has further been observed that when an accused is arrested in execution of a warrant of arrest issued from outside jurisdiction, police is bound to produce the accused before the concerned Magistrate under section 86 of Cr.P.C. for reporting his execution of duty in accordance with law and in such situation Sessions Judge is authorized to grant **‘an interim post arrest bail’** to the arrested accused, if the offences are non-bailable, on furnishing surety by the accused to appear before the Court concerned on the date fixed. It is learnt that Sessions Judges frequently exercise such power liberally in order to save the accused from rigors of arrest.

Thus, it is apparent that very registration of FIR was result of malafide against the petitioner probably due to political victimization. The Supreme Court of Pakistan in a case reported as *"Shahzada Qaiser Arfat alias Qaiser vs. The State and another*" **(PLD 2021 Supreme Court 708**) has held that *malafide* being a state of mind cannot always be proved through direct evidence, and it is often to be inferred from the facts and circumstances of the case. It has further been held by the Supreme Court of Pakistan in the cases reported as *"Khair Muhammad and another vs. the State through P.G. Punjab and another"* **(2021 SCMR 130**), *"JAVED IQBAL versus The STATE through Prosecutor General of Punjab and another"* **(2022 SCMR 1424)**, *"MUHAMMAD UMAR WAQAS BARKAT ALI versus The STATE and another"* **(2023 SCMR 330)** and *"ABDUL REHMAN alias MUHAMMAD ZEESHAN versus The STATE and others"* **(2023 SCMR 884)** that while deciding pre-arrest bail application merits of the case can also be touched upon and question of further inquiry can be stretched at this stage as well. In the circumstances, apparently petitioner has made out a case for grant of pre-arrest bail on the touch stone of further inquiry.

13. In the light of above circumstances, this petition is **allowed** and ad-interim pre-arrest bail already granted to the petitioner is confirmed subject to furnishing fresh bail bonds in the sum of Rs.5,00,000/- (five lac) with one surety in the like amount to the satisfaction of learned trial Court.

Muhammad Amjad Rafiq
Judge

Approved for reporting:

Judge

Signed on 21.05.2024.

*M. Azhar**