

Form No: HCJD/C-121

ORDER SHEET

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

Case No. **Crl. Misc. No.47626-B/2023**

Ghulam Rasool and two others **versus** The State etc.

| Sr. No. | Date of order | Order with signature of Judge, and that of parties or counsel, where necessary. |
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02) 11.09.2023 Mr. Fida Hussain Rana, Advocate for and with petitioners in this petition (petitioners have been identified by their learned counsel) and for Zarina Bibi (petitioner in Crl. Misc. No.50846-B 2023).
Ms. Rahat Majeed, Assistant District Public Prosecutor for the State along with Nasir Azeem, Inspector/Investigating Officer, Muhammad Ameen A.S.I. and record of the case.
Mian Tariq Manzoor, Advocate for complainant of the case/ respondent No.2 in the petition.

This single consolidated order will dispose of two petitions i.e. petition for grant of pre-arrest bail filed by Ghulam Rasool, Ghulam Hussain and Qurban Ali (petitioners/accused persons) bearing “**Crl. Misc. No.47626-B/2023**” and petition for grant of post arrest bail filed by Zarina Bibi (petitioner/ accused) bearing “**Crl. Misc. No.50846-B/2023**”, as both aforementioned petitions have been filed in the case arising out of one and same F.I.R. No.234/2023 dated: 11.06.2023 registered under Sections: 302, 148, 149 PPC at Police Station: Chutiyana, District: Toba Tek Singh.

2. Learned counsel for the petitioners, after having argued the case at full length, does not press Crl. Misc. No.47626-B/2023 to the extent of Ghulam Rasool and Qurban Ali (petitioners No.1 and 3, respectively); therefore, said petition to their extent is dismissed as not pressed and ad-interim pre-arrest bail already granted to them by this Court *vide* order dated: 18.07.2023, is hereby recalled.

3. **After hearing learned counsel for the parties, learned Assistant District Public Prosecutor and going through the available record with their able assistance**, it has been noticed that briefly, as per Crime Report (F.I.R.), at 11:30 p.m. (night) on 10.06.2023, Allah Ditta (complainant of the case), his sons namely Arsalan, Imran along with wife namely Mst. Shamshad Bibi and guests Muhammad Zain and Muhammad Afzal were sitting in the guest room (بیٹھک), Ghulam Rasool *alias* Kala (accused) came, called Arsalan (son of the complainant) and took him away; when after passage of sufficient time, Arsalan did not come back, complainant along with his wife and witnesses including Muhammad Zain and Muhammad Afzal started searching him, reached at the house of Zarina Bibi (accused/petitioner in Crl. Misc. No.50846-B/2023) wife of Ghulam Abbas and saw that in the street, persons residents of the vicinity were gathered there, outer door of

the house was opened and voices of hue and cry of son of the complainant were coming from inside; complainant along with witnesses at 02:30 a.m. (night) went inside the house of Zarina Bibi, saw that bulb was litting in the courtyard, one unknown and Zarina Bibi while catching arms of son of the complainant whereas another unknown while catching his both legs had laid down son of the complainant from back side (الٹا لیٹا رکھا تھا) in the courtyard of the house and his shirt was put off, accused persons namely Ghulam Rasool, Qurban Ali and Ramzan were giving merciless beating with sticks to Arsalan, who was raising hue and cry; complainant and witnesses beseeched the accused persons for rescue of Arsalan upon which, Muhammad Ramzan raised lalkara that they would also be murdered if they intervened and kept continued giving beating to Arsalan; Muhammad Raman and Qurban Ali gave beating to Arsalan at back of his chest and shoulders whereas Ghulam Rasool gave beating at random with stick at buttocks, thighs and his legs; Arslan also received various injuries on different parts of his body including face, arms etc.; call was made to the police on 15 and while coming to know about arrival of the police, accused persons fled away; Arsalan was carried in injured condition and being taken to Rural Health Center, however, he succumbed to the injuries on the way; motive behind the occurrence was that Zarina Bibi and brothers of her husband were having suspicion that Arsalan was having friendship with Misbah daughter of Zarina Bibi.

So far as case of Ghulam Hussain (petitioner No.2 in Crl. Misc. No.47626-B/2023) is concerned, suffice it to say that any role of said Ghulam Hussain is not mentioned in the Crime Report (F.I.R.). On Court's query, learned Assistant District Public Prosecutor under instructions of Investigating Officer (present in Court) and after herself going through the record apprises that complainant has even not given any supplementary statement to the extent of any role of Ghulam Hussain in the occurrence; further apprises that in the statements of eyewitnesses including Muhammad Zain, Muhammad Afzal and Shamshad Bibi recorded under Section: 161 Cr.P.C., name of Ghulam Hussain as accused has not been mentioned; also adds that nothing is to be recovered from him. Therefore, reasonable grounds are not available on record to connect Ghulam Hussain with the commission of alleged offences rather case of prosecution to his extent requires further probe/inquiry and falls in the ambit of Section: 497 (2) Cr.P.C. When aforementioned circumstances are visualized in totality, then arraying Ghulam Hussain in the case as accused by the complainant in connivance with the police through widening of net with *mala fide* intention, cannot be outrightly ruled out. In abovementioned circumstances, insistence of the Investigating Officer/police for arrest of accused is itself sufficient to reflect *malafide* on part of prosecution and accused in such circumstances is not required to produce any other evidence to

prove the same; in this regard, guidance has been sought from the case of **“SHAHZADA QAISER ARFAT alias QAISER Vs The STATE and another”**(PLD 2021 Supreme Court 708); relevant portions whereof are hereby reproduced: -

“4.
The learned High Court did not appreciate that the “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.²”

“6. The power of the High Courts and the Courts of Sessions to grant pre-arrest bail, first and foremost, must be examined in the constitutional context of liberty, dignity, due process and fair trial. Prearrest bail is in the nature of a check on the police power to arrest a person. The non-availability of incriminating material against the accused or non-existence of a sufficient ground including a valid purpose⁴ for making arrest of the accused person in a case by the investigating officer would as a corollary be a ground for admitting the accused to pre-arrest bail, and vice versa.⁵ Reluctance of the courts in admitting the accused persons to pre-arrest bail by treating such a relief as an extraordinary one without examining whether there is sufficient incriminating material available on record to connect the accused with the commission of the alleged offence and for what purpose his arrest and detention is required during investigation or trial of the case, and their insistence only on showing malafide on part of the complainant or the Police for granting pre-arrest bail does not appear to be correct, especially after recognition of the right to fair trial as a fundamental right under Article 10A of Constitution of Pakistan, 1973.⁶ Protection against arbitrary arrest and detention is part of the right to liberty and fair trial.⁷ This Court has, in many cases⁸ granted pre-arrest bail to accused persons after finding that there are no reasonable grounds for believing their involvement in the commission of the alleged offences and has not required independent proof of malafide on part of the Police or the complainant before granting such relief.⁹ **Despite non-availability of the incriminating material against the accused, his implication by the complainant and the insistence of the Police to arrest him are the circumstances which by themselves indicate the malafide on the part of the complainant and the Police, and the accused need not lead any other evidence to prove malafide on their part.**”

(emphasis added)

In view of what has been discussed above, petition for pre-arrest bail bearing Crl. Misc. No.47626-B/2023 to the extent of Ghulam Hussain (petitioner No.2) is **allowed** and ad-interim pre-arrest bail already granted to him by this Court vide order dated: 18.07.2023 is confirmed subject to his furnishing fresh bail bonds in the sum of Rs.300,000/- (Rupees three hundred thousand only) with one surety in the like amount to the satisfaction of trial court within a period of fifteen days from today.

Now coming to the case of Zarina Bibi (petitioner in Crl. Misc. No.50846-B/2023, hereinafter to be referred as “**petitioner**”); as per case of prosecution, she was neither equipped with any weapon nor caused any injury to the deceased of the case rather there is allegation against her that she along with one

unknown accused caught hold Arsalan (deceased of the case) from his arms. In the peculiar facts and circumstances, when number of accused persons were present at the spot for commission of the alleged occurrence and another person was also catching arms of the deceased of the case, then whether it was necessary for Zarina Bibi to catch arms of the deceased, is the question which would be answered by the trial court after recording of evidence and furthermore, vicarious liability of the petitioner would also be seen during trial of the case. Nothing has been recovered from the petitioner. Admittedly, petitioner is a woman and her case falls in the first proviso to Section: 497 (1) Cr.P.C. By now it is well settled that even in the cases falling in the prohibition contained in Section: 497 Cr.P.C. grant of bail to a woman is a rule and refusal is an exception, however, any material could not be referred by the prosecution to bring case of the petitioner for invoking said exception; in this regard, guidance has been sought from the case of “**Mst. GHAZALA versus The STATE and another**” (2023 S C M R 887) and relevant portion of said case law is hereby reproduced: -

“4. No doubt, the offence of Qail-i-amd (intentional murder) punishable under section 302, P.P.C. alleged against the petitioner falls within the prohibitory clause of section 497(1) of the Code of Criminal Procedure, 1898 ("Cr.P.C.") but being a women, the petitioner's case is covered by the first proviso to section 497(1), Cr.P.C. The said proviso, as held in *Tahira Batoool case*, 'makes the power of the court to grant bail in the offences of prohibitory clause of section 497(1) alleged against an accused under the age of sixteen years, a woman accused and a sick or infirm accused, equal to its power under the first part of section 497(1), Cr.P.C. It means that in cases of women accused etc. as mentioned in the first proviso to section 497(1), irrespective of the category of the offence, the bail is to be granted as a rule and refused only as an exception in the same manner as it is granted or refused in offences that do not fall within the prohibitory clause of section 497(1), Cr.P.C. The exceptions that justify the refusal of bail are also well settled by several judgments of this Court.² They are the likelihood of the accused, if released on bail: (i) to abscond to escape trial; (ii) to tamper with the prosecution evidence or influence the prosecution witnesses to obstruct the course of justice; and (iii) to repeat the offence.

5. That being the legal position, we have asked the learned Additional Advocate General and the learned counsel for the complainant to show how the petitioner's case falls in any of the said three well-established exceptions. They, however, could not explain and satisfy the Court as to which one of the said exceptions is attracted to the petitioner's case. Their only response was that there is a sufficient incriminating material available on record of the case to connect the petitioner with the commission of the alleged offence. We are afraid, the response is misconceived.”

Petitioner was arrested in the case on 18.06.2023, sent to jail on the same day and is behind the bars since then; challan report already stands submitted in the Court; no useful purpose would be served to the case of prosecution by keeping the petitioner in jail for an indefinite period and it is trite law that bail cannot be withheld as advance punishment. Even otherwise bail is a procedural relief i.e. mere change of custody from State to surety and has no bearing on ultimate fate of the case.

Liberty of a person is a precious right which has been guaranteed by the Constitution of Islamic Republic of Pakistan, 1973. By now it is also well settled that it is better to err in granting bail than to err in refusal because ultimate conviction and sentence can repair the wrong resulted by a mistaken relief of bail; in this regard, case of “**CHAIRMAN, NATIONAL ACCOUNTABILITY BUREAU through P.G., NAB versus NISAR AHMED PATHAN and others**” (**PLD 2022 Supreme Court 475**) can be safely referred and its relevant portion from Page No(s).480-481 is reproduced: -

“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.”

4. In view of above, Cr. Misc. No.50846-B/2023 filed by Zarina Bibi (petitioner) is **accepted/allowed** and she is admitted to post-arrest bail in the case subject to her furnishing bail bonds in the sum of Rs.3,00,000/- (Rupees three hundred thousand only) with one surety in the like amount to the satisfaction of trial court.

5. It goes without saying that observations mentioned above are just tentative in nature, strictly confined to the disposal of aforementioned petitions for bail and will have no bearing upon trial of the case, which would be decided on its own merits by the trial court expeditiously preferably within a period of four months after the receipt of attested copy of this order. Needless to add that if Ghulam Hussain, Zarina Bibi or any other person acting on their behalf will create any hurdle in the way of conclusion of trial, then complainant as well as the State would be at liberty to move for recalling of this order.

(Farooq Haider)
Judge

APPROVED FOR REPORTING

(Farooq Haider)
Judge