IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Mian Saqib Nisar
Mr. Justice Asif Saeed Khan Khosa
Mr. Justice Sh. Azmat Saeed
Mr. Justice Iqbal Hameedur Rahman
Mr. Justice Dost Muhammad Khan

Criminal Appeal No. 19 of 2012
(Against the order dated 05.07.2011 passed by the Lahore High Court, Lahore in Criminal Miscellaneous No. 7821-B of 2011)

Sarwar, etc. *... Appellants*

versus

The State, etc. *... Respondents*

Criminal Appeal No. 32-L of 2012
(Against the order dated 08.03.2012 passed by the Lahore High Court, Lahore in Criminal Miscellaneous No. 470-B of 2012)

Iftikhar Ahmed *... Appellant*

versus

The State, etc. *... Respondents*

Criminal Appeal No. 82 of 2014
(Against the order dated 23.12.2013 passed by the Lahore High Court, Rawalpindi Bench, Rawalpindi in Criminal Miscellaneous No. 1783-B of 2013)

Nadeem Khan *... Appellant*

versus

The State, etc. *... Respondents*

Criminal Petition No. 397 of 2013
(Against the order dated 30.09.2013 passed by the Lahore High Court, Multan Bench, Multan in Criminal Miscellaneous No. 2088-B of 2013)

Shaukat Ali *... Petitioner*

versus

The State, etc. *... Respondents*

Criminal Petition No. 455 of 2013
(Against the order dated 10.09.2013 passed by the Lahore High Court, Multan Bench, Multan in Criminal Miscellaneous No. 2619-B of 2013)

Mukhtiar Hussain *... Petitioner*

versus

Allah Ditta, etc. *... Respondents*

For the appellants:	Mr. Azam Nazir Tarar, ASC with appellants No. 3 to 5 in person *(in Cr. A. 19 of 2012)* Mr. Azam Nazir Tarar, ASC with the appellant in person *(in Cr. A. 32-L of 2012)* Mr. Ansar Nawaz Mirza, ASC With the appellant in person *(in Cr. A. 82 of 2014)*
For the petitioners:	In person. *(in Cr. P. 397 of 2013)* Nemo. *(in Cr. P. 455 of 2013)*
For the complainant:	Mian Muhammad Shafiq Bhandara, ASC *(in Cr. A. 19 of 2012)* Raja Abdul Rehman, ASC Syed Ali Imran, ASC *(in Cr. A. 32-L of 2012)* Nemo. *(in Cr. A. 82 of 2014)* Mr. Nazir Ahmed Bhutta, ASC *(in Cr. P. 397 of 2013)* N.R. *(in Cr. P. 455 of 2013)*
For the State:	Mr. Asjad Javaid Ghural, Additional Prosecutor-General, Punjab Ch. Abdul Waheed, Additional Prosecutor-General, Punjab *(in all cases)*
Date of hearing:	29.09.2014

JUDGMENT

Asif Saeed Khan Khosa, J.: The question as to whether after having been summoned by a trial court under section 204, Cr.P.C. to face a trial in connection with a private complaint the person so summoned is required only to furnish a bond, with or without sureties, under section 91, Cr.P.C. for his future appearance before the trial court or he is to apply for pre-arrest bail under section 498, Cr.P.C. is a question which has remained a subject of some controversy in the past and, therefore, on 20.01.2012 this Court had granted leave to appeal in some of the present matters so that the issue may be conclusively resolved through an authoritative pronouncement. The leave granting order (reported as 2012 SCMR 1912) passed by a 5-member Bench of this Court reads as follows:

> "The question involved in these petitions is as to whether upon his summoning by a trial Court in a case arising out of a private complaint an accused person needs to apply for bail in terms of sections 496, 497 and 498, Cr.P.C. or in such a situation he is only to submit a bond for his appearance before the trial Court under section 91, Cr.P.C. It appears that in different judgments different notes have been struck by this Court on the subject and a reference in this respect may be made to the cases of Syed Muhammad Firdaus and others v. The State (2005 SCMR 784), Luqman Ali v. Hazaro and another (2010 SCMR 611) and Criminal Appeal No. 56 of 1986 (Raham Dad v. Syed Mazhar Hussain Shah) decided by this Court on 14-1-1987). At different times different High Courts had also rendered conflicting judgments on the issue. It is, therefore, imperative that such conflicts should be removed or resolved at the earliest so as to restore certainty in the matter for the guidance of all the courts in the country. In this view of the matter leave to appeal is granted in both these petitions and the Office is directed to fix the appeals for regular hearing at the earliest possible, preferably within a period of one month. The petitioners in Criminal Petition No. 549-L of 2011 have already been admitted to ad-interim pre-arrest bail by this Court *vide* order dated 11-8-2011. Their ad-interim pre-arrest bail shall continue till the next date of hearing."

2. In view of the legal controversy at hand we have deemed it appropriate to resolve the legal issue first and then to leave the present appeals and petitions to be decided by appropriate Benches of this Court on the basis of their respective merits in the light of the law declared through the present judgment.

3. We have heard the learned counsel for the parties, some of the parties appearing in person and the learned Additional Prosecutors-General, Punjab appearing for the State at some length and have also attended to and perused the statutory provisions and the precedent cases referred to and relied upon by them in support of their respective submissions.

4. For a proper resolution of the legal question involved it may be advantageous to reproduce the following legal provisions of the Code of Criminal Procedure, 1898 relevant to the issue:

> **91. Power to take bond for appearance.** When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court.

> **204. Issue of process.** (1) If in the opinion of a Court taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be one in which, according to the fourth

column of the Second Schedule, a summons should issue in the first instance, it shall issue its summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instance, it may issue a warrant, or, if it thinks fit, a summons for causing the accused to be brought or to appear at a certain time before such Court or if it has no jurisdiction itself some other Court having jurisdiction. ----------

496. In what cases bail to be taken. When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail:

Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

Provided further that nothing in this section shall be deemed to affect the provisions of section 107, sub-section (4), or section 117, sub-section (3).

497. When bail may be taken in case of non-bailable offence. (1) When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years: ----------

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided. ----------

498. Power to direct admission to bail or reduction of bail. The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive; and the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police officer or Magistrate be reduced.

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 authorize 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.

5. Before embarking upon any discussion on the legal issue involved in these matters it may also be useful to refer to all the reported cases on both sides of the legal divide. The reported cases on the subject can be divided into two categories, the first category of cases is that wherein it was held that after having been summoned by a trial court to face a trial in connection with a private complaint the person so summoned is required only to furnish a bond, with or without sureties, under section 91, Cr.P.C. for his future appearance before the trial court and in the second category of cases it was held that such person is to apply for pre-arrest bail under section 498, Cr.P.C. failing which he is to be taken into custody and lodged in jail.

6. In the first category of cases, i.e., the category of cases wherein it was held that after having been summoned by a trial court to face a trial in connection with a private complaint the person so summoned is required only to furnish a bond, with or without sureties, under section 91, Cr.P.C. for his future appearance before the trial court the pioneering and groundbreaking case was the case of *Mazhar Hussain Shah v. The State* (1986 P.Cr.L.J. 2359). In that case while seized of a private complaint a Sessions Judge recorded the statement of the complainant and the evidence produced at the preliminary stage and then issued process against the accused persons under section 204, Cr.P.C. In response to the summonses issued by the Sessions Judge the accused persons appeared before the Sessions Judge and filed applications for pre-arrest bail but the same were dismissed by the Sessions Judge with the observation that it was not a fit case for pre-arrest bail. The accused persons then approached the Lahore High Court, Lahore for the desired relief and Muhammad Rafiq Tarar, J. admitted the said accused persons to pre-arrest bail and observed as follows:

> "3. Section 204, Cr.P.C. provides that if the Court taking cognizance of an offence is of the opinion that there is sufficient ground for proceeding, it shall issue a summons if the case appears to be one in which, according to the fourth column of the Second Schedule, summons should issue in the first instance but if the case appears to be one in which according to that column, a warrant should issue in the first instance, it may issue a warrant, or, if it thinks fit, a summons, for causing the accused to be brought or to

> appear before it. According to fourth column a warrant should ordinarily issue in the first instance in a case under section 302, P.P.C. but in this case the Court chose to issue a summons. Section 91, Cr.P.C. lays down that when any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court. Under this section a bond with or without sureties may be taken from an accused person or from a witness for his appearance. The learned Sessions Judge was empowered to issue warrant or summons for causing the accused to be brought to or appear before him and exercising that power he issued summons to the petitioners in response to which they appeared before him. He was, therefore, required to proceed under section 91, Cr.P.C., and to direct them to execute bonds with or without sureties for their appearance in Court. This section by necessary implication also empowers the Court to commit the person present in Court to custody if he fails to give security for his attendance. It is nobody's case that the petitioners were asked to execute bond and they had failed to do so.
>
> Process is issued to the accused when the Court taking cognizance of the offence is of the opinion that there is sufficient ground for proceeding. Such opinion is not to be equated with the existence of reasonable ground for believing that the accused was guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years. In the circumstances, I feel inclined to the view that the petitioners are entitled to bail. The interim bail is, therefore, confirmed."

Admission of Syed Mazhar Hussain Shah accused to pre-arrest bail by the Lahore High Court, Lahore in that case was challenged by Reham Dad complainant before this Court through Criminal Appeal No. 56 of 1986 but that appeal was dismissed by a 3-member Bench of this Court through its judgment dated 14.01.1987. The said judgment had not been published in any law report or journal and, therefore, the same is being reproduced here in full:

> "IN THE SUPREME COURT OF PAKISTAN
> (Appellate Jurisdiction)
>
> PRESEMT
> Mr. Justice Dr. Nasim Hasan Shah
> Mr. Justice Ali Hussain Qazilbash
> Mr. Justice Saad Saood Jan
>
> **Cr. A. No. 56/86.**
> (On appeal from the order dated 7.12.1985 of the Lahore High Court, Lahore in Cr. Misc. No. 2807/B of 1985)
>
> Reham Dad s/o Muhammad Bakhsh. ....Appellant
>
> Vs.
>
> Syed Mazhar Hussain Shah & others. ...Respondents

For the appellant:	Ch. Muhammad Abdul Wahid, Sr. ASC Mr. Mahmood A. Qureshi, AOR (absent)
For respondents 1-17:	Mr. Nemat Khan, ASC Ch. Mehdi Khan Mehtab, AOR {absent)
For the State:	Mr. M. Nawaz Abbasi, Asstt. A.G. Pb. Rao Muhammad Yousuf Khan, AOR
Date of hearing:	14.1.1987

JUDGMENT

Ali Hussain Qazilbash J.- This appeal arises out of the order of a learned Single Judge of the Lahore High Court dated 7.12.1985 whereby the respondents were allowed bail before their arrest.

2. The facts are that Syed Mazhar Hussain Shah, Head Constable (Incharge) Proclaimed Offenders Staff, Gujrat and 8 other constables as well as 8 private persons are accused in a complaint case by the appellant Rahim Dad for the murder of his two sons namely Muhammad Azam, Muhammad Azhar and one Noor Hussain under sections 120-B, 148, 302 and 109/149 PPC. It was complained by the appellant that in pursuance of a conspiracy the respondents committed the crime under the sections given above on 23.12.1983. As police officials were involved in the case, it was given a colour of police encounter and lot of public attention was attracted to the case. No case, however, could be registered with the police, therefore, the appellant filed a complaint on 18.7.1984. A judicial inquiry was made in the matter by Mr. Muhammad Musa Khan, Magistrate 1st Class, Gujrat in which the respondents were found guilty but in another inquiry conducted by the Assistant Commissioner, Mandi Bahau Din, the police officials, accused in the complaint were exonerated and therefore the complaint was lodged. The complaint came up before a learned Sessions Judge, Gujrat who proceeded under section 204 of the Cr.P.C., recorded preliminary evidence and issued process against the respondents on 17.7.1985. In response to the summons issued by the learned Sessions Judge, the respondents appeared in Court moved application for bail before arrest. Relying on the provisions of sections 90 and 91 Cr.P.C., the learned Sessions Judge rejected the bail application on 29.10.1985 holding that there were grounds for proceeding further in the matter. The respondents then moved in the High Court their bail before arrest through Cr. Misc. No. 2807-B of 1985 on 12.11.1985 which came up for hearing before Mr. Justice Muhammad Rafiq the same day, who admitted the respondents to interim bail and then on 7.12.1985 confirmed the bail through the impugned order, hence the present appeal.

3. We have heard the learned counsel for the parties and have gone through the orders of the Courts below. The learned Single Judge while allowing bail to the respondents has observed, “The learned Sessions Judge was empowered to issue warrants or summons for causing the accused to be brought or to appear before him and exercising that power he issued summons to the petitioners in response to which they appeared before him. He was, therefore, required to proceed under section 91 Cr.P.C. and to direct them to execute bonds with or without sureties for their appearance in the Court. The section, by necessary implication also empowers the Court to commit the person present in the Court to custody if he fails to give security for his attendance.

> Process is issued to the accused when the Court taking cognizance of the offence is of the opinion that there is sufficient ground for proceeding. Such opinion is not to be equated with the existence of reasonable ground for believing that the accused was guilty of an offence punishable with death or imprisonment for life or imprisonment for 10 years."
>
> 4. We have considered the arguments of the learned counsel for the parties in the light of the above observation and we are of the view that the learned Single Judge was justified in admitting the respondents to bail. His findings are unexceptionable and need no interference. This appeal fails and is hereby dismissed."

7. The *ratio* of the case of *Mazhar Hussain Shah* (*supra*) was subsequently referred to and followed by Khalid Paul Khawaja, J. of the Lahore High Court, Lahore in the case of *Maqbool Ahmad and another v. The State and another* (1997 P.Cr.L.J. 1074) wherein it was observed as follows:

> "13. Admittedly the petitioners are accused persons in a private complaint. After the issuance of a process against them under section 204, Cr.P.C. when they had put in appearance before the trial Court the learned Sessions Judge should have acted in accordance with the provisions of section 91, Cr.P.C. which reads as follows:--
>
> > "When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court."
>
> It has been held in Mazhar Hussain Shah v. The State 1986 PCr.LJ 2359 (Lahore) that after appearance of the accused in Court in pursuance of a process issued under section 204, Cr.P.C. the trial Court was required to proceed under section 91, Cr.P.C. and to direct the accused to execute bonds with or without sureties for appearance in Court. Admittedly in the present case the accused petitioners were not asked to execute bonds. This was a lapse on the part of the learned trial Court which militates against the law laid down by Superior Courts. In my opinion the learned Sessions Judge should have asked the petitioners to execute bonds for their appearance even if they had been summoned through non-bailable warrants of arrest.
>
> 14. From the dictum laid down in the aforecited Mazhar Hussain Shah's case it emanates that the learned Sessions Judge had wrongly proceeded to consider that the petitioners had applied for their pre-arrest bail. In the aforecited case the facts are identical to the present case. A few Police Officers were summoned in a private complaint under sections 120-B, 148, 302, 109 and 149, P.P.C. They appeared before the trial Court and moved applications for bail. The Court treated the said applications as applications for pre-arrest bail and dismissed them. It was held that the observation of the learned trial Court that it was case of pre-arrest bail was misconceived and the accused were found to be entitled to bail. It was further held that existence of sufficient grounds for proceedings in a complaint case could not be equated with the existence of reasonable grounds that the accused was guilty of an offence punishable with death or imprisonment for ten years. In this view of the matter the present

> applications, in stricto senso, could not be considered to be applications for pre-arrest bail and, therefore, the contention that the petitioners had not alleged mala fides was irrelevant.
>
> 15. In view of what has been stated above the interim bail granted to Maqbool Ahmad, Babu Muhammad Ishaque, Master Asif, Akhtar and Muhammad Nawaz petitioners is confirmed while Muhammad Aslam petitioner in Criminal Miscellaneous No. 5357/B of 1997 is required to execute a bail bond in the sum of Rs. 20,000 with one surety in the like amount to the satisfaction of the learned trial Court."

8. The legal position declared in the case of *Mazhar Hussain Shah* (*supra*) was also expressly referred to and relied upon by Kh. Muhammad Sharif, J. of the Lahore High Court, Lahore in the later case of *M. Siddique v. Rehmat and others* (PLJ 2001 Cr.C. (Lahore) 251) and it was held in that case as under:

> "Through this Criminal Revision learned counsel for the petitioner has challenged the order of learned Addl. Sessions Judge, Sheikhupura dated 2.10.2000, whereby, the said learned Addl. Sessions Judge in a complaint case after summoning the respondent, through summons directed them to file bail bonds in the sum of Rs. 50,000/-. He submits that in the peculiar circumstances of the case when younger son of the complainant has been murdered by the respondents and police with *mala fide* intention had cancelled the case, the Court in the first instance should have issued non-bailable warrants, that Section 204, Cr.P.C. should be read with Section 497 Cr.P.C. alongwith Section 91, Cr.P.C. He has also relied upon PLD 1992 Lahore 444, and 1987 P.Cr.L.J. 532 & 1897.
>
> 2. I have heard learned counsel for the petitioner at a great length and have also gone through Sections 204, 497 and 91 Cr.P.C. As far as, Section 497 Cr.P.C. is concerned, the same is reproduced below:
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> > 497. When bail may be taken in cases of non-bailable offence--(1) When any person accused of non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or (imprisonment) for life or imprisonment for 10 years."
>
> 2. In Section 497, Cr.P.C. The word used by the statute is that when any accused person of non-bailable offence is arrested or detained without warrant by any officer-in-charge of Police Station, or *appears* or is brought before a Court. In my humble opinion, the words give the meaning that the persons who has been summoned or himself surrenders before the Court, he may be released on bail but he shall not be so released if there appear reasonable grounds for believing that he is guilty of an offence punishable with death or (imprisonment) for life or imprisonment for 10 years. Moreover, the same matter was also examined by this Court while deciding the case of *Mazhar Hussain Shah vs. The State*, reported in 1986 P.Cr.L.J. 2359, wherein it was held that:

> "Process is issued to the accused when the Court taking cognizable of the offence is of the opinion that there is sufficient ground for proceeding. Such opinion is not to be equated with the existence of reasonable ground for believing that the accused was guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years."

> 3. In the instant case, FIR was registered against the respondents but no challan was submitted in the Court, thereafter, complaint was filed. After recording preliminary evidence, Court came to the conclusion that *prima facie* case was made out, summons were issued against the respondents and in response to the summons they appeared before the Court and they were directed by Court to file bail bonds in the sum of Rs. 50,000/-. No illegality has been committed by learned Addl. Sessions Judge, Sheikhupura. The judgments cited by learned counsel for the petitioner are not applicable in the instant case and particularly, in a judgment that is, 1987 P.Cr.L.J. 532, it was held by his Lordship that investigation in that case was biased one which is not here in this case. This practice of summoning the accused through bailable warrants is going on for the last so many years. It is based on good reasoning and interpretation of the statute. No case for interference is made out, therefore, this petition is dismissed *in limine.*"

9. Subsequently in the case of *Ghulam Abbas v. State* (PLJ 2005 Cr.C. (Lahore) 72) while dealing with an application for suspension of sentence and bail after conviction in a case arising out of a private complaint Ch. Iftikhar Hussain, J. of the Lahore High Court, Lahore had observed as follows:

> "7. The contention that he may be released on bail by suspending his sentence by taking bond from him for appearance according to the spirit of Section 91, Cr.P.C. is absolutely misconceived. It is because of the fact that the object of that provision of law is only to secure the attendance/appearance of a person, whose presence may be required by Court in relation to some matter before it. The position in the case of the applicant is altogether different inasmuch as that he after due appreciation of the evidence available on the record was found guilty of the charge of *Qatal-e-Amd* of the deceased and was convicted and sentenced as mentioned above. So, the provision of Section 91, Cr.P.C. cannot be attracted in his case for suspending his sentence and release on bail."

10. Later on in the case of *Syed Muhammad Firdaus and others v. The State* (2005 SCMR 784) a 3-member Bench of this Court approvingly referred to the case of *Mazhar Hussain Shah* (*supra*) and held as already held by this Court in the above mentioned unreported case of *Reham Dad* (*supra*). The relevant observations made by this Court are reproduced below:

> "A perusal of above order indicates that prima facie, learned

> trial Court failed to take into consideration that the case of petitioners Raja Munawar Hussain, Amjad Javed Saleemi is also at par with the case of Dr. Muhammad Azam, therefore, they have also not been summoned and once the Court decided to proceed against them, then their bail should have not been cancelled, as they were liable to be dealt with under section 91, Cr.P.C. in view of the judgment in the case of Mazhar Hussain Shah v. The State 1986 PCr.LJ 2359."

11. The next was the case of *Muhammad Ijaz v. Nadeem and 3 others* (PLD 2006 Lahore 227) wherein Syed Shabbar Raza Rizvi, J. of the Lahore High Court, Lahore noticed the judgment passed by this Court in the case of *Syed Muhammad Firdaus* (*supra*) and went on to add as follows:

> "Section 88 of the Code of Criminal Procedure, 1973 (India) is verbatim in language to section 91, Cr.P.C. For convenience, it is reproduced hereunder:--
>
> > "When any person of whose appearance or arrest the officer presiding in any Court is empowered to issue summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court or any other Court to which the case may be transferred for trial."
>
> The purpose of this section is to ensure or demand presence of such person who is directed by the Court to execute the bonds. For the same reasons, these provisions are applicable to a person who is present in Court and is free. If a person is already under arrest and in custody, provisions of section 91, Cr.P.C. are not applicable. In this regard, two judgments from Indian jurisdiction are referred; Ajit Singh v. State AIR 1970 Dehli 155 and Madhu Umaye v. S.D.M. 1971 1.Cr.L.J. 1720 and AIR 1971 SC 2486."

12. The last case of this category of cases was the case of *Muhammad Yasin v. The State and another* (2008 YLR 2197) decided by Malik Saeed Ejaz, J. of the Lahore High Court, Lahore and it was held in that case as under:

> "12. In the instant case, the petitioner was declared innocent in the investigation and police case against him has been filed as "Untraced". Resultantly, in private complaint regarding the same occurrence, process under section 204, Cr.P.C. was issued by the learned trial Court and the petitioner was directed to appear to face trial in the instant complaint. When the accused appeared in response to issuance of such process, the learned trial Court instead of directing him to execute bonds with or without surety by following the provisions of section 91, Cr.P.C., rejected the request of bail of the petitioner and sent him behind the bars.
>
> 13. The case-law cited by the learned counsel for the petitioner is very much applicable in the instant case. I would like to reproduce the relevant extracts of the same. In the case reported as 2005 SCMR

> 784 it is held that "Once the Court decided to proceed against them (accused), then their bail should have not been cancelled as they were liable to be dealt with under section 91, Cr.P.C." In the case cited as 1997 P.Cr.L.J. 1074 it is observed that "Admittedly the petitioners are accused persons in a private complaint. After the issuance of a process against them under section 204, Cr.P.C. when they had put in appearance before the trial Court the learned Sessions Judge should have acted in accordance with the provisions of section 91, Cr.P.C." Similarly in case published as 1986 P.Cr.L.J. 2359 in its head-note it is held that "In response to summons issued by trial Court in a private complaint accused persons appearing before trial Court and moving for bail which was refused --- After appearance of accused in Court, trial Court, held, was required to proceed under S. 91, Cr.P.C. and to direct accused to execute bonds with or without sureties for appearance in Court --- As accused were not asked to execute bond they could not be said to have failed to do so --- Observations of trial Court that case was of pre-arrest bail was found to be misconceived and accused were found to be entitled to bail in circumstances."
>
> 14. In these circumstances, I am of the considered view that the learned trial Court has not followed the prescribed procedure of law as laid down under section 204, Cr.P.C. read with section 91, Cr.P.C. but on the other hand the learned trial Court had decided the bail petition of the petitioner by touching the merits of the case, while interpreting the provisions of section 204, Cr.P.C. read with section 91, Cr.P.C. in the light of above cited judgments, I am of the considered view that the merits of the case are not required to be touched at the time of deciding bail petition in a private complaint, therefore, the impugned order dated 16-4-2007 passed by the learned Additional Sessions Judge, Khanewal, is not sustainable, hence, the same is set aside.
>
> 15. Keeping in view the facts and circumstances of the case and relying upon the above referred judgments, I have no option but to admit the petitioner to bail merely on technical grounds by following the provisions of section 204, Cr.P.C. read with section 91, Cr.P.C. to release him on bail by directing to submit bail bonds in the sum of Rupees Five Lac (Rs. 5,00,000), with two sureties, each in the like amount, to the satisfaction of the trial Court."

13. The first reported case falling in the second category of cases wherein it was held that a person summoned to face a trial in connection with a private complaint is to apply for pre-arrest bail under section 498, Cr.P.C. was the case of *Wazir Khan and another v. The State* (1987 P.Cr.L.J. 532). In that case Rustam S. Sidhwa, J. of the Lahore High Court, Lahore did not discuss the legal position in respect of the issue at hand at all and proceeded upon an assumption that in such a case the person concerned is to apply for pre-arrest bail. In the later case of *Sajjad Hussain alias Basara v. Faqir Muhammad and another* (1987 P.Cr.L.J. 1898) decided by Qurban Sadiq Ikram, J. of the Lahore High Court, Lahore the position was again the same.

14. In the subsequent case of *Malik Anjum Farooq Paracha v. Manzur-ul-Haq and 5 others* (PLD 1992 Lahore 444) Tanvir Ahmad Khan, J. of the Lahore High Court, Lahore also proceeded under the same assumption and without any discussion regarding the legal issue at hand held as under:

> "I have considered the contentions. I must observe at the very outset that the role of the Investigating Agency is highly questionable in this case. The stance taken by the S.P. Crime Branch who is present in Court is that once the investigation of a case is entrusted to the Crime Branch, the accused named therein would not be arrested unless and until the investigation is finalized and its approval is accorded by the Inspector-General of Police. He has stated that though there are no such written instructions or rules but this procedure is based upon prevailing practice. It is strange enough that in this broad daylight occurrence in the premises of the Court in which one person lost his life and two persons were brutally injured; the F.I.R. was promptly recorded; the prearrest bail of respondents Nos. 1 to 5 was not confirmed by the learned Additional Sessions Judge Mr. Mazhar Hussain Minhas on the 22nd of December, 1991 the police functionaries did not apprehend the accused/respondents. If this practice is not arrested and is allowed to continue, then an accused of' any serious crime, can successfully avoid arrest by arranging the investigation through Crime Branch and frustrate a judicial order. Inspector-General of Police, Punjab is to take serious note of this practice.
>
> Subsequent to this attitude of the Crime Branch, on a complaint filed by the petitioner on the similar facts, Mr. Ata Rasool Joya, Additional Sessions Judge issued process after being fully satisfied from the preliminary evidence recorded by him that a case of section 302, P.P.C. is made out. He issued non-bailable warrants of the respondents and instead of keeping his hand away as it was brought to his notice that the earlier pre-arrest bail application on similar facts was disallowed by Mr. Mazhar Hussain Minhas, Additional Sessions Judge, he allowed the execution of bail bonds through his order dated 7-5-1992. The proper procedure for him was to refer the matter to the learned Sessions Judge, Rawalpindi for an appropriate order. Instead of doing the same he in a mechanical manner directed the respondents to execute the bail bonds without noticing and considering the conditions for grant of bail under section 497, Cr.P.C. This exercise of power on his part is clearly in violation of the rule laid down in Zubair's case PLD 1986 SC 173 wherein it has been specifically held that in the same case (or in the cross-case) successive bail application has to be heard by the same Court. In the case in hand the facts of F.I.R. No. 488 and that of a complaint are completely similar. Respondents were earlier held by Mr. Mazhar Hussain Minhas, Addl. Sessions Judge not entitled to the concession of bail as according to him there appears reasonable ground for believing that they have been guilty of an offence punishable with death or imprisonment for life or for 10 years. Keeping all the facts and circumstances of the case into consideration, the concession granted to the respondents Nos. 1 to 5 by allowing them to submit their bail bonds is hereby recalled and it is directed that they shall be arrested forthwith. Office is directed to transmit this order to the S.S.P., Rawalpindi for compliance. A copy of this order shall also be sent to the Inspector-General of Police, Punjab."

15. The later case of *Noor Nabi and 3 others v. The State* (2005 P.Cr.L.J. 505) holds the same foundational distinction in the second category of cases on the subject under discussion as is held by the case of *Mazhar Hussain Shah* (*supra*) in the first category of cases. In the case of *Noor Nabi* Rahmat Hussain Jafferi, J. of the High Court of Sindh, Karachi had undertaken a detailed analysis of the scheme of things in the Code of Criminal Procedure and had held as follows:

> "I have given due consideration to the arguments and have gone through the material available on the record very carefully. On the earlier dates, the counsel for the applicants got the matter adjourned to produce the order by which the applicants were granted bail in direct complaint case. The counsel for the applicants did not produce the bail order on the ground that no such order was passed but produced the affidavit of surety which was accepted by the trial Court on 12-8-2002 and released the accused.
>
> I have gone through the contents of direct complaint and the F.I.R. I find that the facts are same, the accused are also same. It appears that the direct complaint was filed because the police did not arrest the applicants even after lodging the F.I.R. In the direct complaint, the process was issued against the applicants and other co-accused persons in the shape of bailable warrants as required under fourth column of Schedule-II attached to the Cr.P.C.
>
> In pursuance of the B.Ws. the accused appeared before the Court but the Court released them on executing bond with surety without passing any order granting bail to them as required under section 497, Cr.P.C.
>
> Important question has been raised in this application as to whether the Court issuing process under section 204, Cr.P.C. in a direct complaint, is required to release the accused merely on bond as required under section 91 of Cr.P.C. or a bail is to be granted within the meaning of section 497, Cr.P.C., when the accused involved in non-bailable case appeared before the Court issuing the process against them.
>
> In the case of Mazahar Hussain Shah v. State reported in 1986 PCr.LJ 2359, it has been observed that in a case of private complaint when the accused appear before the Court in pursuance of process issued against him under section 204, Cr.P.C. then the accused is simply required to execute a bond with or without surety for their appearance as provided under section 91, Cr.P.C. With utmost respect to the Honourable Judge, I am unable to agree with the said proposition because of following reasons:--
>
> This point can be properly appreciated if the scheme of Criminal Procedure Code is examined relating to the institution of case, issuing of process and ultimately trial.
>
> A perusal of Criminal Procedure Code reveals that it is divided into parts, which are divided in Chapters and that are again sub-divided in sub-chapters. The parts, chapters and sub-chapters have been given headings to emphasis subject on which they deal. Some of the subjects are general in nature. Some of the subjects are special, contain special provisions to deal with special situation and some of the subjects are supplementary, contain supplementary

provisions to add, supplies deficiency, fill need, give further information to other provisions. This scheme of the Code may be kept in view, to understand the further discussions.

If an offence is committed then the aggrieved party may file report before an officer of police station within the meaning of section 154, Cr.P.C. or file a direct complaint before the competent Court under section 200, Cr.P.C. or the Magistrate on his own information comes to know about the commission of offence. Basically there are three stages in a case:--

(1) Institution of proceedings,
(2) Commencement of the proceedings before the Court and
(3) Trial.

Conditions requisite for initiating proceedings are dealt with in sub-chapter "B" of Chapter XV of Part VI of Cr.P.C. Part-VI of the Code deals with "proceedings in prosecutions". It has 17 Chapters; starting from Chapters XV to XXXIII. For the purpose of present proceedings, Chapters XV, XVI, XVII and XX are material. Chapter XV is divided into two sub-chapters "A" and "B". Sub-chapter "A" deals with "place of enquiry or trial". Sub-chapter "B" deals with "conditions requisite for initiation of proceedings". Chapter XVI deals with "of complaints to Magistrates", Chapter XVII deals with "of the commencement of proceedings before Court", Chapters XX, XXII and XXII-A deal with "trial before Magistrates, summary trials and trials before High Court and Court of Session" respectively.

Sub-chapter "B" of Chapter XV "conditions requisite for initiation of proceedings" of Part VI of the Code is spread into 15 sections starting from sections 190 to 199-B. One of the conditions requisite for initiation of proceedings is of taking cognizance by the Magistrate on a police report (section 173, Cr.P.C.), 2. on a direct complaint constituting the facts of offence when the complaint is filed under section 200, Cr.P.C. and 3. on information received from any person other than Police Officer or upon Magistrate's own knowledge or suspicion. Under section 190, Cr.P.C. the proceedings of a case start by taking cognizance, on the above three sources of information received by a Magistrate. If the direct complaint is lodged and after taking cognizance under section 190, Cr.P.C. then Chapter XVI of Part VI would come into operation which has only four sections starting from sections 200 to 203, under which the Court is authorized to hold preliminary enquiry and if it comes to the conclusion that no case has been made out then the complaint is required to be dismissed under section 203, Cr.P.C. But if from the enquiry it is found that the offence has been committed then the Chapter XVII "of the commencement of proceedings before Court" would come into operation. If the proceedings are initiated on any of the abovementioned three sources viz. police report, direct complaint or personal knowledge of the Magistrate, then the proceedings of a case commences by issuing the process as required under section 204, Cr.P.C. Section 204, Cr.P.C. reads as under:--

> "section 204. Issue of process.--- (1) If in the opinion of a Court taking cognizance of an offence there is sufficient ground for proceedings, and the case appears to be one in which, according to the fourth column of the Second Schedule, a summons should issue in the first instance, it shall issue his summons for the attendance of the accused. If the case appears to be one in which according to that column, a warrant should issue in the first instance, it may issue a warrant, or if it thinks fit, a summons, for causing the accused to be brought or to appear at a certain time

> before such Court or if it has no jurisdiction itself some other Court having jurisdiction.
>
> (2) Nothing in this section shall be deemed to affect the provisions of section 90.
>
> (3) When by any law for the time being in force any process fee or other fees are payable, no process shall be issued until the fees are paid and if such fees are not paid within a reasonable time, the Court may dismiss the complaint."

A perusal of this section reveals that after taking cognizance of an offence (on any of the source of information mentioned in section 190, Cr.P.C.), if the Court is of opinion that there are sufficient grounds for proceeding and the case appears to be one in which according to the fourth column of the Second Schedule, a summons should be issued in the first instance then the Court shall issue summons for the attendance of the accused but if the Court forms an opinion that the case appears to be one in which according to the abovementioned column, a warrant should be issued in the first instance then it may issue a warrant or if the Court thinks fit a summons may be issued for causing the accused to be brought or to appear at a certain time before such Court or if the Court has no jurisdiction then to some other Court having jurisdiction in the matter. Under subsection (2), it is provided that provision of section 90, Cr.P.C. shall not be deemed to be affected because of the above provision.

A general perception is that section 204, Cr.P.C. is applicable to a case filed on a direct complaint only but the wording of the sections "if in opinion of a Court taking cognizance of an offence" are very significant and clear. Under which if the Court takes cognizance of an offence on any of the sources of information mentioned in section 190, Cr.P.C. viz. on police report, on direct complaint or on a Magistrate's personal information, the process can be issued under section 204, Cr.P.C. This is the only provision through which the proceedings are commenced in the Court of law. In my humble view, under the Chapter XVII "of the commencement of proceedings before the Court" the proceedings will commence before any Court if after taking cognizance as required under section 190, Cr.P.C. on any sources mentioned in it, process is issued to the accused persons. Reference is invited to a case of Raghunath Puri v. Emperor reported in AIR 1932 Pat. 72 and Muhammad Aslam v. Additional Secretary, Government of N.-W.F.P. reported in PLD 1987 SC 103. This Chapter which is independent by itself has two sections viz. 204 and 205. Section 205, Cr.P.C. deals with the power of Magistrate to dispense with the personal attendance of the accused. Once the proceedings are commenced under section 204, Cr.P.C. then process of trial begins by framing of the charge as required by various sections of Chapter XIX and then starts the trial before Magistrate, summary trial and trials before High Court and Court of Session as provided under Chapters XX, XXII and XXII-A.

From the perusal of section 204, Cr.P.C. it reveals that the process is issued to procure the attendance of accused persons through summons or warrants so as to bring them or to appear before the Court for the commencement of proceedings before the Court. If the summons are issued then they are required to attend the Court on the date mentioned in it or if the warrants are issued then the accused are brought before the Court and if the accused come to know that process has been issued against them but the summons or warrants have not been served or bailable warrants are served then they can appear before the Court. If the accused is

already in custody then by issuing production warrant for producing the accused before the Court, the proceedings are commenced in the Court. The words used in this section "brought" and "appear" are very significant which should be kept in mind for future reference.

Under the scheme of Criminal Procedure Code, Chapter III, deals with general provisions which has only one Chapter namely Chapter VI "process to compel appearance". This is sub-divided into four chapters viz. "A" to "D". Sub-chapter "A" deals with summons, sub-chapter "B" deals with warrants of arrest, sub-chapter "C" deals with proclamation and attachment and sub-chapter "D" deals with other rules regarding process. Thus, under this Chapter, general provisions are provided for issuance of process to compel the appearance of all persons through summons, warrants and in case of non-compliance of warrants, then actions by issuing proclamations and attachment and then other rules regarding process. In this Chapter forms of summons, warrants, the officers who are competent to issue such process and who are to serve the process, the manner in which process are served and so on so forth are provided. The relevant sub-chapter is sub-chapter "D". It starts from sections 90 to 93-C. Section 90 deals with the issuance of warrants in lieu of, or in additional to summons. Section 91 empowers the Court to take bonds for appearance when the persons against whom the process is issued by executing a bond with or without sureties. Sections 92 and onwards are not relevant for the purpose of present discussion. The important provision viz. section 91 reads as under:--

> "Section 91. Power to take bond for appearance.--- When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court."

A bare reading of this section reveals that when a person is present, in response to summons or warrant, before the Officer Presiding any Court who is empowered to issue summons or warrants then such officer may direct the said persons to execute a bond with or without sureties for his appearance in such Court. Usually under this provision when the complainant or witness appears before the Court in response to summons issued to them and the case is adjourned then bonds with or without sureties are taken from those persons for their appearance on the next date of hearing. However, the words "any person" used in this section are very wide. The said persons can be broadly divided into two categories:--

(1) Accused of an offence which is again sub-divided:

(a) involved in bailable offence;

(b) involved in non-bailable offence;

2) Any other person including complainant, witnesses or any person, whose appearance is required by the Court excepting above-named persons.

The section 91 is appearing in the Part-III, Chapter VI, Cr.P.C. which contains general provisions relating to the process to compel appearance of any person. This Chapter would deal with any process issued against any persons under the Code. Thus, under this Part of Code, general powers have been given to the Court to deal with the issue of process and its related matters.

A perusal of criminal Procedure Code further reveals that there are supplementary provisions which have been enacted to supplement the other provisions which require further addition or clarification. Part-IX of Criminal Procedure Code deals with such provisions and its heading is "Supplementary provisions". The word "supplementary" is derived from the word "supplement". The dictionary meaning of word “supplement” is defined in Chambers Dictionary as under:--

> "Supplement sup'li-ment, n that which supplies a deficiency or fills a need; that which completes or brings closer to completion; an extra part added (later) to a publication, giving further information or listing corrections to earlier mistakes".

Thus, supplementary provisions have been enacted to supply deficiency or fill a need or give further information to already enacted provisions. This part has 9 Chapters starting from Chapters XXXVIII to XLVI. In order to make the point further clear, it is pointed out that Chapter XXXVIII is in respect of "the Public Prosecutor" starting from sections 492 to 495, Cr.P.C. dealing with the appointment of Public Prosecutor and their powers. In the Code wherever the word "Public Prosecutor" is mentioned, the same is to be interpreted within the provisions of Chapter XXXVIII. For example in section 265-A, Cr.P.C., the prosecution is to be conducted by a "Public Prosecutor" but there is no provision in the said section as to who would be the Public prosecutor, what will be his powers so on and so forth. Therefore, for these further clarifications, one has to refer to sections 492, to 495, Cr.P.C. which are supplementary provisions to section 265-A, Cr.P.C. where the word "Public Prosecutor" is mentioned. Therefore, section 265-A, Cr.P.C. is to be read with sections 492 to 495, Cr.P.C. for the purpose of giving clarification to word "Public Prosecutor".

Similarly in section 91, the word "bond" has been referred which is to be executed by a person who appears before the Court for his appearance either with or without sureties. No further details have been mentioned as to how the bond should be executed, forfeited, amount of bond, and instead of bond other recognizance can be executed so on and so forth; therefore, for those matters, we have to refer to other provisions of the Code. Chapter XLII "Provisions as to bonds" appearing in Chapter IX "supplementary provisions", would be referred to and read with section 91, Cr.P.C. dealing with above subject. Similarly under section 91, Cr.P.C. any person is to be released after executing bond. Any person, includes an accused of an offence. No further details have been mentioned in it as to how the accused person can be released in case of bailable or non-bailable offence. For obtaining further details and fill the deficiency of section 91, Cr.P.C. Chapter-XXXII of Supplementary Provisions, Part-IX, Cr.P.C. "on bail" would be attracted which starts from sections 496 to 502, Cr.P.C. which deal "in what cases bail is required to be taken till the discharge of the sureties". As such section 91 is to be read along with the sections 496 to 502, Cr.P.C. for the purpose of releasing the accused involved in bailable or non-bailable offences.

A perusal of section 496, Cr.P.C. reveals that when any person is arrested, detained without warrants by Officer Incharge of a police station or appears or brought before the Court and is prepared to give bail then such person shall be released on bail. Under section 497, Cr.P.C. if the accused person is involved in a non-bailable offence, then in such case where such person is arrested or detained without warrants by an Officer Incharge of a police station, or appears or is brought before the Court, he may be released on bail

but shall not be so released if there appears reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for 10 years. Thus, under both these provisions, an order granting bail is to be passed before releasing an accused person who appears or is brought before the Court, and who is involved in a bailable or non-bailable offence. Without grant of bail such person cannot be released on bail. Bonds are to be executed after grant of bail. If section 91 is read with section 496 and 497, Cr.P.C. then there will be no hesitation in holding that when an accused person involved in a case of bailable or non-bailable offence against whom the process is issued under section 204, Cr.P.C. then he is to be released on bail within the meaning of section 496 or 497, Cr.P.C. as the case may be and then would execute bonds with or, without surety. The word "appears" or "brought" appearing in section 496 and 497, Cr.P.C. are the same words which have been used in section 204, Cr.P.C., for which I have already made such reference in the earlier part of the order.

From the above position, it is clear that once the accused person or persons are brought or appear before the Court in pursuance of process under section 204, Cr.P.C. issued either on a police report, direct complaint or Magistrates own personal information, then the Court is required to decide as to whether the offences are bailable or non-bailable. If the offences are bailable then the Court shall release the accused on bail within the meaning of section 496, Cr.P.C. by passing appropriate order. However, if the offences are non-bailable, then the accused person or persons are required to be remanded to judicial custody or the Court may grant bail to them within the meaning of section 497, Cr.P.C. after complying the requirements of the said section by passing a speaking order. If the accused person or persons before the process is served upon them or bailable warrants are served want to invoke the provisions of pre-arrest bail as provided under section 498, Cr.P.C. then they can approach the appropriate Court for grant or otherwise of the pre-arrest bail by invoking the provisions of said section after satisfying the conditions mentioned therein. The provisions of sections 496, 497 and 498, Cr.P.C. have elaborately been discussed by the Honourable Supreme Court of Pakistan in cases Sadiq Ali v. State PLD 1966 SC 589 and Muhammad Ayoob v. Muhammad Yakoob PLD 1966 SC 1003.

Thus, the section 91, Cr.P.C. cannot be applied in isolation, but it is to be applied and read with sections 496 and 497, Cr.P.C. for the purpose of release of an accused person against whom a process is issued under section 204, Cr.P.C. by the Court after taking cognizance on any source of information mentioned in section 190, Cr.P.C.

In the present case, the offences were non-bailable. When the applicants appeared before the trial Court in pursuance of bailable warrants issued under section 204, Cr.P.C. for their appearance, the trial Court without granting bail within the meaning of section 497, Cr.P.C. released the applicants on the affidavits filed by the surety. The said procedure was not warranted by law; therefore, the trial Court was not justified in releasing the accused without granting of bail through an order passed under section 497, Cr.P.C. The trial Court is required to comply with provisions of section 497, Cr.P.C. in the direct complaint case. Thus, the arguments of the counsel for the applicants has no force that the trial Court had granted bail to the applicants."

16. In the later case of *Zia-ur-Rehman Sajid v. Muhammad Aslam and another* (2005 P.Cr.L.J. 1706) Maulvi Anwarul Haq, J. of the Lahore High Court, Lahore had followed the law declared by the High Court of Sindh, Karachi in the case of *Noor Nabi* (*supra*) and had also referred to the case of *Khizer Hayat v. Inspector-General of Police (Punjab), Lahore and others* (PLD 2005 Lahore 470) wherein a Full Bench of the Lahore High Court, Lahore had referred to the case of *Noor Nabi*. It was observed by Maulvi Anwarul Haq, J. as reproduced below:

> "3. Learned counsel for the petitioner contends that the learned trial Court for all purposes has granted pre-arrest bail to the petitioner without a notice and without complying with the provisions of sections 496 and 497, Cr.P.C. According to him, provisions of section 91, Cr.P.C. arc to be read in conjunction with the said sections 496 and 497, Cr.P.C. He relies on the case of Noor Nabi and 3 others v. The State 2005 PCr.LJ 505. Learned A.A.-G. states that a learned Full Bench of this Court, in its judgment dated 1-6-2005 inter alia, in Writ Petition No. 11862 of 2004 (Khizar Hayat v. Inspector-General of Police (Punjab), Lahore and others) has approved the said dictum of the learned High Court of Sindh High Court at Karachi. Learned counsel for the respondent No. 1, on the other hand, contends that on a plain reading of section 91, Cr.P.C. the impugned order of the learned trial Court cannot be stated to be illegal.
>
> 4. I have examined the available records as also the relevant provisions of Cr.P.C. in the light of said judgments. I deem it appropriate to reproduce hereunder the observations of my learned brother Asif Saeed Khan Khosa, J. who delivered the opinion of the Full Bench appearing at pages 43 and 44 of the said judgment:---
>
> > "The powers available during an investigation, enumerated in, Part V, Chapter XIV of the Code of Criminal Procedure, 1898 read with section 4(1)(1) of the same Code, include the powers to arrest an accused person and to effect recovery from his possession or at his instance. Such powers of the investigating officer or the investigating person recognize no distinction between an investigation in a State case and an investigation in a complaint case. In the case of Noor Nabi and 3 others v. The State 2005 P.Cr.L.J. 505 a learned Judge-in-Chamber of the Honourable Sindh High Court has already clarified that section 91, Cr.P.C. deals only with procuring attendance of a person before the Court and after his availability before the Court the matter of his admission to bail or not rests in the hands of the Court and that the impression about automatic admission of an accused person to bail in a case of private complaint is erroneous."
>
> 5. Now examining the present case in the light of the said judgment of the learned Full Bench cited by the learned A.A.-G. and the said judgment of the learned High Court of Sindh at Karachi in the case of Noor Nabi and 3 others, I find that notwithstanding the fact that the respondent No. 1 had put in appearance before the

learned trial Court, provisions of sections 496 and 497, Cr.P,C. had not been rendered ineffective and the learned trial Court has acted with lawful authority in assuming that the respondent No. 1 is entitled to automatic admission to bail. There was no power vesting in the learned trial Court to release the respondent No. 1 after taking him into custody without passing an order in terms of section 497, Cr.P.C. This criminal miscellaneous is accordingly treated as an application under section 561-A, Cr.P.C. and is allowed and the impugned order of the learned trial Court is set aside. The respondent No. 1 shall, however, be entitled to apply for grant of bail and if such an application is filed, the same shall be considered and decided by the learned trial Court after hearing the complainant as well as the State in accordance with law."

17. Still later in the case of *Shaukat Rasool v. The State and another* (PLD 2009 Lahore 590) Muhammad Khalid Alvi, J. of the Lahore High Court, Lahore decided on the same lines as was done in the case of *Noor Nabi* (*supra*) without referring to the said precedent case and it was held as follows:

"6. Chapter VI of the Code of Criminal Procedure deals with process to compel service through summons, bailable or non-bailable warrants and ensure presence of persons connected with the inquiry or trial. Person may be a witness or an accused in such inquiry or trial. This Chapter does not deal with grant or refusal of bail to a person accused of bailable or non-bailable offence. Section 91 referred by the learned counsel for the petitioners is reproduced as follows:--

> "Power to take bond of appearance.--When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court."

This section empowers a Court to require "any person" to execute a bond with or without surety for his appearance in such Court. Such person may or may not be an accused in the inquiry or trial before such Court he is merely being bound down by such bond to appear before the Court as and when required.

7. So far as grant of bail is concerned, it is dealt with by Chapter XXXIX of the' Code of Criminal Procedure which deals with various categories of bails. Section 496 is reproduced as follows:--

> "In what cases bail is to be taken.-- When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer incharge of a Police Station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail. Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

> Provided, further that nothing in this section shall be deemed to affect the provisions of section 107, subsection (4) or section 117, subsection (3)."

This section deals with accused of non-bailable offences arrested or detained without warrant or appear or brought before the Court, such person "shall" be released on bail without any further formality provided the accused is ready to furnish bail. Meaning thereby that in such eventuality there is no discretion lying with the Court to refuse of grant bail.

8. Section 497 deals accused of nonbailable offence, which is reproduced as follows:--

> "When bail may be taken in case of non-bailable offence.-- (1) When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or [imprisonment] for life or imprisonment for ten years]:"

Subsection (1) of section 497 Cr.P.C. divides accused persons of non-bailable offences in two categories; first category is of those accused persons who have allegedly committed offences which are punishable with less than 10 years and are non-bailable. This category of accused persons may be ordinarily admitted to bail keeping in view the facts and circumstances of the case. However, bail may be refused in exceptional circumstances, keeping in view the nature of offence, previous history of the accused, his conduct, repetition of offence by such accused etc. etc. Second category is of those accused persons who are guilty of offences punishable with more than 10 years. There is a bar for the grant of bail to such accused persons unless reasonable grounds are available for believing that he is not guilty of such an offence.

9. In any case for the grant or refusal of bail under this provision discretion lies with the Court and has to be exercised judicially by application of mind.

10. Another distinctive feature between sections 91 and 497 Cr.P.C. is that in section 91 the Court is not required to issue notice to the prosecution while directing "any person" to execute bond. While under section 497 if the Court intends to admit an accused of non-bailable offence to bail a notice to prosecution is mandatory under the last proviso to subsection (1).

11. Sections 498 and 498-A deal with the powers of Sessions Court and High Court to admit to bail even though he was not yet been arrested or detained in an offence which falls in the category of non-bailable offences.

12. Under section 204 of the Cr.P.C. the Court after recording preliminary evidence is of the opinion that there are sufficient grounds to proceed further would issue process in the nature as provided in the 4th Column of the 2nd Schedule i.e. summons or warrants in the first instance. In response to such process if the accused person appears before the Court he not only may be required by the Court to execute a bond under section 91 Cr.P.C. but it shall also be required that his custody be handed over to a surety under a bail bond in terms of section 496 if the offence is bailable and in terms of section 497 if the offence is non-bailable. If the offence is

> non-bailable the accused is necessarily required to be taken into custody by the Court and notice as required under the last proviso to subsection (1) of section 497 Cr.P.C. will be issued to the prosecution for the purpose of grant or refusal of bail to such an accused.
>
> 13. Nutshell of the above discussion is that if a person accused of non-bailable offence is summoned by a Court under section 204 is not only required to execute bond under section 91 for his appearance but it is also required that either he be taken into custody by the Court and if he is to be released on bail then before such release a notice to prosecution is to be issued and the grant or refusal of bail is then to be examined on its own merits. It is thus evident that a person accused of non-bailable offence should either be in the custody of the Court or in the custody of a surety in terms of section 496 or 497. Execution of bond under section 91 does not qualify the above test.
>
> 14. For what has been stated above, contention of the learned counsel for .the petitioners that furnishing of bond by the petitioners under section 91, Cr.P.C. is sufficient for their release on bail because conditions necessary to be examined for admitting a person accused of non-bailable offence are not considered while requiring bond under section 91."

18. In the case of *Luqman Ali v. Hazaro and another* (2010 SCMR 611) decided by a 3-member Bench of this Court the judgment handed down was authored by Rahmat Hussain Jafferi, J. who was also the author of the judgment rendered by the High Court of Sindh, Karachi in the case of *Noor Nabi* (*supra*). In the judgment delivered in the case of *Luqman Ali* practically the same reasoning was re-advanced as was advanced in the case of *Noor Nabi* (*supra*) and it was held as under:

> "7. Having heard the learned counsel for the parties, the respondent and perusing the record of the case very carefully, we find that the point involved in the case is interpretation of section 204, Cr.P.C. as the name of the respondent was put in Column No. 2 of the Challan because the police found him innocent but the respondent was joined as an accused person under the orders of the trial Court which has not been challenged anywhere as such it has attained finality. Thus, the respondent was an accused in a murder case which is punishable with death or imprisonment for life.
>
> 8. In this case, after submission of Challan, the Judicial Magistrate took cognizance as provided under section 190, Cr.P.C. and sent up the case to the Court of Session where the cognizance was also taken as required under section 193(1), Cr.P.C. The case was assigned to IInd Additional Sessions Judge, who issued the process to the respondent mentioned in Colunm No. 2 of the Challan after joining and making him as an accused. The process in the shape of non-bailable warrants was issued to procure his attendance so as to commence the proceedings against him. The scheme of Criminal Procedure Code envisages three steps (i) initiation of proceedings which can be initiated after fulfilling one of the conditions, as provided under sections 190 to 199-B of Chapter XVB, Cr.P.C.; (ii) commencement of proceedings as provided under Chapter XVII, Cr.P.C. containing only two sections viz. 204 and

205; and (iii) the trial as provided under Chapters XX or XXII or XXII-A, etc. Cr.P.C. One of the conditions for initiation of proceedings is to take cognizance as required under section 190 of Chapter XV-B, Cr.P.C. The heading of Chapter XV-B reads as under:---

"B- Conditions requisite for initiation of proceedings."

Thus, under this Chapter, the cognizance is one of the conditions for initiation of proceedings. Once the proceedings are initiated then the same are required to be commenced which can only be done under section 204, Cr.P.C. of Chapter XVII, heading of which is as follows:-

"Of the commencement of proceedings before Courts."

9. It will be advantageous to reproduce section 204, Cr.P.C. to understand the scope of the said provision of law:---

> "204. Issue of process.---(1)If in the opinion of a Court taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be one in which, according to the fourth column of the Second Schedule, a summons should issue in the first instance, {it} shall issue its summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instance, it may issue a warrant, or, if {it} thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Court or if it has no jurisdiction itself some other Court having jurisdiction.
>
> (2) Nothing in this section shall be deemed to affect the provisions of section 90.
>
> (3) When by any law for the time being in force any process fees or other fees are payable, no process shall be issued until the fees are paid, and if such fees are not paid within a reasonable time, the Court may dismiss the complaint."

Under subsection (1), if the Court, which is taking cognizance of the offence (under sections 190, 193, 194 and 200 etc., Cr.P.C.) finds sufficient grounds for proceedings, then it can issue process according to Column No. 4 of 2nd Schedule to Cr.P.C. If the case is such where summons is required to be issued under 4th Column then summons shall be issued for attendance of the accused and if the case appears to be one in which according to said Column warrants should be issued then the Court may in the first instance issue warrants or if thinks fit summons can be issued for causing the appearance of the accused before the Court on certain date or if it has no jurisdiction then direction can be issued to appear before such other Court. Under subsection (2), the provisions of section 90, Cr.P.C. would not come in the way.

10. Thus, the purpose of section 204, Cr.P.C. is to procure the attendance of the accused by issuing the required process. If the accused is in custody then such process can be issued by issuing production order to the jail authorities and if the accused is absconding then the process can be issued in the shape of warrants. It is pointed out that if the accused is absconding or

> released then the name of accused of both the categories are required to be mentioned in Column No. 2 of the Challan with red and blue ink, respectively. Therefore, the process is to be issued to the accused, who is absconding and similar process can also be issued to an accused whose name is in Column No. 2 with blue ink after he is made an accused in the case. It will be noted that warrants are addressed to the Police Officer to arrest the person and produce him before the Court on a particular date. Thereafter the said warrants become ineffective unless extended or re-issued by the Court. Similar is the case with the bailable warrants under which the Police Officer is required not to arrest the accused if he furnishes surety before him for his appearance before the Court on the date mentioned in the warrants. After appearance of the said accused before the Court the said order ceases to exist unless the accused is released in accordance with law.
>
> 11. In such a situation when the accused appears in pursuance of process under section 204, Cr.P.C. either through summons or warrants or bailable warrants or on his own and if the offence is non-bailable then the provisions of section 497, Cr.P.C. would be attracted and accused could only be released after moving such application and grant of the same. If no such application is moved or no bail is granted by any competent Court either under section 497 or 498, Cr.P.C., as the case may be, then the accused is required to be remanded to judicial custody till the time a proper order is passed either by the trial Court or by the superior Court.
>
> 12. We have examined the order of the learned Additional Sessions Judge and find that the same is well-reasoned, based upon correct interpretation of relevant provisions of law and relying upon the case of Noor Nabi (supra). We have also examined the said judgment and found that the learned High Court examined in depth all the required provisions of law and interpreted the same in its true perspective. We have examined the impugned order of the learned High Court but are unable to persuade ourselves to agree with the finding arrived at by the learned High Court particularly releasing the accused without the grant of bail. Such release of the accused was unwarranted, illegal and against the provisions of sections 497 and 498, Cr.P.C., therefore, the said order cannot be sustained.
>
> 13. In the light of what has been discussed above, the impugned order passed by the learned High Court is set aside and the remarks recorded against the learned Additional Sessions Judge are expunged. The respondent is directed to surrender before the trial Court immediately. However, he may move an application for grant of bail under section 497 or 498, Cr.P.C., as the case may be, which shall be decided in accordance with law and merits of the case."

19. The last reported case of this category of cases is the case of *Amjad Iqbal v. Additional Sessions Judge, Bhalwal, District Sargodha and 9 others* (PLD 2012 Lahore 33) wherein Ijaz Ahmad Chaudhry, C.J. of the Lahore High Court, Lahore (as his lordship then was) had expressly referred to and followed the law declared by this Court in the case of *Luqman Ali* (*supra*) and had observed as follows:

"6. I have heard learned counsel for the parties and have also gone through the documents appended with this petition, in addition to the case law cited by learned counsel for the parties at the bar, in support of their respective pleas. During the course of hearing, I have noted that the question involved in this petition is that whether a court is competent to release the accused summoned in a private complaint upon his furnishing bail bonds or they are required to file independent bail petitions for their release. To resolve the controversy, perusal of sections 91 and 204 of Cr.P.C. would be imperative, which for convenience of reference are reproduced herein below: -

> "91. Power to take bond for appearance.-- When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summon or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such court."
>
> "204. Issue of process.-- (1) If in the opinion of a Court taking cognizance of an offence there is sufficient ground for proceeding and the case appears to be one in which, according to the fourth column of the second schedule a summons should issue in the first instant, it shall issue its summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instance, it may issue a warrant, or, if, it thinks fit, a summons for causing the accused to be brought or to appear at a certain time before such Court or (if it has not jurisdiction itself) some other court having jurisdiction.
>
> (2) Nothing in this section shall be deemed to affect the provision of section 90.
>
> (3) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid, and, if such fees are not paid within a reasonable time, the Court may dismiss the complaint."

A perusal of the aforementioned provisions makes it crystal clear that a court can call a person through summons or through warrants. The afore-quoted sections deal with the procedure regarding procurement of attendance of an accused. Once an accused appears before the court pursuant to the process issued to him, the purpose of afore-mentioned sections comes to an end and then the court is to determine whether the offence is bailable or non-bailable. If according to the court, the offence is bailable, it will release the accused upon submission of bail bonds. In case, if the offence is non-bailable, the court shall either release them on bail upon an application or send them to the judicial lock up. According to the dictum laid down by the Hon'ble Supreme Court of Pakistan, in the case of Luqman Ali, supra, while dealing with such question the Hon'ble Supreme Court of Pakistan inter alia held as under:

> "In such a situation when the accused appears in pursuance of process under section 204, Cr.P.C. either through summons or warrants or bailable warrants or on his own and if the offence is non-bailable then the provisions of section 497, Cr.P.C. would be attracted and accused could only be released after moving such

> application and grant of the same. If no such application is moved or no bail is granted by any competent Court either under section 497 or 498, Cr.P.C., as the case may be, then the accused is required to be remanded to judicial custody till the time a proper order is passed either by the trial Court or by the superior Court.
>
> We have examined the order of the learned Additional Sessions Judge and find that the same is well-reasoned, based upon correct interpretation of relevant provisions of law and relying upon the case of Noor Nabi (supra). We have also examined the said judgment and found that the learned High Court examined in depth all the required provisions of law and interpreted the same in its true perspective. We have examined the impugned order of the learned High Court but are unable to persuade ourselves to agree with the finding arrived at by the learned High Court particularly releasing the accused without the grant of bail. Such release of the accused was unwarranted, illegal and against the provisions of sections 497 and 498, Cr.P.C., therefore, the said order cannot be sustained."

As per the afore-referred judgment of the Hon'ble Supreme Court of Pakistan, if a person appears before the court pursuant to process under section 204, Cr.P.C. in a non-bailable offence, the court cannot release him merely on filing of surety bonds rather he can be released after giving bail."

20. A survey of the reported cases detailed above clearly shows that in the first category of cases in favour of acceptance of a bond under section 91, Cr.P.C. the case of *Mazhar Hussain Shah v. The State* (1986 P.Cr.L.J. 2359) decided by Muhammad Rafiq Tarar, J. of the Lahore High Court, Lahore was the foundational case and the order passed in that case was not only upheld by a 3-member Bench of this Court *vide* judgment dated 14.01.1987 passed in Criminal Appeal No. 56 of 1986 (*Reham Dad v. Syed Mazhar Hussain Shah & others*) but the said order had also been approvingly referred to by another 3-member Bench of this Court in the later case of *Syed Muhammad Firdaus and others v. The State* (2005 SCMR 784). As against that in the second category of cases in favour of bail under sections 496, 497 or 498, Cr.P.C. the pivotal position is held by the case of *Noor Nabi and 3 others v. The State* (2005 P.Cr.L.J. 505) decided by Rahmat Hussain Jafferi, J. of the High Court of Sindh, Karachi and the reasons recorded in that case were subsequently repeated by the same Honourable Judge in his capacity as a Judge of this Court in the case of *Luqman Ali v. Hazaro and another* (2010 SCMR 611)

decided by a 3-member Bench of this Court. It is, thus, imperative to critically examine the cases of *Mazhar Hussain Shah* (*supra*) and *Noor Nabi* (*supra*) and all the precedent cases based on those cases so that the comparative merit of the two conflicting approaches may be assessed.

21. The principles laid down by the Lahore High Court, Lahore in the case of *Mazhar Hussain Shah* (*supra*) were upheld by a 3-member Bench of this Court in its judgment dated 14.01.1987 passed in Criminal Appeal No. 56 of 1986 (*Reham Dad v. Syed Mazhar Hussain Shah & others*) and the said principles were subsequently approvingly referred to by another 3-member Bench of this Court in the case of *Syed Muhammad Firdaus and others v. The State* (2005 SCMR 784) and also in the other cases belonging to the first category of cases mentioned above. After a careful perusal and examination of all the precedent cases belonging to this category of cases the principles laid down therein may be summarized as follows:

> (i) A process is issued to an accused person under section 204, Cr.P.C. when the court taking cognizance of the offence is of the "opinion" that there is "sufficient ground" for "proceeding" against the accused person and an opinion of a court about availability of sufficient ground for proceeding against an accused person cannot be equated with appearance of "reasonable grounds" to the court for "believing" that he "has been guilty" of an offence within the contemplation of sub-section (1) of section 497, Cr.P.C. Due to these differences in the words used in section 204 and section 497, Cr.P.C. the intent of the legislature becomes apparent that the provisions of section 91, Cr.P.C. and section 497, Cr.P.C. are meant to cater for different situations.
>
> (ii) If the court issuing process against an accused person decides to issue summons for appearance of the accused person before it then the intention of the court is not to put the accused person under any restraint at that stage and if the accused person appears before the court in response to the summons issued for his appearance then the court may require him to execute a bond, with or without sureties, so as to ensure his future appearance before the court as and when required.
>
> (iii) If in response to the summons issued for his appearance the accused person appears before the court but fails to submit the requisite bond for his future appearance to the satisfaction of the court or to provide the required sureties then the accused person may be committed by the court to custody till he submits the requisite bond or provides the required sureties.

22. As against that in the second category of cases the principles laid down by the High Court of Sindh, Karachi in the case of *Noor Nabi*

(*supra*) and iterated on the identical lines by a 3-member Bench of this Court in the case of *Luqman Ali v. Hazaro and another* (2010 SCMR 611) and referred to and followed in the other cases of this category mentioned above may be encapsulated as follows:

> (i) The scheme of the Code of Criminal Procedure shows that institution of proceedings, commencement of proceedings before the court and trial before the court are dealt with therein separately and the provisions relatable to the same are different. Section 91, Cr.P.C. is a step relevant to commencement of proceedings before the court taking cognizance of the case.
>
> (ii) Any person appearing before the court or brought before the court upon issuance of summons or warrant against him may be required by the court under section 91, Cr.P.C. to execute a bond for his appearance before the court in future and this power is usually exercised in connection with appearance of the complainant or a witness so as to ensure his appearance before the court in future.
>
> (iii) When an accused person appears before the court or is brought before the court after issuance of summons or warrant against him he cannot be released upon execution of a bond under section 91, Cr.P.C. but he is either to be taken into custody or he may be released on bail under sections 496, 497 or 498, Cr.P.C. depending upon whether the offence in issue is bailable or non-bailable.

23. After carefully attending to the relevant statutory provisions of the Code of Criminal Procedure and after minutely examining all the precedent cases detailed above we may straightaway observe, and we observe so with great respect, that in the cases of *Noor Nabi* (*supra*) and *Luqman Ali* (*supra*) as well as in all the other cases falling in the second category of cases mentioned above different High Courts and even this Court had completely omitted from consideration that a contrary view in respect of the very issue under discussion had already been expressed by this Court in the cases of *Reham Dad* (*supra*) and *Syed Muhammad Firdaus* (*supra*) and in those cases the law declared by the Lahore High Court, Lahore in the case of *Mazhar Hussain Shah* (*supra*) had expressly been upheld and approvingly referred to respectively by different 3-member Benches of this Court. It is, thus, obvious that in the case of *Noor Nabi* the High Court of Sindh, Karachi could not take a view of the issue different from that already expressed by this Court. The judgment in the case of *Luqman Ali* was authored by the same Honourable Judge who was the author of the judgment in the case of *Noor Nabi* and in the case of *Luqman Ali*

too the earlier two judgments of this Court on the subject had completely been ignored. This oversight, if not a lacuna, in the judgments rendered in the cases of *Noor Nabi* and *Luqman Ali* and also in all the other cases wherein the *ratio* of the said two cases had been followed had substantially denuded all such judgments of their authoritative force besides completely impairing their persuasive value and it may be said with respect that the said judgments were rendered *per incuriam*.

24. It has also been particularly noticed by us that in the case of *Noor Nabi* the High Court of Sindh, Karachi had made contradictory observations regarding the scope of section 91, Cr.P.C. On the one hand it had expressly been held in the judgment delivered in that case that the words “any person” in section 91, Cr.P.C. include an accused person who appears or is brought before the court upon issuance of summons or warrant against him but on the other hand it had also been observed in that judgment that the provisions of section 91, Cr.P.C. are usually utilized for securing and ensuring future appearance of a complainant or a witness before the court whereas the matter of an accused person is to be dealt with not under section 91, Cr.P.C. but under sections 496, 497 or 498, Cr.P.C. This contradiction in the said judgment had remained completely unexplained and unresolved and in the case of *Luqman Ali* the judgment in the case of *Noor Nabi* had been expressly referred to, if not dittoed, and the learned author Judge of both of those judgments was one and the same Honourable Judge.

25. In the context of the legal issue under discussion it is of critical importance to understand and appreciate the difference between a bail and a bond and unfortunately in the cases of *Noor Nabi* and *Luqman Ali* that difference and distinction had not been noticed or realized at all. A bail is a release from a restraint (actual, threatened or reasonably apprehended loss of liberty) and a bond is an undertaking for doing a particular thing and in the present context it is an undertaking for appearance before the court in future as and when required to do so. A bond invariably stipulates a penalty for

non-fulfillment of the undertaking and in case of failure to fulfill the undertaking the bond may be forfeited and the stipulated penalty may be imposed in full or in part. It had not been appreciated in the cases of *Noor Nabi* and *Luqman Ali* that in a case of issuance of summons against an accused person under section 204, Cr.P.C. such person is under no actual, threatened or reasonably apprehended restraint at the time of his appearance before the court and, thus, his applying for bail is not relevant at such a stage and if he undertakes before the court to keep on appearing before the court in future as and when required to do so then he may be required to execute a bond, with or without sureties, in support of such undertaking. The position may, however, be different where the process issued against the accused person under section 204, Cr.P.C. is through a warrant, bailable or non-bailable, in which case the accused person may come under an actual, threatened or reasonably apprehended restraint. In such a case the accused person may choose to apply for bail which may or may not be allowed by the concerned court. Even in such a case upon appearance of the accused person before the court or upon his having been brought before it the court concerned may, if it thinks appropriate, require the accused person to furnish a bond, with or without sureties, without even considering bail to be necessary because issuance of a warrant, bailable or non-bailable, was meant only for procuring attendance of the accused person before the court and not for any other purpose.

26. In the backdrop of what has been observed by us in the preceding paragraph we deem it necessary to discuss the concepts of restraint, bail and bond in some detail because a proper understanding of the said concepts holds the key to the legal issue under discussion. So far the most illustrative and illuminating judgment rendered in respect of such concepts has been the one handed down in the case of *The Crown v. Khushi Muhammad* (PLD 1953 Federal Court 170). It was a case decided by a 3-member Bench of the erstwhile Federal Court of Pakistan, the predecessor Court of this Court, and the subject under discussion was the scope of filing of

an application for pre-arrest bail in a criminal case. In that case Abdul Rashid, C.J. had observed as follows:

> "It appears to me to be obvious from the above observation that section 498 does not in any way enlarge the categories of persons to whom bail can be granted under Chapter XXXIX. This necessarily leads to the inference that such persons must be under custody before they can be given any relief by the High Court or the Court of Session.
>
> Under sections 496 and 497 an accused person can be released on bail. This presupposes that the accused person is under some sort of *restraint*. If section 498 is ancillary or subsidiary to sections 496 and 497 it cannot be said that this section empowers the highest Court to grant bail to persons who have not been put under any restraint whatever. If this were so, the ancillary and subsidiary section would be enlarging the powers granted to the Courts under the principal sections, namely, 496 and 497. It is difficult to hold that the legislature would embody in a subsidiary or ancillary section a provision which deals with persons other than those who fall within the purview of sections 496 and 497. If section 498 were given the wide interpretation envisaged in the case of *Hidayat Ullah Khan* (*supra*), section 498 would not be ancillary or subsidiary, but would be wholly independent of the powers conferred on the High Court or the Court of Session by sections 496 and 497.
>
> In order to support the interpretation placed on section 498 of the Code in the case of *Hidayat Ullah Khan* (*supra*), Mr. Qalandar Ali Khan contended, on behalf of the respondent, that as soon as the respondent had made an application to the Court asking for grant of bail he had appeared before the Court and that such appearance must be regarded as a surrender to the custody of the Court. It was urged that, under the circumstances, he could be admitted to bail under the provisions of section 498 as he had appeared in Court under section 497. This argument of the counsel leads to extraordinary results. *If a person who appears before the High Court under section 497, is taken to be in the custody of the Court merely because of his appearance, it is difficult to imagine what would happen to him if the Court rejects his application for bail. He appeared in Court as a free man. Is the Court bound to keep him in custody and send him to jail simply because it rejects his application? If so, under what provision of the Code? The failure of his application would therefore deprive a suspected person of his freedom. What is the Court to do with him is another difficult question? He comes into Court protesting that he is innocent and there is no case against him. The Court decides not to accept his application for bail. He cannot be required to execute any bail bonds under the provisions of section 499 of the Code. It is clear, therefore, that the making of an application for bail and his presence in Court cannot be regarded as appearance under section 497 of the Code. In fact, in Hidayat Khan's case (supra) it was pointed out by the learned Judges of the High Court that nowhere in law was there to be found any warrant for the plea that a Court possesses any power to take into custody a person offering himself for the purpose if there be no justification for the Court to exercise the power of taking such person into custody. When a person appears before the High Court merely to present an application for bail, without any warrant for his arrest having been issued, he is not appearing in respect of any offence of which the High Court is taking cognizance at the time and his appearance before the Court cannot be regarded as a surrender to custody.*

It was urged by Mr. Sleem that "admitting to bail" is also placing a person under some form of restraint. Reference was made in this connection to section 308 of the Code where it is laid down that whenever the jury is discharged the accused shall be "detained in custody or on bail as the case may be." The word "detained" applies both to custody and to the enlargement of a person on bail. The grant of bail to accused person is merely the substitution of one type of restraint for another type of restraint. If through mistake, fraud, or otherwise, a person has been enlarged on bail on insufficient sureties, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and on his failing so to do, may commit him to jail. It is possible to conceive of cases where a person has unnecessarily applied for anticipatory bail and has been released on executing a bail bond with sureties. He might never have been arrested by the police but being released on anticipatory bail he has made himself liable to be committed to prison if his sureties become insufficient after bail has been taken. It may be that at one stage or another the surety of a person who has been given bail desires to be discharged and such person is unable to find a new surety. *In these circumstances, a person who would never have been arrested otherwise may be arrested and committed to prison. The provisions of section 498 of the Code cannot be interpreted in manner which lead to such absurd results.*

The basic conception of the word "bail" is release of a person from the custody of police and delivery into the hands of sureties, who undertake to produce him in Court whenever required to do so. This is the meaning which has been given to the word "bail" in Standard English Dictionaries as well as in Wharton's Law Lexicon and Stroud's Judicial Dictionary. This is also borne out by the form of bond and bail bond given in Schedule V of the Cr.P.C. This basic conception of the meaning of the word "bail" has not been adverted to in the Full Bench judgment in the case of *Hidayat Ullah Khan* (*supra*).

Reliance has been placed by the learned Judges of the High Court on the case of *Johur Mull and others* (10 C W N 1093). In that case there was a murder in Calcutta. Four persons were arrested on suspicion by the police and their cases were pending before the Second Presidency Magistrate. Meanwhile, Johur Mull and others were also suspected and non-bailable warrants for their arrest were issued. Thereupon they made an application for bail in the High Court before they had surrendered. The only objection that was taken to the application by the Offg. Standing Counsel was that in murder cases ordinarily no bail should be taken. It was observed by Mitra, J. that ordinarily they did not allow bail in cases like the present, but they had power under section 498 of the Code to direct that any person should be admitted to bail in any case. This case is distinguishable as *the issuing of a non-bailable warrant may be treated as imposing a certain amount of restraint on the accused.* If the words "in any case" could be taken to include every accused person including a convict or a person who has not been taken into custody, there would have been no necessity to enact section 426 of the Code, or to insert subsection (2-B) in section 426 which was done in 1945. A person who had been granted special leave to appeal to His Majesty-in-Council could then be admitted to bail under section 498 on the ground that the words "in any case" cover the case of a convict who has preferred an appeal to His Majesty-in-Council.

It has been observed by the Lahore High Court in *Hidayat Ullah Khan's case* (*supra*) that it is conceivable to think of cases where credible information has been laid before a police officer that a certain person is guilty of a non-bailable offence not punishable with

death or transportation for life, that he is in the presence of the police officer at the time when information is received, and that in such a case there will be no contravention of anything contained in the Code if the police officer grants bail to such a person forthwith without going through the formality of arresting him. This observation seems to imply that the arrest of a person necessarily means the use of force against him in order to bring him under restraint by the police officer. Section 46 of the Code lays down that "In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". In the case referred to above, there would be a submission to the custody of the police officer by word or action and the police officer could thereupon release the person on bail under section 169 or section 497 of the Cr.P.C. The police officer, in the circumstances, could act only under section 169 or *section 497 which deal with release on bail and the word "release" necessarily implies freedom from some sort of restraint*.

A brief reference may now be made to cases which have taken a view contrary to the one taken by the Full Bench of the Lahore High Court in the case of *Hidayat Ullah Khan* (*supra*). On the 19th of October, 1943 Mr. Justice Blacker delivered judgment in a case (Criminal Miscellaneous No. 743 of 1943) in which an application had been made by one K. S. Sobti that he be admitted to bail under the provisions of section 498 of the Cr.P.C. It was stated in the petition that the petitioner was in no sort of custody, nor was he under any form of restraint. It was pointed out by the Advocate-General that the police had not yet even decided whether they will prosecute Sobti as there was a great deal of material to be sifted, and they were not certain whether the material would be sufficient for the prosecution of the petitioner. The learned Judge came to the conclusion that *section 498 could not be availed of by any one who was not in custody and against whom no warrant for arrest had been issued*. A Full Bench of the East Punjab High Court has held in *Amir Chand v. The Crown* (AIR 1950 East Punjab 53) that *the very notion of bail presupposes some sort of previous restraint. Bail, therefore, could not be granted to a person who had not been arrested and for whose arrest no warrants had been issued*. Section 498 of the Code did not permit the High Court or the Court of Session to grant bail to persons whose case was not covered by sections 496 and 497. The judgment of the Lahore High Court, in the case of *Hidayat Ullah Khan* (*supra*), the decision of Munir, J. (Now C.J.) in *Khawja Nazir Ahmad v. The Crown* (Cr. Misc. No. 592 of 1943), the decision of Blacker, J., referred to above, and some authorities of the Sind Chief Court were discussed in great detail in this case. Reference was also made in the judgment of Kapur, J., to statute law in England and it was pointed out that in spite of the fact that the words "admitted to bail' had been uniformly used in English statutes *there was no case which purported to show that bail had ever been granted to a person who was not under restraint*.

The learned Judges of the Sind Court have also dealt with this matter in the case of *Muhammad Abbas v. The Crown* (PLR 1949 Kar. 95 = PLD 1950 Sind 80). It was pointed out in this case that it would be contrary to every judicial principle for a high judicial authority to exercise a revisional power like that conferred by section 498 of the Code to interfere by giving directions in anticipation to a subordinate authority before the subordinate authority had exercised jurisdiction legally conferred upon it. The existence of a concurrent power in the High Court with that of the Magistrate in granting bail was negatived. It was pointed out that *all persons who can be admitted to bail under Ss. 496 and 497 must be in the custody of the police or in the custody of the Court as otherwise the words "shall be released on bail" would have no meaning.* It was also observed that where a person is admit-

ted to bail he has to execute a bond and his surety or sureties have to execute bail bonds and the time when the person released is required to be present before the Court is to be entered in those bonds. Various other entries have also to be made in the bail bond. such as, the offence with which the accused is charged, and the bail bonds are intended to secure the appearance of persons who have been arrested and whose presence is required by Court. The terms of these documents make it clear that they can only be executed by persons who are under arrest or in custody. It is unnecessary to examine all these authorities in detail as all of them rely to a great extent on the observations made by their Lordships of the Privy Council in the *case of Jairam Das* (*supra*) and on the *basic conception that bail means a release of a person from one type of restraint, and his being handed over to the sureties which is another type of restraint*.

After a careful examination of the provisions of sections 496, 497 and 498 of the Code I have reached the conclusion that a person cannot be admitted to bail against whom a report has been lodged at the police station but who has not been placed in custody, or under any other form of restraint, or against whom no warrant for arrest has been issued. In the case of a person who is not under arrest, but for whose arrest warrants have been issued, bail can be granted under section 498 if he appears in Court and surrenders himself."

(*Italics and underlining have been supplied for emphasis*)

In the same case A. S. M. Akram, J. had recorded the following observations in his lordship's separate opinion:

"On the 20th October, 1950, one Muhammad Sadiq made a report at the Police Station Khudian, District Lahore, to the effect that the respondent, Khusi Muhammad, and four others had abducted his daughter Mst. Mumtaz Begum on the 16th of October, 1950. The police took up investigation and arrested the four others, who were subsequently released on bail. No effort at arresting the respondent Khusi Muhammad was, however, made at any time, but Khushi Muhammad became apprehensive and in anticipation of his possible arrest made an application before the Sessions Judge of Lahore, praying that he may be "released on bail pending investigation and trial, if any". The Sessions Judge refused bail and rejected his application on the 15th November, 1950. Khushi Muhammad thereupon made an application to the High Court of Judicature at Lahore, purporting to be one under section 498, Cr. P. C. for 'bail before arrest'. The High Court relying upon the Full Bench Decision in the case of *Hidayat Ullah Khan v. The Crown* (*supra*) allowed the application by order dated the 14th of December, 1950, and directed that "if it is intended to arrest him (applicant), he should be released by the District Magistrate, if a bail bond is furnished to his satisfaction". Against this order the present appeal by the Crown has been preferred with our leave.

Counsel for the appellant challenges before us the validity of the High Court order on the short ground that no bail can be granted unless the person seeking for it is under legal custody. In support he cites the cases of *Muhammad Abbas and others v. Crown (supra*) and *Amir Chand and another v. The Crown* (*supra*). His contention is that the view taken in the Full Bench case of *Hidayat Ullah Khan v. The Crown* is erroneous and cannot be given effect to. This case has been fully discussed and considered in the two cases mentioned above, in which a contrary view has been expressed and which has laid down that anticipatory bail is not permissible under the law. I do not think

it will serve any useful purpose to reproduce here the elaborate arguments contained in the judgments of these two cases. The decision to the effect that unless a man is under custody no question of bail can arise seems to me to be a correct decision on a proper construction of the relevant sections of the Code. The main argument advanced by counsel for the parties regarding the point under consideration was practically the same as in the cases referred to above. Learned counsel for the respondent urged before us, that the provision in section 498, Cr.P.C. "the High Court or Court of Session may, in any case, ---------- direct that *any person be admitted to bail* ----------", was wide enough to cover the case of a person not under custody: that the word `*appears*' in sections 496 and 497 Cr.P.C., not being qualified in any manner, also conveys the same meaning: that the expression `admitted to bail' in section 498 Cr.P.C. does not imply prior custody: that this interpretation would not in any way militate against the observation of their Lordships of the Judicial Committee in the case of *Lala Jai Ram Das v. The King Emperor* (*supra*) "that sections 496 and 497 provide for granting bail to accused persons before trial and the other sections of the chapter (Chapter XXXIX) deal with matters ancillary or subsidiary to that provision" that the scope of section 498 in no way gets wider than that of sections 496 and 497 in case these sections are construed in the manner suggested. But, one cannot take merely a single word out of a section regardless of its context and setting and then construe the section in the light of the natural meaning which the word ordinarily bears. A section should be construed as a whole keeping in view the manifest purpose for which it is enacted. The expression "*be released on bail*" which occurs in both sections 496 and 497 provides a clue as to the real meaning of the word 'appears' in those sections. *"Be released on bail" pre-supposes that the person must either be in actual custody or be liable to be taken into custody under a warrant of arrest already issued or ordered to be issued.* In the latter events he must as a matter of course surrender before he can be released on bail. The word 'appears' therefore, must be limited in its meaning so as to apply only to the aforesaid persons. If this be correct then 'any person' in section 498 cannot be construed so as to enlarge the class of persons contemplated by sections 496 and 497. The expression "*admitted to bail*" in section 498 and 'released on bail' in sections 496 and 497 is obviously synonymous and to seek to differentiate between the two would be an attempt to make a distinction without difference. The Code itself at times gives directions that persons *arrested* may be "admitted to bail" (see sections 62, 307(2) and 500 of the Cr.P.C). *In truth the word 'bail' signifies only a change of custody or control a change from the rigour of police custody or jail custody to the mild control of private persons (the sureties) upon certain terms and conditions.* In Chapter XXXIX of the Cr.P.C. which includes sections 496, 497 and 498 the heading given is 'Of Bail'. *The contention, therefore, of counsel for the respondent that a person under no sort of restraint and at full liberty to go anywhere he pleases, can be released or admitted to bail, does not appear to me to be a sound one.* I do not think it is necessary to pursue this matter further as I fully agree in this particular respect with the decision in the cases of *Muhammad Abbas and others v. The Crown* and *Amir Chand and another v. The Crown*, and in the reasons given in support thereof. In my opinion neither section 498 nor any other section of the Cr.P.C. is applicable to the facts and circumstances of the present case. The order for bail dated the 14th December, 1950, must, therefore, be set aside as without jurisdiction."

(*Italics and underlining have been supplied for emphasis*)

M. Shahabuddin, J. had also recorded his own opinion in that case and this is what his lordship had held:

> "This appeal raises the question whether under section 498, Cr.P.C., the High Court or Court of Session can grant bail to a person against whom information has been given to the police that he has committed an offence for which he may be arrested, but *who has not yet been placed under restraint by arrest or otherwise.*
> ---
> ---
>
> It is true that the question now under consideration was not before Their Lordships, but the importance of this decision lies in this that, even though there was no provision for releasing on bail a convicted person whom special leave to appeal had been given, and the utility of the High Court having power to release such persons on bail was fully appreciated, it was not possible to take the expressions 'in any case' and 'any person' in section 498 in their literal meaning owing to the context in which they are used. It may be said that as Their Lordships have observed that 'any person' means any accused person and as a person whom a complaint alleging an offence is made is also an accused person, bail under section 498 can be granted to him. But Their Lordships have also laid down that the principal sections relating to bail are 496 and 497 and the rest of the sections in Chapter 39 deal with matters ancillary and subsidiary to sections 496 and 497. Under the latter two sections bail can be granted only to persons who are in some sort of custody and not to those who are at liberty. *That being so, section 498 cannot be construed as applicable to persons who are under no restraint at all*, for, if it is so interpreted it ceases to be a provision dealing with matters ancillary or subsidiary to sections 496 and 497. In my opinion therefore the expressions, 'any case' and 'any person' occurring in section 498 refer only to persons coming under sections 496 and 497.
>
> Mr. Qalandar Ali Khan appearing for the respondent argued that the appearance of a person before the High Court to ask for bail even when he is free amounts to his placing himself in legal custody. A similar contention was raised before the Full Bench by the petitioners in that case but Cornelius, J. repelled it observing as follows:-
>
> > "Nowhere in law is there to be found any warrant for the belief that a Court possesses any power to take into its custody a person offering himself for the purpose if there be no justification in law for the Court to exercise the power of taking such person in custody."
>
> I agree with this observation and I also agree with the further observation of the learned Judge in this connection that it is reasonable to suppose that the Code has provided for the grant of bail to persons in relation to the power it has given to Courts to compel their attendance. *In the present case the respondent when he appeared before the High Court was under no restraint whatever. The police had not taken any action, nor was there anything to compel this attendance before a Court.* There is therefore no substance in the contention of the learned Advocate.
>
> Apart from section 498 being ancillary to sections 496 and 497, *I fail to see how, in view of the connotation of the term 'bail' a person who is under no restraint whatever can be released on bail. 'Bail' is not defined in the Code, but it is clear from its dictionary*

meaning and its definition in Wharton's Law Lexicon that it necessarily implies an existing custody. It is also clear that when a person is released on bail he is not altogether free but on the other hand passes into the custody of his sureties, in *Foxhall v. Barnet* (1854 L J New Series Vol. 23 p. 7) a case for damages for false imprisonment cited by Mr. Sleem, Lord Coleridge observed: "the admitting to bail is only change of custody. The bail might have retaken him and sent him back to prison at any time". The same principles exist in the law applicable to this country. For instance, section 308 refers to bail as detention. It provides that when the jury is discharged the accused shall be detained in custody or on bail. Under sections 501 and 502, if the sureties are found to be insufficient or wish to be discharged the person released on bail becomes liable to be committed to prison unless he furnished the required security. *I therefore consider that subjection to some form of custody is a condition precedent to the grant of bail.*

The learned Judge has referred to the case of *Johar Mull and others* (*supra*) as supporting his view; but there, the present question was neither raised nor discussed. The contention on behalf of the Crown in that case appears to have been only that bail ought not to be allowed in cases of murder. The learned Judges of the Calcutta High Court no doubt observed at the outset that they had power under section 498 to direct that any person should be admitted to bail in any case, but in fact they proceeded on the basis that they could "revise the order of the Magistrate and say that he should have exercised his discretion in granting bail". In that case the Magistrate had issued a non-bailable warrant for the arrest of the petitioners who appeared before the High Court. *That decision does not lay down that bail can be granted to a person even when he is under no restraint.* On the other hand it seems to me that the petitioners in that case can be said to have appeared before the High Court in the sense in which the word `appear' is used in sections 496 and 497. *As pointed out earlier mere appearance when there is no justification for the Court to take the person appearing into custody is not the appearance before Court required for the grant of bail, but when against the person who appears before a High Court a warrant for his arrest has already been issued by the Court of first instance it cannot be said that the High Court has no justification to take him into custody.* In *Muhammad Abbas v. Crown* (*supra*) where the question for decision was the same as here. Tyabji C.J. has observed that the power conferred under section 498 is of a revisional character and that a higher Court should not interfere before the subordinate Court exercises its discretion. I am unable to accept this view. Ordinarily the higher Court may not interfere unless the petitioner has moved the Court of first instance, but I do not think that it can be said that there is a legal bar to a higher Court exercising a power in the first instance unless the section under which it acts states to that effect. Under section 498 the bail required by the police officer or Magistrate may be reduced by the High Court or Court of Session. There is nothing in the section to indicate that the High Court can reduce the bail only after the Session Court has declined to do so. That being so, *I can see no objection to the High Court or Court of Session, like the Court of first instance, exercising the power of granting bail to a person against whom a non-bailable warrant has been issued, if he appears in Court and surrenders himself.*

In Muhammad Abbas v. Crown to which reference has been made above and in Amir Chand v. Crown the Full Bench decision of the Lahore High Court was considered and dissented from. In those cases the applicants for bail were persons under no restraint whatever. They had not been arrested by the police, nor had warrants been issued for their arrest. It was held that they could not be released

> *on bail under section 498. For reasons stated above, I consider that this conclusion and not the one reached by the Full Bench of the Lahore High Court is correct*. Tyabji, C.J. in the Sind case has observed that the power of the High Court and Court of Session under section 498 is not affected by the limitations on the grant of bail imposed in section 497 and Cornelius, J. in the Full Bench case has expressed the same view. Khosla, J. of the East Punjab High Court, however, is of opinion that after the decision of the Privy Council in *Lala Jairam Das's case* (*supra*) that view cannot be regarded as correct. For the purposes of the present case I do not find it necessary to deal with this point, for, *even if it is assumed that the power under section 498 is unfettered by the limitations imposed in section 497 the fact still remains that that power can be exercised only for granting bail, and as 1 have already stated some sort of custody is a condition precedent to the grant of bail*."
>
> (*Italics and underlining have been supplied for emphasis*)

27. The masterly analysis of the relevant legal question undertaken in the above mentioned case leaves no room for doubt that the matter of bail in a criminal case, be it a Challan case or a case arising out of a private complaint, is relevant only where the accused person concerned is either under actual custody/arrest or he genuinely and reasonably apprehends his arrest on the basis of some process of the law initiated either by a court or by the police. It is but obvious that issuance of process by a court through summons for appearance of an accused person before the court neither amounts to arrest of the accused person nor it can *ipso facto* give rise to an apprehension of arrest on his part and, thus, such accused person cannot apply for pre-arrest bail and even if he applies for such relief the same cannot be granted to him by a court. It may be important here to refer to the case of *Muhammad Muddasar v. The State and others* (2011 SCMR 1513) wherein the accused person against whom process had been issued by the trial court under section 204, Cr.P.C. through summons in a complaint case was admitted by this Court to pre-arrest bail because after issuance of summons the trial court had directed arrest of the accused person and through such direction of the trial court the accused person had come under a restraint. Ever since the case of *The Crown v. Khushi Muhammad* (PLD 1953 FC 170) the legal position is quite settled that both in a Challan case and a complaint case pre-arrest bail can be granted to an accused person only where there is a genuine and established apprehension of his imminent arrest in connection with such case with the effect of a virtual restraint on

such accused person and a reference in this respect may be made to the subsequent cases of *Sadiq Ali v. The State* (PLD 1966 SC 589), *Chiragh Shah and another v. The State* (1969 SCMR 134), *Sh. Zahoor Ahmad v. The State* (PLD 1974 Lahore 256), *Murad Khan v. Fazal-e-Subhan and another* (PLD 1983 SC 82), *Jamal-ud-Din v. The State* (1985 SCMR 1949), *Meeran Bux v. The State* (PLD 1989 SC 347), *Ajmal Khan v. Liaqat Hayat* (PLD 1998 SC 97) and *Syed Muhammad Firdaus and others v. The State* (2005 SCMR 784). It had also been held in those and many other cases that for admitting an accused person to pre-arrest bail in a criminal case the court concerned has to be satisfied that the intended or apprehended arrest of the accused person is actuated by ulterior motives or *mala fide* on the part of the complainant party or the police. When an accused person appears before a court which has issued summons for his appearance under section 204, Cr.P.C. on the basis of a private complaint the accused person is still unaware of the exact nature of the allegations leveled against him or about the basis of his summoning by the court and, therefore, he is not expected to be in any position at that stage to urge or substantiate before the court that the private complaint instituted against him is actuated by malice. Apart from that in the case of *Sh. Zahoor Ahmad v. The State* (PLD 1974 Lahore 256) Muhammad Afzal Zullah, J. (as his lordship then was) had summed up the basic conditions to be satisfied before exercise of jurisdiction of a court to allow pre-arrest bail under section 498, Cr.P.C. in all kinds of criminal cases and they are:

> "(a) that there should be a genuine proved apprehension of imminent arrest with the effect of virtual restraint on the petitioner;
>
> (b) that the petitioner should physically surrender to the court;
>
> (c) that on account of ulterior motives, particularly on the part of the police, there should be apprehension of harassment and undue irreparable humiliation by means of unjustified arrest;
>
> (d) that it should be otherwise a fit case on merits for exercise of discretion in favour of the petitioner for the purpose of bail. In this behalf the provisions contained in section 497, Cr.P.C. would have to be kept in mind;
>
> (e) that unless there is reasonable explanation, the petitioner should have earlier moved the Sessions Court for the same relief under section 498, Cr.P.C."

Those conditions and requirements have consistently been insisted upon by all the courts in the country as prerequisites ever since and one of such prerequisites for pre-arrest bail is that the accused person applying for such relief must have a good case for bail on the merits and for having a good case for bail on the merits the requirements of section 497, Cr.P.C. have to be kept in mind which requirements are totally different from those contemplated by the provisions of sections 204 and 91, Cr.P.C. as was noticed by the Lahore High Court, Lahore in the case of *Mazhar Hussain Shah* (*supra*) and by this Court in the cases of *Reham Dad* and *Syed Muhammad Firdaus* (*supra*). Unfortunately all these critical aspects of the matter had completely escaped notice of the Honourable Judges deciding the cases of *Noor Nabi* and *Luqman Ali* (*supra*) and it had been held in those cases as a matter of course that after having been summoned by a court to appear before it the accused person concerned has to apply for bail or he has to be committed to custody. It is regrettable that before holding that their lordships' attention had not been drawn towards the following observations made by Abdul Rashid, C.J. in the above mentioned case of *The Crown v. Khushi Muhammad* (PLD 1953 Federal Court 170):

> "If a person who appears before the High Court under section 497, is taken to be in the custody of the Court merely because of his appearance, it is difficult to imagine what would happen to him if the Court rejects his application for bail. He appeared in Court as a free man. Is the Court bound to keep him in custody and send him to jail simply because it rejects his application? If so, under what provision of the Code? The failure of his application would therefore deprive a suspected person of his freedom. What is the Court to do with him is another difficult question? He comes into Court protesting that he is innocent and there is no case against him. The Court decides not to accept his application for bail. He cannot be required to execute any bail bonds under the provisions of section 499 of the Code. It is clear, therefore, that the making of an application for bail and his presence in Court cannot be regarded as appearance under section 497 of the Code. In fact, in *Hidayat Khan's case* (*supra*) it was pointed out by the learned Judges of the High Court that nowhere in law was there to be found any warrant for the plea that a Court possesses any power to take into custody a person offering himself for the purpose if there be no justification for the Court to exercise the power of taking such person into custody. When a person appears before the High Court merely to present an application for bail, without any warrant for his arrest having been issued, he is not appearing in respect of any offence of which the High Court is taking cognizance at the time

> and his appearance before the Court cannot be regarded as a surrender to custody."

To us those observations apply with equal force to a case of a private complaint wherein a process has been issued against an accused person by a court under section 204, Cr.P.C. through summons requiring him only to appear before the court. In such a case the police is not looking for arrest of such person and what is the authority of the court to order that he may be taken into custody upon refusal to require him to execute a bond for his future appearance before the court under section 91, Cr.P.C. or upon dismissal of his application for pre-arrest bail is a question which abegs an answer which is nowhere to be found in the Code of Criminal Procedure. In the said Code arrest of a person is an incident of investigation by the police and in a case of a private complaint there is no investigation involved unless an investigation is ordered by the court concerned under section 202, Cr.P.C. which can be done before the issue of process under section 204, Cr.P.C. If an investigation under section 202, Cr.P.C. is ordered by the court seized of a private complaint and if during such investigation the police or the investigating person intends to arrest the suspect then such suspect apprehending a restraint on him can, obviously, apply before the court for pre-arrest bail under section 498, Cr.P.C. and if he is actually arrested then he can apply for post-arrest bail under sections 496 or 497, Cr.P.C. It has already been observed above that if a person summoned under section 204, Cr.P.C. fails to submit a bond under section 91, Cr.P.C. to the satisfaction of the court or fails to provide the requisite sureties then he may be committed to custody but such custody would last for as long as he does not fulfill the said requirements and he is to be released from the custody the moment those requirements are fulfilled by him. Such custody would surely not be an arrest in connection with the offence in issue but such custody would only be in connection with compelling him to comply with the court's requirements under section 91, Cr.P.C. It had not been appreciated in the cases of *Noor Nabi* and *Luqman Ali* that even in cases of the most heinous offences the police, not to speak of a court, is under no statutory obligation to necessarily and straightaway

arrest an accused person during an investigation as long as he is joining the investigation and is cooperating with the same. A reference in this respect may be made to sections 54 and 55, Cr.P.C., Article 4(1)(j) of the Police Order, 2002, Rules 24.1, 24.4, 24.7, 25.2(1), 25.2(2), 25.2(3) and particularly Rules 26.1, 26.2 and 26.9 of the Police Rules, 1934 and to the cases of *Abdul Qayyum v. S.H.O., Police Station Shalimar, Lahore* (1993 P.Cr.L.J. 91), *Muhammad Shafi v. Muhammad Boota and another* (PLD 1975 Lahore 729), *Muhammad Siddiq v. Province of Sindh through Home Secretary, Karachi and 2 others* (PLD 1992 Karachi 358), *Mst. Razia Pervez and another v. The Senior Superintendent of Police, Multan and 5 others* (1992 P.Cr.L.J. 131) and *Khizer Hayat and others v. Inspector-General of Police (Punjab), Lahore and others* (PLD 2005 Lahore 470).

28. There is yet another important legal aspect relevant to the issue at hand which had not been adverted to in the cases of *Noor Nabi* and *Luqman Ali* (*supra*) and that revolves around the provisions of section 498-A, Cr.P.C. which stipulate as follows:

> **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 authorize 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 provisions of section 498-A, Cr.P.C. tend to create an impression that the provisions of sections 497 and 498, Cr.P.C. may be relevant only to cases registered (presumably under section 154, Cr.P.C.) and it may be difficult for the purposes of section 498-A, Cr.P.C. to equate a private complaint, and that too only at the stage of issuance of process under section 204, Cr.P.C. through summons, with a case registered under section 154, Cr.P.C. If the impression so created is correct then the concept of bail may be alien particularly to such a stage of a private complaint and it may be a bond mentioned in section 91, Cr.P.C. which may be the only recourse possible in such a case. It may be true that the true scope of the provisions of section

498-A, Cr.P.C. is yet to attain judicial clarity in this specific regard but at the same time it is equally true that even this aspect of the matter had failed to receive any consideration at all in the cases of *Noor Nabi* and *Luqman Ali*.

29. At this stage a clarification may be in order. In his capacity as a Judge of the Lahore High Court, Lahore and speaking for a Full Bench of that Court one of us (Asif Saeed Khan Khosa, J.) had observed in the case of *Khizer Hayat and others v. Inspector-General of Police (Punjab), Lahore and others* (PLD 2005 Lahore 470) as under:

> "The powers available during an investigation, enumerated in, Part V, Chapter XIV of the Code of Criminal Procedure, 1898 read with section 4(1)(1) of the same Code, include the powers to arrest an accused person and to effect recovery from his possession or at his instance. Such powers of the investigating officer or the investigating person recognize no distinction between an investigation in a State case and an investigation in a complaint case. In the case of Noor Nabi and 3 others v. The State 2005 P.Cr.L.J. 505 a learned Judge-in-Chamber of the Honourable Sindh High Court has already clarified that section 91, Cr.P.C. deals only with procuring attendance of a person before the Court and after his availability before the Court the matter of his admission to bail or not rests in the hands of the Court and that the impression about automatic admission of an accused person to bail in a case of private complaint is erroneous."

Those observations had been made in the year 2005 and the judgment in the case of *Noor Nabi* (*supra*) was the latest pronouncement on the subject at that time and, thus, the same was referred to in that judgment. The earlier unreported judgment of this Court in the case of *Reham Dad* (*supra*) handed down in the year 1987 was not brought to the notice of the Court on that occasion and the later judgment of this Court in the case of *Syed Muhammad Firdaus* (*supra*) rendered in the year 2005 had not yet been published in any law report or journal of the country and had, thus, escaped notice. In this background one of us (Asif Saeed Khan Khosa, J.) feels no hesitation in acknowledging that he stands better informed and more enlightened on the subject at present than he was in the year 2005.

30. As a result of the discussion made above we hold that the law propounded by the Lahore High Court, Lahore in the case of *Mazhar*

Hussain Shah v. The State (1986 P.Cr.L.J. 2359) and by this Court in the cases of *Reham Dad v. Syed Mazhar Hussain Shah & others* (Criminal Appeal No. 56 of 1986 decided on 14.01.1987) and *Syed Muhammad Firdaus and others v. The State* (2005 SCMR 784) was a correct enunciation of the law *vis-à-vis* the provisions of sections 204 and 91, Cr.P.C. and it is concluded with great respect and veneration that the law declared by the High Court of Sindh, Karachi in the case of *Noor Nabi and 3 others v. The State* (2005 P.Cr.L.J. 505) and by this Court in the case of *Luqman Ali v. Hazaro and another* (2010 SCMR 611) in respect of the said legal provisions was not correct. As held in the cases of *Mazhar Hussain Shah*, *Reham Dad* and *Syed Muhammad Firdaus* (*supra*) the correct legal position is as follows:

> (i) A process is issued to an accused person under section 204, Cr.P.C. when the court taking cognizance of the offence is of the "opinion" that there is "sufficient ground" for "proceeding" against the accused person and an opinion of a court about availability of sufficient ground for proceeding against an accused person cannot be equated with appearance of "reasonable grounds" to the court for "believing" that he "has been guilty" of an offence within the contemplation of sub-section (1) of section 497, Cr.P.C. Due to these differences in the words used in section 204 and section 497, Cr.P.C. the intent of the legislature becomes apparent that the provisions of section 91, Cr.P.C. and section 497, Cr.P.C. are meant to cater for different situations.
>
> (ii) If the court issuing process against an accused person decides to issue summons for appearance of the accused person before it then the intention of the court is not to put the accused person under any restraint at that stage and if the accused person appears before the court in response to the summons issued for his appearance then the court may require him to execute a bond, with or without sureties, so as to ensure his future appearance before the court as and when required.
>
> (iii) If in response to the summons issued for his appearance the accused person appears before the court but fails to submit the requisite bond for his future appearance to the satisfaction of the court or to provide the required sureties then the accused person may be committed by the court to custody till he submits the requisite bond or provides the required sureties.

We may add that

> (iv) If the process issued by a court against an accused person under section 204, Cr.P.C. is through a warrant, bailable or non-bailable, then the accused person may be under some kind or form of restraint and, therefore, he may apply for his pre-arrest bail if he so chooses which may or may not be granted by the court depending upon the circumstances of the case but even in such a case upon appearance of the accused person before the court he may, in the discretion of the court, be required by the court to execute a bond for

his future appearance, with or without sureties, obviating the requirement of bail.

31. Having declared the correct legal position in respect of the provisions of sections 204 and 91, Cr.P.C. we direct the Office of this Court to fix the titled appeals and petitions for hearing before appropriate Benches of the Court for their decision on the basis of their respective merits in the light of the law declared through the present judgment.

Judge

Judge

Judge

Judge

Judge

Announced in open Court at Islamabad on: 03.10.2014

Judge

Islamabad
03.10.2014
Approved for reporting.

Arif