

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Cr.Misc.BA No.2305-P/2018

Bakhtiar son of Said Akbar,
r/o Pakha Ghulam, Peshawar.

Petitioner (s)

VERSUS

The State etc.

Respondents

For Petitioner :-	<u>Mr. Bakht Nawaz Khan, Advocate.</u>
For State :-	<u>Mr. Wajahat Hussain, Advocate.</u>
For complainant:-	<u>Nemo.</u>
Date of hearing:	<u>12.11.2018</u>

ORDER

ROOH-UL-AMIN KHAN, J:- Petitioner Bakhtiar, seeks post arrest bail in case FIR No.813 dated 26.09.2018, registered under sections 496-A and 496-B PPC, at Police Station Saddar, Mardan.

2. The prosecution case is that on 21.09.2018 at 15.10 hours, complainant Ziarat Khan made a report to local police that some 19 years back his marriage was solemnized with Mst. Sabaz Pari and from their wedlock during 10/11 years, three children i.e. (two sons and a daughter), were born. He then proceeded to Saudi Arabia for earning livelihood. He alleged that in the year 2010-2011, his nephew Bakhtiar (the petitioner) developed illicit relationship with his wife Mst. Sabaz Pari, as a result, she eloped with him, leaving behind her children. That due to disgrace and shame he kept mum and made no report in Police Station and that now he is fully satisfied that his wife has eloped with the petitioner. His report was

incorporated in Daily Diary No.8 dated 21.09.2018. An Inquiry under section 156 (3) Cr.P.C. was initiated. On 27.09.2018, complainant recorded his statement under section 164 Cr.P.C. in which he besides the petitioner, also charged Mst. Sabaz Pari, on allegation of keeping illicit relation with petitioner and that as a result of the illicit relation two kids have been given birth by Mst. Sabaz Parai, hence, this case.

3. Arguments of learned counsel for the parties heard and record perused.

4. Section 496-B PPC defines fornication and provides its punishment. For the sake of convenience and ready reference the same is reproduced below:-

“S.496-B Fornication:- (1) A man and a woman not married to each other are said to commit fornication if they willfully have sexual intercourse with one another.

(2) Who ever commits fornication shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine not exceeding ten thousand rupees.”

5. Section 203-C Cr.P.C. provides a proper procedure and mechanism for taking cognizance of an offence under section 496-B PPC. For the sake of convenience and guidance it is reproduced below:-

“S.203-C. Complaint in case of fornication:- (1) No Court shall take cognizance of an offence under section 496-B of the Pakistan Penal Code, except on a **complaint lodged in a Court of competent jurisdiction.**

(2) The Presiding Officer of a Court taking cognizance of an offence shall at once examine on oath the complainant and at least two eyewitnesses to the act of fornication.

(3) The substance of the examination of the complainant and the eyewitness shall be reduced to writing and shall be signed by the complainant and the witnesses, as the case may be, and also by the Presiding Officer of the Court.

(4) If in the opinion of the Presiding Officer of a Court, there is sufficient ground for proceeding, the Court shall issue summons for the personal attendance of the accused.

Provided that the Presiding Officer of a Court, shall not require the accused to furnish any security except a personal bond, without sureties, to ensure attendance before the Court in further proceedings.

(5) The Presiding Officer of a Court before whom a complainant is made or to whom it has been transferred may dismiss the complainant, if, after considering the statements on oath of the complainant and the witnesses there is, in his judgment, no sufficient ground for proceeding and in such case he shall record his reasons for so doing.

(6) Notwithstanding the foregoing provisions or anything contained in any other law for the time being in force no complaint under this section shall be entertained against any person who is accused of Zina under section 5 of the Offences of Zina (Enforcement of Hudood) Ordinance, and against whom a complaint under section 203-A of this Code is pending or has been dismissed or who has been acquitted or against any person who is a complainant or a victim in a case of rape, under any circumstances whatsoever”.

The mandatory provisions of section S.203-C Cr.P.C. have not been complied with, nullifying all the proceedings to the extent of section 496-B PPC. In this view of the matter, section 496-B PPC is straightaway deleted from the FIR notwithstanding the confessional statement of petitioner, authenticity and voluntariness of which is yet to be determined during trial, as the petitioner has been shown arrested on 25.09.2018 and his alleged confession has been recorded on 29.09.2018 i.e. on the 5th day of his arrest. As

regards section 496-A PPC, complainant in his statement under section 164 Cr.P.C. has charged both the accused for keeping illicit relation. He has not specifically charged the petitioner for enticing or taking away his wife with intent that she may have illicit intercourse with him, which are the essential ingredients to constitute the offence under section 496-A PPC. Even otherwise, punishment provided for the offence under section 496-A PPC does not fall within the Prohibitory Clause of Section 497 Cr.P.C. and in such like cases grant of bail is a rule and refusal thereof an exception. On the face of record, there is no exceptional circumstance to clog the way of grant of bail to the petitioner.

6. For the reasons discussed above, this petition is allowed. Accused petitioner is admitted to bail provided he furnishes bail bonds in the sum of rupees two lac with two sureties each in the like amount to the satisfaction of learned Illaqa Judicial Magistrate/MOD concerned.

7. Before parting with the order I deem it appropriate to mention here that this Court has taken serious notice of the conduct and highhandedness of Investigation Officer, who has pre-decided the fate of legitimacy of two minor innocent children by placing their photographs on file with a foot note of “ . The extra labour done by the Investigating Officer coupled with the above declaration, speaks volumes about his conduct and interest in the case and further indicates that there was something black in the bottom. The I.O. has placed on file photographs of the lady accused and her two kids with absolute findings that these are **“the illegitimate children”** of Mst. Sabaz Pari and petitioner. When there was no DNA test of the kids with the petitioner or any other concrete proof in this regard, on mere allegations the Investigating Officer should not have passed such uncivilized verdict, particularly, playing with

the future and lives of the kids. The job of the Investigating Officer is only to collect evidence and not to give any findings. It is the Court to decide the case in light of the evidence recorded in the Court. The Investigating Officer by no stretch of imagination and under no law and authority was suppose to place pictures of the kids and their mother on file and quoting them with stigmatized words, particularly, in cases involving human dignity. The I.O. is warned to stop this type of practice and remain careful in future. He is further directed to remove the photographs of lay and her kids from the Judicial file and delete the un-parliamentary findings from the record.

8. Copy of this order be placed before the worthy IG (Investigation) Khyber Pakhtunkhwa and SP, Mardan, who shall ensure the removal of the pictures of Mst. Sabaz Pari and her kids from the file, with intimation to this Court. Besides, strict legal action be taken against the Investigating Officer and other officials who have made extra labour for tarnishing the dignity and future of the kids.

Announced:
12.11.2018

Siraj Afridi P.S.

JUDGE

SB of Hon'ble Mr. Justice Rooh ul Amin Khan.