

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Muhammad Ali Mazhar
Mr. Justice Syed Hasan Azhar Rizvi
Mr. Justice Irfan Saadat Khan

Criminal Petition No.201-K of 2023

Against the order dated 20.11.2023
passed by High Court of Sindh, Circuit
Court, Hyderabad, in CrI.B.A.No.S-
1019/2023

Muhammad Ali Mahar and another

...Petitioners

Versus

The State

...Respondent

For the Petitioners:

Raja Jawad Ali Saahar, ASC
Mr. Ghulam Rasool Mangi, AOR
Along with Petitioners

For the Complainant:

Mr. Meer Ahmad, ASC

For the State :

Mr. Zafar Ahmad Khan, Addl.P.G., Sindh
Mehboob, SHO
Ayaz, I.O.

Date of Hearing:

11.06.2024

ORDER

Muhammad Ali Mazhar: J.- This Criminal Petition for leave to appeal is directed against the order dated 20.11.2023 passed by the High Court of Sindh, Circuit Court, Hyderabad, in CrI.B.A.No.S-1019/2023, by means of which the petitioners applied for pre-arrest bail in FIR 34/2023, lodged under Sections 302, 34, 201 and 109 of the Pakistan Penal Code, 1860 ("**PPC**") at Police Station Bhan, District Jamshoro, but the bail application was dismissed and the interim bail granted to them was recalled.

2. According to the nucleus of the FIR, the complainant, Mansoor Ali, lodged a report stating that on 20.09.2021, he contracted marriage with Noreen D/o Muhammad Ali Mahar ("deceased") aged about 26 years, but their marriage did not settle well with the relatives of the deceased.

Since the *Rukhsati* did not take place, therefore the couple was in contact only through phone. He further alleged that the deceased used to tell him that she apprehends danger to her life from her relatives. It was further alleged that on 15.05.2023, the complainant was in telephonic contact with his wife but on 16.05.2023, he came to know from her friend that on 15.05.2023, at about 3 PM, the deceased's parents shot at her temple with a pistol and murdered her, but have disclosed the incident as a matter of suicide. The complainant also came to know from her friend that on the instigation of the accused, Muhammad Ali, on phone, the accused Mohsin Ali Mahar had fired upon his wife and the accused persons concealed the original facts. However on 24.09.2023, the complainant also got his supplementary statement recorded in which he stated to have received information that the accused Ahsan Mahar, directed by his father, Muhammad Ali Mahar, along with his brother, Mohsin Ali Mahar, used the licensed pistol belonging to their uncle. It was further stated that Ahsan Ali and Mohsin Ali both have killed Mst. Noreen and other nominated accused are also involved in the crime.

3. The learned counsel for the petitioners argued that the petitioners have lost their daughter and sister and, despite that, they are facing hardship and humiliation on account of a false case against them. It was further argued that the complainant has lodged this false case to extort money from the accused persons. It was further contended that it was a case of suicide and neither is there any evidence of honour killing nor the prosecution has collected any direct or indirect evidence against the present petitioners who were not present at the scene of the crime. It was further argued that the FIR was lodged with a delay of three days and in fact, the deceased has committed suicide due to the tortured relationship she had with the complainant as she had married the complainant secretly and he was blackmailing the deceased regarding his relation with her, and usurped her money. It was further averred that the petitioners belong to a respectable family and the complainant has leveled false allegations against them with *mala fide* intention, hence the case requires further inquiry.

4. The learned Additional Prosecutor General, Sindh, fully supported the impugned order. He further argued that both the petitioners are involved and have played a vital role in the commission of the crime on account

of their displeasure to the marriage of the deceased with the complainant. He further contended that the petitioners failed to allege any *mala fide* intention. More so, they are charged with the offences that fall within the prohibitory clause, hence they are not entitled to the concession of pre-arrest bail.

5. The learned counsel for the complainant argued that the family of the deceased was much perturbed and annoyed due to the marriage of choice of the deceased and for this reason, she was murdered on the pretext of honour which was portrayed as suicide. No FIR was lodged by the petitioners, which should have been done even if they consider it a case of suicide. It was further contended that the deceased was killed in the house of the petitioners with a firearm and, under the false cover of suicide, they also attempted to destroy evidence by deleting messages from her phone which was later recovered by the forensic department. He further argued that the duly wedded couple has a very cordial relationship which is apparent from the retrieved messages, hence there was no reason for the deceased to commit suicide.

6. Heard the arguments. According to the brass tacks of the prosecution case, the deceased was a young school teacher aged 26 years (though the *Danishnama* mentions the age as being between 21 and 22 years) who sustained a firearm injury at the temple region and succumbed to the injury. The bone of contention, according to the complainant, is that it is a case of murder on account of honour killing whereas the accused persons (deceased's family) advocate that it is a case of suicide. The solemnization of marriage between the deceased and the complainant is an admitted fact and the complainant has alleged that this marriage was not accepted by the deceased's parents and relatives. The age of the deceased shows that by all means she was *sui juris*. The Latin phrase "*sui juris*" literally means "of one's own laws" which indicates legal competence, and the capacity to manage one's own affairs. It also indicates an entity that is capable of suing and or being sued in a legal proceeding in their own name without the need of an *ad litem*. According to Black's Law Dictionary (Sixth Edition), "*Sui Juris*" means a person of his own right, possessing full social and civil rights, not under any legal disability, or the power of another, or guardianship. It denotes having the capacity to manage one's own affairs and not being under legal disability to act for oneself. A major Muslim woman, like a major Muslim

man, is *sui juris* and entitled to the same rights and liberties. This concept is further supported by Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**"), which guarantees that no person can be deprived of life or liberty except in accordance with law.

7. In the case in hand, the complainant alleged that despite his marriage with the deceased, the *Rukhsati* did not take place, however, the married couple was in contact through phone. It is also a ground reality that the parents or other family members never lodged the FIR but the FIR was lodged by the complainant after the murder of his wife. In all conscience, had it been a case of suicide, even then, the matter should have been reported to the police by the family to investigate whether it is really a case of suicide or murder without branding the incident as suicide at first glance, which was not done and raised many questions and apprehensions on the conduct of the petitioners and other family members arrayed in the case by the prosecution. Moreover, the medical evidence indicates a dearth of blackening at the locale of the injury, which suggests that it is not a case of suicide. Certain material is available which demonstrates that the accused persons strived to wipe out the messages which were recovered by the forensics lab. According to the prosecution, the instigation by the petitioner No.1 (Muhammad Ali) was fatal, leading to the death of his daughter, whereas the petitioner No.2 (Ahsan Muhammad Ali) also facilitated his brother in the killing. The WhatsApp messages retrieved by the prosecution, provide significant insight into the relationship dynamics between the deceased and her husband which clearly indicate that the couple shared a harmonious and affectionate relationship. Their light-hearted and humorous conversations further substantiate that there was no animosity or distress in their marriage hence it contradicts any assertion of suicide and instead points towards it being a murder motivated by honour, as alleged. None of the messages indicated that the deceased was perturbed or desperate to attempt suicide.

8. According to the "*Laash Chakas*" Form and the "*Danishtnama*" prepared by the police, Abdul Hameed Mahar (uncle of the deceased) informed *via* mobile phone that his niece Noreen (deceased), while handling the pistol in the house, accidentally fired it, resulting in a gunshot wound to her temple. They rushed her to Bhan hospital for

treatment where she passed away. The police also secured the screenshots of messages from the mobile phone of the complainant, according to which the life of the deceased was found to be in danger. The *Mushirnama* avers that on 15.05.2023, the accused Mohsin Ali Mahar and Ahsan Mahar, in an attempt to conceal their crime, continuously texted the deceased's husband for assurance that Noreen (deceased) was alive. In the mobile phone chats, the complainant continuously asked for assurance that Noreen is alive. It is further enumerated in the same *Mushirnama*, *inter alia*, on the basis of the text messages, that the complainant sent message from his mobile phone to the deceased's father asking for forgiveness for the marriage but the father of the deceased expressed extreme anger and refused to meet the complainant. One statement of Ahsan Ali, son of petitioner No.1 and brother of deceased, was also recorded in which he implicated the petitioners, to which the learned counsel for the petitioners argued that this statement was obtained by the police under duress and compulsion, which plea should be considered by the Trial Court and cannot be examined at the pre-arrest bail state, as doing so would require a deeper appreciation of the evidence.

9. It is a renowned articulation of law that the concession of pre-arrest bail is an extraordinary relief which can be granted in extraordinary situations to protect the liberty of innocent persons. By all means, the petitioner has to satisfy the Court regarding the basic conditions enumerated under Section 497 of the Code of Criminal Procedure, 1898 ("**Cr.PC**") with reference to the reasonable grounds which necessitates and entails further inquiry in the case. No specific details of *mala fide* intention are shown. In fact, no plausible reasons are shown as to why the FIR was not lodged by the parents and other family members; instead, they pleaded that the delay in lodging an FIR lies with the complainant. In the case of Rana Abdul Khaliq Vs. State (**2019 SCMR 1129**), this Court held that the grant of pre-arrest bail is an extraordinary remedy in criminal jurisdiction; it is a diversion of the usual course of law; it is a protection to the innocent being hounded on trumped up charges through the abuse of the process of law, therefore a petitioner seeking judicial protection is required to reasonably demonstrate that the intended arrest is calculated to humiliate him with taints of *mala fide*; and it is not a substitute for post arrest bail in every run of the mill criminal case as it seriously hampers the course of

investigation. While in the case of Rana Muhammad Arshad Vs. Muhammad Rafique (PLD 2009 SC 427), this Court has discussed the guidelines for granting bail before arrest under Section 498, Cr.PC and lays down the following parameters for pre-arrest bail: (a) grant of bail before arrest is an extraordinary relief to be granted only in extraordinary situations to protect innocent persons against victimization through abuse of law for ulterior motives; (b) pre-arrest bail is not to be used as a substitute or as an alternative for post-arrest bail; (c) bail before arrest cannot be granted unless the person seeking it satisfies the conditions specified through subsection (2) of section 497 of the Cr.PC i.e., unless he establishes the existence of reasonable grounds leading to a belief that he was not guilty of the offence alleged against him and that there were, in fact, sufficient grounds warranting further inquiry into his guilt; (d) not just this but in addition thereto, he must also show that his arrest was being sought for ulterior motives, particularly on the part of the police; to cause irreparable humiliation to him and to disgrace and dishonour him; (e) such a petitioner should further establish that he had not done or suffered any act which would disentitle him to a discretionary relief in equity e.g., he had no past criminal record or that he had not been a fugitive at law, and finally that (f) in the absence of a reasonable and a justifiable cause, a person desiring his admission to bail before arrest must in the first instance approach the Court of first instance.

10. So far as the foothold of constructive liability is concerned, it is in essence a common intention; a meeting of the minds of the accused persons to do the criminal act, and in order to constitute an offence under Section 34, PPC, it is not required that a person should necessarily perform an act with his own hand; rather, common intention presupposes prior concert and necessitates a prearranged plan and if, in furtherance of their common intention, all of them join together and aid or abet each other in the commission of an act, then even if one of them does not physically perform the act, their presence or other actions contributing to the commission of the act would deem them to have themselves committed the act within the meaning of Section 34, PPC. Whereas Section 109, PPC, explicates that whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by the Code, for the punishment of

such abetment, be punished with the punishment provided for the offence.

11. The notorious act of honour killing is branded as *karo-kari* which menace is cancerous and tumorous to our society, humanity, and the populace. In fact, this is an act of murder in which a person is killed for his or her actual or perceived immoral deeds and comportments. Without doubt, the father and other family members might be annoyed or exasperated on knowing about a marriage of choice, but it no way allows them to take the law in their hands for evil designs. Such alleged depraved manners and postures can include marital betrayal, refusal to acquiesce to an arranged marriage, wanting marriage or divorce, perceived flirtatious demeanor, or even rape. Predominantly, honour killing is often an emblem for adultery, but it is exploited in multifarious means of seeming unscrupulous conduct. It is really a sorry state of affairs, rather deeply appalling and deplorable, in a typical segment of society where a conviction persists that when a woman is regarded as "*kari*", the family members must consider it their vested right to kill her and the co-accused "*karo*" in order to refurbish and recondition the family honour. However, the research-based statistics demonstrate that the majority of victims of such inhuman and ruthless acts are women who are killed and the assailants or aggressors are no one else but the male members of the family or community. The motivative strength of honour killing is the self-proclaimed ratiocination that honour killing is indispensable to cleanse dishonour or humiliation. This genre of gender-based violence is not only self-destructive to the humanity and social order but it is regarded as "*fasad-fil-arz*" which is not only against the norms of civilized culture in the society, but is also a violation of fundamental rights enshrined under the Constitution, and most importantly, it is also a serious defilement and disrespect to the teachings and injunctions of Islam. In the case of Muhammad Akram Khan Vs. State (PLD 2001 SC 96), this Court held that legally and morally speaking, nobody has any right nor can anybody be allowed to take the law in his own hands to take the life of anybody in the name of "*Ghairat*". Neither the law of the land nor religion permits so-called honour killing which amounts to murder simpliciter. Such iniquitous and vile act is violative of Article 9 of the Constitution which provides that no person would be deprived of life or

liberty except in accordance with law and any custom or usage in that respect is void under Article 8(1) of the Constitution.

12. Seemingly, the complainant raised the allegation of murder of his wife on account of honour killing by the accused persons nominated in the case which will, of course, be subject to the proof in the Trial Court. According to the complainant, it was done on the instigation of the father of the deceased, being a mastermind. The expression "mastermind" insinuates a persona other than the arrested assassins who is responsible for planning and organizing the crime and plays a major role in the murder or some alternate crime, either by ordering the crime or by helping the arrested killers who committed or perpetrated the crime.

13. Without prejudice to the merits of the case which is pending adjudication in the Trial Court, we are also sanguine to sensitivity and significance of the honour killing menace which is also taken very seriously by the legislature to curb the sins of such killings and to deal with such offences, various provisions have been incorporated in the PPC to that extent, therefore, we feel it is of utmost importance to take stock of certain provisions. Under Section 299 of the PPC (Definitions), Clause (ee), the expression "*fasad-fil-arz*" is defined which includes the past conduct of the offender or whether he has any previous conviction or the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience or if the offender is considered a potential danger to the community or if the offence has been committed in the name or on the pretext of honour. Whereas in the same context, under Section 302 PPC (Punishment of *qatl-i-amd*), Clause (c), a person is punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the injunctions of Islam the punishment of qisas is not applicable, provided that nothing in this clause shall apply to the offence of *qatl-i-amd* if committed in the name or on the pretext of honour and the same shall fall within the ambit of (a) and (b), as the case may be. While under Section 305, PPC, in case of *qatl*, *Wali* means the heirs of the victim, according to his personal law but shall not include the accused or the convict in case of *qatl-i-amd* if committed in the name or on the pretext of honour. By the same token, Section 311 PPC, relates to

Ta'zir after waiver or compounding of right of *qisas* in *qatl-i-amd* but it also provide that notwithstanding anything contained in Section 309 or Section 310, where all the *wali* do not waive or compound the right of *qisas*, or if the principle of *fasad-fil-arz* the Court may having regard to the facts and circumstances of the case, punish an offender against whom the right of *qisas* has been waived or compounded with death or imprisonment for life or imprisonment of either description for a term of which may extend to fourteen years as *ta'zir*, provided that if the offence has been committed in the name or on the pretext of honour, the imprisonment shall not be less than ten years. According to the explanation attached to this Section, the expression *fasad-fil-arz* includes the past conduct of the offender, or whether he has any previous convictions, or the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience, or if the offender is considered a potential danger to the community, or if the offence has been committed in the name or on the pretext of honour (*emphasis added*).

14. Likewise, Section 337-N, PPC, delineates the cases in which *qisas* for hurt shall not be enforced but even in this Section, it is unambiguously provided that the *ta'zir* shall not be less than one-third of the maximum imprisonment provided for the hurt caused if the offender is a previous convict, habitual, hardened, desperate or dangerous criminal or if the offence has been committed by him in the name or on the pretext of honour (*emphasis added*). In tandem, Section 338-E, PPC, also reckons the waiver or compounding of offences and expounds that subject to the provisions of this Chapter and Section 345 of the Cr.PC, all offences under this Chapter may be waived or compounded and the provisions of Sections 309, and 310 and 311 shall, *mutatis mutandis*, apply to the waiver or compounding of such offences but according to the second proviso, where an offence under this Chapter has been committed and the principle of *fasad-fil-arz* is attracted, the Court having regard to the facts and circumstances of the case shall punish an offender with imprisonment or fine as provided for that offence

15. Last but not least, Section 345 of Cr.PC is germane to the compounding of offences punishable under the sections of PPC but

yet again Section 2A of Section 345 of Cr.PC provides that where an offence under PPC has been committed in the name or on the pretext of karo kari, siyah kari or similar other customs or practices, such offence may be waived or compounded subject to such conditions as the Court may deem fit to impose with the consent of the parties having regard to the facts and circumstances of the case (*emphasis added*).

16. We have also surveyed and glance over some research-based articles on "Honour Killing" which are very enlightened to the subject and for better understanding, few passages are reproduced as under: -

1. Karo kari is defined as an act of murder, in which a woman is killed for her actual or perceived immoral behavior. In Karo Kari if a woman is engaged in some kind of unlawful sexual relationship with a man or if she has refused to submit to an arrange marriage, she is branded as Kari or "black female" and in order to cleanse the honor of the man to whom she 'belongs' he received permission to kill her and prove that he has safeguarded his honor by doing so. Whereas the tribal law dictates that the man who is branded karo or "black male" should also be killed but usually that does not happen and the karo has the opportunity to flee, while his family members negotiate with the dishonored family to save his life. Ref: Honor Killings-Reckless Practice of the Culture, Asian Human Rights Commission (2012), [<http://www.humanrights.asia/opinions/AHRC-ETC-010-2012>].

2. Honor killing is one form of extreme violence perpetrated on women by men... It is called karo kari (literarily: blackened man, blackened woman). It most commonly is a premeditated killing of a girl or woman, committed by her brother, father, or combination of male agnates in the name of restoring what they consider their family's honor by her behavior. The genesis of honor killing in human societies is deeply sedimented in history but has been linked by various scholars with ascendant patriarchal structures. Ref: A Hermeneutic Study of Various Discourses, ProQuest Information and Learning Company (2003), [<https://shareok.org/handle/11244/590>].

3. Honor killings are known as 'Karo Kari' which in literal sense means 'black man and black woman' who deserves exclusion from the community. In other words, it is a homicide of a family member committed by close relatives such as brother, father, husband, or mother of the victim for bringing dishonor upon family or community. Examples of the acts that trigger homicide may include: wanting to marry of their choice, wishing to seek employment, wanting to live according to free will, dressing 'inappropriately' or in general refusing to give in to the normative standards of behavior set by the local tribe or community. Ref: Rep Opinion, Masland Press (2021), [<https://www.sciencepub>].

4. Honor killings have been pervasive in traditional societies where woman symbolizes the "honor" of the family. Generally, a woman is killed by male relative (usually her father, brother, or husband) for engaging in or being suspected of committing illicit sexual acts. Though family honor rests upon the behavior of family members, women provide a convenient scapegoat in the face of such subjective qualifications as 'public morality', 'decency' and 'religion'.... Honor killing aims to cultivate fear in women to ensure that they blindly and obediently observe the miles set by male members of their family do not raise their voice against marital

violence and abstain from pursuing their Islamic and legal rights..... This practice of honor killing stems from the dual conception of women; women as repositories of honor and women as property. In cases of honor killing, if a woman is accused of having an illicit relationship or if she seeks to choose her own partner, which is considered against her tribe's custom and tradition, she loses her objective value. Ref: Journal of Positive School Psychology (2022), [<https://journalppw.com>].

5. Honor killings, or murders to avenge and restore 'shame', have long been a feature of deeply conservative, traditionalist and tribalistic community. The culture is highly problematic because it leads to fatalities without fear of consequence or retribution, creating a sense of lawlessness in society. More than that, it is a ritual that punishes women more than men, with deaths of the former twice that of the latter. The Human Rights Commission of Pakistan (HRC), one of the civil society groups attempting to tackle this menace, highlighted the dangerous interplay between archaic traditions and modern-day power struggles....Pakistan's 'Manly' Tradition of Settling Scores of 'Shame' via Blood of Women, *Friday times* (2023), [<https://thefridaytimes.com/18-Sep-2023>].

17. The learned counsel for the petitioners relied on the case of Khalil Ahmed Soomro and others Vs. The State (PLD 2017 SC 730) in which it was held that at pre-arrest bail stage, it is difficult for the accused to prove the element of *mala fide* through positive evidence, therefore the same is to be deduced and inferred from the facts and circumstances of the case and where certain events or hints to such effect were available, the same would validly constitute the element of *mala fide*. Likewise, in the case of Shahzada Qaiser Arfat alias Qaiser Vs. The State and another (PLD 2021 SC 708), it was held that *mala fide* being a state of mind could not always be proved through direct evidence and it was often to be inferred from the facts and circumstances of the case. Whereas this Court in the case of Muhammad Ijaz Vs. The State (2022 SCMR 1271) observed that previous registration of case was proved to be false and was recommended for cancellation coupled with the fact that the medico-legal examination of the son was completed after three days of the incident and the injuries caused to the petitioner were suppressed, the possibility of implicating the petitioner with *mala fide* intention cannot be ruled out. While in the case of Muhammad Iftikhar Vs. The State (2022 SCMR 973), this court held that mystery of the occurrence is fraught with doubts and thus it was unsafe to maintain the conviction. It was further held that the locale of the injury being the face below the right eye with blackened margins is a possible choice for a person hell-bent to take his own life; hence the conviction was not maintained by this court. In the end, the learned counsel cited the case of Fahad Hussain Vs. The State (2023 SCMR 364) wherein it was held that the benefit of doubt can be extended to the accused even at the bail

stage. The prosecution has to prove its case beyond reasonable doubt and this principle applies at all stages even at the time of deciding whether accused is entitled to bail or not. All aforesaid cited judgments were vetted by us but we found them quite distinguishable. Even in the bail matter, each case has its own peculiar facts that need to be considered by the Court while extending benefit of bail either pre-arrest or post-arrest. Here we have considered all the material and reached to the conclusion that for claiming pre-arrest bail, the basic limb or ingredient to exercise such jurisdiction is completely missing for the reason that the petitioners utterly failed to demonstrate any *mala fide* on the part of prosecution or the complainant who lodged the FIR to investigate the murder of his wife and punish the culprits though his wife was the daughter and sister of the present petitioners who are alleging an incident of suicide which apparently seems to be an incorrect statement keeping in view the tentative evaluation of the material placed on record.

18. We dismissed this Criminal Petition and refused to grant leave *vide* our short order dated 11.06.2024. As a consequence thereof, the ad-interim pre-arrest bail granted to the petitioners was recalled. Above are the reasons assigned in support of our short order. The observations made in this order shall not prejudice the case of either party on merits and the learned Trial Court shall decide the matter in accordance with law.

Judge

Judge

Judge

Karachi
11.06.2024
Khalid
Approved for reporting