

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE IJAZ UL AHSAN

MR. JUSTICE MUNIB AKHTAR

MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

CRIMINAL PETITION NO. 1267 OF 2022

(On appeal against the order dated 15.08.2022 passed by the Peshawar High Court, Peshawar in Crl. MBA No. 2260-P/2022)

Mst. Asiya

... Petitioner

Versus

The State and another

...Respondent(s)

For the Petitioner: Mr. Arshad Jan, ASC

For the Respondent (2): Mr. Aftab Alam Yasir, ASC
Syed Rifaqat Hussain Shah, AOR

For the State: Mr. Shumail Aziz, Addl. A.G.
Mr. Shahjee Hussain, Inspector

Date of Hearing: 18.11.2022

JUDGMENT

SAYYED MAZAHAR ALI AKBAR NAQVI, J.- Through the instant petition under Article 185(3) of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has assailed the order dated 15.08.2022 passed by the learned Single Judge of the learned Peshawar High Court, Peshawar, with a prayer to grant post-arrest bail in case registered vide FIR No. 613 dated 03.06.2022 under Sections 302/34/297/201/203 PPC at Police Station Nowshera Kalan, District Nowshera, in the interest of safe administration of criminal justice.

2. Briefly stated the prosecution story is that husband of the petitioner namely Barkat Ali went missing on 18.05.2022. The petitioner reported the matter to the Police on 24.05.2022 vide Naqalmaid No. 8. Thereafter, the local police initiated an inquiry wherein it transpired that on 19.05.2022, the local police of Police Station Nizampur found an unknown burnt dead body, which was buried in graveyard of Akora Khattak. The same

was identified by Asghar Ali, brother of the deceased. On 03.06.2022, said Asghar Ali got recorded statement under Section 164 Cr.P.C wherein he stated that his brother has been done to death by Noor Zaman and Hassan Dar on the instigation/abetment of the petitioner. Thereafter, the formal FIR was lodged in the instant case.

3. At the very outset, it has been argued by learned counsel for the petitioner that the petitioner has been falsely roped in this case against the actual facts and circumstances. Contends that the petitioner was only involved to the extent of abetment but no proof in this regard could be placed on record. Contends that the principal accused Hassan Dad has been granted post-arrest bail by the learned High Court, therefore, following the rule of consistency, the petitioner also deserves the same treatment to be meted out. Contends that the petitioner has a suckling baby girl of about 17 months of age with her, which alone entitles her for the grant of bail. Contends that the whole story narrated by the complainant is concocted one and no independent witness has been associated with the case. Lastly contends that the case of the petitioner squarely falls within the purview of Section 497(2) Cr.P.C. entitling for further inquiry into her guilt.

4. On the other hand, learned Law Officer assisted by learned counsel for the complainant defended the impugned order. It has been contended that though the petitioner is not specifically nominated in the crime report, however, a specific motive has been attributed to her. It is further argued that the baby of the petitioner is not residing with her in jail, therefore, she does not deserve any leniency by this Court.

5. We have heard learned counsel for the parties at some length and have perused the available record with their able assistance.

There is no denial to the fact that it was the petitioner, who had reported the matter to the Police on 24.05.2022 that her husband went missing. It was subsequent in time that she was implicated in the case pursuant to the statement of brother of the deceased recorded under Section 164 Cr.P.C. after lapse of 15 days. Admittedly, the recovered dead body of the deceased was fully burnt and overall condition of the dead body

made it impossible to identify the deceased. According to the brother of the deceased, he identified the deceased from pictures, which *prima facie* may hamper the possibility of identification. We have been informed that although DNA test of the corpse has been done but the report is still awaited. We have specifically asked the learned Law Officer as to on which date the sample for DNA test was collected and sent to Forensic Science Laboratory and in how much time the report will come but no specific date could be pointed out to us. The only allegation against the petitioner is that the whole occurrence was committed by the accused on her instigation/abetment. However, no specific date, time and place where the conspiracy was hatched has been mentioned in the said statement. Even name and number of witnesses to that extent are not available on the record. Perusal of Section 107 PPC reveals that three ingredients are essential to dub any person as conspirator i.e. **(i)** instigation, **(ii)** engagement with co-accused, and **(iii)** intentional aid qua the act or omission for the purpose of completion of abetment. All the three ingredients of Section 107 PPC are *prima facie* missing in this case. We have specifically asked the learned Law Officer and the learned counsel for the complainant to show us from record any material, which could *prima facie* connect the petitioner with the commission of the crime but except the Call Data Record (CDR), nothing could be relied upon. This Court in a number of cases has held that in absence of any concrete material the Call Data Record is not a conclusive piece of evidence to ascertain the guilt or otherwise of an accused. We have been informed that the petitioner has two children, one of which is a suckling baby girl of 17 months, who has been confined with her in jail. The other one is living with the grandmother. Learned counsel for the complainant could not deny this fact. In Mst. Nusrat Vs. The State (1996 SCMR 973) this Court has candidly held that "*the suckling child of the petitioner kept in jail is undoubtedly innocent. He is kept in jail with mother obviously for his welfare. The concept of "welfare of minor" is incompatible with jail life. So, instead of detaining the innocent child infant in the jail for the crime allegedly committed by his mother, it would be in the interest of justice as well as welfare of minor if the mother is released from the jail.*" This view was further reiterated by this Court in Criminal Petition No. 164/2022 passed on 14.04.2022. The principal

accused namely Hassan Dar has been granted post-arrest bail by the learned High Court. We are of the considered view that the case of the petitioner is even at better footing as compared to the said accused. In this view of the matter, following the rule of consistency, the petitioner also deserves the same treatment to be meted out. Reliance is placed on the case reported as Muhammad Fazal @ Bodi Vs. The State (1979 SCMR 9), Muhammad Ajmal Vs. The State (2022 SCMR 274) & Muhammad Usman Shakir Vs. The State (2021 SCMR 1880). The petitioner is behind the bars for the last more than five months. This court has time and again held that liberty of a person is a precious right, which cannot be taken away unless there are exceptional grounds to do so. She is otherwise a woman and her case is covered by first proviso to sub-Section 1 of Section 497 Cr.P.C. Merely on the basis of bald allegations, the liberty of a person cannot be curtailed. In these circumstances, the petitioner has made out a case for bail as her case squarely falls within the purview of Section 497(2) Cr.P.C. entitling for further inquiry into her guilt.

6. For what has been discussed above, we convert this petition into appeal, allow it and set aside the impugned order dated 15.08.2022. The petitioner is admitted to bail subject to her furnishing bail bonds in the sum of Rs.200,000/- with one surety in the like amount to the satisfaction of learned Trial Court. The above are the detailed reasons of our short order of even date.

JUDGE

JUDGE

JUDGE

Islamabad, the
18th of November, 2022
Approved For Reporting
Khurram