

Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ

Shahzada QAISER ARFAT alias QAISER---Petitioner

Versus

The STATE and another---Respondents

Criminal Petition No. 801-L of 2020, decided on 3rd February, 2021.

(Against the order of the Lahore High Court, Lahore dated 03.03.2020, passed in CrI. Misc. No.7155-B of 2020).

(a) Criminal Procedure Code (V of 1898)---

---S. 498---Pre-arrest bail, grant of---Grounds---Mala fides of complainant---Scope---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.

Khalil Ahmed v. State PLD 2017 SC 730 ref.

(b) Criminal Procedure Code (V of 1898)---

---S. 54---Police Order [22 of 2002], Art. 4(1)(j)---Police Rules, 1934, R. 26.1---Power of police to arrest an accused---Scope---Ordinarily no person was to be arrested straightaway only because he had been nominated as an accused person in an FIR or in any other version of the incident brought to the notice of the investigating officer by any person until the investigating officer felt satisfied that sufficient justification existed for his arrest---Investigating officers should not mechanically make the arrest of a person accused of having committed a cognizable offence, rather they must exercise their discretion in making the arrest of such person judiciously by applying their mind to the particular facts and circumstances of the case and consciously considering the question: what purpose would be served and what object would be achieved by arrest of the accused person.

Sughran Bibi v. State PLD 2018 SC 595 ref.

(c) Criminal Procedure Code (V of 1898)---

---S. 498---Constitution of Pakistan, Arts. 9, 10-A & 14(1)---Pre-arrest bail---Constitutional grounds for pre-arrest bail stated.

The power of the High Courts and the Courts of Sessions to grant pre-arrest bail, first and foremost, must be examined in the constitutional context of liberty, dignity, due process and fair trial. Pre-arrest bail was in the nature of a check on the police power to arrest a person. The non-availability of incriminating material against the accused or non-existence of a sufficient ground including a valid purpose for making arrest of the accused person in a case by the investigating officer would as a corollary be a ground for admitting the accused to pre-arrest bail, and vice versa. Reluctance of the courts in admitting the accused persons to pre-arrest bail by treating such a relief as an extraordinary one without examining whether there was sufficient incriminating material available on record to connect the accused with the commission of the alleged offence and for what purpose his arrest and detention was required during investigation or trial of the case, and their insistence only on showing mala fide on part of the complainant or the police for granting pre-arrest bail did not appear to be correct, especially after recognition of the right to fair trial as a fundamental right under Article 10A of Constitution. Protection against arbitrary arrest and detention was part of the right to liberty and fair trial.

2014 SCMR 1349 and A Basic Guide to Legal Standards and Practice, published by Lawyers Committee for Human Rights USA (2000) ref.

(d) Criminal Procedure Code (V of 1898)---

---S. 498---Pre-arrest bail, grant of---Grounds---Mala fides of complainant---Scope and proof---In many cases, accused persons were granted pre-arrest bail after the court found that there were no reasonable grounds for believing their involvement in the commission of the alleged offences and the court did not require independent proof of mala fide on part of the police or the complainant before granting such relief--Despite non-availability of the incriminating material against the accused, his implication by the complainant and the insistence of the police to arrest him were the circumstances which by themselves

indicated the mala fide on the part of the complainant and the police, and the accused need not lead any other evidence to prove mala fide on their part.

Muhammad Fayyaz v. State 1976 SCMR 183; Zakauallah v. State 1987 SCMR 1720; Zakia Begum v. State 1991 SCMR 297; Bashir Ahmad v. State 1993 SCMR 919; Muhammad Gul v. State 1998 SCMR 576; Dildar Ali v. State 1999 SCMR 1316; Rizwan Iqbal v. State 2007 SCMR 1392; Meeran Bux v. State PLD 1989 SC 347; Muhammad Firdaus v. State 2005 SCMR 784; Darbar Ali v. State 2015 SCMR 879 and Aqsa Safdar v. State 2019 SCMR 1923 ref.

(e) Penal Code (XLV of 1860)---

---Ss. 109 & 120-B---Abetment and conspiracy---Proof---Court must base its conclusion as to involvement of an absentee accused as abettor or conspirator on some solid material collected during the course of investigation, and not on surmises or conjectures, either tentatively at bail stage or finally at judgment stage---Conspiracy to commit a crime by its very nature was usually secret, and could not be proved by direct evidence in most cases, however, it did not mean that the prosecution was absolved from its duty to prove the allegation of conspiracy, or that mere allegation of conspiracy was sufficient for holding the accused liable---In case of non-availability of direct evidence, the police must collect during investigation, and the prosecution must lead during trial, such circumstantial evidence from which a court could draw a legitimate inference of the existence of conspiracy and involvement of the accused in that conspiracy.

(f) Criminal Procedure Code (V of 1898)---

---S. 498---Penal Code (XLV of 1860), Ss. 302, 109, 148 & 149---Qatl-i-amd, abetment, rioting armed with deadly weapons, unlawful assembly---Pre-arrest bail, grant of---Material available as to the alleged involvement of the accused in hatching alleged conspiracy of committing murder of the deceased persons, so far as the FIR was concerned, was confined to mere allegation of conspiracy/abetment without disclosing any details of such conspiracy/abetment, such as place and time of the alleged conspiracy/abetment and names of the persons who heard such conspiracy/abetment---However, later on the police recorded statements of certain persons, under S.161, Cr.P.C. wherein they had stated that while passing through the Bazar outside the house of the accused persons, they overheard the accused persons say that they would take revenge of the murder of their brother---Prosecution had not claimed that the accused was present at the spot or that he had caused any injury to any deceased or anybody else---In such circumstances there was no chance of any recovery at the instance of the accused if he was arrested---All the incriminating material against the accused was already with the prosecution---Present case was a fit case for exercise of discretion to admit the accused to pre-arrest bail to save him from unjustified arrest, consequent humiliation and the curtailment of his right to liberty---Petition for leave to appeal was converted into appeal and allowed, and accused was granted pre-arrest bail.

M. Sohail Dar, Advocate Supreme Court for Petitioners along with petitioner in person.

Respondent No.2 in person.

Khurram Khan, Addl. P.G. for the State along with Humayun Rashid, SI.

Date of hearing: 3rd February, 2021.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---

Crl. M.A. No. 310/2020: This is an application for condonation of delay. For the reasons given therein, the same is allowed, and the delay in filing the main petition is condoned.

Crl. Petition No.801-L of 2020

2. On December 7, 2019 at about 12 a.m., three persons were shot dead on G.T. Road in Ferozewala, District Sheikhpura. Five brothers and three unknown persons were nominated in the first information report ("FIR")¹ to be the assailants; while their sixth brother, Qaisar ("petitioner") and their father were nominated as abettors, alleged to have instigated and conspired the murders. As Shabbir Hussain (one of the deceased) was involved in the murder of their seventh brother, Asim, the motive alleged was that they wanted to avenge the murder of their seventh brother. Accused Qaisar, the alleged abettor, is the petitioner

before us. The Court of Sessions and High Court have dismissed his petitions for pre-arrest bail. The order dated 03.03.2020 of the High Court has been impugned before us through the present petition.

3. Learned counsel for the petitioner has submitted that the Hon'ble High Court has failed to appreciate the mala fide of the complainant in nominating all the male family members of the accused persons, and the material prime facie showing non-involvement of the petitioner in the alleged offence, i.e., the entries in the passport of the petitioner according to which he was not in Pakistan on the day of occurrence. On the other hand, learned counsel for the State has opposed this petition.

4. We have heard the learned counsel for the parties and perused the record of the case. The High Court has declined the relief of pre-arrest bail to the petitioner making the observation that pre-arrest bail is an extra-ordinary relief and can only be extended to an innocent person who is implicated in the case on the basis of mala fide, but the petitioner has failed to point out to any mala fide. The learned High Court did not appreciate that the "mala fide" being a state of mind cannot always be proved through direct evidence, and it is often to be inferred from the facts and circumstances of the case.²

5. No doubt, a police officer has, under section 54 of the Cr.P.C., the power to arrest a person who has been involved in any cognizable offence or against whom a complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned. Having the power to arrest is one thing but the justification for the exercise of that power is quite another. A police officer that makes arrest of a person must be able to justify the exercise of that power in making the arrest apart from his having the power to do so. He cannot make arrest of a person, only because he has the power to do so. He must also show sufficient grounds for making the arrest. Article 4(1)(j) of the Police Order, 2002 states this legal position when it prescribes that it is the duty of every police officer to "apprehend all persons whom he is legally authorised to apprehend and for whose apprehension sufficient grounds exist". And Rule 26.1 of the Police Rules, 1934 explains this by providing that the authority given under Section 54 of the Cr.P.C. to the police to arrest without a warrant is permissive and not obligatory. As per the said Rule whenever escape from justice or inconvenient delay in completion of the investigation or commencement of the trial is likely to result from the police failing to arrest, they are bound to do so, but in no other cases. "Ordinarily no person is to be arrested straightaway only because he has been nominated as an accused person in an FIR or in any other version of the incident brought to the notice of the investigating officer by any person until the investigating officer feels satisfied that sufficient justification exists for his arrest."³ The investigating officers should not mechanically make the arrest of a person accused of having committed a cognizable offence, rather they must exercise their discretion in making the arrest of such person judiciously by applying their mind to the particular facts and circumstances of the case and consciously considering the question: what purpose will be served and what object will be achieved by arrest of the accused person?

6. The power of the High Courts and the Courts of Sessions to grant pre-arrest bail, first and foremost, must be examined in the constitutional context of liberty, dignity, due process and fair trial. Pre-arrest bail is in the nature of a check on the police power to arrest a person. The non-availability of incriminating material against the accused or non-existence of a sufficient ground including a valid purpose⁴ for making arrest of the accused person in a case by the investigating officer would as a corollary be a ground for admitting the accused to pre-arrest bail, and vice versa.⁵ Reluctance of the courts in admitting the accused persons to pre-arrest bail by treating such a relief as an extraordinary one without examining whether there is sufficient incriminating material available on record to connect the accused with the commission of the alleged offence and for what purpose his arrest and detention is required during investigation or trial of the case, and their insistence only on showing mala fide on part of the complainant or the Police for granting pre-arrest bail does not appear to be correct, especially after recognition of the right to fair trial as a fundamental right under Article 10A of Constitution of Pakistan, 1973.⁶ Protection against arbitrary arrest and detention is part of the right to liberty and fair trial.⁷ This Court has, in many cases,⁸ granted pre-arrest bail to accused persons after finding that there are no reasonable grounds for believing their involvement in the commission of the alleged offences and has not required independent proof of mala fide

on part of the Police or the complainant before granting such relief.⁹ Despite non-availability of the incriminating material against the accused, his implication by the complainant and the insistence of the Police to arrest him are the circumstances which by themselves indicate the mala fide on the part of the complainant and the Police, and the accused need not lead any other evidence to prove mala fide on their part.

7. It is the case of the petitioner that he along with his father were in Saudi Arabia for performing Umra when the occurrence took place. No doubt, managing one's presence in a foreign country at the time of actual commission of an offence may be a tactic to escape criminal liability for being involved in the commission of that offence as abettor or conspirator; but the court must base its conclusion as to involvement of an absentee accused as abettor or conspirator on some solid material collected during the course of investigation, and not on surmises or conjectures, either tentatively at bail stage or finally at judgment stage. It is true that a conspiracy to commit a crime by its very nature is usually secret, and cannot be proved by direct evidence in most cases. It, however, does not mean that the prosecution is absolved from its duty to prove the allegation of conspiracy, or that mere allegation of conspiracy is sufficient for holding the accused liable. In case of non-availability of direct evidence, the police must collect during investigation, and the prosecution must lead during trial, such circumstantial evidence from which a court could draw a legitimate inference of the existence of conspiracy and involvement of the accused in that conspiracy.

8. The material available as to the alleged involvement of the present petitioner in hatching alleged conspiracy of committing murder of the deceased persons, so far as the FIR is concerned, is confined to mere allegation of conspiracy /abetment without disclosing any details of such conspiracy/abetment, such as place and time of the alleged conspiracy/abetment and names of the persons who heard such conspiracy/abetment. However, later on the Police recorded statements of certain persons, under section 161, Cr.P.C. wherein they have stated that while passing through the Bazar outside the house of the accused persons in the night of 18 and 25 November, 2019, they overheard the accused persons say that they would take revenge of the murder of their brother from Shabbir Hussain. It is not the case of the prosecution that the petitioner was present at the spot or he caused any injury to any deceased or anybody else and in such circumstances there is no chance of any recovery at the instance of the petitioner if he is arrested. All the incriminating material against the petitioner is already with the prosecution.

9. In the circumstances, we find it a fit case for exercise of discretion to admit the petitioner to pre-arrest bail to save him from unjustified arrest, consequent humiliation and the curtailment of his right to liberty. We, therefore, convert this petition into appeal and allow the same.

10. These are the reasons of our short order of even date, which is reproduced hereunder for ready reference:

"For reasons to be recorded later, the instant criminal petition is converted into an appeal and the same is hereby allowed. Petitioner Shahzada Qaiser Arafat alias Qaiser is allowed pre-arrest bail subject to his furnishing bail bond in the sum of Rs.100,000/- (Rupees one hundred thousand) with one surety in the like amount, to the satisfaction of the trial Court/Illaq Magistrate, within fifteen days."

MWA/S-18/SC Bail granted.

¹ FIR No. 1441/19, dated 07.12.2019, Police Station Ferozewala, District Sheikhpura, Offences under sections 302, 148, 149 and 109, P.P.C.

² See Khalil Ahmed v. State PLD 2017 SC 730.

- 3 See *Sughran Bibi v. State* PLD 2018 SC 595. (7-MB)
- 4 Pre-trial detention should be the exception reserved only for situations where the likelihood exists that the accused would abscond, destroy evidence, influence witnesses, avoid investigation, flee from the jurisdiction of the state or is likely to repeat the crime due to his past record- *Bail and Liberty*-by Reema Omar, The Dawn, 22.06.2019.
- 5 Also see 2014 SCMR 1349.
- 6 "While incorporating Article 10A in the Constitution and making the right to a 'fair trial' a fundamental right the legislature did not define or describe the requisites of a 'fair trial'. By not defining the term the legislature, appears to have given to it the same meaning as is broadly universally recognized and also embedded in our own jurisprudence." (Suo Motu Case No.4 of 2010, PLD 2012 SC 553 (7-MB), per Nasir-ul-Mulk, J.)
- 7 See *What Is A Fair Trial: A Basic Guide to Legal Standards and Practice*, published by Lawyers Committee for Human Rights, USA (2000).
- 8 See *Muhammad Fayyaz v. State* 1976 SCMR 183; *Zakaullah v. State* 1987 SCMR 1720; *Zakia Begum v. State* 1991 SCMR 297; *Bashir Ahmad v. State* 1993 SCMR 919; *Muhammad Gul v. State*, 1998 SCMR 576; *Dildar Ali v. State*, 1999 SCMR 1316; *Rizwan Iqbal v. State*, 2007 SCMR 1392.
- 9 See also *Meeran Bux v. State* PLD 1989 SC 347; *Muhammad Firdaus v. State* 2005 SCMR 784, *Darbar Ali v. State* 2015 SCMR 879; *Aqsa Safdar v. State* 2019 SCMR 1923.