

[Supreme Court of Pakistan]

Present: Qazi Faez Isa and Syed Mansoor Ali Shah, JJ

Mst. FURSAN---Petitioner

Versus

The STATE---Respondent

Criminal Petition No. 994 of 2022, decided on 26th August, 2022.

(Against the judgment of Peshawar High Court, Peshawar, dated 06.07.2022 passed in Criminal

Miscellaneous B.A. No.2023-P of 2022)

(a) Khyber Pakhtunkhwa Control of Narcotic Substances Act (XXXI of 2019)---

----S. 26---Criminal Procedure Code (V of 1898), Ss. 497 & 498---Provisions of sections 497 & 498, Cr.P.C. that deal with grant of bail in non-bailable offences apply to the offences under the Khyber Pakhtunkhwa Control of Narcotics Substances Act, 2019 ('the Act'), by virtue of the general provisions of section 26 of the Act, according to which the provisions of the Cr.P.C. apply to trials and appeals under the Act, except as otherwise provided in the Act.

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

----S. 497(1), first proviso & 497(2)---Khyber Pakhtunkhwa Control of Narcotic Substances Act (XXXI of 2019), S. 11(c)---Constitution of Pakistan, Art. 185(3)---Female accused found in possession of 1005 grams of methamphetamine---Likelihood of repeating the offence---Bail, refusal of---Offence alleged against the accused fell within the prohibitory clause of section 497(1), Cr.P.C.---Accused was arrested red handed on the spot and a considerable quantity of contraband ICE (methamphetamine) was recovered from her personal possession, but no plausible explanation had been offered by her in respect of the narcotics substance---Recovery memo was duly supported by marginal witnesses who were present on the spot with the seizing officer---No ill-will or mala fide had been shown by the accused on the part of police to falsely implicate her in the present case---Accused has thus not been able to make out a case of further inquiry for grant of bail in an offence of prohibitory clause, under section 497(2), Cr.P.C.---Examining the case of the accused under the first proviso to section 497(1), Cr.P.C., as she was a woman, there were three settled exceptions to the rule of granting bail under the said proviso i.e. the likelihood of the accused to abscond to escape the trial; to tamper with the prosecution evidence, which included influencing the prosecution witnesses; or to repeat the offence---Offences relating to narcotic drugs were of such a nature that did indicate the likelihood of the repetition of the offence by the accused---Dealing in narcotic drugs was usually the business of the persons involved therein, and was not a spontaneous or one time act, and the women were often involved in it as carriers for the transportation, supply and sale of narcotic drugs---Likelihood of such an offence being repeated by the accused could not, therefore, be ruled out---Case of the accused thus came within the scope of the exception of likelihood of repeating the offence---Accused was not found entitled to the relief of bail under the first proviso to section 497(1), Cr.P.C. also---Petition for leave to appeal was dismissed.

Tahira Batool v. State 2022 SCP 247 - Citation from the SCP website distinguished.

M. Amjad Iqbal Qureshi, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioner.

Mian Shafaqat Jan, Additional A.G., Khyber Pakhtunkhwa, Niaz Muhammad DSP and Noor Muhammad, SI for the State.

Date of hearing: 26th August, 2022.

ORDER

SYED MANSOOR ALI SHAH, J.---The principles of the law of bail have been developed gradually by courts, in their effort to maintain a right balance between the two competing factors: the rights of the accused and the interests of the society. The accused enjoys the right to be presumed innocent until he is proven guilty and the bail cannot be denied to punish him before he is convicted by a court of law. On the other hand, it is in the interest of the society that the accused does not avoid trial and frustrate the process of law, and be a risk to the public in the meanwhile. Thus, when there is a likelihood of the accused to escape trial or tamper with the

- prosecution evidence or repeat the offence, the public interest trumps the rights of the accused, who is detained till the conclusion of his trial. The bail is thus declined to him as a preventive measure, and not as a punishment.¹
2. In the present case, the petitioner who has been denied bail by the courts below seeks intervention of this Court for her release on bail pending conclusion of her trial in case FIR No. 1230 of 2022 registered at Police Station Pishtakhara, Peshawar for the offence punishable under section 11(c) of the Khyber Pakhtunkhwa Control of Narcotic Substances Act 2019 ("Act"). The allegation against her is that the Police caught her and her co-accused each carrying 1005 grams of "methamphetamine"², a psychotropic substance, also referred to as "ice"³ under the schedule.
3. Besides his submissions on the insufficiency of the incriminating material to connect the petitioner with the commission of the alleged offence, learned counsel for the petitioner, has contended that the petitioner being a woman is entitled to be released on bail under the first proviso to section 497(1) of the Code of Criminal Procedure 1898 ("Cr.P.C.") and in support of the contention, has placed reliance on the case of Tahira Batool v. State⁴. Opposing his contention, the learned counsel for the State has referred to the exceptions mentioned in paragraph 6 of the order in Tahira Batool case and submitted that in view of the nature of the offence there is a likelihood of repeating the same by the petitioner if released on bail.
4. We have heard the learned counsel for the parties, read the cited case and perused the record.
5. Although section 20 of the Act provides that all the offences under the Act shall be cognizable and non-bailable, there is no other provision in the Act on the subject of bail nor is there any provision that bars application of the provisions of Cr.P.C. in regard to bail in non-bailable offences. Therefore, the provisions of sections 497 and 498, Cr.P.C. that deal with grant of bail in non-bailable offences apply to the offences under the Act, by virtue of the general provisions of section 26 of the Act, according to which the provisions of the Cr.P.C. apply to trials and appeals under the Act, except as otherwise provided in the Act.
6. The offence alleged against the petitioner is punishable with death, imprisonment for life or imprisonment upto fourteen years, and thus falls within the prohibitory clause of section 497(1), Cr.P.C. Perusal of record would reveal that the accused-petitioners have been arrested red handed on the spot and a considerable quantity of contraband ICE was recovered from her personal possession, but no plausible explanation has been offered by the accused in respect of the narcotics substance. The recovery memo is duly supported by marginal witnesses who were present on the spot with the seizing officer. No ill-will or mala fide has been shown by the petitioner on the part of police to have been implicated falsely in the instant case. The two courts below, therefore, formed an opinion, though tentative, that there was sufficient incriminating material available on record of the case that prima facie connected the petitioner with the commission of the alleged offence. We do not find their concurrent opinion to be perverse or arbitrary, which could have justified interference by this Court. The petitioner has thus not been able to make out a case of further inquiry for grant of bail in an offence of prohibitory clause, under section 497(2), Cr.P.C. However, the petitioner being a woman her prayer for post arrest bail should also have been examined under the first proviso to section 497(1), Cr.P.C., if she was not found entitled to bail under section 497(2), Cr.P.C., as held by this Court in Tahira Batool case. The courts below have not adverted to it. We therefore proceed to examine the prayer of the petitioner for bail under the said proviso, in the interest of justice.
7. Under the first proviso to section 497(1), Cr.P.C., grant of bail is a rule and refusal an exception, as held in Tahira Batool case, in a case where the accused is a minor under the age of sixteen years, a woman, or a sick or infirm person, even in a non-bailable offence of prohibitory clause, in the same manner as bail is granted or refused in offences of non-prohibitory clause of section 497(1), Cr.P.C. Thus, we are to only examine, whether the case of the petitioner falls within any of the three settled exceptions to the rule of granting bail, which are the likelihood of the accused: (a) to abscond to escape the trial; (b) to tamper with the prosecution evidence, which includes influencing the prosecution witnesses; or (c) to repeat the offence.
8. The learned counsel for the State has, in the present case, pressed only the third exception, i.e., the likelihood of the petitioner to repeat the offence, on the basis of nature of the offence. This Court has described three circumstances in the Tahira Batool case that may be considered for deciding, whether or not there is a likelihood of repeating the offence by the accused, which are: (i) his previous criminal record, (ii) nature of the offence,

or (iii) manner of committing the offence. These circumstances are, as held by this Court in *Iftikhar Ahmad v. State*⁵, only illustrative in character, and not exhaustive, and the courts may take into consideration "some other striking circumstance that impinges on the proceedings of the trial, or poses a threat or danger to the society" and thus brings the case of an accused within any of the said three settled exceptions to the rule.

9. While examining the applicability of the third exception, relied upon by the learned counsel for the State, as to the likelihood of the repetition of the offence by the petitioner, we find that the offences relating to narcotic drugs are of such a nature that do indicate the likelihood of the repetition of the offence by the accused. Dealing in narcotic drugs is usually the business of the persons involved therein, and is not a spontaneous or one time act, and the women are often involved in it as carriers for the transportation, supply and sale of narcotic drugs.⁶ The likelihood of such an offence being repeated by the petitioner cannot, therefore, be ruled out. The case of the petitioner thus comes within the scope of the exception of likelihood of repeating the offence. The reliance of the learned counsel for the petitioner on *Tahira Batool* case is misconceived, as in the said case also the Court observed that "the persons involved in the commission of offences of robbery or dacoity are usually the professional criminals and there is a likelihood that they would repeat the offence if enlarged on bail", and distinguished the case of *Tahira Batool*, the women accused in the case, because she was employed in the house of the complainant as a maid. Had this distinguishing fact not been there, her case might also have fallen within the exception of likelihood of repeating the offence because of the nature of the offence of robbery.

10. In view of the above factual and legal position, the petitioner is not found entitled to the relief of bail under the first proviso to section 479(1), Cr.P.C. also. We therefore maintain the impugned order and dismiss the petition. However, the learned trial court is directed to proceed with and conclude the trial expeditiously.

MWA/F-14/SC Bail refused.