

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

TAHIRA BATOOL---Petitioner

Versus

The STATE and another---Respondents

Criminal Petition No. 910 of 2022, decided on 19th August, 2022.

(Against the order of Islamabad High Court, Islamabad dated 14.06.2022 passed in CrI. Misc. No. 733-B of 2022).

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

---S. 497(1), first proviso---Non-bailable offence---Bail---Female accused---Scope and extent of the first proviso to section 497(1), Cr.P.C. stated.

The first part of section 497(1), Cr.P.C. provides that if a person accused of a non-bailable offence is arrested, he may be released on bail. Because of the enabling expression, "may be released on bail", used in this part, read with the basic principles of criminal justice, the grant of bail in a non-bailable offence that does not fall within the second part of section 497(1), Cr.P.C. is said to be a rule and refusal, an exception. The second part of section 497(1), Cr.P.C. provides that an accused shall not be released on bail if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years. This part of section 497(1), Cr.P.C. which prohibits the grant of bail in certain offences is popularly known as the prohibitory clause of section 497(1), Cr.P.C.

However, the first proviso to section 497(1), Cr.P.C. provides that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail. The expression "such an offence" used in this proviso refers to the offence mentioned in the second part (prohibitory clause) of section 497(1), Cr.P.C., as for all other non-bailable offences the Court is already empowered to release the accused on bail under the first part of section 497(1), Cr.P.C. The first proviso has thus made equal the power of the Court to grant bail in the offences of prohibitory clause alleged against an accused under the age of sixteen years, a woman accused and a sick or infirm accused, to its power under the first part of section 497(1), Cr.P.C. This means that in cases of women, etc., as mentioned in the first proviso to Section 497(1), irrespective of the category of the offence, bail is to be granted as a rule and refused as an exception in the same manner as it is granted or refused in offences that do not fall within the prohibitory clause of section 497(1), Cr.P.C.

Fazal Elahi v. Farah Naz 1979 SCMR 109; Liaquat Ali v. Bashiran Bibi 1994 SCMR 1729 and Zakir Jaffer v. State 2021 SCMR 2084 ref.

The exceptions for refusing bail in offences that do not fall within the prohibitory clause of section 497(1), Cr.P.C. are therefore also applicable to the accused who pray for bail under the first proviso to section 497(1), Cr.P.C. in an offence falling within the prohibitory clause. These exceptions are well settled. They are likelihood of the accused: (a) to abscond to escape trial; (b) to tamper with the prosecution evidence or influence the prosecution witnesses to obstruct the course of justice; or (c) to repeat the offence keeping in view his previous criminal record, nature of the offence or the desperate manner in which he has prima facie acted in the commission of offence.

Tariq Bashir v. State PLD 1995 SC 34; Zafar Iqbal v. Muhammad Anwar 2009 SCMR 1488; Muhammad Tanveer v. State PLD 2017 SC 733 and Iftikhar Ahmad v. State PLD 2021 SC 799 ref.

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

---S. 497(1), first proviso---Penal Code (XLV of 1860), Ss. 395 & 412---Constitution of Pakistan, Art. 185(3)---Dacoity---Female accused---Bail, grant of---In cases of women as mentioned in the first proviso to section 497(1), Cr.P.C, irrespective of the category of the offence, bail was to be granted as a rule and refused as an exception---Persons involved in the commission of offences of robbery or dacoity were usually professional criminals and there was a likelihood that they would repeat the offence if enlarged on bail, but the case of the present female-accused was distinguishable as she was working as a maid in the house of the complainant as per his own version, therefore, she did not appear to be a professional robber or dacoit and the Court did not

find likelihood of her repeating the offence if released on bail---Petition for leave to appeal was converted onto appeal and allowed, and accused was admitted to post-arrest bail.

Muhammad Shahzad Siddiqui, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioner.

Jahangir Khan Jadoon, Advocate General Islamabad along with S.I. Asif Ali for the State.

Date of hearing: 19th August, 2022.

ORDER

SYED MANSOOR ALI SHAH, J.---Petitioner seeks leave to appeal against the order of the Islamabad High Court, dated 14.06.2022, whereby post-arrest bail has been denied to her in case FIR No.795, dated 16.12.2021, registered at P.S. Lohi Bher, Islamabad, for offences punishable under sections 395 and 412, P.P.C.

2. Briefly, the allegations in the crime report are that five unknown accused entered the house of the complainant, forcibly detained the complainant and his family member along-with their maid (allegedly, the petitioner). They robbed the family of cash, jewellery, mobiles, etc., and also took the maid with them. Subsequently, through a supplementary statement made on the same day, the complainant implicated the petitioner to be a partner of the said five unknown accused who had committed dacoity in his house.

3. Learned counsel for the petitioner submits that in the crime report one Sidra is mentioned as being the maid in the house of the complainant and detained along with the family of the complainant. There is no material on the record to show that the petitioner was the said maid. Further, according to the crime report the maid Sidra has not been ascribed any role in the commission of dacoity. The petitioner being a woman is also entitled to the relief of bail. Conversely, learned Advocate General, Islamabad submits on behalf of the prosecution that the petitioner was in league with the other co-accused who had committed dacoity in the house of the complainant and some items of the stolen property, i.e., artificial jewellery and two mobiles, have also been recovered from her.

4. We have heard the learned counsel for the parties and examined the record of the case. The point that has attracted our attention is that the petitioner being a woman her prayer for post arrest bail should have been examined under the first proviso to section 497(1), Cr.P.C. also, if she was not found entitled to bail under section 497(2), Cr.P.C. The courts below have not adverted to it. Thus, the interest of justice requires us to examine it. For this purpose, we need to see first what is the scope and extent of the said proviso. Section 497(1) and its first proviso are reproduced hereunder for convenience of reference:

497. When bail may be taken in cases of non-bailable offence.

(1) When any person accused of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years:

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

(Emphasis added)

The first part of section 497(1), Cr.P.C. provides that if a person accused of a non-bailable offence is arrested, he may be released on bail. Because of the enabling expression, "may be released on bail", used in this part, read with the basic principles of criminal justice,¹ the grant of bail in a non-bailable offence that does not fall within the second part of section 497(1), Cr.P.C. is said to be a rule and refusal, an exception. The second part of section 497(1), Cr.P.C. provides that an accused shall not be released on bail if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years. This part of section 497(1), Cr.P.C. which prohibits the grant of bail in certain offences is popularly known as the prohibitory clause of section 497(1), Cr.P.C.

5. However, the first proviso to section 497(1), Cr.P.C. provides that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail. The expression "such an offence" used in this proviso refers to the offence mentioned in the second part (prohibitory clause) of section 497(1), Cr.P.C., as for all other non-bailable offences the Court is already

empowered to release the accused on bail under the first part of section 497(1), Cr.P.C. The first proviso has thus made equal the power of the Court to grant bail in the offences of prohibitory clause alleged against an accused under the age of sixteen years, a woman accused and a sick or infirm accused, to its power under the first part of section 497(1), Cr.P.C. This means that in cases of women, etc., as mentioned in the first proviso to section 497(1), irrespective of the category of the offence, bail is to be granted as a rule and refused as an exception² in the same manner as it is granted or refused in offences that do not fall within the prohibitory clause of section 497(1), Cr.P.C.

6. The exceptions for refusing bail in offences that do not fall within the prohibitory clause of section 497(1), Cr.P.C. are therefore also applicable to the accused who pray for bail under the first proviso to section 497(1), Cr.P.C. in an offence falling within the prohibitory clause. These exceptions are well settled by several judgements³ of this Court. They are likelihood of the accused: (a) to abscond to escape trial; (b) to tamper with the prosecution evidence or influence the prosecution witnesses to obstruct the course of justice; or (c) to repeat the offence keeping in view his previous criminal record, nature of the offence or the desperate manner in which he has prima facie acted in the commission of offence.

7. We have examined the record of the case and do not find any material that would attract any of the above exceptions in order to refuse bail to the present petitioner. We are cognizant of the fact 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. But the case of the present petitioner is distinguishable as she was working as a maid in the house of the complainant as per his own version, therefore, she does not appear to be a professional robber or dacoit and we do not find a likelihood of her repeating the offence if released on bail. The impugned order passed by the High Court is, thus, not sustainable under the law and calls for interference by this Court. This petition is, therefore, converted into appeal and the same is allowed: the impugned order is set aside and the petitioner is admitted to post-arrest bail subject to her furnishing bail bond in the sum of Rs.50,000/- with two sureties in the like amount to the satisfaction of the trial court.

8. Needless to mention that this concession of bail may be cancelled by the competent court under section 497(5), Cr.P.C., if the petitioner misuses it in any manner, including causing delay in the expeditious conclusion of the trial.

MWA/T-5/SC Bail granted.