

[Supreme Court of Pakistan]

Present: Syed Mansoor Ali Shah and Syed Hasan Azhar Rizvi, JJ

HILAL KHATTAK---Petitioner

Versus

The STATE and another---Respondents

Criminal Petition No. 461 of 2023, decided on 24th May, 2023.

(Against the order of Islamabad High Court, Islamabad, dated 28.03.2023 passed in Criminal Misc. No. 326-B of 2023)

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

---S. 497---Penal Code (XLV of 1860), Ss. 302, 311, 324, 452, 365, 337-A(ii), 148 & 149---Qatl-i-amd, house-trespass, kidnapping or abducting with intent secretly and wrongfully to confine person, rioting armed with deadly weapons, unlawful assembly---Bail, refusal of---Allegations against the accused as to his involvement in the crime were supported by the statements of witnesses recorded by the investigating officer under section 161 of the Code of Criminal Procedure 1898 ("Cr.P.C."), which included the statements of the injured witness, and three female residents of the house where the incident took place, in addition to the statement of the complainant whose son had died in the incidence---Incident was further supported by the footage recorded on the CCTV camera of a neighbouring house---Sufficient incriminating material was thus available on the record of the case to connect the accused with the commission of the alleged offences---Accused, therefore, had no case for grant of bail under subsection (2) of section 497, Cr.P.C.---In the facts and circumstances of the case the accused was not entitled to the relief of bail even if the question of his vicarious liability for the offence of qatl-i-amd was left to be determined in trial---Petition for leave to appeal was dismissed, leave was refused, and accused was refused bail.

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

---S. 497---Bail---Vicarious liability, question of---Although the question of vicarious liability of an accused can also be looked into at the bail stage and it is not an absolute rule that it must always be left to be determined in trial.

Nazar Muhammad v. State PLD 1978 SC 236; Muhammad Rashid v. State 1979 SCMR 92; Asandas v. State 1975 SCMR 237 and Ghulam Nabi v. State 1996 SCMR 1023 ref.

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

---S. 497(1)---Bail---Offences that do not fall within the prohibitory clause of section 497(1), Cr.P.C.---Exceptions to grant of bail in such offences---It is true that in such offences, bail is to be granted as a rule, but not as of right---Bail can be refused in such offences when the case of the accused falls within any of the three well established exceptions: (i) likelihood to abscond to escape trial; (ii) likelihood to tamper with the prosecution evidence or influence the prosecution witnesses to obstruct the course of justice; and (iii) likelihood to repeat the 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.

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

---S. 497(1)---Penal Code (XLV of 1860), Ss. 302, 311, 324, 452, 365, 337-A(ii), 148 & 149---Qatl-i-amd, house-trespass, kidnapping or abducting with intent secretly and wrongfully to confine person, rioting armed with deadly weapons, unlawful assembly---Bail, refusal of---Possibility of accused absconding or causing harm to alleged abductee---In the present case, the accused being the father of the alleged abductee appeared to have had the real motive for the commission of the alleged offences while the others abetted him in his cause---Most of the other accused persons were absconders, and the police had so far only succeeded to bring the accused and a co-accused person to justice---Thus there was a likelihood that the accused may also abscond if he was released on bail---Further, and more importantly, the alleged abductee had not yet been recovered---No one knew whether she was alive or not---There was a possibility that the accused may cause her harm or may coerce her to influence her evidence concerning the facts of the present case if he was released on bail---Two of the

exceptions to grant of bail in offences not falling within prohibitory clause of section 497(1) Cr.P.C., i.e, likelihood of repeating the offence and influencing the witness were attracted in the present case---Case of the accused, therefore, attracted not one but almost all the three exceptions which justified the declining of bail even in offences that did not fall within the prohibitory clause of section 497(1), Cr.P.C.---Petition for leave to appeal was dismissed, leave was refused, and accused was refused bail with the directions that the concerned Inspector General of Police, shall personally look into the matter and depute a police officer not below the rank of Superintendent of Police to supervise the investigation of the case and to ensure recovery of the alleged abductee at the earliest; that on recovery of the alleged abductee, she may be lodged in Dar-ul-Aman (or some other similar institution) for at least two days before recording her statement as to the facts of the case, so that she may be in a position to make her statement voluntarily without the undue influence of anyone, and her statement should preferably be recorded by the Magistrate concerned under section 164, Cr.P.C.

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

---S. 497---Penal Code (XLV of 1860), Ss. 445, 446, 452 & 458---Lurking house-trespass or housebreaking by night after preparation for hurt, assault or wrongful restraint---Bail, refusal of---Facts alleged in the FIR prima facie constituted the offence of house-breaking by night after preparation for causing hurt, punishable under section 458 of the P.P.C., instead of section 452 of the P.P.C.---Accused and his accomplices allegedly committed house-breaking, that is, trespassed into the complainants' house by scaling over the wall of the house, as defined in clause (2) of section 445 and that housebreaking was also committed by night, that is, after sunset and before sunrise, as defined in section 446, P.P.C.---Offence under section 458 of the P.P.C. being punishable with imprisonment upto fourteen years fell within the prohibitory clause of section 497(1) of the Cr.P.C.---Therefore, even, if the actual role of the accused was considered, his case also fell within the prohibitory clause--Petition for leave to appeal was dismissed, leave was refused, and accused was refused bail.

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

---Ss. 455 & 458---Constitution of Pakistan, Art. 14---Sanctity and privacy of home---Scope---Offences of house-breaking committed after having made preparation for causing hurt or fear of hurt---Categorization as grave offences---It is the sanctity and privacy of home, as guaranteed by Article 14 of the Constitution, that the offences of house-breaking committed after having made preparation for causing hurt or fear of hurt have been categorised by the legislature as grave offences under section 455, P.P.C. (when committed at daytime) and section 458, P.P.C. (when committed at night), punishable with imprisonment upto ten years and fourteen years respectively---House of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose---It would be the worst position of a society if its people do not feel safe and secure even within their houses---Failure to provide protection to its citizens in their houses would amount to the failure of the State---All the organs of the State, including the judiciary, should therefore enforce the laws protecting the privacy of home strictly in letter and spirit.

Semayne case (1604) 5 Coke 91 ref.

Khalid Anwar Afridi, Advocate Supreme Court for Petitioner.

DSP Khalid Mehmood Awan, Inspector and Ashiq Shah, I.O. for the State.

Complainant in person.

Date of hearing: 24th May, 2023.

ORDER

SYED MANSOOR ALI SHAH, J.---The petitioner seeks leave to appeal against an order of the Islamabad High Court, dated 28.03.2023, whereby the High Court has dismissed his application for post-arrest bail in case FIR No. 01/2023 registered at Police Station Aabpara, Islamabad, for the offences punishable under sections 302, 311, 324, 452, 365, 337-A(ii), 148 and 149 of the Pakistan Penal Code 1860 ("P.P.C.").

2. Briefly, the facts as alleged in the crime report (FIR) are that the petitioner, Hilal Khattak, and the complainant, Akbar Ali, are paternal cousins. The petitioner's daughter, Rabia Khattak, married the complainant's son, Talha Akbar, without the consent of the petitioner. On 1st January 2023 in the early hours of the morning at about 06:45, the petitioner along with some other persons, all armed with pistols, trespassed into the complainant's house by scaling over the wall of the house. Some of them besieged the complainant and

his family members at gunpoint. The petitioner and another person (allegedly Tufail Khattak, brother of the petitioner) dragged Rabia Khattak into the street by grabbing her hair. Talha Akbar attempted to rescue her, but was shot in his left ribs by the other person. He fell down injured and later on succumbed to his injury. The petitioner made a fire at the complainant, which however did not hit him. Another person, accompanying the petitioner, injured the complainant's younger son, Huzaifa, on his head. The petitioner and other persons then took Rabia Khattak with them.

3. On making a tentative assessment of the material collected during the investigation, the courts below found that sufficient incriminating material was available on record to connect the petitioner with the commission of the alleged offences and thus declined the relief of post-arrest arrest bail.

4. It has been argued by the learned counsel for the petitioner that there is no sufficient incriminating material against the petitioner to connect him with the commission of the alleged offences. In the alternative, he argued that the offence of qatl-i-amd (intentional homicide) punishable under section 302 of the P.P.C. is not attributed to the petitioner, and his vicarious liability under section 149 of the P.P.C. for that offence can only be determined after recording evidence in the trial. And since the other offences punishable under sections 452 and 365 of the P.P.C. do not fall within the prohibitory clause, he submitted, the petitioner may be allowed post-arrest bail under subsection (1) of section 497, Cr.P.C.

5. We have heard the learned counsel for the petitioner, as well as the complainant and the investigating officer, and examined the record of the case.

6. The allegations against the petitioner as to his involvement in the crime are supported by the statements of witnesses recorded by the investigating officer under section 161 of the Code of Criminal Procedure, 1898 ("Cr.P.C."), which include the statements of the injured witness, Huzaifa, and three female residents of the house where the incident took place, in addition to the statement of the complainant whose son has died in the incidence. The incident is further supported by the footage recorded on the CCTV camera of a neighbouring house. Sufficient incriminating material is thus available on the record of the case to connect the petitioner with the commission of the alleged offences. The findings of the courts below in this regard are not perverse or arbitrary, which could have justified interference by this Court. The petitioner, therefore, has no case for grant of bail under subsection (2) of section 497, Cr.P.C.

7. Although the question of vicarious liability of an accused can also be looked into at the bail stage¹ and it is not an absolute rule that it must always be left to be determined in trial, we find that in the facts and circumstances of the case the petitioner is not entitled to the relief of bail even if the question of his vicarious liability for the offence of qatl-i -amd is left to be determined in trial.

Exceptions to rule of granting bail in non -prohibitory clause offences

8. The argument of the learned counsel for the petitioner, we find, is based on a mistaken understanding of the legal position regarding grant of bail in offences that do not fall within the prohibitory clause of section 497(1), Cr.P.C. It is true that in such offences, bail is to be granted as a rule, but not as of right. Bail can be refused in such offences when the case of the accused falls within any of the three well-established exceptions: (i) likelihood to abscond to escape trial; (ii) likelihood to tamper with the prosecution evidence or influence the prosecution witnesses to obstruct the course of justice; and (iii) likelihood to repeat the offence.²

9. In the present case, the petitioner being the father of the alleged abductee appears to have had the real motive for the commission of the alleged offences while the others abetted him in his cause. Most of the other accused persons are absconders, and the police have so far only succeeded to bring the petitioner and another accused person to justice. There is thus a likelihood that the petitioner may also abscond if he is released on bail. Further, and more importantly, the alleged abductee Rabia Khattak has not yet been recovered. No one knows whether she is alive or not. There is a possibility that the petitioner may cause her harm or may coerce her to influence her evidence concerning the facts of this case if he is released on bail. The exceptions of likelihood of repeating the offence and influencing the witness are thus also attracted. The case of the petitioner, therefore, attracts not one but almost all the three exceptions which justify the declining of bail even in offences that do not fall within the prohibitory clause of section 497(1), Cr.P.C.

Applicability of section 458, P.P.C. and gravity of the offence of house breaking by night

10. Even otherwise, we are of the view that the facts alleged in the FIR prima facie constitute the offence of house-breaking by night after preparation for causing hurt, punishable under section 458 of the P.P.C., instead of section 452 of the P.P.C. The petitioner and his accomplices allegedly committed house-breaking, that is, trespassed into the complainants' house by scaling over the wall of the house, as defined in clause 2 of section 445 and that housebreaking was also committed by night, that is, after sunset and before sunrise, as defined in section 446, P.P.C.. The offence under section 458 of the P.P.C. being punishable with imprisonment upto fourteen years falls within the prohibitory clause of section 497(1) of the Cr.P.C. Therefore, even, if the actual role of the petitioner is considered, his case also falls within the prohibitory clause.

11. We may observe here that it is the sanctity and privacy of home, as guaranteed by Article 14 of the Constitution of Pakistan, that the offences of house-breaking committed after having made preparation for causing hurt or fear of hurt have been categorised by the legislature as grave offences under section 455 (when committed at daytime) and section 458 (when committed at night), punishable with imprisonment upto ten years and fourteen years respectively. It is said that 'the house of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose'³. It would be the worst position of a society if its people do not feel safe and secure even within their houses. Failure to provide protection to its citizens in their houses would amount to the failure of the State. All the organs of the State, including the judiciary, should therefore enforce the laws protecting the privacy of home strictly in letter and spirit.

12. For the above reasons, we find no legal fault in the order of the High Court declining post-arrest bail to the petitioner in the present case. The petition is found meritless. It is, therefore, dismissed and the leave to appeal is refused. However, it is clarified that the observations and findings made in this order as well as in the orders of the lower courts are of tentative nature, which shall have no effect upon final determination of the case by the trial court on conclusion of the trial.

13. Before parting with the order, we feel constrained to observe that the non-recovery of the alleged abductee, Rabia Khattak, despite the lapse of a period of about five months since the day of occurrence, is a serious matter, which demands the immediate attention of the superior police officers of the Islamabad Police. We, therefore, direct the Inspector-General, Islamabad Police, to personally look into the matter and depute a police officer not below the rank of Superintendent of Police to supervise the investigation of the case and to ensure recovery of the alleged abductee at the earliest. On recovery of the alleged abductee, she may be lodged in Dar-ul-Aman (or some other similar institution) in Islamabad for at least two days before recording her statement as to the facts of the case. So that she may be in a position to make her statement voluntarily without the undue influence of anyone, and her statement should preferably be recorded by the Magistrate concerned under section 164, Cr.P.C. Copy of this order be dispatched to the Inspector General, Islamabad Police for necessary action.

MWA/H-4/SC Bail refused.