Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal Miscellaneous No.884-B /2021

Zakir Jaffer and another
Vs
The State and another

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	23.09.2021	M/s. Khawaja Haris Ahmad & Asad Jamal, Advocates for the petitioners. M/s. Shah Khawar, Barrister Qasim Nawaz Abbasi and Babar Hayat Samor, Advocates for the complainant/respondent No.2. Mr. Zohaib Hassan Gondal, State Counsel with Azhar Shah, DSP (Legal), Abdul Sattar, Inspector/I.O. and Shabbir Ahmed, SHO P.S. Kohsar, Islamabad.

The petitioners namely Zakir Jaffar and Asmat Zakir Jaffar seek bail after arrest in F.I.R. No.380/2021 dated 20.07.2021 under Sections 302, 201, 511, 109, 118, 364, 368, 176 & 376 PPC, Police Station Kohsar, Islamabad.

2. On the complaint of Shaukat Ali Muqaddam the abovementioned FIR was registered wherein it was alleged that on 19.07.2021 he had gone to buy a sacrificial goat and when he returned his wife informed that their daughter Noor Muqaddam is not present at home. The call was made on the cellular phone of Noor Muqaddam and she responded that she is going to Lahore with friends and would return within a day or two. On

20.07.2021 in the afternoon Zahir Zakir Jaffer called that Noor Muqaddam is not with him; however, at about 10:00 pm it was informed that Noor Muqaddam has been killed. When complainant reached House No.7, Street No.60, F-7/4, Islamabad which is the house of Zakir Jaffer, it transpired that his daughter has been brutally killed.

3. Initially, the petitioners were not nominated in the FIR but implicated subsequently primarily with respect to the offences under Sections 109, 201, 511, 176 & 118 PPC.

4. The petitioners applied for bail after arrest which was dismissed by the learned Additional Sessions Judge (West), Islamabad vide order dated 05.08.2021. Hence the petition.

5. Khawaja Haris Ahmed, learned Advocate Supreme Court for the petitioners, *inter alia*, argued that out of five different offences with which the petitioners are implicated only Section 109 PPC falls within the prohibitory clause. It was contended that Sections 201 & 176 PPC are bailable, Section 511 PPC is not attracted and Section 118 PPC though entails punishment of seven years and is non-bailable but does not fall within the prohibitory clause. It was further argued that no case against the petitioners for Section 109 PPC is made out in the facts and circumstances and as there is nothing on

record as per the investigation conducted so far by the police authorities that the petitioners aided and abetted the murder of Noor Muqaddam. It was also contended that the case against the petitioners is primarily based on the statement made by the principal accused Zahir Zakir Jaffer wherein apparently he disclosed that he had informed his parents about the abduction of Noor Muqaddam and her death but the same is inadmissible in evidence. It was contended that the law as it has evolved is clear that any confession made before the police is inadmissible in evidence whereas the discovery made during the course of investigation is admissible. Learned counsel drew attention of this Court towards Articles 38 to 40 of the Qanoon-e-Shahadat Order, 1984 and placed reliance on the case reported as ***The State v. Jamil Iqbal*** **(PLD 1974 Quetta 28),** ***In Re Abdul Basha Sahib*** **(A.I.R. 1941 Madras 316),** ***Satish Chandra Seal and others v. Emperor*** **(A.I.R. (32) 1945 Calcutta 137) &** ***Raja Muhammad Younas v. The State*** **(2013 SCMR 669).** It was also submitted that the incriminating material independent of the statement of Zahir Zakir Jaffer against the petitioners is only the Call Data Record (CDR) which *per se* does not prove the guilt of the petitioners. Reliance was placed on the case titled ***Mian Khalid Perviz v. The State*** **(2021 SCMR 522)**. Learned counsel also took the Court through the judgments on the

subject of bail to argue that while adjudicating bail application the Court is to make a tentative assessment of the material before it and if after examination of the material it comes to the conclusion that there are sufficient and reasonable grounds to release the accused on bail then the same becomes a matter of right. Reliance was placed on the case titled ***Manzoor v. The State*** **(PLD 1972 SC 81),** ***Amir v. The State*** **(PLD 1972 SC 277),** ***Zaigham Ashraf v. The State and others*** **(2016 SCMR 18),** ***Khalid Javed Gillan v. The State*** **(PLD 1978 S C 256),** ***Shoaib Mehmood Butt v. Iftikhar ul Haq and 3 others*** **(1996 SCMR 1845).** It was also pointed out that since there is no material on the basis of which it can be said that the petitioners aided and abetted the principal accused; Section 109 PPC is not attracted and the other offences are either bailable or do not fall within the prohibitory clause, hence in such like cases grant of bail is a rule and refusal is an exception. Reliance was placed on the case titled ***Tariq Bashir v. The State*** **(PLD 1995 SC 34),** ***Muhammad Faisal v. The State and another*** **(2020 SCMR 971),** ***Abid Mehmood etc. v. The State etc.*** **(2017 SCMR 728) &** ***Muhamamd Sarfraz Ansari v. The State etc.*** **(PLD 2021 SC 738)**. Learned counsel further added that the case against the petitioners is one of further inquiry as only the CDR of phone calls made to and from the cellular phone of the

petitioners is available without any transcript which does not show that what are the contents of the conversation that took place either with the principal accused or with the other co-accused especially the watchman (*chokidar*) namely Iftikhar who was posted at the residence/place of occurrence and Tahir Chief Executive Officer (CEO) of Therapy Center. Reliance was placed on the case titled ***Muhammad Faisal v. The State etc.*** **(2020 SCMR 971)**. It was added further that the instant matter is one of unseen account, hence circumstantial chain of evidence is to be developed which is missing. Reliance was placed on the case titled ***Abid Mehmood v. The State*** **(2017 SCMR 728)**. It was also argued that the rule that once the trial has commenced the bail is to be refused is one of practice and not the law. Reliance was placed on the case titled ***Muhammad ismail v. Muhammad Rafique and another*** **(PLD 1989 SC 585)**. It was reiteratted that once reasonable grounds are made out for grant of bail then it is the right of the accused to be released and also entails his fundamental rights. Reliance was placed on the case titled ***Naveed Asghar and 2 others v. The State*** **(PLD 2021 SC 600)**. Learned counsel also emphasized that fact that the offence is heinous is inconsequential. It was also argued that under Section 44 Cr.P.C. there is an obligation on any person who has information that offence is about to be committed and fails to do so does

not make him an aider or abettor and perhaps the only applicable penal provision is Section 118 PPC. Reliance was placed on the case titled ***Muhamamd Riaz v. The State and others*** **(2021 MLD 564)**.

6. Learned State Counsel as well as learned counsel for the complainant/respondent No.2, *inter alia*, argued that there is CDR available which clearly shows that the principal accused namely Zahir Zakir Jaffer was in contact with his parents (Zakir Jaffer and Asmat Zakir Jaffer) on 20.07.2021. It was contended that the probable time of death is about 7:00 pm and CDR clearly shows that there were exchange of calls during the period from 6:30/6:45 pm till 9:00 pm. Moreover, it was submitted the Watchman (*Chokidar*) categorically stated that he had informed one of the petitioners namely Zakir Jaffer about the confinement of a girl by Zahir Zakir Jaffer and also suggested that the matter be reported to police authorities. Likewise, Tahir CEO of Therapy Center also stated in statement under Section 161 Cr.P.C. to the same effect. It was contended that at bail stage only tentative assessment of the material on record is to be made and detailed inquiry or finding is to be deprecated. It was also submitted that even if any offence does not fall within the prohibitory clause the grant of bail is not an absolute thing as there are exceptions to the said principle and the instant case falls within the exceptions inasmuch as it is

evident from the record available that the petitioners tried to eliminate evidence and conceal the offence after coming to know of the offence by their son and there is every likelihood that they might tamper with the prosecution evidence and hamper the progress of the trial. Reliance was placed on the case titled ***Tariq Bashir v. The State*** **(PLD 1995 SC 34),** ***Gulzar Hassan Shah v. Ghulam Murtaza and 4 others*** **(PLD 1970 SC 335),** ***Naseer Ahmed v. The State*** **(PLD 1997 SC 347),** ***The State v. Khalid Sharif*** **(2006 SCMR 1265) &** ***Dr. Behram Khan v. Nasir Ahmed Bacha and others*** **(PLD 1986 SC 118)**. It was also contended that where there are *prima facie* grounds regarding culpability of the accused the bail is to be refused. Reliance was placed on the case titled ***Muhammad Nasir Muneef Qureshi v. The State etc.*** **(2019 YLR 1591) &** ***Naseer Ahmed v. The State*** **(PLD 1997 SC 347).**

7. In response to the query of the Court, it was informed that on the last date fixed by the learned Trial Court i.e. 23.09.2021 the copies of the documents have been handed over to the accused and the case is now fixed for framing of charge on 06.10.2021.

8. Arguments advanced by the learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

9. The petitioners are implicated under the offences mentioned hereinabove. Admittedly, they are not the principal accused under Section 302 PPC but are to face the trial with respect to offences under Sections 109, 201, 511, 176 & 118 PPC. It is also an admitted position that petitioners are not nominated in the FIR but were investigated and arrested as the investigation progressed. Initially, they came under investigation in light of the statement made by the principal accused namely Zahir Zakir Jaffer when he divulged the police that he had informed the parents about the confinement of Noor Muqaddam and also subsequently him killing her. The question regarding admissibility or inadmissibility of such statement though is a question for the learned Trial Court to determine but *prima facie* Articles 38 to 40 of Qanoon-e-Shahadat Order, 1984 are attracted. However, there is independent CDR which clearly establishes that principal accused was in touch with the petitioners in the early and late part of evening between 6:30/6:45 pm till 9:00 pm. Watchman (*Chokidar*) posted at the residence of the petitioners i.e. the place of occurrence also confirmed that he apprised Zakir Jaffer about the confinement of a girl and the entire scenario but no effort was made to report the matter to police. Likewise, intimation was made to one Tahir the CEO of Therapy

Center about the entire situation but again no effort was made to inform the police authorities.

10. In view of the referred facts and circumstances, dilemma before the Court while deciding bail application is that should it delve in the record as the same tantamount to deeper appreciation or make the tentative assessment to decide the fundamental right of liberty of accused persons. In ***Khalid Javed Gillan v. The State*** **(PLD 1978 S C 256)** the august Apex Court observed that as the power conferred under Section 497 Cr.P.C. is not an arbitrary power; it is to be exercised by reference to the material placed before the Court. It was also observed that no Judge can be satisfied even *prima facie* with the evidence produced by the prosecution does not lead to inference of guilt against the accused unless he made tentative assessment of the material produced before him. It has also been held by the august Apex Court in case titled ***Amir v. The State*** **(PLD 1972 SC 277)** that the benefit if any must go to the accused at bail stage and the prosecution evidence should not be stretched beyond proportion. Similar view about the liberty of an individual and onus being on the prosecution to place on record the material showing connectivity of the accused with the commission of the offence were laid down in case titled ***Manzoor v. The State*** **(PLD 1972 SC 81).** There is also plethora of case law to the effect

that where there is scope of further inquiry into the guilt of the accused bail is to be allowed. Reliance is placed on the case titled ***Shoaib Mehmood Butt v. Iftikhar ul Haq and 3 others*** **(1996 SCMR 1845) &** ***Muhammad Faisal v. The State and another*** **(2020 SCMR 971)**. In light of the recent case law on the subject by the Hon'ble Supreme Court of Pakistan in case titled ***Naveed Asghar and 2 others v. The State*** **(PLD 2021 SC 600)** heinous nature of a crime would not disentitle any accused the concession of bail inasmuch as once the reasonable ground exists for enlarging the accused person on bail then the same is as of right and does not remain a privilege or concession. In view of the law and material placed on record *prima facie* it seems that the petitioners aided and abetted the principal accused in the commission of offence inasmuch as they had the information that Noor Muqaddam was in confinement yet did not make any attempt to inform the police authorities. The said fact is borne out independent of the statement of Zahir Zakir inasmuch as watchman (*Chokidar*) Iftikhar categorically stated that he informed Zakir Jaffer about the confinement of a girl and then Zakir Jaffer called Tahir CEO of Therapy Center with respect to the said fact. The abetment is not only restricted to the extent of actual physical assistance but passive assistance may also in the facts and circumstances amount to the offence

under Section 109 PPC. In this behalf abetment is explained in Section 107 PPC; for ease of convenience the relevant provision is reproduced below:

> ***Abetment of a thing:*** *A person abets the doing of a thing, who---*
>
> *First: Instigates any person to do that thing; or*
>
> *Secondly: Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or*
>
> *Thirdly: Intentionally aids, by any act or illegal omission, the doing of that thing."*

11. The bare perusal of above definition of abetment shows that it, *inter alia,* includes illegal omission. Section 44 of the Code of Criminal Procedure 1898 makes it incumbent on every person aware of commission of, or of the intention of any other person to commit, any offence punishable under, *inter alia,* Section 302 PPC, information to the nearest Magistrate or Police Officer of such commission or intention unless there is reasonable excuse for failure. The failure on part of the petitioners in the facts and circumstances of the case may constitute illegal omission as envisaged under Section 107 *ibid*. The concept of abetment was elucidated by the august Supreme Court of Pakistan in case reported as ***Shahid Orakzai v. Pakistan Muslim League (Nawaz)***

(2000 SCMR 1969). Moreover, in ***Mst. Hanifan Bibi and another v. Zulfiqar and another*** **(PLD 2001 Lahore 123)** it was observed that abetment in the offence of murder is as much serious offence as that of murder itself and it could not be lightly treated or taken it for granted. Absence of direct evidence of abetment or conspiracy is not a factor to consider a person accused of abetment innocent as a rule. Evidence of abetment or conspiracy could be indirect or circumstantial and each case has to be examined in light of peculiar facts of that case, in that context. Furthermore, the word "Omission" as defined in Black's Law Dictionary means a failure to do something esp. a neglect of duty.

12. Another aspect of the matter is that offences other than Section 109 PPC do not fall within the prohibitory clause of Section 497 Cr.P.C. It was argued vehemently that where such is the case the grant of bail is a rule and refusal is an exception. The seminal judgment on the subject is ***Tariq Bashir v. The State*** **(PLD 1995 SC 34)** and time and again the principles laid down in the same have been reaffirmed and reiterated; recently again in case titled ***Iftikhar Ahmad v. The State*** **(PLD 2021 S C 799)** it was approved, endorsed and followed. However, in the case of Tariq Bashir *supra* and the judgments that follow there are certain exceptions under which bail may be refused even if an offence does not fall within the

prohibitory clause. One such exception is that where it is felt that accused if enlarged on bail might tamper with the prosecution evidence or influence the prosecution witnesses or obstruct the course of justice. The petitioners, as per the material available on record, did try to conceal the evidence and clear the scene of crime in order to protect their son by calling personnel from Therapy Center and did not inform the police authorities. The case is almost ripe for trial, hence there is every likelihood that if they are enlarged on bail they might obstruct the course of justice, tamper with the prosecution evidence and/or try to influence the trial . Since the exceptions enumerated in ***Iftikhar Ahmad v. The State*** **(PLD 2021 S C 799)** *supra* are attracted hence the general rule for grant of bail in respect of offences not falling in prohibitory clause cannot be followed or adhered.

13. For what has been stated above, the instant petition is without merit, hence the same is dismissed.

14. Since the trial is about to commence as it is expected that on 06.10.2021 the charge shall be framed, hence the learned Trial Court is directed to conclude the trial expeditiously preferably within eight weeks from the framing of charge.

15. The observations made herein above are tentative in nature and shall not prejudice the learned Trial Court while deciding the matter.

(AAMER FAROOQ)
JUDGE

Announced in open Court on the 29th day of September 2021

JUDGE

Approved for reporting

M.NAVEED