Form No: HCJD/C-121.

ORDER SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Criminal Misc. No. 108-B of 2022

Majid Ali

Versus

The State & another

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	08.02.2022	Mr. Usman Ali Chaudhry, Advocate for petitioner. Mr. Rabi Bin Tariq, State Counsel. Mr. Mumtaz Baig, S.I and Mr. Imad Shah, ASI.

The petitioner, Majid Ali son of Nazeer Ahmed, has sought bail after arrest in case F.I.R No. 66/21, dated 06.03.2021, registered under Sections 392/411 of Pakistan Penal Code, 1860 **("PPC")** at Police Station Shahzad Town, Islamabad.

2. Brief facts as stated in the FIR lodged on the complaint of Syed Tahir Bukhari are that on 05.03.2020 at about 08:00 p.m, he was walking towards Cash and Carry for purchasing some grocery when two unknown persons riding on a motorcycle pointed a pistol at the complainant and forcibly took from his possession a mobile phone, OPPO A7, and cash amounting to Rs.3000/-.

3. The learned counsel for the petitioner contended that Section 392 of PPC prescribed a sentence that could range from a minimum of three years to a maximum of ten

years. And that in view of the law laid down in ***Zahid Hussain Chandio Vs State*** ***(2016 MLD 1103)*** the lesser punishment as prescribed in the PPC was to be considered at the bail stage for determining whether or not the offence fell within the prohibitory clause. He submitted that the minimum sentence prescribed under Section 392 of PPC is three years, the offence that the petitioner was charged with did not fall within the prohibitory clause and therefore bail ought to be granted as a right to the petitioner. He further contended that no specific features of the petitioner were mentioned in the FIR and he had been identified six months after the registration of the FIR. He relied on ***Haneef alias Qadeer Vs The State*** ***(1988 PCr.LJ 2287)*** and ***Syed Shamshad Razi Vs. The State*** ***(1987 MLD 1003)*** for the proposition that identification parade carried out after such delay was not reliable. He further contended that no number associated with the SIM Card installed in the allegedly stolen cell phone had been mentioned in the FIR and it could therefore not be said whether the cell phone recovered from the petitioner was the one snatched from the complainant and consequently the case was one of further inquiry. He lastly contended that the petitioner had not previously been convicted in any case even though there were other FIRs registered against him. In view of the law laid down by the august Supreme Court in ***Muhammad Rafique Vs State*** ***(1997 SCMR 412)*** the presence of such FIRs was not a ground for denial of bail to the petitioner.

4. The learned State Counsel submitted that the petitioner was arrested on 18.09.2021 and identification parade was carried out within ten days of the arrest on 27.09.2021 and consequently there was no delay in conducting the identification parade. He submitted that the petitioner was a habitual offender and various FIRs of similar nature involving offences such as theft and robbery were registered against him. He submitted that the petitioner had been properly identified by the complainant in a validly conducted identification parade. He further submitted that a cell phone with the IMEI number as reported by the complainant and recorded in the FIR had been recovered from the petitioner and it was the IMEI number of cell phone that was its identifier and not a SIM which could be replaced anytime. He contended that in view of the positive identification of the petitioner together with recovery of an item snatched by him from the complainant during the robbery created ample evidence establishing that the petitioner was liable for an offence under Section 392 of PPC. He submitted that punishment prescribed under Section 392 of PPC was up to ten years imprisonment, which fell within the prohibitory clause of Section 497 of Cr.P.C. and the petitioner was not entitled to the concession of bail.

5. The contention of the learned counsel for the petitioner that the punishment to be awarded for the offence under section 392 of PPC is prescribed in the form of a range, and the minimum sentence permissible for purposes of such offence is to be considered at the bail stage to

determine whether or not the offence falls within the prohibitory clause is without force.

6. A plain reading of section 497 of Cr.P.C suggests that it is the maximum sentence prescribed that is to be considered in relation to an offence for purposes of determining whether or not such offence falls within the prohibitory clause. Section 497(1) and the second proviso of such section, which are relevant for our present purposes, state the following:

> ***497. When bail may be taken in case 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 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*:
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> *Provided further that a person accused of an offence as aforesaid shall not be released on ball unless the prosecution has been given notice to show cause why he should not be so released:*

The first part of section 497(1) is permissive and allows a person arrested to be released on bail who is accused of a non-bailable offence. The second part of section 497(1) contains a prohibition against the release of a person arrested for being accused of a non-bailable offence, and has come to be recognized as the prohibitory part of section 497 (i.e. the prohibitory clause). The prohibition is applicable in relation to a person who has been arrested after being

accused of a non-bailable offence "punishable" with death or imprisonment for life or imprisonment for ten years. The operative word here is "punishable".

7. The word "punishable" has been defined by Black's Law Dictionary to mean "subject to a punishment" when used in relation to a person. The ordinary dictionary meaning of the word "punishable" therefore clarifies that in the event that an offence that a person has been charged with could possibly result in the punishment of ten years in prison such offence would fall within the prohibitory clause. Thus, any offence in relation to which punishment has been prescribed in the form of a range and it has been left to the court to determine the sentence in view of the facts of the case, but the maximum punishment that could possibly be awarded for such offence is ten years, would fall within the prohibitory part of section 497(1) of Cr.P.C. Simply put, it is the maximum punishment and not the minimum prescribed in relation to an offence under PPC that determines whether or not the accused is "punishable" for ten years and whether the offence in question falls within the prohibitory clause or not. At bail stage it is not for the court to try and predict the possible sentence that would be imposed on a person under arrest for being an accused of a non-bailable offence.

8. Section 497(1) provides a broad threshold to guide the courts in exercising their discretion in bail matters. Initially the prohibitory part of section 497(1) provided that a person was not to be released on bail if there appeared

reasonable grounds for believing that he was guilty of a non-bailable offence that he had been charged with. The said proviso was amended and substituted in 1923 when the prohibition was limited to offences punishable with death or transportation for life. The provision was once again amended in 1974 and the prohibition in section 497(1) was extended to offences punishable with death or imprisonment for life or imprisonment for ten years. The legislative intent in view of the words used in section 497(1) is therefore unambiguous. In relation to offences which attract a maximum punishment of less than ten years, bail is granted as a matter of right as held by the august Supreme Court in ***Tariq Bashir and others Vs. The State (PLD 1995 SC 34) and Muhammad Tanveer Vs. The State and another (PLD 2017 SC 733)***. However, in cases where a person has been arrested for a non-bailable offence the maximum punishment for which is up to ten years in prison, the court is required to determine, "if there appears reasonable grounds for believing that he has been guilty" of such offence. The Second proviso to section 497(1) places the responsibility of showing cause as to why an accused should not be released on bail upon the prosecution. Thus it is for the prosecution to satisfy the court that reasonable grounds do exist for supporting the belief that the accused is guilty of an offence punishable with up to ten years of imprisonment. In the event that the prosecution fails to do so the court can admit an accused to bail under section 497(1), even where he stands accused of a non-bailable

offence punishable with death or imprisonment for life or imprisonment for ten years.

9. What constitutes "reasonable grounds" for purposes of section 497(1) was explained by the august Supreme Court in ***Abdul Malik Vs. State*** ***(PLD 1968 SC 349)*** in which the following was held:

> *"Reasonable grounds" is an expression which connotes that the grounds be such as would appeal to a reasonable man for connecting the accused with the crime with which he is charged, "grounds" being a word of higher import than "suspicion". However, strong a suspicion may be it would not take the place of reasonable grounds. Grounds will have to be tested by reason for their acceptance or rejection. The reasonableness of the grounds has to be shown by the prosecution by displaying its cards to the Court, as it may possess or is expecting to possess as demonstrating evidence available in the case both direct and circumstantial.*

10. It was further explained in ***Abdul Malik*** that while it is not for a court to conduct anything in the nature of preliminary trial at bail stage to consider the probability of accused's guilt or innocence, it is for the court, "*to ascertain as to whether there exist any reasonable grounds upon which its belief can be founded to look on the materials placed before it by the investigating agency and be prima facie satisfied that some tangible evidence can be offered which if left unrebutted may lead to the inference of guilt before it can come to the conclusion that this discretion no longer exists. This evidently means that the discretion of the Court in refusing bail in cases of offences punishable with*

death or transportation is wrested away only after the investigating agency satisfies the Court prima facie that there are reasonable grounds in the case which if not rebutted would lead to the inference of guilt of accused persons."

11. In ***Chaudhry Shujat Hussain Vs. The State (1995 SCMR 1249)*** the august Supreme Court provided further guidance and how to ascertain the existence of reasonable grounds for purposes of section 497(1) of Cr.P.C and held that:

> *"15. … In case of bail the Court is not required to probe into the matter but has to make a tentative assessment of the material produced to ascertain whether there are reasonable grounds to believe that the accused has committed the crime.*
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> *18. …The term "reason to believe" can be classified at a higher padestal than mere suspicion and allegation but not equivalent to proved evidence. Even the strongest suspicion cannot transform in "reason to believe." In Nisar Ahmad's case the criteria laid down seems to be that where some tangible evidence is available against the accused which, if left unrebutted, may lead to the inference of guilt.*

12. The question what constitutes "reasonable grounds" for purposes of section 497(2) of Cr.P.C came before the august Supreme Court in ***Shoib Mehmood Butt Vs. Iftikhar ul Haq and 3 others (1996 SCMR 1845)***, wherein the following was held:

> *"The Court held that under section 497(2), Cr.P.C. bail is to be allowed if it appears to the Court that there are*

sufficient grounds for further enquiry into the guilt of the accused. Now what would constitute as sufficient grounds for further enquiry would depend on the peculiar facts of each case and no hard and fast rule can be laid down for that purpose. Every hypothetical question which can be imagined would not make it a case of further enquiry simply for the reason that it can be answered by the trial Court subsequently after evaluation of evidence. Broadly speaking, the condition laid down in clause (2) of section 497, Cr.P.C. is that there are sufficient grounds for further enquiry into his guilt which means that the question should be such which has nexus with the result of the case and may show or tend to show that accused is not guilty of the offence with which he is charged."

13. In view of aforementioned guidance provided by the apex court there is discretion vested in the court to release a person on bail who has been accused of an offence punishable with death or imprisonment for life or punishment up to ten years. But such discretion has to be exercised on the basis of whether or not the court has been convinced by the prosecution that sufficient material exists on record which satisfies the test of existence of reasonable grounds for the court to believe that the person is guilty of such offence which falls within the prohibitory clause.

14. This Court has taken note of judgments referred to by the learned counsel for the petitioner wherein it has been held that for purposes of determining whether or not an offence falls within prohibitory clause the minimum punishment described for such offence is to be taken into account. The Court is not persuaded by the dicta or the reasoning in such judgments in view of language of section

497(1) as well as its legislative history as explained above. The legislature has determined the scope of discretion vested in a court to release a person on bail who has been accused of a non-bailable offence. The legislature in balancing the interest of the State in prosecuting offenders and the rights of a person to liberty (till such time that he or she has been convicted after a fair trial) could have left only the most heinous offences within the prohibitory clause of section 497(1) of Cr.P.C. That would probably be in line with provisions of Articles 9 and 10A of the Constitution and the settled principle of fairness and justice that a person is presumed to be innocent until proven guilty. However, the legislature has not done so and has placed fetters on the right to liberty of a person who is accused of a non-bailable offence punishable for up to ten years in prison. The only discretion vested in the Court for purposes of bail in an offence falling under section 497(1) of Cr.P.C is for the court to satisfy itself that sufficient grounds exist to support a belief that the person arrested is guilty of an offence he has been charged. The court cannot give the words of section 497(1), and specially the word "punishable" used therein any meaning other than its ordinary textual meaning which inevitably means that given that punishment up to ten years imprisonment is prescribed in relation to a large number of offences, the persons accused of such offences are not entitled to bail as a matter of right.

15. The language of Section 497(1) of Cr.P.C might have been acceptable in a colonial State where the

indigenous persons did not enjoy complete citizenship and fundamental rights and the State found it expedient to lock up anyone accused of a non-bailable offence. But the apex Court has repeatedly emphasized that every person is presumed innocent until proven guilty, that the benefit of any doubt must be granted to the accused, and that bail is not to be denied to an accused as punishment. Yet, the language of Section 497(1) of Cr.P.C vests in a Court the limited discretion to determine if there exist "reasonable grounds for believing" that the accused is "guilty". The standard applicable is that of a reasonable man and the language of Section 497(1) of Cr.P.C does not require the prosecution to satisfy the "beyond reasonable doubt" standard applicable for securing a conviction. In other words, Section 497(1) of Cr.P.C essentially requires a court to prejudge the "guilt" of an accused by applying a "reasonable" man standard, which is a lower standard than the "beyond reasonable doubt" standard, leaving almost no room to grant an accused the benefit of the doubt at the time of considering his entitlement to bail. This, together with the innumerable offences, which prescribe a punishment of up to 10 years means that the state has to meet a very basic threshold to take away the right of a citizen to liberty guaranteed by Article 9 of the Constitution, if he is charged with a non-bailable offence. The accused remain hauled up behind bars pending trial in which the State often fails to meet the higher "beyond reasonable doubt standard" (as reflected by our conviction rate),

resulting in acquittal, but also resulting in the accused having been imprisoned for years, due to denial of bail pending without ever being convicted.

16. Denial of bail automatically becomes a punishment in view of (i) the broad category of offences that fall within the prohibitory clause, (ii) the limited discretion vested in Court in view of the language of Section 497(1) of Cr.P.C and the lax standard that applies to the prosecution to justify arrest, and (iii) the time it takes to complete trials. It undermines the rights of an accused to liberty guaranteed by Article 9 and pretrial punishment without conviction prohibited by Article 10A and fundamental principles of fairness, due to courts required to only ascertain, tentatively, if the accused is "guilty" on the basis of a "reasonability" standard. This assessment takes place at a time when the accused is behind bars and has no ability to fully defend himself as he does not have complete access to the material to be presented by the prosecution before the court to satisfy the "reasonability" threshold. The right to liberty in Article 9 is subject to law. And the language used in Section 497(1) creates a prescription by law renders the right of liberty of a citizen accused of a non-bailable offence pending his trial largely meaningless. The Parliament might wish to reconsider Section 497(1) of Cr.P.C in juxtaposition with Article 9 and 10A of the Constitution to address the continuing practice of pre-trial punishment due to denial of bail.

17. In the present case, the features of the petitioner were mentioned by the complainant and recorded in the FIR. The petitioner after having been arrested in the relation to another FIR was included in an identification parade and was positively identified by the complainant. Nothing has been placed on record to establish that the identification parade was not carried out in accordance with law. Such identification parade was carried out within ten days of the petitioner having been arrested. The cell phone with the IMEI number that is noted in the FIR has been recovered from the possession of the petitioner. The argument that the number of the SIM Card installed in the phone was not mentioned in the FIR makes no difference as the SIM Card is replaceable and it is the IMEI number that is unique to the phone.

18. In view of the above, there exist reasonable grounds to support the belief that the petitioner might be liable for the offence he has been charged with. The instant petition is without merit and is therefore **dismissed.**

19. This Court has however noted with concern that challan was produced in the learned trial Court on 08.10.2021. But despite the passage of four months no charge has been framed by the learned trial Court. The learned trial Court will ensure that the trial of the petitioner is concluded within a period of six months. The office will also share a copy of this order with the learned MIT to inquire into the reasons for delay in framing of the charge.

20. Needless to mention that the observations recorded in the instant petition are based on tentative assessment of material produced by the prosecution, which ought not prejudice the proceedings before the learned trial court.

21. Let the office send a copy of this judgment to Secretary, Ministry of Parliamentary Affairs, to bring to the attention of the Federal Government observations in paras 15 and 16.

(BABAR SATTAR)
JUDGE

Shakeel Afzal

Approved for Reporting.