Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

PRESENT:

Mr Justice Tariq Mehmood Jehangiri, J.
Mr Justice Babar Sattar, J.
Mr Justice Arbab Muhammad Tahir, J.

Crl. Misc. No.431-B-2024

Barkat Ullah
Versus
The State & another

Petitioners by	:	Mr Muhammad Ilyas Khan, Advocate. Mr Mujahid Khan, Advocate. Mr Danish Akbar Khan, Advocate. Mr Waqar Ahmed Khan, Advocate.
Respondents by	:	Rana Zulfiqar Ali, Special Public Prosecutor, ANF. Mr Tahir Kazim, Law Officer, ICT Police. Dr Tanvir Ahmed, Incharge, Federal Narcotics Testing Lab. Malik Abdul Rehman, State Counsel/Amicus Curiae.
Assisted by	:	Mr Sajjad Ali, Law Clerk.
Date(s) of Hearing	:	**27.06.2024.**

Arbab Muhammad Tahir, J.- This Bench has been constituted to decide the legal questions raised by my lord *Mr Justice Babar Sattar, J.* while hearing a bail petition wherein the petitioner accused of possessing 542 grams of heroin, pleaded the ground that his case is not covered under the prohibitory clause of section 497(1) of the Code of Criminal Procedure, 1898 (hereinafter **"Cr.P.C."**). My lord *Mr Justice Babar Sattar, J.* in his order, dated 18.03.2024, has highlighted several judgments of the Supreme Court as well different High Courts (including this Court), wherein contradictory views with regard to application of the prohibitory clause contained in section

497(1) Cr.P.C. have been taken. The legal questions for our consideration framed vide order, dated 18.03.2024, are as follows.-

a) While defining which offence falls within the prohibitory clause under section 497(1) of Cr.P.C, is the maximum punishment for the said offence to be taken into account or is the minimum or alternative punishment of fine etc. to be taken into account?

b) What weight of a contraband, where such contraband is heroin, qualifies as a borderline case, which, in the absence of any other grounds for bail, would suffice to make the case one of further inquiry on the basis of doubt as to whether such case attracts the statutory prohibition of section 497(1) of Cr.P.C or not?

2. The learned counsels for the petitioners have relied upon various judgments[1] of the Supreme Court as well as the High Courts including this Court, wherein bail has been granted to the accused person keeping in view lesser or alternate punishment provided for an offence.

3. In order to answer the above legal questions, it would be appropriate to reproduce section 497(1) Cr.P.C. for convenience.-

[1] Jamal-ud-Din alias Zubairi v. The State (2012 SCMR 573), Khuda Bux v. The State (2010 SCMR 1160), Sagheer Ahmed v. The State and another (2024 SCMR 913), Reginald Chude Bjekwe v. The State (2021 MLD 2028), Faiz Rasool v. The State (Crl.Misc. No.1195-B/2022, IHC), Abdul Latif v. The State (2016 PCrLJ Note 122), Altaf Hussain v. The State and another (Crl. Misc. No.745-B/2022, IHC), Muhammad Akram v. The State (2020 PCrLJ 31 Sindh), Muhammad Azam Khan Swati v. The State and another (2023 PCrLJ 350 Islamabad), Ghulam Haibi v. The State (Crl.Misc. No.645/2024, IHC). Taj Muhammad v. The State (Crl. Misc. No.293-B/2024, IHC), Hanan Ahsan v. The State (Crl. Misc. No.1650-B/2022, IHC), Asim Hanif v. The State (Crl. Misc. No.1998-B-2023, IHC), Izzat Khan v. The State (Crl. Misc. No.176/B of 2024, IHC), Arshad alias Goga v. The State (2022 PCrLJ 198), Muhammad Shafique v. the State (2016 PCrLJ 1315), Ismail Ijaz v. The State (2023 PCrLJ 114), Mustafa Ali v. The State (2014 PCrLJ 1464), Ameer Ullah v. The State (2012 PCrLJ 1858), Muhammad Hayat Khan v. The State and another (2019 PCrLJ 472), Naeem Shah v. the State (2023 YLR 166 Lahore), Umair Shaukat v. The State (Crl. Misc. B.A. No.398-A/2020), Faizan v. The State (2021 YLR 629 Sindh), Talib Hussain v. The State (2014 YLR 1319 Sindh), Mevo Rind v. The State (2012 YLR 151 Sindh), Shehzore and another v. The State (2006 YLR 3167), Zahid Maseeh and another v. The State (2012 MLD 814 Sindh), Zahid Hussain Chandio v. The State (2016 MLD 1103), Muhammad Fayaz v. The State (2010 YLR 1934), Muhammad Amin v. The State (2017 YLR 609 Sindh), Shahid Ahmed v. The State (2022 PCrLJ Note 89), Dila Baz Khan v. The State (2008 PCrLJ 1437 Peshawar).

> **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**:

Emphasis supplied

4. 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. (*Syed Raza Hussain Bukhari's*[2] *case*)

5. The main purpose of keeping an under-trial accused in detention is to secure his attendance at the trial so that the trial is conducted and concluded expeditiously or to protect and safeguard the society, if there is an apprehension of repetition of offence or commission of any other untoward act by the accused. Therefore, in

[2] Syed Raza Hussain Bukhari v. The State through D.A.G, etc. (PLD 2022 SC 743)

order to make the case of an accused person fall under the exception to the rule of grant of bail in offences not covered by the prohibitory clause of Section 497(1) Cr.P.C., the prosecution has to essentially show from the material available on the record, such circumstances that may frustrate any of the said purposes, if the accused person is released on bail. (*Iftikhar Ahmed's*[3] *case*)

6. In the facts and circumstances of the case, the word "punishable" used in section 497(1) of Cr.P.C. needs interpretation so as to determine whether such expression means the "maximum" punishment provided for an offence. In this regard it would be advantageous to briefly discuss the legislative history of section 497(1) Cr.P.C.-

Evolution of Section 497(1):

- Initially, the provision prohibited bail if there were reasonable grounds to believe the accused was guilty of a non-bailable offence.
- In 1923 [4], this prohibition was limited to offences punishable with death or transportation for life.
- In 1974 [5], the prohibition was extended to offences punishable with death, imprisonment for life, or imprisonment for ten years.

Current Legislative Intent:

- The legislative intent of section 497(1) is clear: bail is generally permissible for offences where the maximum punishment is less than ten years.
- For offences punishable with up to ten years' imprisonment, the court must determine if there are reasonable grounds to believe the accused is guilty of such an offence.

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[3] Iftikhar Ahmed v. The State through P.G. Punjab and another (PLD 2021 SC 799)
[4] The Code of Criminal Procedure (Amendment.) Act, 1923 (18 of 1923)
[5] The Criminal Procedure (Amendment.) Act, 1974 (25 of 1974)

7. The Supreme Court, in Tariq Bashir's[6] case observed that it is crystal clear that in bailable offences the grant of bail is a right and not favour, whereas in non-bailable offences the grant of bail is not a right but concession/grace. Section 497, Cr.P.C. has divided non-bailable offences into two categories i.e. (i) offences punishable with death, imprisonment for life or imprisonment for ten years; and (ii) offences punishable with imprisonment for less than ten years. The principle to be deduced from this provision of law is that in non-bailable offences falling in the second category (punishable with imprisonment for less than ten years) the grant of bail is a rule and refusal an exception. So bail will be declined only in extraordinary and exceptional cases, for example.-

(a) where there is likelihood of abscondcace of the accused;
(b) where there is apprehension of the accused tampering with the prosecution evidence;
(c) where there is danger of the offence being repeated if the accused is released on bail; and
(d) where the accused is a previous convict.

8. The above principles were reaffirmed by the Supreme Court in the cases of Zafar Iqbal[7], Subhan Khan[8] and Riaz Jafar Natiq[9]. The fact that in case of offences for which maximum punishment of ten years and more is provided, fall within the prohibitory clause of section 497(1) Cr.P.C. has also been affirmed by the Supreme Court in the cases of Bilal Khan[10], Sheqab Muhammad[11] and Ghazan Khan[12].

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[6] Tariq Bashir and 5 others v. The State (PLD 1995 SC 34)
[7] Zafar Iqbal v. Muhammad Anwar and others (2009 SCMR 1488).
[8] Subhan Khan v. The State (2002 SCMR 1797)
[9] Riaz Jafar Natiq v. Muhammad Nadeem Dar (2011 SCMR 1708)
[10] Bilal Khan v. State (2020 SCMR 937)
[11] Sheqab Muhammad v. The State (2020 SCMR 1486)
[12] Ghazan Khan v. Mst .Ameer Shuma (2021 SCMR 1157)

9. In Majid Ali’[13] case, this Court has interpreted the expression “punishable” used in section 497(1) Cr.P.C. as follows.-

> “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 P.P.C. 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.

10. The expression “punishable”, therefore, refers to maximum sentence or punishment provided for an offense. In other words, if a penal provision makes an offence punishable by ten years, it refers the power of the court to award a sentence upto ten years in prison, if found guilty. However, on conclusion of trial, the actual sentence imposed by the court may be less than the maximum punishment, depending on various factors, such as severity of offence,

[13] Majid Ali v. The State and another (2022 PCrLJ 981 Islamabad)

offender's criminal history, mitigating circumstances and discretion of the court.

11. There is another aspect of the matter, i.e. can we relate the expression "punishable" to the minimum sentence provided for an offence? There are some arguments to support an affirmative answer to this question as well. Let us first discuss the arguments and then we will try to put the same in juxtaposition to section 497(1) Cr.P.C. Subject to the final conclusion, few of the grounds are as follows.-

(i) When law presumes the accused to be innocent until proven guilty, and the minimum sentence is specified, then the term "punishable" can be related to the minimum sentence. In this context, the expression "punishable" may imply a minimum threshold of punishment, rather than the maximum. It is a way of acknowledging the accused's presumed innocence while still holding him accountable for the offense if found guilty.

(ii) In criminal law, statutes are often interpreted in favor of the accused. This means that any ambiguity in the law should be resolved in a way that benefits the accused. In this case, interpreting "punishable" to mean the minimum sentence is more favorable to the accused than interpreting it to mean the maximum sentence. The legislative intent behind prohibiting bail for offenses punishable by ten years and more may be to ensure that serious offenses are not taken lightly. However, this intent should not override the presumption of innocence and the principle of interpreting statutes in favor of the accused.

(iii) Interpreting the expression "punishable" to mean the minimum sentence ensures consistency with right of accused to principles of fair trial and due process. It may ensure that the accused is not denied bail without a fair trial and that their rights are protected throughout the criminal proceedings.

12. Let us now put the above arguments in juxtaposition to section 497(1) Cr.P.C. It provides that (i) when a person accused of nonbailable offence is arrested; he may be released on bail, (ii) but 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. If the case of an accused falls within the ambit of first category, then grant of bail is a rule and refusal an exception. However, if it is hit by the second category, then there is statutory prohibition on grant of bail. Now if we interpret the expression "punishable" to mean the minimum punishment provided for an offence so as to favour of the accused due to his presumed innocence at bail stage, then it will render the first category of section 497(1) Cr.P.C. as redundant in offences which only provides for maximum punishment of imprisonment. To explain further, if a penal provision makes an offence punishable to imprisonment of twenty years without mentioning the minimum limit or it provides an alternate penalty of fine, then such a case may never attract the statutory prohibition, which interpretation would be against the spirit of section 497(1) Cr.P.C. Thus the above interpretation would circumvent the statutory prohibition contained in section 497(1) Cr.P.C. The above arguments, therefore, cannot stand in conjunction with the basic provision of law governing bail.

13. The above discussion leads us to conclude that the expression "punishable" used in section 497(1) Cr.P.C. refers to the maximum punishment provided for an offence. Thus if an offence is punishable by ten years or more, then subject to other legal grounds, the same would attract statutory prohibition contained in section 497(1) Cr.P.C.

14. Now we shall advert to the second question i.e. what weight of a contraband, where such contraband is heroin, qualifies as a borderline case, which, in the absence of any other grounds for bail, would suffice to make the case one of further inquiry on the basis of doubt as to whether such case attracts the statutory prohibition of section 497(1) of Cr.P.C or not?

15. Section 497(1) Cr.P.C. has to be read with section 51 of the Act of 1997, which lays down guidelines for grant of bail in narcotics cases. Sub-section (1) of section 51 of the Act of 1997 provides that notwithstanding anything contained in sections 496 and 497 of the Cr.P.C. bail shall not be granted to an accused person charged with an offence under the Act of 1997 or under any other law relating to narcotics where the offence is punishable with "death". Sub section (2) provides that in the case of other offences punishable under the Act of 1997, bail shall not be normally granted unless the Court is of the opinion that it is a fit case for the grant of bail *and* against the security of a substantial amount. Section 9 of the Act of 1997 has been substituted through section 6 of the Control of Narcotic Substances (Amendment) Act, 2022, through which the capital punishment of "death" provided in the erstwhile provisions i.e. section 9(c) of the Act of 1997 (since substituted) has been omitted. Section 51(1) of the Act of 1997 has, therefore, been rendered redundant by legislature as it prohibited grant of bail in an offence entailing death penalty, which penalty no longer exists in the Act of 1997 and is no more relevant as no corresponding amendments have been made. Whereas, sub section (2) of section 51 of the Act of 1997 lays down two guidelines for grant of bail in offences under the Act of 1997 viz, (i) *when it is a fit case for grant of bail* and (ii) *against the security of substantial amount*.

16. The Supreme Court in Tariq Bashir's case supra has held that as regards the first category of offences (punishable with death, or imprisonment for life, or with ten years' imprisonment) the

provisions of section 497(1) are not punitive in nature. There is no concept of punishment before judgment in the criminal law of the land. The question of grant/refusal of bail is to be determined judiciously having regard to the facts and circumstances of each case. Where the prosecution satisfies the Court, that there are reasonable grounds to believe that the accused has committed the crime falling in the first category the Court must refuse bail. On the other hand where the accused satisfies the Court that there are not reasonable grounds to believe that he is guilty of such offence, then the Court must release him on bail. For arriving at the conclusion as to whether or not there are reasonable grounds to believe that the accused is guilty of offence punishable with death, imprisonment for life or with ten years' imprisonment, the Court will not conduct a preliminary trial/inquiry but will only make tentative assessment, i.e. will look at the material collected by the police for and against the accused and be prima facie satisfied that some tangible evidence can be offered which, if left unrebutted, may lead to the inference of guilt. Deeper appreciation of the evidence and circumstances appearing in the case is neither desirable nor permissible at bail stage. So, the Court will not minutely examine the merits of the case or plea of defence at that stage.

17. Similarly, in the Supreme Court in Abdul Malik's[14] case, has explained the expression "reasonable grounds" used in section 497(1) Cr.P.C. as follows.-

> "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

[14] Abdul Malik v. The State (PLD 1968 SC 349)

> 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.

18. Furthermore, the Supreme Court in Muhammad Nadeem's[15] case, explained the expression "further inquiry" used section 497(2) Cr.P.C. as follow.-

> "The case of further inquiry pre-supposes the tentative assessment which may create doubt with respect to the involvement of accused in the crime. It is well settled that the object of a trial is to make an accused face the trial, and not to punish an under trial prisoner. The basic idea is to enable the accused to answer criminal prosecution against him rather than let him rot behind bars. The accused is entitled to expeditious access to justice, which includes a right to a fair and expeditious trial without any unreasonable and inordinate delay. In the case of Zaigham Ashraf v. State and others (2016 SCMR 18), this Court held that the words "reasonable grounds" as contained in Section 497, Cr.P.C., required the prosecution to show to the court that it was in possession of sufficient material/ evidence, constituting 'reasonable grounds' that accused had committed an offence falling within the prohibitory limb of Section 497, Cr.P.C. For getting the relief of bail accused only had to show that the evidence/material collected by the prosecution and/or the defence plea taken by him created reasonable doubt/suspicion in the prosecution case and he was entitled to avail the benefit of it."

[15] Muhammad Nadeem v. The State and another (2023 SCMR 184)

19. The expression "fit case for the grant of bail" used in section 51(2) of the Act of 1997 has to be interpreted in light of the provisions of section 497 Cr.P.C., inter alia, the words "reasonable grounds", "further inquiry" and "statutory period", etc. The Supreme Court in Amir Faraz's[16] case has observed that it is settled law that in criminal matters, each case has its own peculiar facts and circumstances and the same has to be decided on its own facts. The decision whether to grant or refuse bail, depends upon multiple factors, even if the alleged offence is hit by the prohibitory clause of section 497(1) Cr.P.C. All those factors can be considered collectively as well as in isolation so as to reach a just conclusion. The question of bail is directly linked to right of liberty of an individual, who, unless found guilty on conclusion of trial, has to be considered innocent. Therefore, a slightest dent, visible on tentative assessment of material available on record, in the prosecution's case, would entitle the accused to grant of bail, even if the offence alleged to have been committed is hit by the prohibitory clause. The prohibition on grant of bail in section 497(1) Cr.P.C. is not absolute, rather dependent on satisfaction of the Court to believe that reasonable grounds exists that the accused is connected with the commission of offence. No hard and fast rule can be laid down to regulate discretion of the Court relating to its satisfaction for grant/refusal of bail. The Court may take into account all the grounds collectively or any one of them in view of the peculiar facts and circumstances of the case and grant or refuse bail. In Manzoor's [17] case, the Supreme Court has laid down the golden principle relating to bail. In the referred case it was held that "It is to remember that bail is not be withheld as a punishment. There is no legal or moral compulsion to keep people in jail merely on the allegations that they have committed offences punishable with death or transportation, unless reasonable grounds appear to exist to disclose their complicity. The ultimate conviction and incarceration of a guilty person can repair the wrong caused by a mistaken relief of

[16] Amir Faraz v. The State (2023 SCMR 308)
[17] Manzoor and 4 others v. The State (PLD 1972 SC 81)

interim bail granted to him, but no satisfactory reparation can be offered to an innocent man for his unjustified incarceration at any stage of the case albeit his acquittal in the long run.

20. Having concluded that bail in criminal cases registered under the Act of 1997 has to be decided in light of section 51(1) of the Act of 1997 read with section 497 Cr.P.C., it is held that if a provision of the Act of 1997 provides for maximum punishment of ten years and more, it shall attract the prohibitory clause of section 497(1) Cr.P.C. The applicability of the term "borderline case" developed in the context of erstwhile provisions of the Act of 1997 i.e. section 9(c), would amount to anticipating possible period of conviction at bail stage, which exercise is not permissible while making tentative assessment of a criminal case at bail stage. This, however, shall not bar the Court adjudicating a bail petition to decide the same in light of peculiar facts and circumstances of a particular case.

21. We had appointed *Mr Tanveer Ahmed Khan*, Incharge Federal Narcotics Testing Laboratory, Islamabad to assist us on the point of variance in weight of recovered narcotic substance due to the packing/wrapping material particularly when it is packed in capsules. The learned amicus appeared and explained to us the question in detail. He also submitted his written report, the relevant portion whereof is as follows.-

> "It is submitted that these handmade capsules have various sizes and quantity of packing material also varies with each capsule. However, the weight of packing material up to 15% of total weight of a capsule has been observed in our current laboratory practices."

He, however, submitted that since the whole quantity of recovered contraband is kept by the police in safe custody and only a representative sample is sent to the Laboratory for chemical analysis, therefore, he is unable explain the average weight of other wrapping materials i.e. solution tape, plastic shopping bag, etc.

22. During the proceedings, certain queries were put[18] to the prosecution, regarding the quality, mechanism and procedure of investigation in narcotics cases and the Inspector General of Police and Director General, Anti-Narcotics Force were directed to submit reports. Accordingly they submitted their respective reports. The Islamabad Police in its written report has submitted that (i) in most of the cases, the accused person discloses that narcotic substance was brought from "illaqa ghair", where access is not possible due to lack of resources, (ii) due to insufficient funds and time, narcotic source is only traced if it is located in Islamabad or adjacent cities, (iii) till date no investigations are carried out to trace the assets derived out of the illicit drug dealing; (iv) courts normally grant two/three days physical remand of the accused for the purpose of investigation. The report submitted by the Anti-Narcotics Force reveals that, (i) during the period from April 2022 – April 2024, multiple assets inquiries were conducted and assets worth Rs.210,246,705/- (approximately) were traced and submitted before the court for proceedings in accordance with law, (ii) ANF is performing duties with limited resources and manpower, (iii) out of 977 registered criminal cases, in 932 cases physical remand for 01 day, in 41 cases 2 to 3 days and only in 04 cases more than three days physical remand has been granted by the courts for the purposes of investigation, (iv) in the two years' period sixty one inquiries were initiated against delinquent investigators.

23. The reports submitted by the two investigating agencies shows that criminal cases relating to narcotics are not being investigated according to the spirit of the Act of 1997. As a result of such faulty investigations, the society shall suffer as it is exposed to risk of narcotics/drugs abuse. Not investigating the main culprits/sources of narcotic substance in a criminal case amounts to

[18] Vide order, dated 09.05.2024 in Crl. Misc. No.431-B/2024

granting them licence to violate the Act of 1997 and cause irreparable damage to the society.

24. The Act of 1997 has been enacted to prohibit possession of narcotic substances and rehabilitate victims of drug abuse. To ensure strict adherence to the provisions of the Act of 1997, penalties have been provided under section 9 thereof. In order to ensure that no one indulges in the dealing and trafficking of narcotic substances in violation of the Act of 1997, the profit derived and properties acquired out of such profit have been declared as liable to confiscation. How can this goal be achieved? Will the State establish separate entities to enforce each provision of the Act of 1997 and let the police/ANF proceed with investigations of narcotics cases without due adherence to provisions of the Act of 1997?

25. When a criminal case is registered on the allegation of possession of narcotic substance, the accused is normally arrested at the spot. Then the line of investigation (*without prejudice to the Act of 1997 and the rules made thereunder*) should be.-

(i). to investigate from whom the recovered narcotic substance was received/purchased by accused;

(ii). to whom the delivery of narcotic substance was intended;

(iii). to investigate the purpose/ultimate utilization for the recovered narcotic substance;

(iv). to trace the drug abusers (for their rehabilitation);

(v). who are deriving financial benefits and the use/purpose of the derived finance/ assets;

(vi). who are the persons engaged in the business in contravention of the Act of 1997 (starting from cultivator/ manufacturer to the end abuser);

(vii). and which are the assets derived by persons engaged in dealing with narcotics.

26. The Act of 1997 provides for a comprehensive mechanism to deal with narcotics cases so as to curb the menace of drug abuse, which in fact is a great threat to the society and adversely affecting citizens. It is mandatory for the Investigating Agencies to conduct investigations on true lines in accordance with the spirit of the Act of 1997. Sections 6, 7 and 8 of the Act of 1997 prohibit possession of narcotic drugs, its import, export and trafficking or financing the trafficking of narcotic drugs. Section 8(a) provides that no one shall organize, manage, traffic in or finance the import, transport, manufacturing or trafficking of narcotic drugs, psychotropic substances or controlled substances. Section 14 of the Act provides that no one shall, within or outside Pakistan, participate in, associate or conspire to an offence punishable under the Act of 1997.

27. Chapter IV of the Act of 1997 deals with freezing and forfeiture of assets. Section 37 empowers the Court and appropriate officers to order freezing of assets. Section 38 empowers the investigating agency to trace and identify assets acquired through illicit involvement in narcotics. Section 39 provides that after the accused is convicted of an offence under the Act of 1997, on request of the investigating agency, the Court is empowered to order forfeiture of assets of the convict, or as the case may be, his associates, relatives or any other person holding or possessing assets on behalf of the convict. It is also pertinent to refer to section 42 of the Act of 1997, which makes the acquisition of assets, frozen under the provisions ibid, punishable with imprisonment for a term which may extend to three years and with fine.

28. Section 49A (Remand) has been inserted through section 19 of Control of Narcotic Substances (Amendment) Act, 2022 in the Act of 1997, which provides that a person arrested for breach of the provisions thereof shall, having regard to the facts and circumstances

of the case, be liable to be detained in custody for the purpose of inquiry or investigation not exceeding *"ninety days".* The Magistrate while dealing with the request for remand of the accused submitted by the investigating officer is, therefore, bound to consider such request keeping in view the scope of investigations provided under the Act of 1997. It is generally understood that after recovery of narcotic substance further physical remand would be futile. Such concept is violative of the basic spirit of the Act of 1997. Curbing the menace of drug/narcotic abuse is not an easy task; rather the same would require restless efforts of every stakeholder in the criminal justice system. One case of narcotic substance, if investigated in the manner in which the Act of 1997 is structured, would bring to justice the whole chain i.e. cultivator/manufacturer, peddler, seller and drug abuser and would serve as deterrent factor in the society. The manner in which narcotics cases are being investigated favours the real culprits. The drug peddlers are caught and sent to jail. Nobody dares to investigate the giants who derive profits out of such illicit drug/narcotic deals. Their assets are never investigated. The two ends i.e. drug dealer, cultivator, manufacturer and the drug/narcotic abusers are never held accountable. This would never have been intention of the legislature while enacting the Act of 1997. Investigating the assets (*derived from the proceeds of illicit drug dealing*) of persons involved in narcotics cases is mandatory for making a request to the Court by the investigating agency for confiscation/forfeiture of the same. It is, therefore, not the discretion but a bounden duty of the investigating agency to investigate complete chain in the commission of offence and trace the assets derived out of such illicit trade.

29. For what has been discussed above, it is held and declared as follows.-

(a) The expression "punishable" used in section 497(1) Cr.P.C. refers to the maximum punishment provided for an offence. Thus if an offence is punishable by ten years or more, then subject to other legal grounds, the same would attract statutory prohibition contained in section 497(1) Cr.P.C.

(b) It is held that if a provision of the Act of 1997 provides for maximum punishment of ten years and more, it shall attract the prohibitory clause of section 497(1) Cr.P.C. The applicability of the term "borderline case" developed in the context of erstwhile provisions of the Act of 1997 i.e. section 9(c), would amount to anticipating possible period of conviction at bail stage, which exercise is not permissible while making tentative assessment of a criminal case at bail stage. This, however, shall not bar the Court adjudicating a bail petition to decide the same in light of peculiar facts and circumstances of a particular case.

(c) After insertion of section 49A in the Act of 1997, the maximum period of remand is ninety days. As highlighted above, the investigation in narcotics cases is not limited to mere recovery of narcotic substance from the peddler but extends to the source, manufacturer, cultivator, seller, dealer, etc. The Magistrate while dealing with the request of remand shall give due consideration to facts and circumstances of the case and the scheme of the Act of 1997 and grant physical remand of the accused for a reasonable period.

(d) Investigating the complete chain in commission of offence (including source of supply) under the Act of 1997 and trace the assets derived out of such illicit trade/dealing is the duty of the investigating agency and not discretion. The investigating officer shall, therefore, investigate all persons and trace their assets involved in the commission of offence under Act of 1997.

(e) We have been informed that after filing of the instant bail petitions, trials in the main cases were transferred to competent courts at Rawalpindi, therefore, the petitioners may approach the relevant forum vested with jurisdiction. The petitions stand accordingly disposed-of.

30. Office is directed to transmit copy of this order to the Director General, Anti-Narcotics Force, Inspector General of Police, ICT, Advocate General, ICT, Prosecutor General, ICT, Special Courts (CNS) and the Sessions Judges (East and West Divisions), Islamabad for information, compliance and circulation to all the Judicial Officers.

(ARBAB MUHAMMAD TAHIR)
JUDGE

(TARIQ MEHMOOD JEHANGIRI)
JUDGE

(BABAR SATTAR)
JUDGE

Announced in the open Court on ______________

JUDGE JUDGE JUDGE

Approved for reporting.

Luqman Khan/*