

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI  
**CrI. Bail Appln No.1141 of 2019**

Date	Order with signature of Judge
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***Present; NAZAR AKBAR, J:-***

1. For Orders on M.A. No.8286/2019 (U/A)
2. For Orders on M.A. No.8287/2019 (Ex/A)
3. For hearing of Main case
4. For Orders on M.A. No.8288/2019 (U/s.498)
5. For Orders on M.A. No.8289/2019 (U/s.561-A)

**16.08.2019**

Mr. Sarmad Hani, advocate a/w applicant.

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1. Urgency application is granted.
2. Exemption granted subject to all just exceptions.

3to5. By this order I intend to dispose of CMA No.8288/2019 under **Section 498 Cr.P.C** alongwith CMA No.8289/2019 under **Section 561-A Cr.P.C**. Both the applications by their contents are in the nature of application for interim relief pending the instant criminal bail application No.1141 of 2019. The main prayer is as follows:-

It is, therefore, respectfully prayed that the instant application against the impugned Order dated 05.08.2019 of the learned District and Sessions Judge, Karachi, Malir may very graciously be allowed and the said order be set aside/quashed with cost.

Pending disposal of the instant application, this Hon'ble may graciously be pleased to admit/enlarge the applicant **on bail before arrest** subject to furnishing the solvent surety before the Nazir of this Court.

Any other relief which this Hon'ble Court may deem fit and appropriate under the circumstances.

The learned counsel for the applicant seems to be unaware of the nature of proceedings he should have filed to protect liberty of his client who is charged with offence under Cyber Crimes. He is not

sure that he has filed an application for bail before arrest for the applicant Kashir Dars or it an appeal / revision or Criminal Miscellaneous against the impugned order of District & Sessions Judge Malir whereby an application for cancellation of bail under **Section 497(5) Cr.P.C** was allowed. When asked that how the provision of **Section 498 Cr.P.C** can be invoked to set aside an order passed by Sessions Court he replied in addition to **Section 498 Cr.P.C** he has also mentioned **Section 561-A Cr.P.C** on his application. The perusal of the application shows that he has added in his hand writing “R/w Section 561-A Cr.P.C” probably on the advice of some clerk in the criminal branch of this Court. Be that as it may, Mr. Sarmad Hani, learned counsel for the applicant has argued it as an application for bail before arrest since the applicant’s bail has been cancelled by the District Judge and he apprehends his arrest in crime No.11/2019 under Section 16, 20, 21, PECA 2016 r/w 49, 420, 109 PPC registered at P.S FIA Cyber Crime Reporting Centre, Karachi. He has also filed a certificate that “no Cr.Bail Application has been filed by the applicant against the FIR No.11/2019 P.S F.I.A Cyber Crime Centre, Karachi.

Brief facts of the case are that the applicant/accused was arrested by the FIA Cyber Crime Circle Karachi on registration of FIR No.11/2019 dated **15.5.2019** after completion of Enquiry No.231/2019 dated **25.4.2019** on the application of the complainant. The manner and circumstances of arrest of accused have been elaborately discussed by the learned Session Judge in the impugned order dated **05.8.2019** whereby the bail granted to the applicant by the trial Court was cancelled. In the impugned order following passage clearly indicates the circumstances of the arrest and involvement of the applicant in the offence.

Record shows that F.I.A, Cyber Crime Circle, Karachi had conducted enquiry, and it was transpired that alleged Facebook I.D i.e. [facebook.com/night.huma](https://www.facebook.com/night.huma) etc. are available on internet, and the same I.Ds were sent to Facebook authorities for obtaining I.P of the user. As per available record I.P address and cell number 0300-3030040 from the same I.D were retrieved and sent to concerned ISP and cell companies, and in reply it was found that I.P is in the name of one Syed Khalid Shah, while cell number is registered in the name of Kashif Dars (present accused). **As per I.O the account used to upload and circulate defamatory content and indecent and abusive images was created using the same mobile number.** On the basis of these findings F.I.R under section 16, 20 and 21 PECA, 2016 r/w section 419 and 109 PPC was registered.

It is further transpired from the record that above information was shared with the complainant and then it was disclosed that Kashif Dars is working as Deputy Director, Financial aid MUET. Thereafter, accused Kashif Dars was questioned by F.I.A, where **he had admitted that cell number 0300-3030040 is registered in his name as well as in his use.** The concerned F.I.A officials had then visited the office of Kashif Dars and **technical analysis of mobile phone of Kashif Dars was done on spot, and it clearly showed that objectionable edited images of the complainant and other faculty members as well as defamatory descriptions posted with some images were found in the same mobile phone.** As per record all the I.Ds including the I.D by the name of Nighat, which was mainly used for circulating the objectionable material were also used in the same mobile phone. **The concerned officials had seized the same mobile phone, one Laptop and equipments from there, and Kashif Dars was also arrested.**

Learned counsel for the applicant was required to show a malafide against the accused since he is seeking bail before arrest and by now it is settled law from innumerable pronouncements of the Superior Courts that bail before arrest can be granted on the sole ground of malafide against the applicant who is being nominated in the FIR. Learned counsel has attempted to read the FIR and insisted that Facebook I.D is in the name of one Khalid Shah and since it is not in the name of the applicant, therefore, his

involvement in the case by FIA is malafide. However, he has not denied the fact that mobile number 0300-3030040 associated with the Facebook I.D was not his client. It is very strange that despite the fact that same cell phone was in use of the applicant but he was unable to witness the alleged material on his cell phone screen. I have also asked the learned counsel to distinguish the case law relied upon by the learned Sessions Court in the impugned order, viz; **2018 YLR 329** & **2018 P.Cr.L.J 739**. Learned counsel after reading the judgments could not distinguish the cases from the case in hand.

In fact in the Cyber Crime the accused cannot alleged malafide in associating / connecting him in the crime. The complainant was not aware of the applicant. He had only noticed certain fake pages on internet and Facebook carrying objectionable material and he has reported the matter to the FIA to “**identify the persons involved in the crime**”. It was during Enquiry No.231/2019 dated **25.4.2019** in which the official of FIA by application of different technics through social engineering reached to the accused through cell phone number which has been used / associated to the Facebook carrying objectionable material. Since the complainant party was never aware of the person behind this misuse of internet, it cannot be said that complainant had malafidely named the accused and the applicant has been malafide arrested or associated with the offence. In the impugned order the learned Judge has elaborately discussed material connecting the accused with the commission of offence. The visit of FIA official at the office of Kashif Dars, technical analysis of his mobile phone, his admission that the said cell phone is in his use coupled with the objectionable images available in his cell phone are the kind of evidence which cannot be fabricated by the investigating agencies.

Prima facie these documentary evidences were more than enough to connect the accused with the offence.

Learned Judge while recalling the order of bail granted by the trial Court has also discussed the dubious manner in which without assigning any cogent reason bail has been granted by the trial Court. I have also gone through the order of the trial Court and I have also not found any reason for grant of bail except two lines which have been reproduced by the learned Sessions Judge in the impugned order. Therefore, I feel it necessary to reproduce the relevant para from the impugned order wherein the conduct of trial Court in bail granting order has been referred by the Sessions Court. It is as under:-

Record further reveals that Kashif Dars was produced before I/C Ist Judicial Magistrate, Malir on 22.05.2019 for police custody remand, however, the Magistrate, had declined the request and sent accused to Jail. On the same day the said Magistrate on application of accused had given direction to Jail authorities to extend better class facility to accused in the prison. Vide order dated 31.05.2019 the learned I/C Judicial Magistrate, Malir had granted bail to accused Kashif Dars. In the same order, the learned Magistrate had mentioned that advocate for F.I.A had not appeared inspite of notice. During the course of arguments on this application the learned A.D Legal F.I.A has strongly disputed this observation, and contended that he had no notice about hearing of bail application. Learned A.D legal has further contended that this is high profile case and being Government official he cannot even think of missing the date of bail hearing. Learned A.D legal went on to contend that learned Magistrate had granted bail without considering and discussing the material available on record. For the sake of clarity I would like to reproduce the main observation of the learned Magistrate in bail order:

“I have also made tentative assessment of the material available on record. On tentative assessment of record, I have come to the conclusion that present case appears to be of further enquiry”.

The refusal of learned Magistrate to remand the accused to police custody on the first date of production of accused for remand was unusual. Then by simply mentioning in the order that “notice of this application was given to the learned A.D legal FIA” without referring to record that notice was served or not, it was even issued or not, the bail was granted. Such conduct of the learned Magistrate adversely reflect on the reputation of Courts. It also means the prosecution was denied an opportunity of proper investigation.

In view of the above facts and circumstances and particularly on account of the reliance placed on the cases reported as **2018 YLR 329** & **2018 P.Cr.L.J 739**, the learned Sessions Judge has rightly cancelled the bail granted to the applicant with the observation that bail order was factually incorrect, erroneous and resulted in miscarriage of justice. In these circumstances at least no case for **bail before arrest** is made out.

Consequently both the Applications, one under **Section 498 Cr.P.C** and the other under **Section 561-A Cr.P.C** are also dismissed. However, before concluding I believe it was duty of the Deputy Registrar Judicial to have checked that whether the instant application under **Section 498 Cr.P.C** was in the prescribed format for such an application or not. And if it was not the Deputy Registrar should have raised objection to bring it in the proper form. It was not supposed to be half criminal bail application and half criminal Miscellaneous Application. It is expected that Deputy Registrar Judicial shall be careful in future.

JUDGE