

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Cr. Bail Appln. No. S-124 of 2016

Haji Hussain

Versus

The State

Date of hearing: 02.03.2017

Mr. Irshad Hussain Dharejo, advocate for applicant.

Mr. Achar Khan Gabole, advocate for complainant.

Mr. Abdul Rehman Koalchi, A.P.G for the State.

ORDER

Mohammad Karim Khan Agha, J. By this order I propose to dispose of Cr. Bail Application No. S-124 of 2016, whereby the applicant (Haji Hussain) has moved this application for the grant of post arrest bail on medical grounds.

2. The brief facts of the case are that the applicant was booked in Crime No. 32/20012, for the offences U/S 302, 324, 452, 147, 148 and 149 PPC registered at police station Mirpur Mathelo, District Ghotki. In short the accusation against the present applicant as per case of the prosecution is that he along with co-accused duly armed with deadly weapons in pursuit of common object formed an unlawful assembly, trespassed into the house of complainant, committed Qatal-e-amd of deceased Mst. Nusrat (sister of complainant) by giving her fire-arm injuries and also fired shots at Mst. Zameeran which hit her right shoulder and neck with intention to commit her murder, for which present case was registered against him and others.

Initially the applicant applied for pre-arrest bail which was granted by the trial court but which was then cancelled by the Hon'ble Sindh High Court which



order was finally upheld by the Hon'ble Supreme Court vide order dated 23.12.2013, which found as under at paragraph 5 of the said order.

5. We are of the opinion that the petitioners have been squarely nominated by the Complainant in the crime in question and the medical evidence on record corroborates the ocular version. Therefore there was no good reason for the grant of pre-arrest bail to the petitioners and the learned trial Court has incorrectly given this concession to them, hence we find no occasion to interfere in the impugned order. Consequently, this Petition is dismissed and leave refused.

4. That the applicant then moved the trial court for bail based largely on medical grounds and his old age however by order 19.01.2016 the learned trial court dismissed his bail on medical grounds and old age (the impugned order). The applicant has now approached this court against the impugned order and submitted that the learned judge erred in passing the impugned order and that the applicant is entitled to bail on medical grounds and on account of his old age. In terms of his old age he submitted that the applicant was around 79 years of age and this amounted to infirmity in terms of old age and that he was entitled to bail on that ground alone. He also submitted that it was an admitted position that the applicant was suffering from Hepatitis-C which illness could not be properly treated in jail and was hazardous to his life. In this respect he placed reliance on a medical report of the medical officer of the District Prison Ghotki dated 14.12.2015. He also placed reliance on the cases of **Ghulam Raza V. Khuda Bux and another** (2005 SCMR 1904), **Abbas V. The State** (2000 SCMR 212) and **Ghous Ali V. The State** (2008 P Cr L J 647).

5. On the other hand, learned A.P.G for the State opposed the grant of bail on the grounds of old age and the fact that the applicant suffers from Hepatitis-C. With regard to the age of the applicant he submitted that this was irrelevant in terms of bail and placed reliance on **Haji Allah Ditta V. The State** (1987 P Cr L J 13). He



also submitted that the applicant could be adequately treated inside the jail premises and as such he was not entitled to medical bail.

6. Learned counsel for the complainant also opposed the grant of bail on medical grounds to the applicant mainly on the ground that Hepatitis-C was a common disease and could be adequately treated in jail and was not hazardous to the applicant's life. Furthermore he submitted that no material has been placed on record to show that the condition of the applicant had deteriorated in recent times. In support of his contentions he placed reliance on the cases of **The State V. Haji Kabeer Khan** (PLD 2005 S.C 364), **Zarin Khan V. The State** (1980 SCMR 305) and **Shahbazuddin Chaudhry V. The State** (PLD 2004 SC 785).

7. I have considered the submissions of learned counsel, perused the record, relevant law and considered the authorities cited by them at the bar.

8. The statutory basis for the grant of bail on medical grounds can be found in the first proviso to S.497 Cr.PC which provides as under:

“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.

Provided that the Court may direct that any person under the age of sixteen years or any woman **or any sick or infirm person accused of such an offence be released on bail.**” (bold added)

9. It is clear from the proviso that it encompasses “any sick or infirm person”

10. The question which therefore emerges is how have the Courts interpreted the above proviso to section 497 (1) Cr.PC and what is the test for determining whether a person is entitled to bail on medical grounds on account of him being sick or



infirm bearing in mind that there are likely to be different stages and levels of sickness and infirmity.

11. This court in the unreported Divisional Bench case of **Kifayatullah V Federation of Pakistan and others** (C.P. No.D-6758 of 2015) dated 24-05-2016 in which I was one of the members had considered in detail the relevant law to be applied in cases of bail on medical grounds. For ease of reference that discussion from para's 14 to 19, which I believe to be the correct law on this issue is set out below for ease of reference:

14. In our view the test for determining whether or not a person could be released on bail on medical grounds or not was initially laid down as long ago as 1995 by the Hon'ble Supreme Court in the case of **Mohammed Yousafullah Khan V State** (PLD 1995 SC 58) where it was held at P.65 as under:

"From the above discussed position it is clear to us that the bail on medical ground can be granted under section 497, Cr.P.C. if the Court reaches the conclusion on the basis of medical report that the ailment with which the accused is suffering is such that it cannot be properly treated while in custody in Jail. The fact that the appellant is not suffering from any particular type of injury (as observed by the learned Judge that there was no fracture of bone in that case), would not be a ground either to refuse or grant the bail on medical ground. **The correct criteria for grant of bail to an accused in a non-bailable case, on medical ground, in our view, would be that the sickness or ailment with which the accused is suffering is such that it cannot be properly treated within the premises of jail and that some specialized treatment is needed and his continued detention in Jail is likely to affect his capacity or is hazardous to his life**". (bold added)

15. The test would therefore appear, in non bailable cases such as the instant case, to have the following limbs as set out below all of which in turn the court would need to be satisfied of, based on the medical reports, before the Court before bail on medical grounds can be granted under the first proviso to S.497 (1) Cr.PC

- (a) the sickness or ailment with which the accused is suffering is such that it cannot be properly treated within the premises of jail **and**



(b) that some specialized treatment is needed **and**

(c) his continued detention in Jail is likely to affect his capacity **or** is hazardous to his life

16. This test was followed in the case of **Mian Manzoor Ahmed Watto V State** (2000 SCMR 107) and the **State V Haji Kabeer Khan** (PLD 2005 SC 364) where at P.371 in Haji Kabeer's case (Supra) it was observed as under:

"In addition to it we may observe that when it has been established as a matter of fact that the respondent has been getting proper treatment in the hospital or in Jail he would not be entitled for grant of bail as it has been held in the case of **Zarin Khan v. The State** 1980 SCMR 305."

17.....

18.....

19. However, bearing in mind that in **Saeed Mehdi's case (Supra)** the **bail on medical grounds was unopposed and it was conceded** by the prosecution that the petitioner requires immediate treatment, hospitalization and close monitoring by specialists in a well-equipped hospital **and other grounds for bail had also been made out** and the case of **Peer Mukaram(Supra)** concerned bail under S.426 Cr.PC and that he was **also granted bail on account of his having served a substantial portion of his sentence** and as such his medical condition, as in **Saeed Mehdi's case (Supra)**, was not the sole ground for the grant of bail we are of the view that the complete original test as laid down in **Mohammed Yousafullah's case** and as affirmed in **State V Haji Kabeer Khan's case** remains the test to be adopted even if greater emphasize is to be placed on the sickness not being able to be properly treated in the jail premises. In our view what the cases of **Saeed Mehdi (Supra)** and **Peer Mukaram (Supra)** tell us is that each case must be judged against the test for bail on medical grounds on its own particular facts and circumstances and that no single case is likely to be the same"



12. Thus, in my view the correct legal test for the grant of medical bail as affirmed time and again by 3 member benches of the Hon'ble Supreme Court is that the following grounds must be satisfied based on the medical evidence.

- (a) the sickness or ailment with which the accused is suffering is such that it cannot be properly treated within the premises of jail **and**
- (b) that some specialized treatment is needed (grater emphasis to be given based on recent case law as cited above) **and**
- (c) his continued detention in jail is likely to affect his capacity **or** is hazardous to his life

13. It is made clear that each case must be based on its own particular facts and circumstances and no case is likely to be the same. It is also made clear that each independent limb of the test must be satisfied. i.e. sub para's (a), (b) and (c) in para 12 above.

14. We now need to consider the medical evidence which has been brought on record to consider if it meets the legal test for the grant of medical bail. The first hurdle which the applicant must cross is (a) to show that the sickness or ailment with which the accused is suffering is such that it cannot be properly treated within the premises of jail

15. The applicant has relied exclusively on a medical report of the medical officer of the District Prison Ghotki dated 14.12.2015 which is set out as under:

**BELOW EXTRACT OF REPORT No. 640 DATED:
14.12.2015 RECORDED IN THE REGISTER NO: 44 BY THE
MEDICAL OFFICER OF DISTRICT PRISON GHOTKI.**

With the reference of Honourable 3rd Additional Sessions Judge Mirpur Mathelo vide letter No.1156 dated 11.12.2015, it is to inform that UTP Hussain S/o Sanwan Gabole is **Hepatitis C positive case.**

As already there are seven UTPs who are Hepatitis C positive and also are under treatment, hence there is possible treatment



inside prison for Hepatitis C. However depending upon the age, the said UTP is referred to GMMC Hospital Sukkur for expert treatment of Physician. The final report would be submitted in Honourable Court after receiving the same from GMMC Hospital Sukkur.

Sd/-
Medical Officer
District Prison Ghotki.

16. The first point to observe is that the medical report relied upon is one year and 2 months old and in this period the applicant seems to have been adequately treated in the jail premises and no material has been placed on record thereafter of any deterioration in his health. The report also specifically states that "As already there are seven UTPs who are Hepatitis C positive **and also are under treatment, hence there is possible treatment inside prison for Hepatitis C.** As such according to the report relied upon by the applicant the applicant can be treated inside jail for his ailment.

17. It is true that the report also states that, "however depending upon the age, the said UTP is referred to GMMC Hospital Sukkur for expert treatment of Physician. The final report would be submitted in Honourable Court after receiving the same from GMMC Hospital Sukkur"

18. No such final report however or any other medical evidence was placed before us although the following was observed in the impugned order at Para (c) which in addition to the above report added the following words,

"However, depending the age, the said UTP is referred to GMC Hospital Sukkur for expert treatment physician **and further opined that according to physician said UTP age is not candidate for interferon and ribavirin therapy, so he is advised to take medicine tab. Glucophage, Tab: Ascard & Tab. Silver"**



19. The above finding does also not seem to indicate that the applicant cannot be treated adequately for his illness within the jail premises.

20. Learned counsel for the applicant had in particular relied upon a 2 member Bench order of the Hon'ble Supreme Court in the case of **Abbas V. The State** (2000 SCMR 212) where a prisoner who was also suffering from hepatitis C (the same ailment as the present applicant) had been granted medical bail. I am of the view that this case is distinguishable from the current case in that 3 member benches of the Hon'ble Supreme Court have consistently **after** the case of **Abbas V. The State** (Supra), held that the above referred 3 pronged test is applicable, that medical bail should only be granted based on the opinions of duly constituted medical boards and even then for strong reasons that the applicant's medical treatment was not possible in jail bearing in mind the advancement in medical treatment and facilities. Even otherwise 17 years on from the case of **Abbas V. The State** (Supra) the willingness and ability to provide proper treatment to patients suffering from hepatitis C in the jail infirmaries has greatly improved and thus I distinguish the case of **Abbas V. The State** (Supra) from the instant case

21. It would appear therefore that based on the medical report the applicant can be adequately treated in jail for hepatitis C and as such his application for medical bail fails to pass the first of the three legal requirements for the grant of bail on medical grounds (i.e. sickness) and as such his application for the grant of bail on medical grounds (sickness) is hereby dismissed.



The next issue to be addressed is whether the applicant is entitled to bail based on his infirmity (as opposed to sickness) which is a separate aspect of the proviso to S.497(1) Cr.PC which provides as follows, "or infirm person accused of such an offence be released on bail."

23. The question which we need to consider is how have the Courts treated cases of "infirmity" in the context of the proviso to S.497(1) Cr.PC.

24. In the case of **Allah Ditta V. The State** (1987 P Cr L J 13) it was held at p.16 Para 9 as under when defining infirmity;

"Para 9. In respect of accused petitioner Allah Ditta, learned counsel had next submitted that he is 70 years of age and is, therefore, an infirm person and for that reason he should be granted bail under first proviso to subsection (1) of section 497, Cr.P.C. However, beside the fact that the learned counsel has not produced any proof of said age of the said accused, **there is the further circumstances that it is now well-established that the infirmity means impairment of bodily strength or extreme weakness or languor of a disabling nature and is a concept totally different from mere old age. A man of 70 years and even of 100 years can be quite healthy fit and even stout fully able to perform his normal avocation while a man of only 50/60 years of age may be physically so weak that he may safely be called an infirm person.** (bold added)

25. According to the Oxford English dictionary 10th edition, the word "infirm" is defined as under;

"Infirm". Adj. 1 **not physically strong especially through age** 2. archaic Irresolute, **weak**. DERIVATIVE infirmly adv. ORIGIN ME: from L. infirmus, from in 'not' firmus 'firm'. (bold added)

26. In the case of **Zarin Khan V. The State** (1980 SCMR 305) the Hon'ble Supreme Court held as follows in terms of infirmity at P.306.

"Now it is true that in all the said reports the petitioner is said to be suffering from Asthmatic Bronchitis of chronic type with left pulmonary T.B. But the learned Judge in the High Court felt satisfied that **the said illness was not of the type which would render the petitioner an infirm person within the meaning of the second proviso to section 497, Cr.P.C, and consequently, dismissed his petition observing that he could be satisfactorily treated in jail hospital.**

We are quite inclined to agree with the said finding recorded in the High Court. It is true that according to the report of the private doctor of the petitioner, namely, Doctor Muhammad Murad he remained under his treatment for the last one year. **But even Doctor**



Murad does not claim that during the said period the petitioner had remained with him as an indoor patient. The opinion of the Jail doctor no doubt is that the petitioner is in need of the treatment of a Specialist. But according to the Medical Board of three eminent doctors all that the petitioner needs is proper treatment irrespective of the fact whether he is inside or outside the jail. In this view of the matter, the learned counsel for the petitioner was unable to contend that the order passed by the learned Judge in the High Court was perverse or unreasonable" (bold added).

27. The case of **Ghous Ali V. The State** (2008 P Cr L J 647) which the applicant has primarily relied upon for his contention that the applicant is entitled to bail under the proviso to S.497 (1) Cr.PC on the grounds of infirmity is, in my view, distinguishable from the present case in that it concerned a number of issues in addition to the question of infirmity of the applicant which only appears to be a side issue in that case. In that case the main issue was whether an absconder could be granted bail, whether it was a case of further inquiry which was conceded to by state counsel and whether it was fair to keep the applicant behind bars for over 22 months without any justification with the trial not even commencing which amounted to punishment before trial. Furthermore, there was no discussion on what amounted to infirmity under the proviso to S.497 (1) Cr.PC. However in the case before me the trial is proceeding expeditiously and the only issue is the medical condition of the applicant and his alleged infirmity.

28. In my view the age of the applicant being 79 does not automatically make him infirm. Infirmness in my view was correctly defined in **Allah Ditta's case** (supra) where it was held that, "**it is now well-established that the infirmity means impairment of bodily strength or extreme weakness or languor of a disabling nature and is a concept totally different from mere old age**" Such finding is also in line with the OED definition of infirmity.



29. Even in **Zarin Khan's** case (Supra) although the applicant was suffering from a medical condition, as in this case, this did not make him automatically infirm.

30. In my view the age of the person in determining whether a person is infirm for the purposes of the proviso to S.497 (1) is not the conclusive factor. Although old age especially coupled with serious medical conditions may amount to infirmity in my view this would only be the case **if additionally** a duly constituted medical board found that the applicant was on account of his continued confinement in jail due to no fault of his own was permanently now too weak and not strong enough to be able to perform the usual activities of life without any major discomfort.

31. In the case before me the applicant has placed no material, medical or otherwise, on record in support of the applicant's infirmity and has simply relied on his age. Thus, in my view the applicant has not made out a case to be released on bail on the ground of infirmity under the proviso to S.497 (1) Cr.PC and as such his application for bail is also denied in respect of the ground of infirmity.

32. In summary the applicant's application for bail under the proviso to S.497 (1) Cr.PC on both medical grounds and/or on account of his infirmity stands dismissed.

33. I have however observed that the case is a murder case and that it is in the advanced stages and as such I direct the trial court hearing this matter to decide the same within 4 months of the date of this order a copy of which shall be transmitted by the office immediately to the concerned trial court for compliance.

Sd/-
MOHAMMAD HUMAYON KHAN,
JUDGE.

SUKKUR

DATED: 06-03-2017

CERTIFIED TO BE TRUE COPY

TYPED BY

COMPARED BY

READ BY

ASSISTANT REGISTRAR.

