IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Cr. Bail Appln. No. S-795 of 2014

Muhammad Ayoob and others

Versus

The State

Date of hearing 02.03.2017

Mr. Iftikhar Ali Arain, advocate for applicants a/w the applicants.

Mr. Nisar Ahmed Bhanbhro 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 Appln. No.S795 of 2014 whereby the applicants (Muhammed Ayoob, Gohram and Sono Khan) have sought the confirmation of the pre arrest bail granted to them vide order of this Court dated 31-12-2014.

2. The brief facts of the case are that complainant Falak Sher Rind registered F.I.R No.189/2014 at PS Kandiaro on 21-09-2014 at 1400 hours U/S 392 PPC, alleging therein that the applicants all duly armed had alighted from their motor bike and had robbed him of his motor cycle, RS 5,000 and his mobile phone.

3. After lodging of the F.I.R and after usual inquiry the matter was challaned and the charge framed against the applicants on 16-02-2015.

4. Learned counsel for the applicants submitted that the malafides on the part of the complainant was that the applicants had filed a civil suit against the complainant and others and that the F.I.R had now been filed against them by the complainant as revenge for filing the civil suit and in order to pressurize them to withdraw the civil suit which remains pending. He further submitted that since being granted pre arrest bail by this Court the applicants had been regularly

attending the trial proceedings and had no intention of absconding. In addition he submitted that the complainant through his own conduct had virtually brought the trial to a halt which was evident by order dated 04-11-2016 passed by the Civil Judge and District Magistrate No.II at Kandairo (the Kandario Order) in the case in which they had been charged being case 373/2014.As such for the above mentioned reasons the learned counsel for the applicants submitted that the bail of the applicants should be confirmed.

5. Learned state counsel submitted that the case under S.392 PPC fell within the non prohibitory clause, that malafide had been shown against the applicants by the complainant and on account of the above referred Kandairo Order since the trial in effect was in abeyance he very fairly did not oppose the confirmation of the pre arrest bail granted to the applicants.

6. On the other hand learned counsel for the complainant opposed the confirmation of bail. He submitted that there had been no malafide on the part of the complainant and as such the applicants were not entitled to bail. In this respect he placed reliance on the case of **Rana Mohammed Arshad V Muhammed Rafique** (PLD 2009 SC 427).

7. He further submitted that an offense under S.392 PPC fell within the prohibitory clause of S.497 Cr.PC and as such the applicants were not entitled to bail as of right. With regard to the Kandiaro Order he submitted that this was an illegal order and had no legal sanctity. He further submitted that the past conduct of the applicants also disentitled them to the confirmation of their bail as they had been granted pre arrest bail by the trial court but they had failed to join the inquiry which lead, to amongst others things, the recalling of their interim pre arrest bail by the trial court by order dated 04-12-2014 and lead to them approaching this Court for ad interim pre arrest bail which was granted vide order dated 31-12-

2014.Thus for all the above reasons he submitted that the pre-arrest bail granted to the applicants should not be confirmed.

8. I have considered the arguments of learned counsel, perused the record and considered the authorities cited by them at the bar.

9. It is correct that in cases of pre arrest bail malafides has to be shown on the part of either the complainant or the police. Based on the facts and circumstances of this case namely the complainant filing the F.I.R against the applicants **after** they filed the civil suit against him I am satisfied that the F.I.R has prima facie been lodged for malafide reasons in order to pressurize the applicants into withdrawing or settling the civil suit. I am fortified in my view by the Kandario Order which clearly shows that the complainant is making no attempt whatsoever to proceed with, let alone, complete the trial of the applicants and his sole purpose seems to be to unnecessarily linger it on whilst the sword of Damocles remains hanging over the heads of the applicants which conduct itself appears to be prima facie malafide.

10. With regard to S.392 PPC this section reads as under;

> "**392. Punishment for robbery**. Whoever commits robbery shall be punished with rigorous imprisonment for a term which [shall not be less than three years nor more than] ten years, and shall also be liable to fine; **and, if the robbery be committed on the highway the imprisonment may be extended to fourteen years.** (bold added)

11. In my view a plain reading of Section 392 PPC makes it clear that even if robbery is committed on the highway, which has not been proven in this case, the maximum imprisonment may be extended from not more than ten years to not more than fourteen years imprisonment. However even in such circumstances the

minimum period of not less than three years shall apply when the trial judge considers passing a sentence if the accused is convicted under S.392 PPC. It is trite law that when the sentence carries a range e.g. from five to fifteen years imprisonment for the purpose of bail the lower end of the range must be considered which in the case of Section 392 PPC is three years. Accordingly as per the classic judgment in the case of **Tariq Bashir V. State** (PLD 1995 SC 34) bail should be granted as a right as opposed to a concession to the applicants.

12. With regard to the past conduct of the applicants, this to some extent is condonable, in the sense that since being granted pre-arrest bail by this court over two years ago the applicants have been regularly attending the trial proceedings.

13. What is most shocking however in this case is the Kandiaro Order which remains in the field. It is pertinent to note that despite learned counsel for the complainant stating that it is an illegal order he has not challenged the same. For ease of reference the Kandiaro Order is set out below:

> ORDER
> 04.11.2016
>
> F.I.R against the accused persons was lodged on 21.09.2014. The police after usual investigation submitted Challan on 20.10.2014. The charge against the accused was framed on 16.02.2015 to which accused persons pleaded not guilty and claimed to be tried.
>
> Perusal of the record shows, that after framing of charge, matter was fixed for evidence, during that complainant appeared on some dates and filed applications for production of witnesses, but no witness appeared before this court. Thereafter the bailable warrants were issued upon the PWs but it returned unexecuted due to non availability of Prosecution witnesses at their specified addresses. Thereafter, non bailable warrants have been issued in order to procure the attendance of prosecution witnesses but the same returned unexecuted. It has been observed that from the date of framing of charge not a single witness has appeared in Court. **Moreover, the Complainant is in full knowledge of the proceedings of this case but he used to file the adjournment applications, so far he has not made a single appearance of**

witnesses. To my utter surprise no intimation has been sent by any Prosecution witnesses to this Court assigning reasons for non appearances. **The accused persons have been attending the Court regularly and they are suffering undue hardships on account of deliberate non appearance of Prosecution witnesses. The case has been prolonged for more than 2 years but the trial could not be concluded due to delaying tactics of complainant** and non appearance of prosecution witnesses. According to National Judicial Policy, 2009 all criminal cases not punishable with death or imprisonment for life or imprisonment for ten years should be decided within six months. **As the prosecution has failed to produce witnesses further proceedings of the case will be abuse of process of Court and it will cause undue hardship for accused persons. Moreover, the learned counsel of the complainant, filed the statement and started therein that this court may pleased to stop the proceeding against the accused persons, and when complainant produced the witnesses the case may be re-opened.**

The Prosecution was given notice and learned ADPP candidly conceded the facts narrated hereinabove but he formally opposed. The learned ADPP did not furnish any good reason for keeping the case pending. **Under these circumstances the proceedings of this case has been stopped till appearance of all Prosecution witnesses. The case shall be reopened on the condition that Complainant will furnish surety in the sum of Rs.50,000/- for production of all private witnesses on one date of hearing as may be fixed by the Court.** The accused persons are present on bail dispensed with the attendance till they are summoned and there bail bond is cancelled and surety is discharged.

14. It is quite apparent from the Kandario Order that the complainant has absolutely no interest in pursuing this case and his counsel had even filed the statement that the court may be pleased to stop the proceedings against the accused persons and when the complainant produces the witnesses the case may be reopened. It is notable that the complainant has not even recorded his own evidence.

15. Keeping a side the above discussion the question needs to be asked whether based on the facts and circumstances of the case, whereby the trial has been halted largely on account of the complainant's conduct, it would serve the interests of justice to recall the pre-arrest bail granted to the applicants. In my view the answer to that question is a resounding "No". In such circumstances to recall the interim

pre-arrest bail would serve no useful purpose and in my view tend to defeat the ends of justice and would probably amount to an abuse of the process of law. This is more so since it is the role of the prosecution to prosecute the case and the role of the trial judge to manage the trial proceedings. The applicants should not be prejudiced/made to suffer due to no fault of their own especially, as they were regularly attending the trial proceedings, and it is settled law that bail should not be withheld as a punishment. Based on the facts and circumstances of this case to recall the applicant's pre-arrest bail would in my view amount to punishing them as no trial proceedings are currently taking place and based on the history of the case it seems unlikely that any trial proceedings will take place in the near future. Under such circumstances I am not prepared to potentially permit the applicants to rot in jail for years on end if they are arrested if I recall their pre arrest bail. This, as noted above, would be a complete in justice to the applicants

16. Thus based on the above discussion and the facts and circumstances of this particular case each of the applicants' interim pre-arrest bail is confirmed subject to furnishing additional surety in the sum of Rs.1,50,000/- each and P.R bond in the like amount to the satisfaction of the Additional Registrar of this court.

17. These are the reasons for my short order dated 02.03.2017.

Sd/-
MOHAMMAD KARIM KHAN AGHA.
JUDGE.

SUKKUR
DATED: 02-03-2017

CERTIFIED TO BE TRUE COPY

TYPED BY

COMPARED BY

READ BY

ASSISTANT REGISTRAR.