

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Criminal Bail Application No.1307 of 2015

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

Present:
Mr. Justice Nazar Akbar

Applicant: Muhammad Iqbal through Naveed Ali,
Advocate.

Respondents: The State through Ms. Rahat Ahsan, D.P.G.

Date of hearing **16.12.2015**

Date of Annoucement: **23.12.2015**

ORDER

Nazar Akbar, J. The Applicant is facing trail in crime No.57/2011 under Section 302 PPC registered at PS Ferer, Karachi. His first bail application was rejected by IIIrd Additional District & Sessions Judge (South) Karachi by order dated **18.10.2012**. Thereafter he moved another bail application on statutory ground which was also dismissed by IIIrd Additional District & Sessions Judge (South) Karachi on **08.09.2015** and therefore, he has preferred the instant bail application only on the ground of statutory delay in the trial.

2. Very briefly the accused is charged with slaughtering his own daughter aged about 3/4 years inside his own house. The FIR was lodged by the real brother in law of the applicant on the basis of facts narrated to him by the mother of the victim and wife of the applicant/accused. This is first bail application before the High Court. The counsel of the applicant has referred to several judgments on the point of grant of bail on account of statutory delay. Counsel for the applicant has also argued that heinousness of crime is not enough to withhold the bail. Learned Deputy Prosecutor has also relied on various case laws to counter the arguments of grant of bail merely on delay in trial.

3. There is no cavil to the preposition that delay in trial is a valid ground for seeking bail. However, in the name of statutory delay, the Court is not supposed to give up its sacred duty of careful examination of the facts and circumstances of the case before exercising the discretion in favour of the applicant for grant of bail. In every case the Court is not supposed to rely on the circumstances in which delay in trial has been caused by the accused or the prosecution and decide the fate of bail application on mathematical calculations. Other factors cannot be simply ignored. The prime duty of the Courts in bail matters, is to see that there are **“reasonable grounds for believing that the applicant has been guilty”** or not. The use of word **“shall not”** in main **Section 497 Cr.P.C** to deny bail is mandatory in cases where reasonable grounds exist for believing the guilt of the applicant. Therefore, the use of word **“shall”** in third proviso to release the accused person on ground of being in detention for continuous period of two years even in absence of conditions mentioned in the forth proviso would not take away or undermine the duty of Court to examine the other attending circumstances and evidence connecting the accused with offence to the extent of “reasonable believe” against him. When the provision of law is couched in negative terms and places an embargo on Court then a strict view is required to be taken. The use of word **“shall”** in the third proviso has lost its mandatory command for two reasons; Firstly, the proviso to any section in an enactment cannot be interpreted to render the effect of main section null as void, such as the limited discretionary power of Court for grant of bail in non-bailable offences, and secondly, the use of word **“shall not”** in main **Section 497 Cr.P.C** has made it mandatory for Court to check “reasonable ground for believing or not believing in the guilt of applicant before releasing anyone on bail.

4. In the case in hand the contents of FIR dated **18.02.2011** fully implicates the applicant and unfortunately the complainant is real brother of his wife. The wife has nowhere disputed the contents of the FIR. The police

had already recovered knife used in the commission of an offence of slaughtering his 3/4 years old innocent daughter. The accused was arrested immediately from the place of offence, and on 19.01.2011 he has even confessed his guilt.

5. The truth has come on record when the complainant on the spur of the moment recorded the true facts of the offences committed by the applicant in the FIR with all genuineness and natural course of events uninfluenced by the consequences of true facts of the case against the applicant. May be with the passage of time the pain and agony of the complainant party for the victim has subsided and slowly and gradually they have developed sympathy with the accused for the obvious reasons. The delay in the proceedings at times is willfully and deliberately contributed by the complainant side with connivance of prosecution not for the fear of possible acquittal of accused on account of weakness of the case of prosecution but may to give long term benefit to the accused in the name of delay in the trial to favour the accused who otherwise has a dark case. The accused and the complainant party are so closely related to each other that developing a soft corner for the accused in the heart of complainant cannot be ruled out. Keeping in view the changing mood of complainant side for the obvious reasons, on **20.11.2015** I had passed the following order:-

“Adjourned to 14.12.2015. In the meanwhile, trial court is directed to ensure that Sessions Case No.139 of 2011 proceeds on weekly basis and prosecution should examine at least two more witnesses before 12.12.2015. Failure of the trial court to examine two witnesses in the given time should be explained in writing and such explanation should reach to this court by 12.12.2015. I.O. should also be present in court on next date of hearing to explain the circumstances in which he has failed to complete the trial in the case even when witnesses are available and they are ready to proceed with the case.”

The charge sheet shows that there are only seven prosecution witnesses. Complainant has already been examined and at least one more witness was examined by the Court after last order dated 20.11.2015, Three (03) officials

i.e. two Sub Inspectors and one Lady MLO and 02 private witnesses who are closely related to the complainant have to be examined.

6. I am afraid the order dated 20.11.2015 has not been fully complied with. By **12.12.2015** the trial Court has not furnished explanation of not completing examination of two prosecution witnesses. On **14.12.2015** the Investigating Officer was also not present. It was the duty of the prosecution to ensure that Investigating Officer should be present before the Court when the case has proceeded during this intervening period between **12.11.2015** to **14.12.2015**. It cannot be believed that Investigating Officer unaware of the order dated **20.11.2015**. Therefore, in the given circumstances the benefit of delay may not be attributed to the accused directly, however, the conscious efforts of complainant and prosecution in sharing the burden of delay cannot be ruled out in the peculiar circumstances of this case.

6. In view of the above circumstances, since the discretion of grant of bail is not supposed to be uncontrolled and unreasonable and the Court has to see the circumstances in which the delay took place, I am not convinced to grant bail simply on the ground of statutory delay in the facts and circumstances of the present case.

7. The bail application is dismissed. However, the trial Court is given four months time from the date of receiving of this order to complete the prosecution evidence. The Sessions' case No.139/2011 should be listed for hearing before the trial Court on weekly basis and if, for whatever reason, on the given date case could not proceed on account of sudden holiday or strike called by the Bar Associations the case should be taken up on the very next working day. On each and every date absence of witnesses will amount to willful failure of the prosecution and the Investigating Officer to produce them. The private witnesses are traceable as they reside in one and the same premises in the heart of the city. They should be bound down before hand. The failure to complete the evidence within four months by the prosecution shall entail disciplinary action against the Investigating Officer and Incharge

prosecution branch, Ferer Police Station, Karachi. Copy of this order be sent to SSP (South) Karachi with directions that he should keep an eye on the proceedings and in case of failure of prosecution he should take disciplinary action against the Investigating Officer and report to the Court through M.I.T-II for its perusal in the Chamber. The trial Court is also directed to submit progress report after every 30 days to the High Court through MIT.

Judge

M. Ayaz/PS