IN THE HIGH COURT OF SINDH AT KARACHI

CR. BAIL APPLICATION NO.1399/2018

Applicant : Fahad Parekh,
through Mr. Asghar Ali Khan, advocate.

Respondent : The State,
through Mr. Muhammad Aslam Bhutta, Assistant Attorney General.

Date of hearing : 02.11.2018.

Date of short order : 02.11.2018.

O R D E R

Salahuddin Panhwar, J: Through instant application applicant seeks post arrest bail in FIR No.262/2018, u/s 17(1), 17(2)(b), 22(b) of Emigration Ordinance 1979 r/w section 420, 468, 471, 109 PPC PS FIA, ATH Circle, Karachi.

2. *Precisely*, it is alleged that during enquiry at immigration re-checking counter on scrutiny, travel documents of Syed Mubashir Anwar were found fake including visa hence he was detained for further investigations; further it was revealed that he was desirous to go to South Africa for employment purpose hence he contacted with applicant; applicant alongwith co-accused Sohail Samana arranged visa after receiving Rs.200,000/- from brother of victim, accordingly both were arraigned.

3. At the outset learned counsel for applicant contends that relevant sections provide alternate punishment hence trial court is

competent to pass sentence with the term of seven years or to pass sentence of fine, he further contends that lesser punishment can be considered while deciding bail application, co accused has been acquitted by the trial court only with the direction that he shall pay fine hence at the most applicant can be extended same conviction therefore he is entitled for bail. Relied upon 2014 PCrLJ 297, 2016 YLR 355, SBLR 2016 SINDH 1908. He has also emphasized that charge framed by the trial court against co-accused wherein accused is charged under section 17(1) of Immigration Ordinance 1979 read with section 471 PPC. Learned APG contends that referred sections are providing alternate sentence whereas fine is not mandatory and this is discretion of the trial court to impose any fine while awarding rigorous sentence.

4. Heard and perused the record.

5. Admittedly quantum of lesser punishment for the offences, if appreciated for bail purpose, brings the case out of the prohibitory clause; co-accused has also been convicted for punishment of *fine* of Rs.12000/- only, hence applicant's case falls within the scope of further enquiry, hence he was admitted to post arrest bail by short order dated 02.11.2018 which is that :-

> "For reasons to be recorded later on, applicant is admitted to post arrest bail in the sum of Rs.100,000/- (Rupees One Lac) and P.R. bond in the like amount to the satisfaction of the trial Court. Besides, this court has noticed irregularity/ illegality in the judgment dated 25.09.2018 passed by the trial court in FIR No. 262/2018, under section 17(1), 17 (2) (b), 22 (b) of E.O. 1979 read with Section 420, 468, 471, 109 PPC, hence, to examine further the illegality of referred judgment, office shall call R & P."

6. While parting, I feel it quite necessary to attend the plea, so raised by the learned counsel for the applicant, to effect of entitlement of present applicant / accused to punishment of *fine* only as was done with co-accused **Syed Mubashir Anwaar**. Before going to attend this *plea,* a direct referral to acquittal order, being relevant, is made hereunder:-

> The accused Syed Mubashir Anwaar s/o Syed Anwaar Hussain alongwith absconding accused Fahad Parekh s/o Muhammad lqbal and Sohail Samana s/o Wali Muhammad were chaIlaned by FIA AHTC Karachi to face trial before this Court.
>
> As per prosecution case, the allegations against the accused are that he on 10-05-2018, with the assistance of absconding accused Fahad Larokh s/o Muhammad lqbal and Sohail Samana s/o Wali Muhammad, departed for Dubai for onward journey to South Africa for employment against Rs.600,000/- to be paid on reaching at the destination, on the basis of his passport No.AD-1797623 and Tourist visa for Dubai arranged by them, and after reaching at Dubai, associates of absconding accused arranged/got affixed fake/forged visa sticker No. LMTZNFP on page No.13 of his passport, wherefrom he proceeded to Mozambique and then entered in South Africa illegally by crossing the borders of Swaziland and South Africa and started the work but after two months he decided to return Pakistan, therefore, his elder brother Syed Ashraf paid Rs. 200.000/- to absconding accused Fahad and then he came back to Pakistan on 17.09.2018 on the basis of aforesaid travel documents but on arrival the immigration authorities at JIAP Karachi apprehended and detained due to fake forged visa sticker affixed on his passport and referred to FIA AHT Circle Karachi whereafter preliminary enquiry, a crime was registered against him and the absconding accused and afer usual investigation complaint in terms of Section 24(6) of E. O. 1979 was filed charging the ***present accused U/s.17(1) of E. 0. 1979 R/w Sec. 471 PPC*** and the absconding accused named above for the offences punishable *U/s.17(2)(b), 22(b) of E. 0. 1979 R/w Sec.420,468,471,109 PPC*
>
> To a formal charge the present accused pleaded guilty and prayed for mercy.
>
> The accused on further questioning as to why conviction should not be recorded on his plea of guilt, replied that he has no explanation and that he is ashamed for the said offence and undertook not to repeat such an offence in

> future and prayed for taking of lenient view.
>
> In the light of above I am satisfied that his plea of guilt is voluntary without any external pressure. Since the accused has placed himself at the mercy of the Court and that he is in jail since the date of his arrest, I am inclined to take lenient view, hence, the accused named above is convicted under ***Section 17(1) of E. 0. 1979 R/w Sec.471 PPC*** and sentenced him to pay ***fine of Rs.12,000/-*** or in default thereof to suffer S. I. for three months. Accused is produced in custody and has paid the fine, thus he is remanded back to Jail with the directions to release him forthwith, if he is not required in any other case/FIR.
>
> The case against the absconding accused Fahad Parekh s/o Muhammad lqbal and Sohail Samana s/o Wali Muhammad be kept on Dormant File to be recalled as and when they are arrested."

From above, it is *prima facie* undisputed fact that the co-accused Syed Mubashir Anwaar was charged for committing two *different* offences i.e section **"17(1) of E.O, 1979** & section **471 PPC** and *even* trial court judge convicted and sentenced him for both the offence (s) while observing as:

> "the accused named above is convicted under ***Section 17(1) of E. 0. 1979 R/w Sec.471 PPC "***

but punishment awarded was:

> "and sentenced him to pay ***fine of Rs.12,000/-*** or in default thereof to suffer S. I. for three months"

At this point, it is necessary to reiterate the legal position that the conviction and acquittal must always be *specific* with reference to "**offence"** because it is never the ***crime number/FIR*** for which one is tried but the offence (s) which the accused is claimed to be *guilty***.** Every **'offence'** *legally* has its own ingredients (allegation) as well consequences therefore, either the *charged* accused is to be acquitted of every single charged offence else it shall be within competence of the court(s) to

convict accused for any of the offences regardless of his acquittal from some of the charged offences. Even the law permits conviction for the offence, not *specifically* charged but found proved.

The above has been the reason because of which it has been made a mandatory requirement of a *valid* judgment (within meaning of Section 367 of the Code) that acquittal must be with reference to offences while conviction must not only be with reference to offence but must specify the section thereof. The relevant sub-sections are referred hereunder:-

> "(2) It shall specify, *the offence (if any) of which*, and the **section of the Pakistan Penal Code or other law** under which, the **accused is convicted**, and the punishment to which he is sentenced. "
>
> "(4) If it be a judgment of acquittal it shall state ***the offence of which the accused is acquitted***, and direct that he be set at liberty. "

The manner the learned trial court judge has awarded sentence (s), *prima facie,* show that said principle has *entirely* been ignored because though trial court judge convicted the accused for two different offences yet awarded a single ***sentence*** which, *too,* without specification. I would add that conviction in the manner, as *referred,* cannot be said to be within mandatory requirement of Section 367(2) of *Code.* Any departure thereto would render the *judgment* as **'not legal'.** Reference, if any, may well be made to the case of *Irfan & another v. Muhammad Yousaf & another* (2016 SCMR 1190) wherein it is held as:-

> "6. Under the provisions of section 367(2) and (3), Cr.P.C. it is mandatory for the Court that after finding the accused guilty of one or more offences, upon recording conviction, separate sentence must be clearly awarded to the accused so

> convicted otherwise **it would be illegal being in violation of the mandatory provisions cited above**. In this case, no separate sentence was awarded to the appellants under section 7(a), A.T.A. by the Trial Court or the High Court, as explained above. This legal aspect of vital importance, conveniently escaped from the notice of the Trial court and the learned High Court in the second round when the appellants were seeking acquittal on the basis of compromise under section 302(b), P.P.C alone, because it cannot be compromised.... The provision of section 367 Cr.P.C. provides that the Court determine first the guilt of the accused and then to pass judgment of conviction whereafter the sentence shall follow.
>
> Being inseparable and integral part of conviction, unless specifically awarded, it cannot be assumed to the prejudice of the accused that he / they were also sentenced under section 7(a), A.T.A, by applying the rule of implication because the law provides the passing of specific sentence for a distinct offence and if it is not awarded, it cannot be construed that same was impliedly awarded as the very judgment **to that extent becomes illegal and violative of the mandatory provisions of subsections (2) and (3) of section 367 Cr.P.C."**

7. Be that as it may, to make things a little more clear, it would be conducive to reproduce sections wherein the accused was convicted.

> **17(1) of Emmigration Ordinance 1979**
>
> **"17. Unlawful emigration, etc.**
>
> (1) Whenever, except in conformity with the provisions of this Ordinance and the rules, emigrates or departs or attempts to emigrate or depart shall be punishable with imprisonment for a term which may be extended to five years, ***or with fine***, ***or with both***.
>
> (2) ...
>
> (a) .....
>
> (b)..
>
> (c) ....."

Ordinarily the word "or" is a disjunctive that makes an alternative which *generally* corresponds to the word "***either"*** which, *however,* is *often* used as interchangeable to word **'and'**, as in the instant case without

appreciating the fact context is always to be examined before taking the word **'or'** as interchangeable to the word **'and'**. Reference is made to the case of ***Muhammad Sanaullah v. Allah Din*** 1993 MLD 399 wherein it is observed as:-

> "9. The use of word 'or' signifies a disjunctive sense and it cannot be read as 'and', unless of course the context provides so…

Since the issue, involved, is with regard to **'legal punishment'** hence confining myself to this, I would add that basic concept of punishment is not to have one **'rotting behind the bars'** but reformation and deterrence (balance in society) *too*. Further, there also can be no denial to the fact that the every **'offence'** has its own characteristics; therefore, no ***fixed*** quantum of punishment for every offence can legally be accepted / approved. This has been the reason that legislatures, keeping in view concepts of punishments, have themselves chosen 'punishments' for every offence per their nature and seriousness.

The provision of Section 53 of the PPC *itself* has categorized the ***'punishments'*** into ten (10) different categories which a person, if found guilty, may be awarded as:-

> **Section 53: Punishments:**
>
> The punishments to which offenders are liable under the provisions of this Code are:
>
> *Firstly:-* **Qisas;**
>
> *Secondly:-* **Diyat;**
>
> *Thirdly:-* **Arsh**

Fourthly:- **Daman**

Fifthly:- **Ta'zir**

Sixthly:- **Death**

Seventhly:- **Imprisonment for life;**

Eighthly:- **Imprisonment which is of two descriptions, namely:--**
i) Rigorous, i.e, with hard labour;
ii) simple;

Ninthly:- **Forfeiture of property;**

Tenthly:- **Fine**

All the above sentences, being creation of the law *itself,* therefore, legally the Court is competent to pass ***that sentence*** or ***sentences*** which the offence itself provides but where the offence stands proved. Normally, no exception *legally* can be taken to the wisdom of the ***legislature*** and every word and phrase must always be taken as ***'deliberate*** and ***purposeful'***. Since, the importance of purpose of providing a ***likely*** punishment for an **'offence'** cannot be denied which *legally* is to be awarded by a Court alone, therefore, I sailed through the ***"Code"*** so as to see whether there has been *left* any ambiguity for Courts or *otherwise?*. I would say that such *sailing* through the ***'Code'*** makes me of the *view* that competence of the Court in awarding **'punishments'** has been made clear. Such competence can well be parted in two *main* categories i.e **'obligatory'** and **'discretionary'.**

9. The ***'obligatory'*** punishment is that which the Court cannot avoid if the accused is found *guilty* while the *discretionary* punishments are those where the Court has option of *choosing*. The *legislatures* themselves have deliberately detailed the ways wherefrom the Court can

competently find as to which punishment is ***obligatory*** and which one is ***'discretionary'.*** There can be no other *classic* example to make things clear but a referral to Section 302 PPC as the categories thereof (section 302 itself) are sufficient to establish this:-

> **"Punishment of qatl-i-amd:**
>
> Whoever commits qatl-e-amd shall, subject to the provisions of this Chapter be:
>
> a) Punished with death as qisas;
>
> b) punished **with death** or **imprisonment for life** as ta'zir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in Section 304 is not available; or
>
> c) punished with imprisonment of **either description** for a term which may extend to twenty-five years, where according to the injunctions of Islam the punishment of qisas is not applicable;"

For offence under section 302(a) PPC the Court has no discretion to award any other punishment except that of **'death as qisas';** while for offence under section 302(b) PPC the court has discretion to award any of two specific punishments i.e **'death'** or **'imprisonment for life'.** Any of two **'punishments'** , if awarded by a Court, shall be ***legal*** and ***valid.*** In the case of *Iftikharul Hassan v. Israr Bashir and another* (**PLD 2007 SC 111)** at rel. P-119, it was held as:-

> ".....The difference of punishment for Qatl-e-amd as Qisas and Tazir provided under sections 302(a) and 302(b), P.P.C. respectively is that **in a case of Qisas, Court has no discretion in the matter of sentence** whereas **in case of Tazir Court may award either of the sentence provided under section 302(b), P.P.C.** and exercise of this direction in the case of sentence of Tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender is absolved from sentence of death by way of Qisas if he is minor at the time of occurrence but in a case in which Qisas is not enforceable, the Court in a case of Qatl-e-amd, keeping in view the

> circumstances of the case, award the offender the punishment of death or imprisonment for life by way of Tazir. The proposition has also been discussed in Ghulam Murtaza v. State 2004 SCMR 4; Faqirullah v. Khalil-uz-Zaman 1999 SCMR 2203; Muhammad Akram v. State 2003 SCMR 885; and Abdus Salam v. State 2000 SCMR 338".

If the offence, appears to the Court to be one falling within meaning of Section 302(c) PPC then *legally* the punishment of ***'life imprisonment'*** cannot be awarded because such classified punishment has its own *definition* and legislatures have deliberately used the phrase ***imprisonment of either description*** (i.e rigorous and simple) upto **'twenty five years'** hence the Court, per circumstances, can award any punishment between sketched line i.e **'twenty five years'** which shall be legal and binding unless found *otherwise* by superior court of law.

10. From above referral it becomes quite clear that such ***discretion*** is provided by use of the phrase **'or with....'** hence I would be quite safe in concluding that the word **'or'** , used in detailing the punishments in PPC, *legally* cannot be taken as interchangeable to word **'and'.** Thing would further stand clear from referral to another way whereby legislature detailed the most of the punishments as:-

> ***"imprisonment*** *may extend to....., or with* ***fine,*** *or* ***with both;***

Here by use of phrase **'or with fine'** and **'or with both'** , it has been made quite clear that first, provided punishment of ***imprisonment,*** is not obligatory rather things have been left open at the ***discretion*** of the Court to choose the alternative **punishment** of **'fine'** and even can award both punishments of ***imprisonment*** as well as ***fine.*** Such ***discretion*** , however, shall always be subject to sketched guidelines, provided by the

law itself or enunciated principles. I would add that if there would have been any other *interpretation* for word **'or with'** then there was no need for adding phrase **'or with both'** in the ***end.*** In the case of *Ebrahim Brothers Ltd. v. Wealth Tax Officer & another* (PLD 1985 Karachi 407) it was observed as:-

> "... The above words and the term are to be read disjunctively as the use of a 'coma' and the word 'or' between the above words and term is not without significance but are employed to manifest that the same are to be read disjunctively. ...."

The ambiguity, if any, shall stand clear from referral to another way of detailing punishment whereby the likely punishment of ***imprisonment*** was added with phrase ***', shall also be liable to fine'.*** This ***phrase*** be not taken as integral and inseparable part of **punishment of *imprisonment*** which *otherwise* was / is obligatory / mandatory. To this view, I would take guidance from the case of ***Karo v. State*** (PLD 1963 (W.P) Karachi 256) wherein the proposition was framed as:

> "Whether the expression in the Penal Code 'and shall also be liable to fine, makes the imposition of fine obligatory or discretional?

and after thorough discussion and referring to different view was answered as:-

> "23. From what has been said above, we are clearly of the view that the expression "and shall also be liable to fine" appearing in the Pakistan Penal Code makes the imposition of fine discretional and not obligatory. We, therefore, while answering the reference hold that "and shall also be liable to fine" means that is within the discretion of the Court to impose a fine or not."

Said view was affirmed in the case of *Shamroz Khan & another v. Muhammad Amin & another* (PLD 1978 SC189).

10. Having said so, I would conclude that the word **'Or'** in the *Code,* while detailing punishments, would always be taken as '*disjunctive*' corresponding to the word "***either"*** and legally cannot be taken as interchangeable to word **'and'.** The use of word **'OR'** legally speaks about choosing one out of two or more options which *(act of choosing)* shall be **'*legal*'.** Therefore, conviction of ***'fine'*** alone in existence of such *'options'* for offence under section 171 *ibid* is **'legal**'.

However, since the accused was also convicted for offence under section 471 PPC *too* therefore, let's see whether the punishment provided therein has any such option or *otherwise?.* The provision of section 471 PPC reads as:-

> **"471. *Using as genuine a forged document:*** Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, ***shall be punished*** in the same manner ***as if he had forged such document"***

The provision does not specify any **'sentence'** but makes it clear that man, charged for such offence (471 PPC) shall be punished in the manner as if he *himself* has forged the document. The relevant provision for such offence (forging of a document) is **'468 PPC'** which reads as:-

> **"468. PPC. *Forgery for purpose of cheating:*** Whoever commits forgery, intending that, the document forged shall be used for the purpose of cheating, ***shall be punished with imprisonment of either description for a term which may extend to seven years***, and ***shall also be liable to fine"***

The reading of above, *prima facie,* leaves nothing ambiguous that said provision does not provide any such **"option'** because no where the phrase ***'or with fine'*** is used, therefore, the punishment of ***imprisonment*** for such offence is **'obligatory'** while that of ***'shall also be liable to fine'*** was ***discretionary.*** The record shows that the learned trial court judge though convicted the co-accused for offence under section 471 PPC but has not awarded ***obligatory*** punishment of ***imprisonment.*** If it is presumed that punishment of fine (*one fine without specification)* was for two *distinct* offences i.e Section 171 and 471 *ibid* yet such sentences cannot be taken as **'legal'** because the punishment of ***imprisonment*** for offence under section 471 PPC is ***mandatory / obligatory*** which, *prima facie,* never awarded.

11. In view of above legal position, I am of the clear view that **'sentence',** so awarded by the trial court judge, cannot be stamped to be **'legal'** because if the accused was found *guilty* for commission of the offence under section 471 PPC then punishment of ***imprisonment*** was mandatory / obligatory and in absence thereof a conviction for offence under section 471 PPC cannot be said to be **'legal'.** Here, I would also add that in absence of a **'legal sentence'** the conviction cannot stand therefore, the Court (s) while awarding sentences must be conscious of legal obligations and matters of awarding sentences / punishments should not be taken *carelessly* because it may not only prejudice the purpose of **'punishment'** but shall also render the conviction liable to be set-aside on this count *alone.*

12. Since, I am conscious of the legal position that this Court within meaning of Section 435 of the *Code* is always competent to call for

and examine the record of any proceeding before any *inferior* Court for purpose of satisfying itself as to correctness of legality of *sentence* even. Such jurisdiction is not dependant to an application by one but an *information / knowledge* of this Court *(revisional court)* is sufficient, therefore, I find it appropriate to exercise *suo moto* revisional powers of this court. Office is directed to assign number as per relevant register. R&P is already called. Issue show cause to co-accused Syed Mubashir Anwaar that why impugned judgment of conviction be not set aside and case be not remanded back to the trial court for re-writing of *judgment* if he sticks with his plea of **'being guilty'**. Office shall communicate this order to all criminal courts under the supervisory jurisdiction of this Court, including Special Courts.

IK **J U D G E**