

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Cr. Bail Application No.358 of 2018

Date	Order with signature of Judge
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20.03.2018

I have received this file of Cr. Bail Application No.358/2018 filed by accused Shoaib Ahmed Shaikh “for favour of perusal” of submission note dated **18.3.2018**. The office note is based on the order dated **16.3.2018** passed by my brother **Muhammad Saleem Jessar, J.**

2. I have perused the submission note as well as file and noticed that prior to the instant bail application in FIR No.51/2015:-

(i) On **26.2.2018** a Division Bench of this Court comprising my brothers **Naimatullah Phulpoto** and **Shamsuddin Abbasi, JJ** had allowed Cr. Acq. Appeals No.390/2016 and 60/2017 through short order and set aside the acquittal order dated **24.8.2016** of applicant/accused **Shoaib Ahmad Shaikh** and co-accused Muhammad Junaid and Muhammad Younus to face trial in **FIR No.51/2015**.

(ii) The applicant Shoaib Ahmad Shaikh then filed a Criminal **Bail Application No.302/2018** which was also heard my brother **Naimatullah Phulpoto J.** on the orders of Hon’ble Chief Justice on the following office note dated **26.2.2018**:-

A. *Whether the annexed Bail Application may be heard by Hon’ble Mr. Justice Naimatullah Phulpoto by constituting specials Single Bench of his lordship.*

B. *Whether the annexed Bail Application may be allowed to be heard by Single Bench according to roster.*

My brother **Naimatullah Phulpoto J.** after hearing Mr. Shaukat Hayat and Mr. Shahab Sarki, advocates, for the applicant, dismissed it by a comprehensive order.

3. Then probably on **27-02-2018** applicant Shoaib Ahmed Shaikh filed Bail Application before the District & Sessions Judge, South, Karachi and it was assigned to VIII-Addl: District & Sessions Judge. Within two days on **01.3.2018** he obtained an order of dismissal on his bail application.

4. The record shows that on **7.3.2018** the instant bail application was presented and this being **second or subsequent to bail application No.302/2018**, which was dismissed by my brother **Naimatullah Phulphoto J.** the office has raised the following objection:-

“Copy of last order passed by this Hon’ble Court in Cr. B.A No.302/2018 to be filed”.

and the learned counsel for accused/applicant on office file wrote the following reply to the office objection

“Copy of order will be supplied at the time of hearing”.

5. The office again before fixing the bail application for orders in Court submitted following office note dated **07.3.2018**, before the Honourable Chief Justice:-

A. Whether the annexed Bail Application may be heard by Hon’ble Mr. Justice Naimatullah Phulpoto by constituting special Single Bench of his lordship

OR

B. Whether the annexed Bail Application may be allowed to be heard by Single Bench according to Roster

6. Therefore, pursuant to the orders on the above office note, **according to roster** this case was listed before my brother **Salahuddin Panhwar, J.** on 9.3.2018 and on 14.3.2018 for orders on office objection and application. The said orders are reproduced below:-

Order dated 09.3.2018

1. For order on MA No.2171/2018
2. For order on office objection and reply of advocate at flag-A.
3. For order on M.A No.2172/2018
4. For hearing of main case.

09.3.2018

Mr. Shahab Sarki advocate.

1. Urgency granted.
2. Deferred for the time being
3. Granted subject to all just legal exceptions
4. Issue notice to Additional Attorney General and P.G Sindh for 14.3.2018.

Order dated 14.3.2018

1. For order on office objection and reply at "A"
2. For hearing of main case.

14.3.2018

Mr. Shahab Sarki advocate for applicant.

Mr. Ghulam Shabbir Baloch, A.A.G.

Learned counsel for the applicant **undertakes to produce order** passed by Hon'ble Apex Court in Suo Moto proceeding with regard to direction that matter pertaining to applicant shall be decided expeditiously.

Learned AAG contends that this matter would be proceeded by Additional Attorney General, Pakistan.

Adjourned to **16.03.2018**. Let this matter be fixed before another bench.

7. Then on **16.3.2018** when this application was fixed before my brother **Muhammad Saleem Jessar, J.** on the basis of misstatement in Para 19 of the memo of bail application and out of context annexure "H" at page 207, my brother Judge was persuaded to observe that:-

"It appears that co-accused Muhammad Younus and Muhammad Junaid have already been granted post-arrest bail vide order dated 18.12.2015, passed in

*connected bail application No.1478/2015, by my elder brother **Mr. Justice Nazar Akbar.***

and instantly Mr. Shahab Sarki, advocate, representing the applicant, instead of informing the Court that co-accused are in jail further misguided the Court when he contended that:-

*Mr. Shahab Sarki, advocate representing the applicant **at this juncture**, submits that His Lordship Mr. Justice Nazar Akbar is holding roster sitting on Original Side, therefore, instant bail application has been assigned to this bench”*

On the above submission, the case was referred to the Hon’ble Chief Justice on the strength of a famous Zubair’s case (**PLD 1986 Supreme Court 173**).

8. In my humble view, learned counsel Mr. Shahab Sarki has deliberately misguided the Court by suppressing the facts in his knowledge. In fact Mr. Shahab Sarki advocate, for the applicant, knew but he concealed that:-

i) Co-accused’s **bail application No.1478/2015** had been dismissed by my brother **Faheem Ahmad Siddiqui, J.** on **03.3.2017**.

ii) Co-accused are not on bail nor they have filed bail application in High Court after setting aside of their acquittal order by Division Bench of this Court by order dated **26.02.2018**. They are probably in jail.

iii) As is apparent from orders dated **9-3-2018, 14-03-2018** and **16-03-2018** reproduced above, the learned counsel for the applicant in spite of his undertaking that copy of order of this court on **Criminal Bail Application No.302/2018** will be supplied at the time of hearing, he did not present the same to the Court at any of the dates of hearing.

iv) On **16.3.2018** when the application was listed before my brother **Muhammad Saleem Jessar, J.**, learned counsel for the applicant filed Photostat copies of order dated **13.3.2018** passed by the Hon’ble Supreme Court in **Human Rights Case No.2335 of 2018 C.M.A No.51/2018** giving an impression of

compliance of OFFICE OBJECTION and copy of supreme court order was taken on record.

v.) At the first and second hearing on **9.3.2018** and **14.3.2018** before my brother **Salahuddin Panhwar, J.** the learned counsel for the applicant did not refer either to the order filed as annexure “H” or to the Zubair’s case.

vi) On **16.3.2018** before my brother **Muhammad Saleem Jessar, J.** after placing a copy of order of Hon’ble Supreme Court in Human Rights Case No.2335/2018, he suddenly came to know that Justice Nazar Akbar is sitting on Original side who has allowed bail application of co-accused though I had not allowed and on **16-03-2018** the co-accused were not on bail when the instant bail application was heard.

vii) Even otherwise perusal of order annexure “H” at page-207 clearly indicates that through the said order bail application No.1478/2015 was **not** allowed. It was an interim order and subsequently the said bail application has been dismissed on **3-3-2017** by my brother **Faheem Ahmed Siddiqi J.** since it was not pressed by the co-accused.

9. Further perusal of the Court record suggests that the correct ratio of **Zubair’s** case has not been properly presented by the learned counsel. Before highlighting the true spirit of the law laid down by the Hon’ble Supreme Court in Zubair’s case, it may be appreciated that the Hon’ble Supreme Court in the said judgment had laid down certain responsibilities of counsel for applicant/accused and held that breach of said responsibilities would amount to PROFESSIONAL MISCONDUCT on the part of counsel, I reproduce relevant observations from Zubair’s case as follows:-

7. *Another principle enunciated in some of the rulings is that **it is the duty of the counsel to mention in a bail application filed by him the fact of having filed an earlier bail application, also stating the result thereof. Failure on the part of the counsel to do so would, in fact, amount to professional misconduct because the concealment of the fact of the dismissal of the***

earlier bail application of the accused or the co-accused and getting a subsequent bail application decided by another Judge of the same Court may result in conflicting judgments and disharmony in the Court

10. In my humble view, Mr. Shahab Sarki, learned counsel for the applicant in view of binding nature of the Zubair's case reproduced above is guilty of profession misconduct since in the case in hand; his following conduct is contrary to the binding observation of Supreme Court.

i.) He suppressed the fact of filing of earlier **bail application No. 302/2018** in memo of the instant bail application.

ii.) He did not disclose fate of the earlier bail application that it was dismissed.

iii.) He neither complied with office objection nor the orders sheets suggest that office objection was complied with by the applicant or his counsel.

iv.) In para-19 of bail application he deliberately made a false statement that "Bails to co-accused have been allowed by the competent Court". He neither mentioned the Court nor bail applications which were allowed. Para-19 of bail application is reproduced below:-

19. That the Court has failed to understand that Bails of co-accused have been allowed by the Court of competent jurisdiction and Applicant is entitled to bail on the principle of consistency.

v.) In the memo of bail application he suppressed the fact that bail **application No.1478/2015** was dismissed on **3-3-2017** as not pressed by the co-accused themselves meaning thereby the co-accused were not on bail on **16.3.2018**.

11. Now I take up the relevance of Zubair's case in the given facts of the case in hand. The principle laid down by the Hon'ble Supreme Court in Zubair's case is reproduced below:-

*The aforementioned principle enunciated by these judgments are based on the **salutary principles**,*

inasmuch as the practice of filing successive bail applications in the same case by the same person or his co-accused and getting it fixed before a different Judge, is not only likely to result in conflicting judgments but also tends to encourage malpractice by the accused persons and to bring the judicial system into disrepute, because in the event of a conflicting order being given by another learned Judge in a subsequent application, an impression, though false, may be created that the second order was based on extraneous consideration. It is mainly to avoid this that this Court has emphasized, over and over again, that subsequent bail application must be placed for disposal before the same learned Judge who had dealt with the first bail application and also that the counsel must disclose the fact of having filed a previous application and to state the result thereof.

12. In view of the facts on record that since one bench of this Hon'ble Court has very comprehensively dealt with the case registered as **crime No.51/2015** when deciding CrI. Acq. Appeal No.390/2016 is supposed to be more conversant with the facts of the case than any other bench. The same bench has also dismissed **Cr. B.A No.302/2018** on **26.02.2018** and therefore, no other bench including myself has "dealt with the case" of applicant Shoaib Ahmed Shaikh in the spirit of Zubair's case. An interim order passed by a bench without touching the merit or even hearing the counsel for either side (Annexure 'H') does not mean the bench has "dealt with the first bail application". Even otherwise since bail application No.1478/2015 was not pressed by the co-accused themselves and it was dismissed as not pressed by another bench, the said bail application cannot be treated as "a case dealt with" by this bench.

13. Learned counsel for applicant in **para-19** of the memo of bail application has knowingly with conscious mind taken plea of **principle of consistency** to misuse it before the bench of his disliking and persuade it not hear the case and got it adjourned it from the said bench of his dislike on the basis of Zubair's case. In

fact the co-accused even today are probably in jail, or at least they are not on bail from High Court therefore, “**plea of consistency**” was not at all an honest plea being factually incorrect. Precisely it was to purposely taken only to be misused. In any case, in my humble view, if at all the spirit of Zubiar’s case is applicable in the case in hand the case is supposed to be heard by the same bench which has **dealt with** and decided CrI. Acq. **Appeal No.390/2016** and subsequently **dealt with** CrI. **Bail application No.302/2018** and dismissed it. The deliberate suppression of facts by the learned counsel and discussed in detail in preceding paras in fact supports my contention.

14. Be that at it may, in view of the facts discussed above in my humble view it would be appropriate that all these facts may be brought to the notice of Hon’ble Chief Justice. His Lordship, following the binding nature of Zubair’s case as discussed above, may take or propose to take action against learned counsel who appears to be guilty of “Professional Conduct” as defined by the Hon’ble Supreme Court in Zubair’s case and may further be pleased to decide the future course of this bail application in the light of Supreme Court decision on the subject. However, since Mr. Shahab Sarki, advocate himself has chosen to place on record copy of an order of Supreme Court in **H.R case No.2335/2018**, in the file of this case, I would humbly suggest that with the permission of Hon’ble Chief Justice, at least copy of my “perusal of submission note” may be sent to the Hon’ble Supreme Court for placing in the said Human Right case.

JUDGE