

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Cr. Transfer App. No. S – 24 of 2021
Cr. Misc. App. No. S – 150 of 2021

Date of hearing: 27-09-2021

Date of decision: 27-09-2021

Applicant in both cases: Abdul Rasheed Shar

Respondents / Accused: Ghulam Shabbir & Ghulam Mustafa

Mr. Ghulam Shabbir Shar, Advocate for the applicant in Cr. Transfer App. No. S-24 of 2021 and Cr. Misc. App. No. S-150 of 2021.

Mr. Shewak Ram Valecha, Advocate for respondents No.2 & 3 in Cr. Transfer App. No. S-24 of 2021 and for respondents No.1 & 2 in Cr. Misc. App. No. S-150 of 2021.

Mr. Zulfiqar Ali Jatoi, Additional Prosecutor General.

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ORDER

Muhammad Junaid Ghaffar, J. – Through Criminal Transfer Application, the Applicant seeks transfer of Sessions Case No.604 of 2020 (Crime No.33/2020 under sections 302, 337A-I, 337F-I, 114 & 148 PPC) from the Court of Additional Sessions Judge, Mirwah to any other appropriate Court having jurisdiction, whereas, through Criminal Miscellaneous Application as above, filed under Section 497(5) Cr.P.C, the Applicant seeks cancellation of bail granted to Respondents / Accused Ghulam Shabbir and Ghulam Mustafa vide order dated 22-02-2021 by the same Court.

2. Heard both the learned Counsel as well as learned Additional P.G and perused the record.

3. Insofar as the Criminal Miscellaneous Application seeking cancellation / recalling of the bail order dated 22-02-2021 is concerned, it appears that earlier these two Respondents / Accused had filed bail after arrest application before the learned Trial Court and the same was dismissed vide a common order dated 21-05-2020. Relevant finding thereof reads as under:

“4/- According to FIR, the applicants/accused are nominated in FIR with specific role of causing injuries to complainant, while applicant/accused Muhammad Aslam had caused injury to deceased, the provisional medical certificates are very much in support of version of complainant. **Besides that it was brutal murder committed by applicants/accused by beating**

deceased Abdul Hameed, thus prima facie appears that applicants/accused are involved in offence for punishment for death. While the case of co-accused Bakhshal is totally different from role of present applicants/accused, as case of co-accused Bakhshal is of instigation, while present applicants/accused have played active role for causing injuries to complainant and deceased, therefore, at this stage, the applicants/accused are not entitled for concession of bail.”

4. The Respondents / Accused, being aggrieved, filed Criminal Bail Application No. S-507 of 2020 before this Court and after briefly arguing before a learned Single Judge the bail application was not pressed vide order dated 05-10-2020, which reads as under:

“Learned counsel for applicants submits that in the instant matter he intends to examine Medico Legal Officer before the trial Court and he may be allowed to withdraw the aforesaid bail application.

In view of such statement, the instant bail application is disposed of being not pressed and the applicants/accused are at liberty to file fresh bail application after examination of M.L.O by the trial Court. **The learned trial Court is directed to pace up the trial and examine the material witnesses including M.L.O within a period of one month.**”

5. The learned Trial Court thereafter has passed the order now impugned dated 22-02-2021 and the relevant part of the same reads as under:

“5. I considered the submission and gone through the case diaries, as present bail is solely on the ground that directions are not complied, hence the conduct of parties is very relevant in this regard. In fact this court has received directions of honorable High Court of Sindh passed on 05-10-2020.

6. In present case charge framed on 10-11-2020 and matter was scheduled with consent of the parties counsels for 19-11-2020 but on same day 19-11-2020 complainant and his counsel were called absent, only police officials witnesses were present but prosecution was reluctant to proceed on the ground that there is senior counsel engaged on behalf of the complainant and he will proceed in his absence, then matter was adjourned as scheduled for 20-11-2020, on this day complainant and private witnesses were present but filed adjournment application on the ground that they will not proceed in absence of their private counsel and matter was adjourned by passing following orders:-

“adjourned with notice to proceed and appear for evidence in failure will face consequences”

7. Again matter was rescheduled for 01-12-2020 on this date neither complainant nor his counsel were present, even prosecution failed to produce witness Doctor / MLO to comply with the directions of the honorable High Court, resulting to that Bail able warrants for witnesses were issued and matter was adjourned to 08-12-2020 but again neither complainant nor his witnesses were appeared though

warrants were served and they undertook to appear even officials witness doctor was not appeared to comply with the directions of the honorable High Court.

8. Thereafter matter was again adjourned to 14-12-2020 due to conduct of the complainant party it was fixed for only one date, on this day complainant and his witnesses were present along with associate to Mr. Shabir Ahmed Shar and complainant flatly refused to give evidence without any reason resulting to that detail order was passed and learned ADPP Mr. Amjad Hussain Leghari was directed for counseling of the complainant and witnesses and for production of remaining witnesses but again failed to appear and proceed with the matter.

9. It is pertinent to mentioned here that all the times counsel for the accused persons was present and ready to proceed with the case but it was prosecution, especially the conduct of the complainant and his counsel who did not cooperate to proceed with matter and record evidence.

10. In this regard I am taking guidance of honorable High Court of Sindh in judgment "2020 YLRN 43 KARACHI-HIGH-COURT-SINDH" wherein bail was granted after failure of prosecution to proceed with matter, hence to my wisdom presence accused are also entitled for concession of bail.

11. It is pertinent to mentioned here that again complainant and prosecution failed to proceed on 28-12-2020, 29-12-2020, then on 09-01-2021, 30-01-2021 and finally on 20-02-2021, all the times complainant / prosecution shown their unwillingness/non-cooperation to proceed with the matter. **Besides that having no respect and dignity for the lawful directions of the honorable High Court of Sindh, Sukkur passed to conclusion of trial (to examine doctor within one month). Case law cited by the counsel for the complainant with great respect and honor for superior courts are distinguishable from the facts and circumstances of present case, as in present case conduct of the prosecution is involved with the behavior of complainant for complying the directions of honorable High Court but in the judgments referred by counsel for the complainant no such situation was available.**

By the following reasons and due to conduct of prosecution accused persons are granted bail subject to furnishing solvent surety in sum of Rs.3,00,000/- (Rupees three lacs) each and P.R. bond in like amount."

6. Perusal of the aforesaid order in question reflects that the learned Trial Court has granted bail to the Respondents / Accused on the ground that the Medico Legal Officer was not examined and the matter was not proceeded by the prosecution as well as the complainant, therefore, in view of the directions of this Court dated 05-10-2020, the Respondents / Accused were entitled for the concession of bail. On the face of it, the same appears to be a result of faulty understanding of the Courts order dated 5.10.2020; depicts improper application of mind and lastly, is in utter disregard to the law settled by the Hon'ble Supreme Court in a number of cases. Prima facie, under the garb of purported directions, even the settled law has been distinguished without any explanation and reasoning.

7. As to the order dated 05-10-2020 passed by this Court is concerned, it needs to be appreciated that the order was in fact a withdrawal order of a bail application and was not passed on merits; but only on the statement of the Counsel for the accused. The only direction was that “*the Trial Court shall pace up the trial and examine the material witnesses including MLO within a period of one month*”. It may be noted that there were no consequences given in the said order by this Court that if the material witnesses including the MLO are not examined within a period of one month, then what has to happen. The inference drawn by the Trial Court that in case of non-examination of these witnesses, the Respondents / Accused have become entitled for grant of bail, does not seem to be a correct approach and instead shows lack of application of mind, which is not expected from the Court of an Additional Sessions Judge. The directions, if any, were not to the effect that if MLO is not examined, then bail has to be granted; rather, even if the MLO had been so examined, the bail could only have been granted on merits in accordance with law. The concept of granting bail(s) on failure to comply with any directions of the superior courts while disposing of a bail application of an accused is never mandatory, as the law itself provides such procedure (s.497(1)(b) being relevant here); hence, the course adopted in this case is also against the mandate of law. Besides, it is not only strange, but does not appeal to this Court, as to how the trial Court could be so helpless and dependent on the prosecution and the complainant to examine an MLO, whose presence, being a Government Servant, could be, rather ought to have been ensured through coercive means, if needed, for which the trial Court was fully competent. Notwithstanding, at the most, side of the prosecution could have been closed; and or a reference could have been sent to this Court for further directions.

8. Moreover, as rightly pointed out by the learned Additional P.G that time and again it has been held by the Hon'ble Supreme Court in a number of cases including the case cited by him reported as *Talat Ishaq v National Accountability Bureau* (PLD 2019 SC 112) that directions, if any, given while disposing of a bail applications are always directory in nature and not mandatory and resultantly it does not entitle the accused for an automatic grant of bail if the directions are not complied with for any reason. It has been further held that mere delay in conclusion of a trial or longevity of the period of incarceration of an accused person could not by itself entitle an accused person to bail. It may also be of relevance to note that this was a

case under the NAB Ordinance, 1999, which ordains completion of trial in 30 days, and even use of the words “shall” for such purposes has not prevailed upon the Hon’ble Supreme Court to treat the time line as mandatory; but directory in nature. It is also settled proposition that if certain directions have been given to the trial court to complete the trial within certain period of time; non-compliance thereof, is no ground to seek bail¹.

9. As to the argument that once bail is granted, recall requires most extraordinary measures is beside the mark as in an appropriate case, like one in hand, the Court would unhesitatingly strike down the error, manifestly reflecting upon the law². Moreover, reference to the protection of freedom guaranteed under the Constitution is equally misplaced as the Constitution pledges freedom to the law abiding citizens; an offender, alleged to have committed some crime, is subject to a different legal regime; he is certainly entitled to due process of law and a fair and speedy trial, however, once taken in custody, his release is regulated by the provisions of the Code of Criminal Procedure, 1898³. It may also be noted that the same learned Judge while dismissing the bail applications of these two accused along with another accused had by himself observed that a brutal murder was committed by these persons and prima facie appears that they are involved in the offence for punishment for death, and if that is so, then how and in what manner the Trial Court could have granted bail to these Respondents / Accused merely on the ground that MLO or other witnesses have not been examined within the time period as noted in the order dated 05-10-2020. How this could have been ignored while taking into account the purported directions of this Court to grant bail certainly speaks volumes. Certainly it is for the trial Court to finally settle petitioner’s alleged culpability and the offence made thereunder on the strength of evidence, nonetheless, available material in the given circumstances constitutes “*reasonable grounds*” within the contemplation of section 497 of the Code of Criminal Procedure 1898 so as to bring his case within the remit of prohibition provided thereunder and, thus, there was no occasion for the learned Additional Sessions Judge to release him on bail⁴.

10. Argument that no exceptional grounds are available to maintain this Application for cancellation of bail do not hold water in the peculiar facts and

¹ Nisar Ahmed v The State (PLD 2016 SC 11)

² Hazrat Nabi Shah alias Hazrat Khan v The State (2020 SCMR 1672)

³ Abid Hussain v Tassawar Hussain and another (2021 SCMR 518)

⁴ Muhammad Waheed v The State (2020 SCMR 2066)

circumstances as discussed hereinabove. Here, bail has not been granted on merits; neither on statutory delay; but purportedly in non-compliance of certain directions, which as noted earlier were not given in any mandatory form. Applicant is not seeking cancellation of bail on any misuse of concession of bail, wherein, in an appropriate case this argument may hold the field. The order through which bail has been granted has not only ignored the material against the accused; but has also been passed in sheer violation of law settled by the Superior Courts. Earlier the same trial Court has observed that the accused are involved in a heinous crime entailing death penalty. The same has resulted in passing a perverse order. It should not be ignored that the concept of setting aside the unjustified, illegal, erroneous or perverse order to recall the concession of bail is altogether different than the concept of cancelling the bail on the ground that the accused has misused the concession or misconducted himself or some new facts requiring cancellation of bail have emerged⁵. A bail granting order can be cancelled if the same is perverse⁶.

11. No doubt, grant of bail is a discretionary relief, however, exercise of discretion must be structured on sound judicial considerations, objectively deducible from the record of the case, particularly in cases punishable with imprisonment of ten years or above and, thus, grant of bail in disregard thereof by itself constitute a strong ground, justifiably calling for interference⁷.

12. As to the Transfer of this case to another Court, the Applicants Counsel has filed a Statement along with certain documents and orders of the same Trial Court; though, in respect of some other Crime No.75 of 2019 to show that once pre-arrest bail was refused to accused Gaji Khan and Ghulam Ali on 14-04-2020, and thereafter, in another pre-arrest bail application, the same accused along with others were granted bail vide order dated 02-05-2020 merely for the reason that some other co-accused had been acquitted by the said Court, hence, the case become of further inquiry. Though the said case is not before this Court in any manner, however, Applicant's Counsel has brought to the notice of this Court that this conduct of the Trial Court is warranting interference at least to the extent

⁵ Sidra Abbas v The State (2020 SCMR 2089)

⁶ Samiullah v Laiq Zada (2020 SCMR 1115 & The State/ANF v Rafique Ahmed Channa (2010 SCMR 580)

⁷ Order dated 2.6.2021 passed by the Hon'ble Supreme Court in CrI.P.No.439 of 2021 (Noor Aslam v The State)

of the Transfer Application filed by the present Applicant and perhaps these documents have been relied upon to show that the same learned Counsel had appeared before the trial court while passing of the impugned order dated 22.2.2021 and order dated 2.5.2020 in Crime No.75 of 2019.

13. In view of hereinabove facts and circumstances of this case, this Court is of the view that both the applications filed by the Applicant merits consideration and therefore, on 27-09-2021, the Criminal Transfer Application and the Criminal Miscellaneous Application as above were allowed by means of a short order in the following terms and these are the reasons thereof:

“Heard arguments of all learned Counsel and learned Additional Prosecutor General.

For reasons to be recorded later on, Criminal Transfer Application No. S-24 of 2021 is allowed. Learned District & Sessions Judge Khairpur is directed to withdraw Sessions Case No.604/2020 from the Court of Additional Sessions Judge, Mirwah, to any other Court of competent Court having jurisdiction to decide the same.

Insofar as Criminal Misc. Application No. S-150 of 2021 is concerned, the same is also allowed; the order dated 22.2.2021 passed by Additional District & Sessions Judge, Mirwah, in Sessions Case No.604/2020, is hereby set-aside, and the bail already granted to the applicants/ accused Ghulam Shabbir s/o Muhammad Hasan and Ghulam Mustafa s/o Muhammad Bakhshal is recalled. They are present in Court and are taken into custody.”

14. Since the issue in hand requires immediate attention of all judicial officers, the Additional Registrar of this Court is directed to circulate copy of this order to all the District Judges falling within the territorial jurisdiction of this Bench, who shall further circulate amongst all judicial officers for information and compliance. Further, a copy of this order may also be forwarded to the Registrar of this Court for placing the same before the Hon'ble Chief Justice, for circulation amongst all other districts of the Province, if so desired.

J U D G E

Abdul Basit