

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Misc. Application No.857 of 2023

Date	Order with signature of Judge
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1. For order on office objection at 'A'
2. For hearing of main case
3. For hearing of MA No.13103/2023

06.11.2023

Mr. Amer Raza Naqvi advocate for the applicant
Ms. Rubina Qadir, Deputy PG along with ASP Iqbal Awan and DSP
Muhammad Yousuf, Central Jail Karachi

Through instant Criminal Miscellaneous Application, the applicant Ali Ahmed Tariq has called in question the dismissal of his Application under Section 75(2) Cr.P.C., vide order dated 27.9.2023 for withdrawal of his warrants of arrest, issued by the Judicial Magistrate (South) Karachi and prayed for his release from Central Prison Karachi in Criminal Case No.4613 of 2023, arising out of F.I.R No. 121 of 1992 for offenses under section 295-A and 298-C PPC, of Police Station Shahdadpur, inter-alia on the ground that he was/is on bail granted by this court vide order dated 28.10.1992 in Criminal Bail Application No.776 of 1992 as such cannot be incarcerated in jail without trial for indefinite period.

2. The case of the applicant is that he filed CP-D No. 2674/ 1992 before this court, wherein the proceedings of the Criminal Case, arising out of F.I.R No. 121 of 1992 stayed and subsequently petition was dismissed on account of Non-Prosecution vide its Order dated 20.05.2009. Resultantly the criminal case was restored to its original position, however, the Applicant did not bother to attend the trial court on even a single date, initially NBWs were issued against the Applicant/Accused, by the trial court, thereafter completing the proceedings under section 87 and 88 CR.P.C the case was kept on Dormant File by the trial court vide its order dated. 03.08.2011 after recording the evidence of material PWS under section 512 Cr. P.C in the intervening period, the Applicant/Accused was arrested in another Crime No. 54 /2023, under section 298-B PPC, registered at PS City Court, and thus the subject Case was restored by the trial court vide its Order dated 18.05.2023 passed because of Application filed by the Complainant for resumption of trial and issuance of Production Order, resultantly the Applicant/Accused was ordered to be produced before the trial court to face charges against him.

3. Applicant pleaded his case on the premise that his NBWs were wrongfully issued since he was on Bail granted to him by this Court, vide its Order dated 28.10.1992; that he was not aware of the proceedings

under section 87 and 88 Cr. P.C; that since no reference was moved before this Court for the cancelation of his Bail, therefore, his bail was/is still intact; that he being 76 years old, is illegally confined in the Jail and thus prayed that his earlier NBWs issued be canceled/ recalled and he may be released on earlier bail granted by this Court.

4. Learned counsel for the applicant has submitted that if the bail is granted by this Court, the Sessions Court/Magistrate cannot cancel it unless new circumstances not known earlier crop up during the trial. If the High Court has granted bail to a person, the State/complainant can approach the High for cancellation of bail under section 497(5) Cr.P.C., he further argued that very strong and exceptional grounds would be required to hamper the concession extended to an accused, who is otherwise clothed with free life, as a consequent of the concession, and the view taken by the learned Magistrate is synonymous to curtailing the liberty of the applicant before completion of the trial, which otherwise is a precious right guaranteed under the Constitution, he added that the bail can only be cancelled if the accused has misused the concession in any manner or tried to hamper prosecution evidence by persuading or pressuring prosecution witnesses, which is not the case in hand. Per learned counsel as per section 75, Cr.PC, a warrant can be executed by showing the substance of the warrant to the person being arrested. Here in the present case, no substance was produced before the Magistrate to issue such warrants against the applicant when he was already on bail by this Court.

5. Learned APG has waived the notice and submitted that since the question of law is involved in the present proceedings as such she is ready to assist this court and argued that Applicant/Accused remained absent from the present case for long and failed to put his appearance on the single date before the trial court, resultantly the proceedings under section 87 and 88 were held and he was declared an absconder. She subsequently argued that since Applicant/Accused absconded after obtaining bail he was declared fugitive from the law and thus he is not entitled to any concession by this Court.

6. I have heard the learned counsel for the parties and perused the record with their assistance.

7. The applicant has remained incarcerated for approximately six months from the date of his arrest i.e. 27.04.2023 in FIR No. 54 of 2023 at City Court Police as the aforesaid proceedings arising out of F.I.R No. 121 of 1992 were stayed by this court in CP-D No. 2674/ 1992 before this court, and subsequently petition was dismissed on account of Non-Prosecution vide its Order dated 20.05.2009, however later on the learned counsel for the applicant put his appearance before this court in the

aforesaid case and assigned reasons for his nonappearance on the plea that his name was not appearing in the cause list; and then the office fixed the matter for further orders; and unfortunately office consigned the case to record, in result thereof the trial court restored the criminal proceedings and issued warrants of arrest of the applicant, however in the aforesaid case the applicant had already obtained bail from this court vide order dated 28.10.1992 in Criminal Bail Application No.776 of 1992, an excerpt whereof is reproduced as under:-

“ Mr. Aftab Ahmed Advocate General does not oppose this bail application, the applicants are granted bail in the sum of Rs. 10,000/- each and P.R bond in the like amount to the satisfaction of Nazir of this Court . the bail application stand disposed of.”

8. But unfortunately, the learned Magistrate was not bothered to refer the matter to this court for cancellation of the bail of the applicant if at all he failed to appear before the trial Court in pursuance of bailable warrants, which were converted into non-bailable and purported proceedings under Section 87 and 88 were initiated by the learned Magistrate though he was well aware of the factum that the applicant is a practicing lawyer of Karachi and even the record does not show that he was served with the notice through concerned Bar Council. The reason assigned by the learned Judicial Magistrate is that during the pendency of the proceedings before the Magisterial Court, the applicant had failed to put his appearance and resultantly non-bailable warrants for his arrest had been issued. With further reasoning that the applicant was subsequently declared a Proclaimed Offender, and non-bailable warrants for his arrest were issued in such a situation issuance of non-bailable warrants against him ipso facto amounted to cancellation of his bail. Prima facie, the prosecution has failed to place on record any material to the effect whether before initiation of proceedings, under section 87 Cr. P.C. any notice of his appearance before the trial court was served upon the applicant as he had been practicing as an advocate of this Court as well as Supreme Court and in absence of such material, no adverse inference could be drawn against him at this stage. I have exercised extreme care not to say anything on the merits of the case which may adversely affect the case of the parties except what was necessary to decide this lis.

9. Since the procedure adopted by the learned Magistrate against the applicant was not proper under the law for the reason that the learned Magistrate, without even giving him an opportunity of being heard to the applicant on the issue of cancellation of bail, straight away proceeded to cancel the bail granted to him by this court on the analogy that issuance of non-bailable warrants ipso facto amounted to cancellation of his bail. Such an approach on the part of the trial Court cannot be appreciated especially when the trial court could have sent the reference to this court for cancellation of his bail if he had misused the concession of bail at all. By

taking suo moto action, the trial court has transgressed its powers and authority and kept the applicant behind bars for such a long period, which cannot be compensated under the law for the simple reason that the principles governing the grant of bail and the cancellation of bail substantially stand on different footings. Courts have always been slow to cancel bail already granted as the liberty of a person cannot be curtailed on flimsy grounds. No interference with an order of bail is required to be made unless the order lacks reasons or is perfunctory.

10. Once bail has been granted, the prosecution should make out strong case for cancellation not by making an allegation alone but by giving substantive proof of such an allegation. The cancellation of bail is a harsh order because it interferes with the liberty of an individual hence it must not be resorted to lightly and the power to take back in custody is to be exercised with due care and circumspection. I am also fortified by the dictums laid down by the Supreme Court reported in **2009 SCMR 786, 2004 SCMR 1160, 2005 SCMR 1539, 1994 SCMR 1064, and 2004 SCMR 231** in which it was held that considerations for cancellation of bail are quite distinct from the considerations for grant of bail. Once bail has been granted by a competent court of law, strong and exceptional grounds are required for canceling the same. It has to be seen as to whether an order granting bail is patently illegal, erroneous, factually incorrect, and has resulted in a miscarriage of justice. Section 497 (1) CR.P.C prohibits the grant of bail for offenses punishable with death or imprisonment of 10 years or over. Section 497 (5) CR.P.C does not command the court to cancel the bail even when the offense is punishable with death or imprisonment for life, and even if the grant of bail is prohibited under Section 497 (1) CR.P.C, the discretion is left in the court under Section 497 (5) CR.P.C which is pari-materia with the principles which apply to the setting aside of the orders of acquittal.

11. As a result of the above discussion, I feel no hesitation to hold that the order dated 27.9.2023 passed by the learned Judicial Magistrate (South) Karachi who failed to demonstrate justifiable cause to detain the applicant, which is set aside, as his bail is held to be still intact. Prima facie, no reasonable cause exists for the learned Judicial Magistrate to cancel the bail granted to the applicant by this Court on the analogy so put forward by him in the impugned order. Consequently, this Criminal Miscellaneous Application is allowed. The learned Magistrate is directed to issue a release writ of the applicant in F.I.R No. 121 of 1992 for offenses under section 295-A and 298-C PPC, of Police Station ShahdadPur forthwith on the same terms and conditions as outlined in the bail granting order passed by this court.

JUDGE

