

THE HIGH COURT OF SINDH KARACHI

Criminal Bail Application No. 782 of 2024

For hearing of Bail Application.

Applicant/ Accused : Muhammad Rafiq son of Gul Rauf through Mr. Tahir-ur-Rehman Tanoli, Advocate.

The State : Through Mr. Zafar Ahmed Khan, Additional Prosecutor General, Sindh.

Date of hearing : 24-04-2024

Date of order : 24-04-2024

FIR No. 30/2022
u/s: 396 PPC
P.S. Mominabad, Karachi

ORDER

Adnan Iqbal Chaudhry J. - The Applicant seeks post-arrest bail in the aforesaid crime on the statutory ground of delay after the same has been declined by the trial court *vide* order dated 18-03-2024.

2. Per the FIR, on 16.01.2022, three persons on a motorcycle robbed the Complainant's shop when it was manned only by his son who was shot in the process; that the Complainant, who resided above the shop, reached the scene after hearing the gun shot; and according to him, the crime was witnessed by residents of the vicinity including Abdul Rehman and Qurban. The Complainant's son eventually succumbed to the injury and passed away.

3. The Applicant was arrested on 12.03.2022. At that time he was already under arrest in FIR No. 132/2022 lodged at P.S. Gulshan-e-Maymar for offences under section 253, 324 PPC read with section 7 ATA. He was produced before the Magistrate for an identification parade on 17.03.2022, where he was identified by the aforesaid eye-witnesses as the person who fired at the deceased.

4. Heard learned counsel for the Applicant, learned Additional Prosecutor General, Sindh and perused the record.

5. The FIR was lodged for offences under section 392, 397, 34 PPC. However, the charge framed by the trial court against the Applicant is for the offence under section 396 PPC i.e. dacoity with murder which can be punished with death. Therefore, for the ground of statutory delay, the period of delay to be considered is of 2 years under clause (b) of the third-proviso to section 497(1) Cr.P.C.

6. Per learned Prosecutor, the aforesaid period of 2 years is to be reckoned from the date of commencement of 'trial' and hence the date the charge was framed which was 22.11.2023. On the other hand, learned counsel for the Applicant relies on *Ali Akbar v. The State* (2020 SCMR 1225) to submit that the period of 2 years was to be reckoned from the date of arrest which was 12.03.2022. Indeed, in *Ali Akbar*, the Supreme Court counted the period for the statutory ground of delay from the date of arrest. More recently, that point has been discussed more elaborately by the Supreme Court in *Shakeel Shah v. The State* (2022 SCMR 1), and reiterated in *Nadeem Samson v. The State* (PLD 2022 SC 112), where it has been held that the statutory ground of delay is to be considered from the date of arrest/detention, and that the date of framing charge is of little importance, the intent being that the trial should be conducted expeditiously and pre-conviction detention should not exceed 2 years. In the instant case, the Applicant was in detention for 2 years before he moved the application for bail on the statutory ground of delay.

7. There are two exceptions to the ground of statutory delay provided in section 497(1) Cr.P.C. The first is in the third-proviso itself *viz.* where delay in the trial has been occasioned by an act or omission of the accused or any other person acting on his behalf.

The second exception is in the fourth-proviso *viz.* where the accused is a previously convicted offender for an offence punishable with death or imprisonment for life, or a hardened, desperate or dangerous criminal, or is accused of an act of terrorism punishable with death or imprisonment for life. The scope of these exceptions is also discussed in the case of *Shakeel Shah*. As regards the first exception, it was observed that the act or omission by the accused to delay trial must be a visible concerted effort orchestrated by the accused. As regards the second exception, it was observed that the words 'hardened, desperate or dangerous' mean a person who would be a serious threat to society if set on bail.

8. The final challan was filed in Court on 06.07.2022 i.e. after nearly 4 months of the Applicant's arrest. From the diary of the trial court it appears that the I.O. took his sweet time to complete the investigation, and the trial court had to issue show-cause notices to him before he filed the final challan. Thereafter, the matter was delayed either for a supplementary report, or for transfer of the case to the Sessions Judge, or due to the non-production of accused persons by the jail authorities, none of which can be attributed to the Applicant. Even after the charge was framed on 22.11.2023, the case diary does not show any delay on the part of the Applicant, rather it is the prosecution which has not examined a single witness since then. Therefore, in the circumstances of the case, the first exception to the ground of statutory delay cannot be urged by the prosecution.

9. Though the Applicant was implicated in FIR No. 132/2022 for the offence under section 7 of the Anti-Terrorism Act, he was tried and acquitted in that case *vide* judgment dated 18.12.2023 passed by this Court in Special Cr. Anti-Terrorism Appeal No. 148/2023. The learned Prosecutor has not placed on record any other case of the nature pending against the Applicant. Therefore, thus far, there is no

material before the Court to allege that the Applicant is a dangerous criminal or that he is accused of an act of terrorism punishable with death or imprisonment for life, and hence the second exception to the statutory ground of delay is also not attracted to deny bail.

10. Learned Prosecutor submits that the Applicant had been identified by two eye-witnesses at an identification parade as the person who fired upon the deceased. While that may be so, that evidence has yet to be tested at trial. In any case, it is settled law that bail on the statutory ground of delay is of right and not by way of discretion, and that it cannot be defeated but for the exceptions discussed in the third and fourth proviso to section 497(1) Cr.P.C. In that regard reliance can be placed on the cases of *Zahid Hussain Shah v. The State* (PLD 1995 SC 49) and *Muhammad Usman v. The State* (2024 SCMR 28).

11. For the foregoing reasons the Applicant is entitled to bail on the statutory ground of delay under the third proviso to section 497(1) Cr.P.C. Bail is granted subject to furnishing solvent surety in the sum of Rs. 100,000/- [Rupees One Hundred Thousand only] alongwith P.R. Bond in like amount to the satisfaction of the trial Court.

Needless to state that the observations above are tentative and shall not be construed to prejudice the case of either side at trial.

JUDGE

*PA/SADAM