

## IN THE HIGH COURT OF SINDH AT KARACHI

### CR. BAIL APPLICATION NO.1120/2018

Applicant : Sohail Ahmed,  
through Mr. Sajjad Gul Khatri, advocate.

Respondent : The State,  
through Mr. Abrar Ali Khichi, APG.  
Complainant Muhammad Farooq Awan present on  
date of hearing.

Date of hearing : 12.09.2018.

Date of announcement : 02.10.2018.

### ORDER

**Salahuddin Panhwar, J:** Applicant has approached this Court for post arrest bail in Crime No.241/2015, u/s 302/365/34 PPC, PS Sachal, after his bail plea was rejected by trial Court vide order dated 31.07.2018.

2. Brief facts of prosecution's case are that on 09.06.2015, complainant was present at his office situated at P-15, Shah Latif town near Aftab Hotel, Karachi; at about 1100 hours, in his presence four persons in a car forcibly kidnapped his son Tahir Farooq Awan; amongst them, one was Sohail Randhawa while out of three persons one person's name was revealed as Qadir Baloch; thereafter Shahazad son of Sher Khan informed the complainant that complainant's son Tahir Farooq Awan had a friendship with his brother Tamraiz Khan and that Qadir Baloch has also taken him (Tamraiz Khan) alongwith his motorcycle from his home. On such

information they went to police Station Shah Lateef and submitted an application in the name of DIGP at his office. On 15.06.2015 Tamraiz Khan's brother Sher Afzal informed the complainant over telephone that two dead bodies have been recovered within the jurisdiction of Police Station Sachal; when they came, complainant identified one of them as his son Tahirq Farooq Awan and the other was identified by Sher Afzal as his brother Tamraiz Khan. Complainant's claim is against Sohail Randhawa, Qadir Baloch, who along with their other companions (who can be identified on appearance), having some enmity killed them and after killing packed them in bags and have thrown their bodies within the jurisdiction of PS Sachal. Police recovered two dead bodies of unknown persons packed in bags hence proceedings under section 174 CrPC were completed and post mortem was conducted.

3. Learned counsel for applicant has contended that earlier bail applications of applicant were dismissed by trial Court and last bail application bearing No.1868/2018 was filed by the applicant before this Court which was dismissed as not pressed vide order dated 09.02.2018 and directions were issued to the trial Court to conclude the trial preferably within a period of three months but the prosecution could examine only four witnesses and remaining PWs are yet to be examined and there is no chance of conclusion of trial with the period stipulated in aforesaid order; that there are major discrepancies in evidence of prosecution witnesses which have created doubts in prosecution's case and such benefit of doubt is to be extended to the applicant at bail stage; that the applicant is in custody for last more than three years. In the last he added that the co-accused Suhail

Randhawa has also been admitted to bail by trial court which also advances the case of applicant / accused for grant of bail so he insisted that applicant / accused is entitled for concession of bail. He relied upon 2000 SCJ 208, 2017 PCrLJ Lahore Note 231, 2008 PCrLJ Sindh 87, 2006 SCMR 66, 2005 PCrLJ Lahore 557, 2009 PCrLJ Sindh 582, 2018 PCrLJ 934, 2018 PCrLJ 974, PLD 2017 Sindh 120, 2017 MLD Peshawar 1376, SBLR 2017 Sindh 1170, 2017 YLR Lahore 2319, 2012 PCrLJ Sindh 1613, 2017 SCMR 1468, 2012 PCrLJ Sindh 986, 2002 PCrLJ Sindh 349, 2014 PCrLJ Sindh 1215, 2012 YLR Sindh 1421, 2015 PCrLJ Sindh 1433, 2016 MLD Sindh 862, SBLR 2017 Sindh 1972, SBLR 2017 Sindh 1614, 2002 SCMR 184, 2004 PCrLJ 935, 1997 SCMR 1336, 2017 PCrLJ Sindh 631, 2014 YLR Peshawar 736 and 2012 SCMR 184.

4. On the contrary, learned Assistant Prosecutor General argued that after disposal of previous bail application of applicant by this Court vide order dated 09.02.2018 the prosecution has examined four PWs and remaining PWs were in attendance before the trial Court however counsel for the applicant kept seeking adjournments that resulted in delay in conclusion of trial within the time fixed; that the applicant filed bail application before the trial Court on same grounds as were urged earlier and that bail application was dismissed on 31.07.2018; that learned counsel for applicant though argued that prosecution has failed to conclude the case before the trial Court inspite of directions of this Court, however such non-conclusion of the case within stipulated period, cannot be considered to be a valid ground to enlarge the applicant on bail, especially when applicant is charged under sections 302 and 365 PPC; that present bail application before this Court also does not disclose any fresh or new ground; that there is no

material contradiction in the evidence of PWs so recorded by the trial court; other remaining witnesses are yet to be examined hence direction may be issued to the trial Court for conclusion of trial within a reasonable period as deemed appropriate by this Court. He placed reliance on PLD 2015 SC 41, PLD 2016 SC 11 and 2017 PCrLJ Note 135 (Lahore).

5. The complainant is also present in *person* and contended that he has business in Sharjah, Dubai and used to visit his house on every month. Applicant and other accused persons, released on bail, are issuing threats of dire consequences, he has not entered into compromise with the accused party, hence he is under serious threats. He also prayed for protection.

6. I have heard the *respective* parties and have also *carefully* gone through the available record.

7. At the very outset, I would like to attend the *plea*, raised by learned counsel for the applicant / accused with reference to bail, granted to co-accused Suhail Randhawa by trial Court through order dated 30.12.2017. Bare perusal thereof shows that bail was granted with reference to **no-objections**, extended by complainant (father of one of the deceased namely Tahir Farooq Awan) and Sher Afzal ( brother of another deceased namely Tamrez Khan), which *ground* (no-objections) is not available with present applicant / accused hence such *plea* is of no help for present applicant / accused. In answer to this *plea*, the record, attached with bail application was perused, which has necessitated to make a *foreword* first.

8. Since, I am quite conscious of the legal position that though the Courts have been vested with *jurisdiction / discretion* in releasing an accused on bail pending determination of his *guilt or innocence* but such *jurisdiction / discretion* is never unfettered rather same is controlled by well established principles of law enunciated by honourable Apex Court. Reference may well be made to the case of Commissioner Inland Revenue, Karachi v. Pakistan Beverages Ltd. (2018 SCMR 1544) wherein it is *categorically* observed as :-

“4. .... We begin by noting that it is well settled that the law recognizes no such thing as an unfettered discretion. All discretionary powers, especially that as conferred by statute, must be exercised in terms of well established principles of administrative law, which are of longstanding authority and have been developed, enunciated and articulated in many judgments of this Court. There is no need to rehearse those principles here save only to note one aspect. This is that a discretionary statutory power can only be exercised on a ground or to achieve an object or purpose that is lawfully within the contemplation of the statute. ....”

There can be no denial to the legally established principle of law that term *‘fresh ground’* stood defined by honourable Apex Court. Reference, if any, may be made to the well known case of Zubair & Ors (PLD 1986 SC 173) wherein it was categorically *enunciated* as:-

“8. It might be useful to mention here that the second or subsequent bail application to the same Court shall lie only on a fresh ground, namely, a ground which did not exist at the time when the first application was made. If a ground was available to the accused at the time when the first bail application was filed and was not taken or was not pressed, it cannot be considered as a fresh ground and made the basis of any subsequent bail application. ....”

Any departure from such *enunciated* principle of law is not only a *‘violation of said enunciated principle of law’* but was observed as *colourable*.

Reference may well be made to the case of Muhammad Siddiq v. State (2014 SCMR 304) wherein it is observed as:-

“6. .... The main ground taken by the learned judge of the Lahore High Court for suspending the sentence of respondent No.2 was rule of consistency having similarity of roles ascribed to respondent no.2 as well as Madad Ali co-convict, as such, the impugned order has been passed **in violation of law laid down by this Court in the case of "The State through Advocate-General N.W.F.P. v. Zubair & 4 others"** PLD 1986 SC 173 wherein it has been held as under:-

.....

In such circumstances it is apparent on the face of record that the ground of similarity of role and rule of consistency was available to the petitioner at the time of filing first application for suspension of sentence but the learned Judge has totally ignored it. From the tenor of impugned order it appears that the learned Judge of the Lahore High Court while suspending the sentence of respondent no.2 has not exercised discretion in a proper and judicious manner rather has not at all adverted to the guidelines laid down in Zubair's case (supra)

8. Before parting with this order we may observe that discretion exercised by the learned Judge while passing the impugned order in the instant case has appeared to us **to be somewhat colourable** because after dismissal of second application for suspension of sentence bearing the same ground the only difference in the respondent's third application for the same relief was a different learned counsel for that respondent. Office is directed to send a copy of this order to the learned Judge of the Lahore High Court, Lahore for his information.”

As well in case of Nazir Ahmed vs. the State, (PLD 2014 SC 241) in para 7 it is held that :-

7. After hearing the learned counsel for the parties and going through the relevant record with their assistance we find that there are many issues involved in these review petitions and, thus, in the background of the facts of this case we have decided to discuss and resolve these issues one by one in the light of the principles concomitant thereto laid down by this Court from time to time. We find that the first issue involved in the review petitions in hand is as to whether the considerations weighing with the learned Judge-in-Chamber of the Lahore High Court, Lahore for suspending the sentence of Nazir Ahmed petitioner and for releasing him on bail during the

pendency of his appeal were valid considerations for grant of the said relief on the merits of the case. We note in this context that the reasons prevailing with the learned Judge-in-Chamber of the Lahore High Court, Lahore for suspending the sentence of Nazir Ahmed petitioner and for admitting him to bail were that in the Challan case the police had found the petitioner innocent; the complainant had filed his private complaint after a delay of six months; there was previous enmity between the parties; and the sentence of a co-convict of the petitioner namely Madad Ali, attributed a role identical to that alleged against the petitioner, had already been suspended and he had been admitted to bail by the Lahore High Court, Lahore through an order which had not been interfered with by this Court. The facts and circumstances of the case, however, show that none of the said reasons provided a valid or sufficient ground for suspending the sentence of Nazir Ahmad petitioner and for his admission to bail during the pendency of his appeal before the Lahore High Court, Lahore. It ought to have been appreciated by the learned Judge-in-Chamber of the Lahore High Court, Lahore that any declaration of innocence of Nazir Ahmad petitioner recorded by the police in the Challan case was irrelevant as the petitioner's trial had been conducted in the complainant's private complaint and not in the Challan case and even otherwise opinion of the police regarding the petitioner's innocence was inadmissible in evidence being irrelevant besides such opinion having already paled into further irrelevance in view of the judicial verdict recorded by the learned trial court in respect of the petitioner's guilt. The learned Judge-in-Chamber of the Lahore High Court, Lahore had also failed to appreciate that the complainant had filed his private complaint when the investigating agency had disappointed and frustrated him on account of its alleged collusion with the accused party and the reasons for the delay in filing of the private complaint had been explained by the complainant before the learned trial court which reasons had been accepted by it as justified. Mere existence of enmity between the parties was hardly a valid ground for suspending the petitioner's sentence and for his admission to bail because the learned trial court had already adjudged the petitioner guilty of the alleged murder and the existing enmity between the parties had been found by it to be supporting the motive set up by the prosecution. Apart from that existence of enmity between the parties and a possibility of false implication of the petitioner on the basis of such enmity was a factor which could only be attended to and appreciated by the learned appellate court after a detailed assessment of the evidence at the time of hearing of the main appeal and certainly not at the time of deciding an application seeking suspension of sentence and release on bail during the pendency of the appeal. The learned Judge-in-Chamber of the Lahore High Court, Lahore was also clearly unjustified in holding that the case of Madad Ali co-

convict was "identical" to that of Nazir Ahmed petitioner and, therefore, in view of Madad Ali's admission to bail upon suspension of his sentence Nazir Ahmed petitioner was also entitled to the same relief. The learned Judge-in-Chamber of the Lahore High Court, Lahore had committed a serious error in this respect by not appreciating, or ignoring, the fact that most of the firearm injuries to the deceased attributed by the complainant in the F.I.R. to Madad Ali were non-existent in the Post-mortem Examination Report pertaining to the dead body of the deceased and, therefore, in his private complaint the complainant had changed the locale of the injuries allegedly caused by Madad Ali to the deceased whereas the complainant had throughout been quite consistent in his F.I.R. as well as in his private complaint regarding the firearm injuries caused by Nazir Ahmed petitioner to the deceased which injuries stood duly reflected in the Postmortem Examination Report. In view of this factual position it could not be urged with any degree of seriousness or held with any degree of reasonableness that the case of Nazir Ahmad petitioner was identical to that of Madad Ali co-convict for the purpose of treating them alike in the matter of suspension of sentence and release on bail. For all these reasons a conclusion is irresistible and inescapable that the learned Judge-in-Chamber of the Lahore High Court, Lahore was not justified in suspending the sentence of Nazir Ahmed petitioner and in admitting him to bail on the merits of the case and, thus, cancellation of his bail by this Court brought about through the judgment under review cannot be taken any legitimate exception to. The learned counsel for Nazir Ahmed petitioner has remained unable to point out any error patent on the face of the record justifying review of that decision by this Court."

The perusal of record shows that the Additional District & Sessions Judge, Malir (SHAFI MUHAMMAD PIRZADA) himself had rejected a *joint* bail application by order dated 29.08.2017 (available at P-77) while categorically observing that:-

"I have considered the contentions raised by the parties counsel and have gone through the material available on record, from it appears that previously the bail application of accused Sohail Ahmed was dismissed by this Court vide order dated: 14.12.2015. Thereafter accused Sohail Randhawa has filed bail application, which was also declined vide order dated: 20.06.2017. **Thereafter this bail application has been made on the sole ground that complainant Muhammad Farooq Awan, who is father of one of the deceased Tahir Awan has raised no objection for bail and the witness Sher Afzal also raised oral no objection to the extent of accused Sohail**



Randhawa, but there are other legal heirs of deceased who have neither appeared before this Court nor raised any no objection, therefore they cannot be ignored, mere any no objection of father of one of the deceased is not sufficient and any oral no objection of witness for only accused Sohail Randhawa is not sufficient. Previously the bail applications of accused Sohail Randhawa and others have been dismissed. No fresh ground is made out. The alleged offence carries capital punishment of death or imprisonment for life. Hence, the applicants/accused have failed to made out the prima facie case for grant of bail, therefore the bail application in hand is hereby dismissed."

From above, it is quite clear that learned trial Court Judge (Shafi Muhammad Pirzada) not only had considered merits but '**no-objections**', extended by complainant and witness Sher Afzal as well was conscious of the meaning of **fresh ground**; and in consequence to discussion found such grounds to be '*insufficient*' to release co-accused **Suhail Randhawa** but surprisingly only after few days (vide order dated 30.12.2017), the same learned trial Court judge (*Shafi Muhammad Pirzada*) not only entertained bail plea, separately moved for co-accused **Suhail Randhawa only**, but also granted him bail on same *grounds* which he (learned trial court judge) *himself* found to be **insufficient** in his own earlier order dated 29.08.2017. Here direct referral to such order, being necessary, is made hereunder:-

"Applicant / accused Suhail Randhawa has submitted fresh bail application under section 497 Cr.P.C.

The facts of the prosecution case have already mentioned in previous bail order dated 20.6.2017, therefore, there is no need to repeat the same.

Notice of bail application has been extended to the State counsel as well as Advocate for the complainant.

Heard learned counsel for the accused / applicant, DDPP for the State, duly attested by the learned counsel for the complainant.

Learned counsel while arguing the bail application reiterated the same grounds as mentioned in the bail application. Advocate for the complainant, who is father of one of the deceased namely Tahir Farooq raised no objection on bail application and one Sher Afzal, who is brother of another deceased namely Tamrez Khan also raised

no objection, and he in his evidence recorded on 07.12.2017 not implicated the accused / applicant Sohail Randhawa son of Muhammad Anwar.

In such circumstances and **no objection raised by the learned counsel for the complainant and brother of another deceased, bail application in hand is allowed.** Accordingly, accused / applicant is admitted to bail in the sum of Rs.100,000/- (One lac) subject to furnish solvent surety and P.R bond in the like amount to the satisfaction of this Court."

Announced in open Court.  
Given under my hand and seal of the Court.  
This 30th day of December, 2017.

(SHAFI MUHAMMAD PIRZADA)  
1st Addl. Sessions Judge Malir, Karachi."

Here it is also worth to add as regard *evidences* the learned trial Court Judge (*Shafi Muhammad Pirzada*) himself had observed in his another bail rejection order dated 31.07.2018 over bail plea of present applicant / accused as:-

"8. In the light of above circumstances and the case law discussed above of superior courts that discrepancies if any in the evidence of prosecution witnesses available on record could not be touch and deeper appreciation also to be avoided which may prejudice the either party."

I am unable to understand as to what had prevailed over mind of the learned trial court judge in granting bail to co-accused **Suhail Randhaw** mainly on the ground (*no-objections*) which, *otherwise*, was earlier found as '**insufficient**'. Thus, *prima facie*, the learned trial Court judge (*Shafi Muhammad Pirzada*) not only *deliberately* acted in *violation* of settled enunciated principle of law for '**fresh ground**' but there appears to be no *legal* justification in sitting over his own *findings* just after lapse of few days. I may also add here that since the case of *Nazir Ahmed* (PLD 2014 SC 241) was not only circulated to each court but it was made mandatory that no bail plea shall be filed without a '*certificate*' with reference to such case therefore, there had never been an *exception* for passing said bail grant order by learned

trial Court judge, basing the *ground* which earlier was not only available but was considered too. I would also add that a *judge always speaks through his pen* (written words) hence there is no other way to shoulder the trembling trust in *judiciary* but by making every single *order* a reasonable and legally justified which seems to be lacking in bail grant matter of co-accused **Suhail Randhawa**. Resultantly, learned trial court judge for a *prima facie* deliberate ‘violation of principle of law, so enunciated rather insisted by honourable Apex Court’ which, as already discussed to have been found as ‘somewhat colourable’ therefore, MIT-I shall call R&P and place this order before the competent authority for action on departmental side. Needless to add that no such *exercise* (colourable) could be swallowed when same may cause prejudice to *administration of justice*. I would also add that since bail granted to co-accused **Suhail Randhawa** appears to be not in line with settled principle of law hence let a show cause notice be issued to him *too* thereby requiring him to explain as to why his bail be not cancelled.

9. Reverting to other *sole* ground of delay in conclusion of trial, it would suffice to refer the progress report dated 30.12.2017 (available at P-97) so, called from the learned trial court judge, which reads as:-

“SUBJECT PROGRESS REPORT IN SESSIONS CASE NO. 799/2015, FIR NO.241/2015 UNDER SECTION 365, 302, 34 PPC. PS SACHAL KARACHI

Ref: - Cr.Bail Application No. 1868 of 2017 Sohail Ahmed Vs. The State dated 22.12.2017

I have the honour to submit progress report of above sessions case as under:-

That sir after framing of the charge, the prosecution has examined the following witnesses.

PW-01 Complainant Farooq Awan. PW-02 Mohammad Asif was examined on 06.12.2016 and his cross examination was reserved

**at the written request of learned counsel for the accused Sohail Ahmed Rindhawa, Shan, Afraz and Irfan.** PW-03 Sher Ali Abbasi was examined on 11.12.2017, his cross examination was also reserved **at the written request of learned counsel for the accused.**

That sir, the matter was fixed today. The PWs whose cross were reserved, were present and remaining PWs ASI Mohammad Younis, I.O SIP Shakeel Ahmed and Dr. Mohammad Khalid MLO Abbasi Shaheed Hospital were present, but they returned unexamined **due to adjournment applications of accused side.** **PWs present in Court are bound down and the matter is adjourned to 10.01.2018 with direction to the accused to bring their counsel on next date of hearing without fail.**

Report be placed before the Honourable Court where the bail application No. 1868/2017 is fixed."

Further, learned trial court judge while rejecting *last* bail plea of the present applicant / accused also observed as:-

**"The accused party sought adjournments at the initial stage of the case and framing the charge complainant and PWs used to remain present and the accused were seeking the adjournments turn by turn on many dates. The record reveals that after the directions of Hon'ble High Courts in bail applications No.149/2016 of accused Sohail Ahmed vide order dated 08-04-2016, the trial court took fair efforts and recorded the examination in chief of complainant but the accused turn by turn were seeking adjournments for cross-examination for about three months and still the cross of Advocate for accused Asif Nazeer is not been made due to absence of his advocate. The complainant and other PWs remained present before the trial court but due to absence of defense counsel they were not examined."**

Since, *prima facie*, the delay, if any, in conclusion of trial is not *absolutely* on the part of prosecution therefore, the applicant / accused cannot insist bail on this count *too*. Reference may well be made to the case of *Babar Hussain* (2016 SCMR 1538) wherein it is observed as:-

**"4. ....We are of the considered view that even after lapse of two years, the conduct of an accused seeking adjournments can be taken note of and bail can be denied by a Court even on the statutory ground.** We have noticed that adjournments were sought and even the cross examination of the eye-witnesses was not conducted by the petitioner's counsel, for which no plausible explanation has been offered."

Thus, I am of the clear view that the present applicant / accused has failed in making out a case for grant of bail. Accordingly, the bail plea is hereby dismissed.

10. Since, *peculiar* facts, so discussed above, have made a *cause* to withdraw the case crime from the file of learned trial court judge hence the learned Sessions Judge, Malir Karachi is directed to withdraw the same from the file of trial court and to assign the same to any other court or to try the same by himself.

While parting, I would add that since the complainant *categorically* pleaded apprehension to his and his family's *life*; logically no witness could be expected to speak *truth* if he continues under an *apprehension* hence the learned trial court before summoning the witnesses (*private witnesses*) shall ensure that:

- i) counsels for accused are available and ready for evidence;
- ii) escort is provided to witnesses from point of their *convenience* till their reaching back to such point;

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**J U D G E**