ORDER SHEET
IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA
Crl. Bail Application No.S- 398 of 2011

DATE	ORDER WITH SIGNATURE OF JUDGE

1. For orders on office objection flag 'A'
2. For Hearing

27.2.2013

Mr. Ghulam Dastagir Shahani, advocate for applicant.
Mr. Safdar Ali G.Bhutto, advocate for complainant.
Mr. Abdul Rasheed Soomro, State counsel.

Muhammad Shafi Siddiqui. J.- Applicant has moved this bail application in Crime registered as FIR NO.87/2008 under section 302, 114, 34, PPC at Police Station Hyderi, Larkana.

2. Learned counsel for the applicant submitted that the applicant is confined in jail since 05.7.2008 and the trial of the case is still not concluded and the delay in trial is not caused by the applicant. It is contended that the statutory period of two years as per proviso in Section 497, Cr.P.C has already been completed but the evidence/trial has not been concluded. It is contended that the applicant is not desperate, hardened or dangerous criminal and the report of the jail authorities ensure such fact and as such is entitled for benefit of grant of bail under statutory period. Learned counsel has also placed on record diaries with effect from 09.2.2009 to 18.6.2011 to support his contention that the delay in the trial was not caused by the applicant. Learned counsel in support of his contention has relied upon:

(i) Arbab v. State 2006 MLD 1846,
(ii) Abdul Waheed v. State 2005 MLD 802,
(iii) Mahar Ali Shahi v. State 2008 P.Cr.L.J 449,
(iv) Mashooque v. State 2001 P.Cr.L.J 874,
(v) Abdul Hameed v. State 2003 MLD 19,
(vi) Taj Muhammad v. State 2011 P.Cr.L.J. 1910,
(vii) Muhammad Yousif v. State 2000 SCMR 79,
(viii) Sher Zaman v. Muhammad Azad 1978 SCMR 248,
(ix) Abdullah v. State 1985 SCMR 1509,
(x) Muhammad Iqbal v. State 1992 MLD 287 and
(xi) Faisal v. State PLD 2007 Karachi 544.

Learned counsel relying upon aforesaid authorities submitted that even on those dates where the counsel for the applicant is not in attendance or on which dates the

applicant had no counsel to attend the case, the case on the said dates could not have been proceeded, for one reason or the other since either the co-accused or the learned Presiding Officer was on leave and as such the non appearance of the counsel for applicant would count nothing towards causing delay in the trial.

3. Conversely, learned counsel for the complainant submitted that originally 3rd proviso was inserted in the year 1979 and then subsequently in the year 1981 4th proviso was added. Learned counsel submitted that the delay in the trial was caused by the applicant as reflected from the diary sheets. On 24.02.2009 the counsel for the applicant was absent, on 11.3.2009 again the counsel for applicant was absent, on 15.4.2009 again the accused were directed to engage an advocate. On 04.8.2009 applicant was directed to engage an advocate again and on 19.12.2009 accused was directed to engage counsel for the third time. On 09.4.2011 it was observed by the Presiding Officer that accused Khalid has addressed the court with an aggressive attitude and he was warned to be careful in future and he for the first time filed application seeking time to engage an advocate which was granted. On 12.5.2011 the applicant engaged counsel only for bail application. Learned counsel submitted that the remarks in the aforesaid diary goes on to prove that the delay in the trial was caused and attributed by the applicant and as such he is not entitled and does not qualify to move such application to be enlarged on bail on statutory ground. He has submitted that a number of witnesses including mashirs and private witnesses have been examined and only 2/3 witnesses are left to be examined and it will not take more than two months to conclude the trial. Learned counsel in support of his contention relied upon:

(i) Sahib Khatoon v. Bakhsal 2001 MLD 229,
(ii) Abdur Rashid v. State 1998 SCMR 897,
(iii) Muhammad Sadik v. State 1980 SCMR 203 and
(iv) Moundar v. State PLD 1990 SC 934.

4. Learned State counsel has adopted the arguments of learned counsel for the complainant and supported him.

5. I have heard the learned counsels and perused the record.

6. This bail application is moved purely on statutory ground, since it is claimed that the trial is not yet concluded and since his arrest more than two years have passed.

The third and fourth proviso for the convenience are reproduced as under :-

497 (1) ....

Provided further that the Court shall, except where it is of the opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf, direct that any person shall be released on bail.

> (a) who, being accused of any offence not punishable with death, has been detained for such offence for a continuous period exceeding one year or in case of a woman exceeding six months and whose trial for such offence has not concluded; or
>
> (b) who, being accused of an offence punishable with death, has been detained for such offence for a continuous period exceeding two years and in case of a woman exceeding one year and whose trial for such offence has not concluded,
>
> Provided, further that the provisions of the foregoing proviso shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

7. In terms of third proviso the Court was obliged to release the applicant on bail provided it is of the opinion that the delay in the "trial" of the accused has not been occasioned by act or omission of the accused or any other "person" acting on his behalf. Such "person" acting on is behalf include but not limited to be his advocate. The period of two years is associated only with sub clause (b) of third proviso and it is not reflected in the main third proviso i.e. delay in the trial. Meaning thereby in order to qualify to file bail application under the said proviso it is to be shown that the applicant has been detained for such offence for continuous period exceeding two years and once he qualifies such period he has to further prove that the "delay in the trial" was not caused by any of his act or omission. The substantial fact that is to be determined is whether the applicant caused delay in the trial or not. The period of two years is only attributed to qualify

for filing such application whereas the second qualification is that there should be no delay in the trial on the part of the applicant is not supported by any period or any mathematical calculation.

8. The fourth proviso of Section 497, Cr.P.C further provides a hurdle that even if the applicant comes out successful of the aforesaid two criteria he has to qualify in terms of the fourth proviso which says that the aforesaid proviso will not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who in the opinion of the Court is a hardened, desperate and dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life. I would now first deal with the third proviso as to measure the length of his detention. No doubt it is an admitted position that the applicant was arrested on 05.7.2008 and he remained in confinement for about more than two years when he filed bail application and on 12.5.2011 on which application notice were ordered on 16.5.2011. The application was moved after more than two years. The substantial question which now comes across is whether the delay in the trial was caused by the applicant. The trial began on 09.2.2009 on which date the charge was framed. Period before framing of charge would not count towards delay in trial as the trial began on 09.2.2009. Therefore, I am inclined to see the period beyond 09.2.2009. Now the delay in the trial as I could see was caused on 24.2.2009, 11.3.2009, 15.4.2009, 4.8.2009, 09.12.2009 and 09.4.2011 and so on. The case diary of the aforesaid dates are reproduced as under :-

> 24.02.2009.
>
> Case called. Accused Khalid and Mohammad Siddique are produced in custody. DDPP for the State is present. Mr.Abdul Hakeem Brohi advocate for accused is absent. Mr.Safdar Ali Bhutto advocate for complainant is present. Complainant present. No other P.W present. Repeat process to R/P.Ws. Put off to 11.3.2009 for evidence. Accused are remanded back to custody. Call original police papers case property Chemical and Ballistic report.
>
> 11.03.2009
>
> Case called. Accused Khalid and Mohammad Siddique are produced in custody. DDPP for the State is present. Mr.Abdul Hakeem Brohi advocate for accused is absent. Miss Maimoona Safdar Ali Bhutto. Advocate filed power on behalf of complainant order thereon. Complainant present. No other P.W present Put off to 28.03.2009 for evidence. Accused are remanded back to custody.
>
> 15.04.2009
>
> Case called. Accused Khalid and Mohammad Siddique are produced in custody. DDPP for the State is present. Complainant present and bound

down to attend. No other P.W present. Repeat process to R/P.Pws. Accused are directed to engage advocate. Put off to 06.5.2009 for evidence. Accused are remanded back to custody.

Accused Mohammad Siddique submitted bail application. Order thereon. Notice to DDPP Hg. 06.05.2009.

04.08.2009.

Case called. Accused Khalid is produced in custody. Accused Mohammad Siddique is not produced form CP Larkana only slip received. Next date communicated on it. DDPP for the State DC and advocate for the complainant are present. P.W Abdul Qadir and Habibullah are present and bound down to attend. Accused Khalid is directed to engage an advocate. Put off to 26.08.2009 for evidence. Accused is remanded back to custody. Application of accused Siddique along with P.S copy of M.C. Order passed thereon. File.

09.12.2009

Case called. Accused Khalid is produced in custody. Accused Mohammad Siddique is not produced from CP Larkana. Complainant and P.W SIP Asadullah are present and bound down to attend. No other P.W present. Accused are directed to engage an advocate. Put off to 12.01.2010 for evidence. Accused Khalid is remanded back to custody. Issue P.O for accused.

Accused Khalid submitted application. Order thereon. Call report from Superintendent Jail.

09.04.2011

Accused Khalid is produced in custody. Accused Siddique is present on bail. DDPP present DC absent. Complainant is present with his counsel. Pws; Habibullah and Ahmed Ali are present. Accused Khalid is addressing the court with an aggressive attitude and he is warned to be careful in future. Accused persons filed an application for time to engage an advocate. Order on it. Granted. Put off to 25.04.2011 for evidence. Present p.ws; be bound. Accused are directed to engage an advocate before date of hearing to proceed with the case on the date of hearing. Accused Khalid sent back to custody. Accused is on bail is directed to attend.

9. The diary of aforesaid dates did reflect that on some occasions the delay in trial was, if not completely but mostly attributed to the applicant. No doubt at some occasions Presiding Officer was on leave but applicant could claim such delay only if there is no default on delay attributable to applicant for the same day. Applicant cannot rely on weaknesses of others which may have contributed in delay of trial when he himself is contributory in such delay.

10. The delay that could be attributable to the applicant includes his reluctance in engaging Counsel as he until 12.5.2011 did not even engage a Counsel and even on 5.12.2011 the advocate who was engaged by the applicant was only to

the extent of bail application. He was continuously reminded by the Court to come up with a clear statement regarding engaging a Counsel. The Honourable Supreme Court in the case of *Abdul Rasheed v. The State,* reported in **1998 SCMR 897** has already observed that where for any reason accused or his authorized agent which necessarily includes the Advocate engaged for defence causes delay, protection contained in third proviso to Section 497(1), Cr.P.C. cannot be invoked. As I have observed above that at some occasions the Presiding Officer or the prosecution witnesses remained absent, however, while ascertaining cumulative effect of the delay in disposal of the case it would not be merely a mathematical calculation of excluding the adjournments obtained by the accused or his Counsel. Mechanism of delay in the trial do not work on the basis of mathematical and mechanical inclusion and exclusion of days. This is so because one adjournment by accused whether necessary or un-necessary deliberate or non deliberate may frustrate further dates of hearing as it take hectic efforts to accumulate and motivate all prosecution witnesses, complainant etc for trial/evidence and one such desire of adjournment on the part of the accused may unsettle mind of prosecution witnesses for the next few dates at least if not more. So as I observed it does not work on mechanical inclusion and exclusion of the days.

11. The perusal of the aforesaid proviso reflects that apart from the prerequisite of two years and delay in the trial the applicant is yet to cross last proviso that he is not convicted offender for offence punishable with death or imprisonment for life or that in the opinion of the Court the applicant is not hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life. All three components of this proviso are independent i.e. to say that to be hardened, desperate and dangerous criminal he need not to be a previously convicted offender. Even a brutal and cold blooded murder and the planning of the murder and its execution could define the applicant as being hardened, desperate or dangerous criminal and not only on the basis of previous conviction such opinion is to be formed. Thus the contention of the applicant's counsel that the applicant not being previous convict is not hardened and desperate criminal is farfetched. It has to be seen independently in terms of the first

information report and the evidence that may have come so far as to whether the applicant is hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life. Thus even in cases of statutory bail application court is constrained to go through the contents of the F.I.R and the evidence which may have come so far on record.

12. I now discuss the relevant citations referred by the learned Counsel for the complainant.

13. The first judgment that was cited by the learned Counsel is the case of *Muhammad Sadik v. The State,* reported in **1980 SCMR 203**, in terms whereof it was observed by the full Bench of the Honourable Supreme Court that in view of the matter that the trial is to commence shortly and date is already fixed by the Court it is not fair to go into the merits of the case in the form of a bail application at this juncture and the case is, therefore, not fit for grant of special leave.

14. It is pertinent to point out here that in this case charge has already been framed and the matter was being fixed for recording evidence and the accused were directed to attend the trial and only 2 to 3 witnesses were remained to be examined.

15. The other case relied upon by the learned Counsel for the complainant is the case of *Moundar v. The State*, reported in **PLD 1990 SC 934.** The full Bench of the Honourable Supreme Court in the aforesaid case has described the meaning of hardened, desperate and dangerous criminal as under :-

> "According to the same dictionary the word "harden" has been defined to mean, inter alia, (1) to render or make hard; to indurate, (2) to embolden, confirm, (3) to make callous or unfeeling and (4) to make persistent or obdurate in a course of action or state of mind. The word "hardened" has also been defined to mean "made hard, indurated, rendered callous; hard-hearted; obdurately determined in a course".
>
> The same dictionary gives the meaning of the word "desperate" inter alia, in relation to person: driven to desperation hence reckless, violent, ready to risk or do anything.
>
> The same dictionary gives the meaning of the word "dangerous", inter alia, as fraught with danger or risk; perilous, hazardous, unsafe.

These appear to be the meanings intended to be conveyed by the legislature by using the words "hardened, desperate or dangerous criminal". Accordingly the view taken by Sajjad Ali Shah, J, appears to be correct and the construction placed by him is in consonance with the intention of the legislature underlying the provision in question in the context of the whole section. In the circumstances we are unable to accept the contention of Mr. Muhammad Hayat Junejo that the facts and circumstances of the prosecution case in which the accused person seeking release on bail is facing trial cannot be taken into consideration. The proposition relied upon in support of the contention to the effect that a finding in a criminal trial can only be reached upon the assessment of entire evidence produced in the Court, is inapplicable, insofar as the opinion reached by the Court for purposes of the 4th proviso has nothing to do with the findings of the Court at the trial. Indeed the conclusions drawn for the purpose of disposal of a bail application cannot be used to the prejudice of the accused as the same are tentative in nature. However, there is no justification for the argument that such an exercise undertaken by the Court, violates the principle that an accused person is presumed innocent until proved otherwise. In subsection (1) of section 497 the legislature has already empowered the Court even before the commencement of the trial to make a tentative assessment of the evidence collected against an accused person or likely to be produced in the trial against him, in order to reach the conclusion whether there appears a reasonable ground for believing that he has been guilty of an offence punishable with death or life imprisonment or imprisonment for 10 years. The provision under consideration here is a proviso to the same subsection, and, therefore, it will be reasonable to construe it in the same manner authorizing a Court to take into consideration the evidence collected by the prosecution for purpose of determining whether the accused is a criminal of the categories prescribed therein. Of course the Court can taken into consideration and indeed in most of the cases it will take into consideration other materials produced by the prosecution in order to show that the case falls within the prohibition contained in the 4th proviso.

16. The third case that was relied upon by the learned Counsel for the complainant is the case of *Faisal v. The State,* reported in **PLD 2007 Karachi 544**, which discuss the due process of law.

17. The last case relied upon by the learned Counsel for the complainant is the case of *Abdul Rasheed v. The State,* reported in **1998 SCMR 897**, wherein the Honourable Supreme Court recorded the following invaluable observations :-

"Careful examination of this provision would clearly disclose that cases where offence is not punishable with death and accused is detained for a period exceeding one year, and trial has not yet concluded; the accused would be entitled to grant of bail except where in the opinion of the Court delay in completion of trial was occasioned by the act or omission of accused or any person acting on his behalf. It may be seen that third proviso was promulgated though Act No.XIX/94 on 14th November, 1994. Real object of introducing above referred amendment appears to be an effort to ensure that criminal trial are not unnecessarily protracted. It thus created an implied obligation upon the prosecution for taking effective measures to produce evidenced so that cases of accused persons facing trials

concerning respective categories contained in sub-clauses (a) and (b) of third proviso to section 497, Cr.P.C could be finalized expeditiously and within the period stipulated by aforementioned provisions of law. Any slackness or incapacity of prosecution to conclude the prosecution side within the time frame mentioned in clauses (a) and (b), supra, will provide an advantage to the accused for being realized on bai8l. However, exception contained in third proviso unambiguously imposes a responsibility upon the accused for ensuring that delay in disposal is not occasioned or caused on account of him or any person acting on his behalf. Therefore, it is crystal clear that if for any reason accused or his authorized agent which necessarily included the advocate engaged for defense causes delay, then in such eventuality protection contained in the third proviso cannot be invoked. It may further be noticed hat while asce3rttaining cumulative effect of ultimate delay in disposal of the case, it would not be merely mathematical calculation of excluding such days for which adjournment was obtained by the accused or his counsel.

Factually, if the witnesses are in attendance and matter is ripe for recording evidence; but defence does not proceed with the case, it may seriously affect the prosecution because on the next date, possibly, for some or the other reason, witnesses who had in fact appeared may not attend. Therefore, if effective hearing is got postponed by the accused or his counsel, then they are bound to fact entire risk and such period which may be consumed in procuring presence and examination of those witnesses who earlier appeared in the Court when adjournment was sough on behalf of accused would be important factor for considering question of bail merely on statutory ground under third proviso to section 497, Cr.P.C.

We have considered the ratio decidendi in cases Amir v. The State (1991 Pakistan Criminal Law Journal 534), Qaiser Mehmood v. The Stare (1996 MLD Lahore 157), M.Siddiq v. The State (1996 Criminal Cases 1713), Liaquat Ali v. State (PLD 1997 Karachi 156). In our opinion the observations in the afore-quoted judgments holding that adjournments sought by the counsel for the accused or accommodating granted to him by the Court should not affect the right of accused for availing benefit of third provision to section 497, is not correct. In the above cases exception contained in the thir4d proviso has been completely ignored and misinterpreted . We seriously apprehend that if above construction of law is allowed to hold field, there is greater likelihood of its being misused by adopting different devices and real object of incorporating third proviso (supra) would be frustrated. It is quite apparent that if delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf, then the right to release under third proviso cannot be availed (Underlining is for emphasis).

The conclusions arrived at in the afore-quoted judgments are, therefore, disapproved. It may be further noticed that principle of law discussed in Shoukat Ali v. Ghulam Ali (1998 SCMR 228) has no applicability to the facts of the present case. This Court while examining the application of 3rd proviso to section 497, Cr.P.C in case Zahid H. Shah v. The State (PLD 1995 SC 49) had observed that right of the accue3d to seek bail would not be left to discretion of the Court and would be controlled by the relevant provision of law. However, bail under 3rd proviso (ibid) can be certainly reused to accused on the ground that delay regarding conclusion of trial had been caused on account of any act or omission of the accused or any person acting on his behalf . Now adverting to the facts of this case, it is quite apparent that the counsel for the petitioner obtained adjournments on 22.9.1997, 16.10.1997, 29.10.1997, 19.11.1997, 10.121.1997,

18.12.1997 and 5.1.1998 as per the order-sheet available on the record when prosecution witnesses were in attendance. Therefore, petitioner is not entitled to avail the benefit of 3rd proviso to section 497, Cr.P.C. Both the Courts below have correctly construed the legal position. There being no illegality or infirmity in the impugned judgment, petition is dismissed."

18. I have minutely perused the diaries and it does reflect that at times the accused was either accommodated or he sought adjournment and more importantly he never engaged a Counsel until he moved bail application on 12.5.2011. Thus the ratio of the aforesaid judgments of the apex Court enable me to conclude that it is the cumulative effect that embarrassed the trial and simple mathematical calculation of excluding adjournments sought by the applicant or considering dates when Presiding Officer was on leave would not serve the purpose as one adjournment application on the day when the trial could have begun, if granted on account of the applicant/accused's incapacity to proceed, the whole process get frustrated and it would again depend on hectic efforts to fix a date and time suitable for the witnesses who out of their busy schedule may not get time for the next date or so. Since the applicant could not succeed in the 3rd proviso regarding the delay in the trial, therefore, I do not feel it necessary to comment and discuss the applicant being hardened, desperate and dangerous criminal. This being so, the applicant has not made out a case for the grant of bail on statutory ground and accordingly the application is dismissed.

Judge

*Abid H. Qazi/***