

ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA.
2nd Cr. Bail Application No. D- 24 of 2020.

Date	Order with signature of Hon'ble Judges
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1. For orders on office objection as flag A.
2. For hearing of main case.

Present:

Mr. Justice Mohammad Karim Khan Agha,
Mr. Justice Zulfiqar Ali Sangi,

Date of hearing: 28.01.2021.

Date of hearing: 16.02.2021.

Mr. Habibullah G. Ghouri, advocate for the applicants.

Mr. Aitbar Ali Bullo, D.P.G.

ORDER.

MOHAMMAD KARIM KHAN AGHA-J:- By this application, applicants Ali Sher and Fida Hussain are seeking post arrest bail in Crime No.12 of 2009 of Police Station Imam Bux Jamali registered for an offence under Sections 302, 324, 404, 436, 427, 353, 395, 396, 148, 149 PPC r/w Section 6/7 A.T.A 1997.

2. Brief facts of the prosecution case are that on 22.9.2008 at 1800 hours complainant SIP Noor Mustafa Pathan lodged FIR on behalf of the State alleging therein that a police picket was established at Noorpur Regulator of Saifullah Minor Canal to stop the activities of criminals from Balochistan where HC Ashiq Ali Gopang Incharge Special Team-II alongwith police staff were posted while other police staff was also posted at Police Station where wireless set was provided. About 3/4 days back accused Akbar Shahalyani Jamali had threatened to remove the said police picket from Noorpur Regular so that he could continue his criminal activities. On 22.9.2008 complainant alongwith SIP Muhsbat Khan Rind SHO P.S Imam Bux Jamali went there for checking of staff

and at 2.00 p.m they reached at Noor Mustafa Regulator when about 50/60 persons in tractor trolleys, motorcycles and a white colour 2D crossed Noorpur Regulator from Balochistan side and got down near the said police picket when complainant party saw and identified in all 25 accused duly armed with rocket launchers, G-3 rifles and K.Ks, who are nominated in the FIR including present applicants Fida Hussain and Ali Sher having G-3 rifle and K.K respectively while rest of 25/30 accused were unidentified. It is further alleged in the FIR that accused Akbar Shahalyani and Muhammad Sallah fired rockets at police picket which hit its building and other accused started firing upon complainant party with their respective weapons and put siege around the police picket. SIP Muhbat Ali Rind conveyed message on wireless to DSP Ghulam Abbas Gadehi SPO Shahdadtal on which he alongwith SIP Ghulam Ali Laghari SHO P.S Shahdadtal and other staff arrived at the spot. In the meantime the culprits started firing rockets upon police and police also retaliated firing in self defence and within their sight SIP Muhbat Khan Rindh, SHO P.S Imam Bux Jamali, PC Sajjad Hussain Chandio, PC Manthar Ali Gopang, PC Muhammad Mureed Metlo sustained firearm injuries and as result of firing by complainant party accused Akbar Shahalyani Jamali and some of his accomplices also sustained fire shots who were taken by their accomplices while SIP Ghulam Ali Laghari also sustained firearm injuries inside *Baktar Band* vehicle. It is further stated in the FIR that ammunition of police party was consumed and the culprits cordoned them off. The culprits put the HC Ghulam Shabir Brohi into mobile No.6014 and set the mobile on fire and also caused injuries to driver PC Pandhi Khan and took the weapons of police, motorcycle and wireless. It was 4.00 p.m when several police mobiles alighted from eastern side and seeing the mobiles the culprits took their injured and deceased accomplices alongwith the robbed property mentioned in the FIR. They threw SHO Muhbat Khan Rind in Saifullah Minor Canal and passed their tractor over all the police officials who had sustained firearm injuries and then accused decamped away towards Balochistan. Later it was seen that PC Mumtaz Ali Gopang, PC Sajjad Hussain Chandio and

PC Muhammad Mureed Metlo had died due to firearm injuries and under the wheels of tractors, HC Ghulam Shabir Brohi had died in the police mobile which was set on fire and dead body of SIP Muhbat Khan Rind was recovered from Saifullah Minor Canal. Later on dead bodies and injured were sent to the hospital, DPO along with staff followed the culprits and complainant appeared at P.S and lodged the FIR to the above effect.

3. The applicants were arrested and sent up to stand trial before the Court of Special Judge, Anti Terrorism Court Larkana where bail plea moved on their behalf was dismissed on merits and also dismissed by this court. The bail application was filed before the supreme court against this courts order declining bail on merits but was not pressed and the Supreme Court in its order dated 21.12.2011 gave a direction to the trial court to complete the trial within 6 months. Later on a fresh bail plea moved on behalf of applicants on hardship grounds was also declined vide impugned order dated 19.6.2020 by the trial court giving rise to filing of instant bail applications.

4. Learned counsel for the applicants at the very out set made it clear that he was not arguing the case on merits but exclusively on hardship grounds. He contended that applicant Ali Sher had been in jail for 11 years whilst applicant Fida Hussian had been in jail for over 9 years and that no delay had been caused by them or their counsel in the trial and that still 10 PW's remained to be examined and thus although they had been charged with a very serious offence they were entitled to be released on bail on hardship grounds. In support of his contentions he placed reliance on Article 10(A) of the Constitution, **Shabeer v. The State** (2012 SCMR 354) and **Taj Muhammad and another v. The State** (2011 P.Cr.LJ 1910).

5. Learned DPG opposed the grant of bail to both the applicants on hardship grounds mainly contending that the trial could be concluded very shortly if a direction maybe given by this court to the trial court to complete the trial within a given period of time. In support of his

contentions he placed reliance on **Tallat Ishaq v. National Accountability Bureau through Chairman and others** (PLD 2019 Supreme Court 112).

6. We have heard learned counsel for the applicants, learned Addl. P.G for the State, perused the material on record and considered the relevant law.

7. There is no doubt that the applicants have been charged with a very heinous crime whereby 5 police officers lost their lives when a heavily armed mob of miscreants attempted to usurp the writ of the State by destroying a police check post however these bail applications have **not** been moved on merits but on the ground of hardship which is a distinct type of bail.

8. We have noted that initially only the two applicants were arrested and stood trial. After a long trial on 04.11.2016 the case was fixed for final arguments however the prosecution moved an application under S.540 Cr.PC to call another PW i.e. SIP Ghulam Ali which was allowed by the trial court. His evidence was finally recorded on 31.07.2017 but he apparently did not support the prosecution case. When the matter was again fixed for final arguments before a judgment could be announced another of the many accused was arrested which lead to the charge being re framed and the trial starting from the beginning with all PW's being recalled. Later on 02.08.2018 another accused was arrested so the same process was once again adopted with the charge being reframed on 22.08.2019. None of this delay has been caused on account of the applicants or their counsel. It is notable that when this court originally rejected the applicants bail on merits the Supreme Court vide order dated 21.12.2011 (over 9 years ago) directed the trial be completed within 6 months. There still remain 15 PW's to be examined and as can be seen from the FIR there are many absconding accused who could be arrested and the trial re started again from scratch as has happened twice in the past. Although it is not particularly relevant for the purposes of this bail application it is noted that both the applicants have

only been given a general role in the FIR as opposed to a specific role in killing any of the police man and that no witness so far has deposed to this effect against either of them. **The bottom line however** is that under Article 10(A) of the Constitution an accused has the right to an expeditious trial no matter how serious his crime as at the end of that trial he may be acquitted and any time spent in jail cannot be recovered by him and no compensation is available to him. In this respect reliance is placed on **Ziagham Ashraf V. State** (2016 SCMR 18). It is the duty of the State to ensure the expeditious trial and the applicants should not be penalized or made to suffer if they have not caused any delay in the trial and the failure to conduct an expeditious trial lays at the door of the State.

9. The main principles for the grant of bail on hardship grounds have been referred to in the case of **Atta Abbas Zaidi vs. Chairman NAB & others** (unreported) (CP No.D-1865 of 2016), which are reproduced below for ease of reference:

16. Generally speaking the superior judiciary has tended to classify hardship cases as being those where **there has been a "shocking" or "in ordinate" or "repulsive and unconscionable" delay in completing the trial**, which often runs into a delay of a number of years and where there seems little chance of the trial being completed in the near future, as opposed to a lesser degree of delay. For example, in cases such as **Hamesh Khan V NAB** (2015 SCMR 1092 almost 5 years delay), **The State V. Syed Qaim Ali Shah** (1992 SCMR 2192), **Riasat Ali V. Ghulam Muhammad and the State** (PLD 1968 SC 353), **Gul Hasan Penhyar V The State** (1997 SCMR 390 around 6 years delay) **Muhammad Azim V The State** (2009 P Cr. L J 1314, Kar. Around 6 years delay), **Hashim V The State** (2009 YLR 1777, Kar.) around 6 years delay) **Shah Nawaz V The State** (2010 YLR 3182, Kar.) around 3 years delay) **Anwar Ali V The State** (2002 P Cr. L J 186, Kar.) around 2 years to even frame the charge) (bold added)

10. In our view we do not consider that granting a further direction to complete the trial within a given period would have any meaningful

effect keeping in view that the Supreme Court's order to complete the trial over 9 years ago within 6 months has not been complied with and it appears from the facts and circumstances of the case that this case will not be completed in the foreseeable future even with such a direction which would in effect be an exercise in futility and only serve to keep the applicants in jail much longer where upon after the expiry of such direction they would again approach this court for bail on hardship grounds due to violation of the direction by the trial court. Thus, for the reasons discussed above and in particular that fact that **the applicants have been in jail for 11 and over 9 years respectively and no delay has been caused on their part or the part of their counsel in concluding the trial as conceded to by learned APG and the fact that the trial is unlikely to conclude in the foreseeable future** based on Article 10(A) of the Constitution, the aforesaid cases we find that the delay in concluding this trial to have reached the level of "shocking" and/or "inordinate" and/or "repulsive and unconscionable" keeping in view the fact that no man can be incarcerated indefinitely pending the conclusion of trial and that bail cannot be refused as a punishment and as such we hereby grant **each** of the applicants post arrest bail in the aforesaid case subject to them **each** furnishing solvent surety in the amount of RS one million (10 lacs) and PR bond in the like amount to the satisfaction of the Additional Registrar of this court.

11. If either of the applicants fail to appear before the trial court on each and every date of hearing or cause any delay in the conclusion of the trial the State is at liberty to move this court for the cancellation of either or both of the applicants bails as the case may be.

12. The bail application is disposed of in the above terms.