

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Crl. Misc. No.709/B/2017

Miss Robina Tabusam

Versus

The State & another

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
(04)	15.11.2017	Mr. Muhammad Aslam Chaudhry, Advocate for petitioner. Ch. Manzoor Ahmed Kamboh, Advocate for respondent No.2. Mr. Sarfraz Ali Khan, State Counsel. Ms. Saima Naqvi, State Counsel. Shafqat Mehmood, S.I., P.S. Sabzi Mandi, Islamabad.

Through the instant petition, the petitioner seeks her post-arrest bail in case FIR No.143, dated 27.02.2014, U/S 365, 302/34 PPC, P.S. Sabzi Mandi, Islamabad.

2. Brief facts of the instant case as referred in the FIR are that, complainant/ respondent No.2 got lodged the instant FIR at P.S. Sabzi Mandi, Islamabad with the allegation that his son, who was working in National Assembly Secretariat, is missing since 21.02.2014 when he left his office for his home but he neither reached his home at Toba Tek Singh nor attended his office and his mobile phone was not responding. However on 22.02.2014, his son called at his home and informed that he is alright, thereafter, he is missing. On the complaint of respondent No.2, FIR was registered whereafter the police arrested Muhammad Irshad, father of present petitioner, who disclosed the alleged incident of murder of son of

respondent No.2, namely Sakhi Sarwar, whereafter the police arrested the present petitioner on the supplementary statement of complainant and challaned her against the allegation of murder of deceased Sakhi Sarwar.

3. Learned counsel for petitioner contends that petitioner was not nominated in the instant case and she has been nominated after the statement of her father; that petitioner is facing trial and is behind the bars for more than three and a half years but trial has not been concluded yet; that the petitioner is not instrumental in the delay of trial rather delay is on the part of prosecution; that this is the first ever bail petition filed by petitioner before this Court as petitioner had not applied for her bail on merits prior to instant bail petition.

4. Conversely, learned counsel for respondent No.2 as well as learned State Counsel contend that trial is likely to be concluded in near future as only seven witnesses are left, therefore, bail could not be granted to the petitioner who has committed heinous offence of murder.

5. Arguments heard, record perused.

6. From the perusal of record, it has been observed that the complainant got lodged the case FIR No.143, dated 27.02.2014, U/S 365, 302/34 PPC, P.S. Sabzi Mandi, Islamabad with the allegation that his son Sakhi Sarwar went missing on 21.02.2014 and neither reached his home situated at Toba Tek Singh nor even attended his office, however, he contended that his son Sakhi Sarwar called him on 22.02.2014 and informed him that he is alright and

thereafter he is missing. The police started investigation after the registration of case however, the complainant/ respondent No.2 got recorded his supplementary statement dated 23.05.2014 whereby he contended that he obtained the call data record of his son whereby the last accessed location has been found as Chak No.035/3R, Tehsil Haroonabad, District Bahawalnagar and the last contacted number was 0304-4728703, which belongs to his relatives Muhammad Irshad, Qaiser s/o Muhammad Irshad and Muhammad Azam who abducted his son. On the supplementary statement, only Muhammad Irshad was arrested on 10.06.2014 whereas the complainant again got recorded his second supplementary statement on 10.06.2014 whereby he nominated the daughter of Muhammad Irshad namely Rubina Tabusam/ present petitioner, who is niece of the complainant, and contended that as per CDR, last conversation of his missing son was made with present petitioner at her number. Complainant further contended that his son was interested to marry Rubina Tabusam but he/ complainant and his other family members were not in favor of the said marriage because Rubina Tabusam was older than his son.

7. The Investigation Officer after the arrest of Muhammad Irshad investigated the case and on 16.06.2014, accused Muhammad Irshad disclosed that his daughter/ present petitioner has committed the murder of Sakhi Sarwar, who is buried in his house, whereafter the Investigation Officer arrested the present petitioner on 17.06.2014. Petitioner then disclosed the place of murder

of deceased and on her pointation dead body of deceased was recovered from Chak No.035/3R, Tehsil Haroonabad, District Bahawalnagar.

8. After completion of investigation, Challan U/S 173 Cr.P.C. was submitted on 25.09.2014, whereupon learned trial Court framed the charge on 25.03.2015, whereafter statements of 13 PWs have been recorded so far, 03 PWs have been given up by the prosecution and statements of 07 PWs have yet to be recorded by learned trial Court whereas this Court while hearing the instant bail petition obtained a report from learned trial Court regarding the progress of trial, whereby the learned Additional District & Sessions Judge, (West) Islamabad has confirmed the above facts with the following words:-

"With reference to the hon'ble Islamabad High Court, Islamabad letter No.4332/Criminal dated 09.11.2017, I have the honour to submit that sessions case titled "The State Vs. Irshad Etc" is pending adjudication in this court, in which lady accused Robina Tabasum is also facing trial and she is being represented by Ch. Zafar Warraich Advocate. The case is fixed for prosecution evidence. Out of 23 prosecution witnesses, 13 PWs have been recorded so far, whereas, 03 PWs have been given up by the prosecution. Now evidence of only 07 PWs are to be recorded by the court. It is pertinent to mention that most of the remaining PWs belong to Haroonabad (Bahawalnagar) and Toba Tek Singh (South Punjab) who have been summoned for 15.11.2017 for completion of prosecution evidence. It is assured that the case would be decided expeditiously as early as possible in accordance with law."

The above referred report of learned Additional District & Sessions Judge (West) Islamabad clearly reveals that the

prosecution has yet to go for long way even from the perusal of record it has been observed that since the arrest of petitioner she is behind the bars and on majority of dates of hearing the PWs were not present and the matter was delayed for one reason or the other. However, the major contribution in delay in trial has been attributed to the prosecution and their witnesses, who have not appeared before the Court. The absence of PWs is visible from the diary of Court. PWs have not been produced on 14.04.2015, 24.04.2015, 30.04.2015, 05.05.2015, 09.05.2015, 16.05.2015, 06.06.2015, 13.06.2015, 25.06.2015, 28.10.2015, 12.11.2015, 19.12.2015, 21.01.2016, 08.02.2016, 16.03.2016, 18.04.2016, 24.09.2016, 22.11.2016, 08.12.2016, 05.01.2017, 31.07.2017, 11.09.2017, 19.09.2017 & 27.09.2017. Whereas, on majority of dates when PWs were present the matter was not concluded due to non-availability of set of witnesses or on the request of complainant side.

9. The above referred details of the learned trial Court clearly reveal that the petitioner has served almost 03 ½ years behind the bars without any material progress of the case and even to-date 07 PWs are still left to be recorded by the learned trial Court, whereby the petitioner is claiming her post-arrest bail on the basis of third proviso of section 497(1) of Cr.P.C. where a person who is accused of an offence punishable with death is entitled to be released on bail if he/she has been detained for such offence for a continuous period exceeding two years and whose trial for such offence has not concluded, however,

there are certain conditions, firstly, the Court is of opinion that the delay in the trial of the accused has not been occasioned by any act or omission of the accused or any other person acting on his behalf, secondly, he is previous non convict for an offence punishable with death or imprisonment for life, thirdly, he is not a hardened, desperate or dangerous criminal and fourthly, he is not a dangerous criminal or involved in terrorism.

10. I am of the considered view that petitioner, who is a woman, was neither nominated at the first instance nor in the first supplementary statement recorded by the complainant on 23.05.2014 rather she has been nominated in the second supplementary statement on 10.06.2014, after four months of alleged crime, however, she has disclosed about the dead body of deceased, which was recovered from the house of petitioner and it has been observed that the disclosure of information of murder of deceased Sakhi Sarwar was already made by the co-accused Muhammad Irshad (father of petitioner) whereafter the present petitioner was nominated by the complainant, therefore, the information of disclosure was already in the knowledge of investigation agency, this fact creates a ground of further inquiry even otherwise, the petitioner has not been attributed any delay in trial rather the prosecution witnesses have not been produced on majority of dates of hearing, therefore, in such like situation, I am fortified with the view given by Islamabad High Court, Islamabad in case reported as **2015 YLR**

1132 [Islamabad] "Mehtab Ahmed versus The State**and others"** wherein it has been held that:-

"10. Besides the above statutory ingredients, the principles and law enunciated by the courts through interpreting the said statutory provisions are summarized as follows:--

(i) The accused under the 3rd Proviso of section 497(1), Cr.P.C. is entitled to bail as a matter of right, if the statutory period mentioned in either clause a or b has expired and the trial has not been concluded.

(ii) The right of bail in case of statutory delay is clearly provided in the law, as the word "shall" cannot be read as "may".

(iii) Such right can be defeated only if the State or the complainant is able to show that the delay in the trial is attributable to the accused, and once it is shown, then such a right is forfeited.

(iv) The right under the 3rd Proviso cannot be denied under the discretionary power of the Court to grant bail and, therefore, the right is not left to the discretion of the Court but it is controlled by the 3rd Proviso read with the 4th Proviso.

(v) It is not the intention of the law to calculate the amount of the delay caused by the defence; rather, it is necessary to see whether the progress and conclusion of the trial has, in any manner, been delayed by an act or omission on the part of the accused.

(vi) While ascertaining the delay, the cumulative effect in disposal of the case is to be considered, and it will not be merely mathematical calculation of excluding such dates for which adjournment was obtained by the accused or counsel.

(vii) When witnesses are in attendance and the matter is ripe for recording evidence, but the defence does not proceed, and the effective hearing is postponed by the accused or his counsel, it is an important factor for consideration.

(viii) Bail under the 3rd Proviso can be refused on the ground that delay in the conclusion of the trial had been caused on account of any act or omission of the accused or any person acting on his behalf.

(ix) *Where, for any reason, the accused or his authorized agent, which necessarily included the counsel engaged for defence, caused delay, the protection under the 3rd Proviso cannot be invoked.*

(x) *The right of the accused for bail on statutory grounds cannot be defeated for any other reason except on the ground as provided in the 3rd and 4th schedule.*

(xi) *The object of the right to bail on statutory grounds subject to the conditions mentioned in the 3th Proviso is to ensure that criminal trials are not unnecessarily delayed.*

(xii) *When the statement of one of the witnesses has yet to be recorded, it cannot be said that the trial has been concluded.*

11. *For the above principles, reliance is placed on Nazir Hussain v. Zia ul Haq and others (1983 SCMR 72), Sher Ali alias Sheri v. The State (1998 SCMR 190), Akhtar Abbas v. State (PLD 1982 SC 424), Moundar and others v. The State (PLD 1990 SC 934), Abdul Rashid v. The State (1998 SCMR 897), Zahid Hussain Shah v. The State (PLD 1995 SC 49), Muhammad Siddique v. Muhammad Behram and another (1998 PCr.LJ 358). The facts and circumstances of the present case require to be analysed in the light of the above principles."*

11. It has further been observed from the record that the petitioner is behind the bars for last 3½ years and delay in trial has not been occasioned due to act or omission of the petitioner or any other person acting on her behalf and even she has not been directly nominated in the FIR except she has led the recovery of dead body of deceased which was already in the knowledge of Investigation Officer. Whereas, it is settled proposition of law that if the delay in trial is not associated to accused, the accused would be entitled for bail. Reliance is placed upon **2013 P.Cr.L.J 1031 "Zarina Bibi versus The State and another", 2007 P.Cr.L.J 875 [Karachi]**

"Khalida Akram versus The State", 1999 P.Cr.L.J 238 [Karachi] "Mst. Zainab versus The State" and 2011 YLR 1008 [Lahore] "Razia Bibi versus the State and others".

12. It has also been observed from the record that there is no likelihood of early conclusion of trial in near future keeping in view the number of PWs who have not yet been produced by the prosecution and even it is failure on the part of prosecution who failed to ensure the attendance of PWs. Majority of the adjournments of the case were given due to absence of PWs or the reasons attributed to them and few adjournments were made on the request of defence but even on those dates the material PWs were not present for recording of their statements. In such like situation, bail should be granted. Reliance is placed upon **2017 MLD 1013 [Peshawar (Abbottabad Bench)] "Niaz Ahmed Khan versus The State"**. Whereas, petitioner pressed the instant petition mainly on the ground of statutory delay in the trial as prosecution has examined only 13 PWs during 3 ½ years whereas the speedy trial is an inalienable right of and accused who could not be left at the mercy of prosecution in jail for an indefinite period. Delay in conclusion of trial of accused/ petitioner cannot be lightly ignored. In such like cases, bail should be granted. Reliance is placed upon **2016 YLR Note 88 [Sindh] "Muhammad Umer versus The State", 2017 MLD 1357 [Lahore] "Muhammad Ijaz Khan versus The State and**

another" and 2016 P.Cr.L.J 1206 [Sindh]
"Muhammad Riaz and another versus The State".

13. In view of above, instant bail petition is allowed subject to furnishing of bail bonds in the sum of Rs.100,000/- with one local surety in the like amount to the satisfaction of learned trial Court.

14. Keeping in view the peculiar circumstances of the case, learned trial Court seized with the matter is directed to conclude the trial within a period of 05 months under intimation to this Court through learned Registrar of this Court.

(MOHSIN AKHTAR KAYANI)
JUDGE

Irfan Ali

Approved for Reporting.