

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal Miscellaneous No.745-BC /2020

Saeed Muhammad
Vs
Muhammad Imran and another

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	13.10.2020	Mr. Mukhtar Ahmed Tarar, Advocate for the petitioner. Raja Yasir Shakeel, Advocate for respondent No.1 in Cr. Misc. No.745- BC/2020. Mr. Naveed Malik, Advocate for respondent No.1 in Cr. Misc. No.746-BC/2020. Mr. Muhammad Sadiq Khan, Advocate for respondent No.1 in Cr. Misc. No.825- BC/2020. Mr. Awais Haider Malik, State Counsel. Asif Khan, S.I. alongwith police record.

This order shall dispose of the instant
application as well as Cr. Misc. No.746-BC/2020 titled
“Saeed Muhammad v. Arsalan Alias Shani and another”
and Cr. Misc. No.825-BC/2020 titled *“Saeed Muhammad
v. Usama Hafeez and another”* as all the applications
pertain to the same FIR.

2. The petitioner is complainant in case FIR
No.97/2020 dated 20.03.2020 under Sections 302, 324,
337-D, 337-F(i), 337-F(ii) and 34 PPC Police Station
Shalimar, Islamabad.

3. The case of the prosecution against private respondents in all the petitions is that the complainant's son Bilal Uddin was killed by the respondents. In this behalf, as per the contents of the FIR Ubaid Abbasi inflicted injuries with knife on the deceased and the other accused facilitated him in the commission of the offence. Muhammad Imran was granted bail after arrest by Muhammad Ali Warraich, Additional Sessions Judge (West), Islamabad vide order dated 13.05.2020 whereas Arslan *alias* Shani was granted bail on 09.05.2020 by Sayyed Faizan Haider, Additional Sessions Judge (West), Islamabad. In the case of Usama Hafeez he was granted bail before arrest by Muhammad Ali Warraich, Additional Sessions Judge (West), Islamabad vide order dated 29.04.2020.

4. Learned counsel for the petitioner/applicant, *inter alia*, submitted that the orders passed by the Additional Sessions Judge (West), Islamabad are in violation of law settled by the august Supreme Court of Pakistan in case titled "*The State through Advocate-General N.W.F.P. v. Zubair and four others* (PLD 1986 SC 173). It was contended that even the *suo motu* proceedings to revisit Zubair's case reported as **Suo Motu Criminal Review No.9 of 2001** carries further principles enunciated in "*The State through Advocate-General N.W.F.P. v.*

Zubair and four others (PLD 1986 SC 173). In this behalf, it was contended that the petitions for bail before arrest of two of the respondents namely Muhammad Imran and Arslan *alias* Shani were heard and decided by Muhammad Atta Rabbani Additional Sessions Judge (West), Islamabad; however, the bail after arrest was decided by Muhammad Ali Warraich, Additional Sessions Judge (West), Islamabad and Syed Faizan Haider, Additional Sessions Judge (West), Islamabad which is in violation of the law. It was further contended that the matters in post arrest bail ought to have been decided by Muhammad Atta Rabbani, Additional Sessions Judge (West), Islamabad. Learned counsel took the Court through the applications filed by the respondents and pointed out that even they are in violation of Zubair's case inasmuch as in one of the same i.e. Arslan *alias* Shani no certificate as required under the law was given. It was contended that even on merit the respondents have no case and the discretion exercised by the Additional Sessions Judge (West), Islamabad is perverse. Learned counsel placed reliance on the case titled **Bilal Khan v. The State through P.G. Punjab and another** (2020 SCMR 937), **Muhammad Azam v. The State** (1996 SCMR71), **Shameel Ahmed v. The State** (2009 SCMR174), **Baz Muhammad Kakar and others v.**

Federation of Pakitan through Ministry of Law and Justice, Islamabad and others (PLD 2012 Supreme Court 870), *Shoukat Ilahi v. Javed Iqbal and others* (2010 SCMR 966) and *Mudassar Altaf and another v. The State* (2010 SCMR 1861). It was further contended that in the orders passed by the Additional Sessions Judge (West), Islamabad reference has been made to the circular issued by the Islamabad High Court, Islamabad with respect to following the special procedure and SOPs due to COVID-19 situation; that the circular by the High Court cannot override the directions issued by the august Apex Court.

5. Learned counsel for the respondents, *inter alia*, contended that there is no violation of either Zubair's case or any other judgment of the august Apex Court. In this behalf, it was contended that the bail before arrest applications were filed before different Courts and upon learning of the same Muhammad Ali Warraich, Additional Sessions Judge (West), Islamabad sent the matter to the District and Sessions Judge (West), Islamabad for consolidation of the same and both the applications for bail before arrest were entrusted to him. It was further contended that due to COVID-19 situation all the Judges were not in attendance so the duty Judge of Muhammad Ali Warraich, Additional Sessions Judge

(West), Islamabad was Muhammad Atta Rabbani, Additional Sessions Judge (West), Islamabad who heard the matters as duty Judge and dismissed the bail applications. It was submitted that the post arrest bail applications were accordingly filed and entrusted to Muhammad Ali Warraich, Additional Sessions Judge (West), Islamabad who decided one of the same alongwith the bail before arrest application and Syed Faizan Haider, Additional Sessions Judge (West), Islamabad as duty Judge decided one post arrest bail in the matter. It was further contended that the purpose of Zubair's case and the subsequent case law is only to ensure that the principle of consistency is maintained and that the accused and the applicant for bail does not misuse the fact that if the matter is dismissed by one Court the same be filed in another. Reliance was placed on the case reported as **2002 SCMR 171**. All other learned counsel for the respondents supported the contentions of Mr. Naveed Malik, Advocate Supreme Court.

6. Learned State Counsel also submitted that there is no violation of Zubair's case.

7. In order to resolve the controversy regarding the entrustment of matters a report was sought from the

learned District and Sessions Judge (West), Islamabad which accordingly was filed.

8. Arguments advanced by the learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

9. It is settled principle that the principles for grant of bail are different from the cancellation. In this behalf, the august Supreme Court of Pakistan recently has reiterated the principles for cancellation of bail. In case titled **Sami Ullah and another v. Laiq Zada and another** (2020 SCMR 1115) the Hon'ble Supreme Court of Pakistan observed as follows:

5. The crux of the grievance invoked under section 497(5), Cr.P.C. by the complainant before learned High Court Peshawar was that the order passed by the learned trial court was in defiance of the material available on the record, hence, the same was not sustainable in the eye of law. Bare perusal of provision of section 497(5), Cr.P.C. it do not demonstrate any specific ground to press into the pretense of said provision of law, however, superior courts of the country from time to time have enunciated certain principles governing cancellation of bail and those are in field with unanimous concurrence since considerable time. Those are enumerated as under:-

i) *If the bail granting order is patently illegal, erroneous, factually incorrect and has resulted into miscarriage of justice.*

ii) *That the accused has misused the concession of bail in any manner.*

iii) *That accused has tried to hamper prosecution evidence by persuading/pressurizing prosecution witnesses.*

iv) *That there is likelihood of absconsion of the accused beyond the jurisdiction of court.*

v) *That the accused has attempted to interfere with the smooth course of investigation.*

vi) *That accused misused his liberty while indulging into similar offence.*

vii) *That some fresh facts and material has been collected during the course of investigation which tends to establish guilt of the accused.”*

10. It was also observed by the apex Court that:

“6. Ordinarily the superior courts are reluctant to interfere into the order extending concession of bail; rather they have shown reluctance to intervene in such like matters. The rationale behind is that once concession of bail is granted by a court of competent jurisdiction then very strong and exceptional grounds would be required to hamper with the concession extended to a person who is otherwise clothed with free life, any contrary action of the court would be synonymous to curtailing the liberty of

such person, which otherwise is a precious right guaranteed under the Constitution of the country. Our judicial system has evolved beside others the concept of "benefit of reasonable doubt" for the sake of safe administration of criminal justice which cannot only be extended at the time of adjudication before the trial court or court of appeal rather if it is satisfying all legal contours, then it cost be extended even at bail stage which is a sine qua non of a judicial pronouncement, hence, any unjustified action by the court of law intruding into the affairs would certainly frustrate the free life of an accused person after availing the concession of bail. It is not beyond the legitimate expectations that in our society mere levelling of accusation basing upon trumped-up charges is not something beyond imagination. Therefore, false implication/ exploitation which has become epidemic in our society has to be safeguarded by the majesty of the courts. Unfortunately, our judicial system does not effectively provide appropriate speedy remedy for the rescue of innocent person. rather it seldom helps those who are victim of such wrong doing rightly or wrongly, hence it is ensuing serious consequences in the fabric of society. This Court is fully conscious of this aspect. It is now established that every conviction/ incarceration suffered by a person involved in a criminal case due to any possible

reason can repair the wrong caused by a mistaken involvement but it cannot compensate him for the period he suffered by any means which further demonstrate undue frustration in the society at large. This concern of the society further casts duty upon the courts of law to adhere the dictum of reasonable doubt whenever it is surfaced to resolve it in favour of an entity which deserves it judiciously.”

11. Similar principles were reiterated in another recent judgment by the Hon’ble Supreme Court of Pakistan in titled **Sharif Khan v. The State** (Cr. Petition No.1228 of 2020) and the earlier dictum in **2020 SCMR 1115** *supra* was reaffirmed. The principle derived from the above dicta by the Hon’ble Supreme Court of Pakistan is that once a bail is granted generally it is not interfered with unless the order is patently illegal or the discretion exercised is perverse. In the instant matter the thrust of the arguments by the learned counsel for the petitioner was that the jurisdiction exercised by the Additional Sessions Judge (West), Islamabad is in violation of the principles laid down in Zubair’s case. The Hon’ble Supreme Court of Pakistan in **“The State through Advocate-General N.W.F.P. v. Zubair and four others** (PLD 1986 SC 173) observed as follows:

“7. Another principle enunciated in some of the rulings is that it is the duty of the counsel to mention in a bail application filed by him the fact of having filed an earlier bail application, also stating the result thereof. Failure on the part of the counsel to do so would, in fact, amount to professional misconduct because the concealment of the fact of the dismissal of the earlier bail application of the accused or the co. accused and getting a subsequent bail application decided by another Judges of the same Court may result in conflicting judgments and disharmony to the Court. It was held in the case of Farid v. Ghulam Hussain (1968 S C M R 924) that where one Judge of the High Court has expressed himself against the grant of bail, another learned Judge of the same High Court in accordance with the long established practice and rule of propriety, when moved for bail of an accused or his co-accused in the same case should transfer such bail application for disposal to the same Judge who had already dealt with the matter earlier in order to avoid contradictory order.....

8. It might be useful to mention here that the second or the sub sequent bail application to the same Court shall lie only on afresh ground namely, a ground which did no: 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 and made the basis of any subsequent bail application. We may also point out, with respect to the learned Judge, who dealt with the second bail application that the mere fact that the learned Judge who had rejected the first bail application of the respondents with the observation that as far as the remaining petitioners (the respondents herein) are concerned no case had been made out for their release on bail, does not mean that the application had not been disposed of on merits. It must be assumed that he had considered all the pleas or grounds raised by the applicant's counsel before him and that the same had not found favour with him. It may be pointed out, with great respect that the notion that each contention raised before the Court in a bail application must be dealt with separately or repelled by recording elaborate reasoning is totally misconceived. We are of the view that in the present case the learned Judge who dealt with the second bail application had in fact embarked on a review of the order of the learned Judge in fact, who had earlier dismissed the first bail application.

9. If at the relevant time the first Judge is holding Court at a Bench other than the one where the first bail application was filed, it can always be transferred to that learned Judge, wherever he is sitting. There would, of course, be cases where it is absolutely

impassible to place the second or the subsequent bail application before the same learned Judge who had dealt with the earlier bail application of the same accused, or in the same case. In such cases the learned Chief Justice of the concerned High Court, may order that it be fixed for disposal before any other learned Judge of that Court.”

12. Due to administrative problems, created by the above dicta by the Hon’ble Supreme Court of Pakistan as the Hon’ble Judges of the High Court were on Benches, the matter was taken up in *suo motu* proceedings to revisit Zubair’s case in **2002 SCMR 171** and following principles were laid down:

“(1) Constitution of the Benches is the exclusive function of the Chief Justice.

(2) Ordinarily, subsequent bail application by the same accused or in the same case must be placed for disposal before the same Single Judge/Division Bench of the High Court which had dealt with the first bail application.

(3) If the learned Single Judge who had dealt with the first bail application is not available and departure from (2) above is unavoidable, the learned Chief Justice concerned may refer the second or

subsequent bail application to another learned Single Judge at the Principal Seat or Permanent Benches/Circuit Benches, as the case may be.

(4) Where the first bail application is heard and disposed of by a Division Bench which is not available either at the Principal Seat or the Permanent Benches/Circuit Benches at the time of filing of the second or subsequent bail application then such bail application shall be heard by a Division Bench of which one of the Judges was a Member of the Division Bench which dealt with the first bail application. If none of the Members of the Division Bench which heard the first bail application is available, the learned Chief Justice concerned may assign the subsequent bail application to any appropriate Division Bench at the Principal Seat or the Permanent Benches/Circuit Benches, as the case may be

(5) Subsequent bail applications shall be filed, heard and disposed of at the Principal Seat or the Permanent Benches/Circuit Benches, as the case may be, where the first bail application was filed and finally disposed of. In the event of non availability of the learned Single Judge or the learned Member/s of the Division Bench, who had dealt with the earlier bail applications, the office at the Principal Seat shall obtain appropriate orders from the learned Chief

Justice and the office at the Permanent Benches/Circuit Benches shall obtain appropriate orders from the learned Chief Justice through fax or on telephone for fixation of subsequent bail application before other appropriate Benches, in the interest of expeditious and inexpensive dispensation of justice in bail matters.

(6) Subsequent bail application shall not be entertained unless accompanied by copies of earlier bail applications and copies of orders thereon.”

13. The matter was again taken up by the Hon’ble Supreme Court of Pakistan in case reported as **Nazir Ahmed and another v. The State and others** (PLD 2014 Supreme Court 241) and following principles were laid down:

“(i) At the bottom of every application for bail it is obligatory to attach a certificate regarding non-filing of any such application before the same court previously and, in case of a repeated or successive application, a certificate disclosing filing of any such application previously by the same accused person, any other accused person, the State or the complainant party before the same court in the same criminal case or its cross-case and such certificate must also disclose the number of the previous application, the date of its decision and the name of the

Judge dealing with and deciding the same. No subsequent bail application is to be entertained unless the same is accompanied by copies of the earlier bail applications and copies of the orders passed thereon.

(ii) All repeated or successive applications for bail must be fixed for hearing before and heard and decided by the same Judge(s) who had dealt with and decided any earlier application for bail unless the Judge or one or some of the Judges dealing with and deciding the earlier application(s) is/are not available at the relevant station of posting/ Principal Seat/Bench.

(iii) Dismissal of an application for bail after attending to the merits of the case amounts to rejection of all the grounds available or in existence till the time of such dismissal whether such grounds were actually taken or urged or not and whether such grounds were expressly dealt with in the order of dismissal or not.

(iv) In case of dismissal of an earlier application for bail on the merits of the case a subsequent application for the same relief can be filed and entertained only if it is based upon a fresh ground, i.e. a ground which was not available or in existence at the time of decision of the earlier application.

(v) Withdrawal simpliciter of an earlier application for bail before addressing or hearing of any argument on the merits of the case does not preclude filing of a subsequent application for the same relief before the same court and its decision by such court on the merits of the case. In all cases of withdrawal of such an application the court must faithfully record in its order as to whether withdrawal of the application had been requested and allowed after addressing and hearing of some or all the arguments on the merits of the case or withdrawal of the application had been requested and allowed before addressing and hearing of any argument on the merits of the case.

(vi) In a case of withdrawal of an earlier application for bail after addressing and hearing of some or all the arguments on the merits of the case no subsequent application for the same relief can be filed before or entertained by the same court unless such subsequent application is based upon a fresh ground, i.e. a ground which was not available or in existence at the time of disposition of the earlier application.”

14. As noted above the report was sought from the District and Sessions Judge (West), Islamabad regarding the issue in hand with respect to entrustment of matters to various Courts. The first report filed by the District &

Sessions Judge (West), Islamabad was dated 24.08.2020 which was found to be insufficient, hence another report was sought which was filed on 09.09.2020. The operative paragraphs of the report are reproduced below:

“5. All the above mentioned three (03) pre-arrest bail petitions of the petitioners were placed before Mr. Mohammad Atta Rabbani, learned AD&SJ-West, Islamabad being Duty Judge of the Court of Mr. Muhammad Ali Warraich as the Court of Mr. Muhammad Ali Warraich was allocated to Mr. Mohammad Atta Rabbani vide Duty Roster having Endst No.1269/E-XV dated 25.04.2020 (copy enclosed), who after hearing the arguments, decided the petitions vide separate consolidated order dated 28.04.2020, and dismissed the pre-arrest bail petitions.

6. Petitioner/accused Osma Hafeez (Osama) S/o Hafeez Ahmed has moved his pre-arrest bail petition in the above mentioned case FIR on 29.04.2020, before Mr. Muhammad Adnan, being Duty Sessions Judge who entrusted the same to the Court of Mr. Muhammad Ali Warraich, learned AD&SJ-West, Islamabad and Mr. Muhammad Warraich, learned AD&SJ-West Islamabad has disposed of the same vide order dated 08.06.2020, irrespective of the fact that that the petitioner has categorically given note on the title page of his pre-arrest bail petition which is reproduced as below:-

:Note; That the bail before arrest of the co-accused have been cancelled on 28.04.2020 by the Court of Mr. Muhammad Ali Warraich, learned ASJ-West, Islamabad/Duty Judge Mr. Mohammad Atta Rabbani, learned ASJ- West, Islamabad.”

7. *The petitioner Muhammad Imran S/o Nazakat has moved his post-arrest petition on 09.05.2020, before Sayyed Faizan Haider, AD&SJ/Duty Judge Sessions Judge and the same was entrusted to Mr. Mohammad Ali Warraich, learned AD&SJ-West, Islamabad who after due process of law, heard the arguments and decided the same on 13.05.2020, by accepting the bail petition.*

8. *The petitioner Arslan Alias Shani has also moved his post-arrest bail petition on 30.04.2020, before Mr. Muhammad Jehangir Awan, AD&SJ-West, Islamabad who being Duty Sessions Judge entrusted the same to the Court of Mr. Muhammad Ali Warraich for disposal. On 09.05.2020, the said file was put up before the Court of Sayyed Faizan Haider being Duty Judge of the Court of Mr. Muhammad Ali Warraich and heard the arguments of the learned counsel for the complainant on the maintainability of the petition while relying upon Zubair’s case reported in PLD 1986 SC 173 as well as relying on another case reported as 2002 SCMR 171. The learned Duty Judge in Para No.05 of his order dated 09.05.2020 has specifically referred the circular dated 10.04.2020 of the Hon’ble*

Islamabad High Court, Islamabad regarding the measures adopting for social distancing in the wake of COVID-19 and has not considered the objection so far raised by the learned counsel for the complainant and has decided the post-arrest bail petition of the petitioner Arslan Alias Shani.

9. *In pursuance of the decision of Crisis Management Committee of the Hon'ble Islamabad High Court, Islamabad the operation of the District Courts was minimized due to pandemic (COVID-19) to ensure the safety of all concerned. In this respect to settle and streamline the duties of the Judicial officers, the learned AD&SJ-West, Islamabad were authorized the powers conferred under section 17(4) of Cr. PC and Section 22 of the West Pakistan Civil Courts Ordinance, 1962 during the above referred period. Therefore, during the above referred entire period the undersigned has neither marked/entrusted any case during the pandemic COVID-19 nor the above said bail petitions were marked/entrusted by me. The duty roster was formulated for different period during COVID-19, which was accordingly communicated."*

15. In view of the above case law and the report filed by the District & Sessions Judge (West), Islamabad it is clear that Muhammad Atta Rabbani, Additional Sessions Judge (West), Islamabad, who decided the pre-arrest bail

petition of the respondents in the instant case, was acting as duty Judge of the Court of Muhammad Ali Warraich, Additional Sessions Judge (West), Islamabad who actually was hearing the cases. Likewise, when the post arrest bail applications were filed alongwith another pre-arrest bail was also filed; since the Judge actually hearing the matters was Muhammad Ali Warraich, Additional Sessions Judge (West), Islamabad all the cases were entrusted to him. However, Sayyed Faizan Haider, Additional Sessions Judge (West), Islamabad being duty Judge for Mr. Muhammad Ali Warraich, Additional Sessions Judge (West), Islamabad decided one of the post arrest bails. The question before the Court is that in such circumstances whether there is violation of the above principles laid down by the Hon'ble Supreme Court of Pakistan. It is pertinent to observe that of course the circular by the High Court does not take precedent over the principles laid down by the Hon'ble Supreme Court of Pakistan but the fact also remains that from March onward in the year 2020 there were extra ordinary circumstances and the Courts in the wake of the Government Policy and in order to protect the litigants, legal fraternity and the Judges adopted the Policy and working in shifts and maintaining the duty roster accordingly. In these special circumstances as

Muhammad Ali Warraich, Additional Sessions Judge (West), Islamabad was not available Muhammad Atta Rabbani, Additional Sessions Judge (West), Islamabad being duty Judge heard the matters. Similarly, when the post arrest bail and the pre-arrest bail applications were filed Muhammad Ali Warraich, Additional Sessions Judge (West), Islamabad was available and he accordingly decided the matters. In another case when he was not available the matter was heard and decided by Sayyed Faizan Haider, Additional Sessions Judge (West), Islamabad. In **2002 SCMR 171** *supra* the august Apex Court has taken note of such a situation where a Judge who has been hearing the matter or has decided a bail application, if is not available, the Administrative Judge, District & Sessions Judge or any other Senior Judge performing such duties is competent to entrust the matter to any other Judge for hearing of the bail applications. In such view of the matter, I do not think that there is any violation of the principles laid down in Zubair's case or even the subsequent decision regarding hearing of the matters. The certificates at the end of the bail applications have mentioned the actual position except in the case of Arslan *alias* Shani but even that does not warrant cancellation of bail in light of the principles enunciated by august Apex Court.

16. Learned counsel for the petitioner argued that the discretion has been exercised by the learned Additional Sessions Judge (West), Islamabad in perverse manner. In this behalf, he placed reliance on cases reported as **Shameel Ahmed v. The State** (2009 SCMR 174), **Shoukat Ilahi v. Javed Iqbal** (2010 SCMR 966) to argue that in the cases which fall within the prohibitory clause the bail is only granted where there are reasonable grounds to believe that the accused did not commit the offence. It was contended that the conclusion arrived at by the Additional Sessions Judge (West), Islamabad is not made out from the facts and circumstances. Nothing was shown from the record to establish the said argument or to highlight that the conclusion arrived at by the Additional Sessions Judge (West), Islamabad while granting bail to the accused persons was unreasonable or perverse under the facts and circumstances of the case. It is trite law that at bail stage only tentative assessment is made and deeper appreciation is to be avoided; nothing was shown from the record of the police to controvert the conclusion arrived at by the Courts granting the bail.

17. The report under Section 173 Cr.P.C. has already been filed and the trial has commenced. In such view of the matter, it would be appropriate that a direction be

issued to the learned Trial Court to expeditiously conclude the case.

18. For the reasons stated above, the impugned judgments do not warrant any interference; however, the petitions are disposed of with the direction to learned Trial Court to expeditiously conclude the trial preferably within a period of four months from the date of receipt of this order.

(AAMER FAROOQ)
JUDGE

Announced in open Court on the 8th day of January 2021.

JUDGE

Approved for reporting

M.NAVEED