HCJD/C-121

ORDER SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

CRL. MISC. NO. 759-B/2014

Sohail Younas.
VERSUS
The State, etc.

S.No. of order/ Proceeding	Date of hearing	Order with signature of Judge, and that of parties or counsel, where necessary.
	07-01-2015.	Mr Muhammad Atif Nawaz Khokhar, advocate for the petitioner. Malik Zahoor Ahmad Awan, Standing Counsel. Mr Atta ur Rehman, Inspector FIA, with record.

The petitioner, Sohail Younas, son of Muhammad Younas, has sought post arrest bail in case, F.I.R. No.286, dated 19-11-2014, registered under Sections 17/18-22 of Emigration Ordinance, 1979 (hereinafter referred to as the "Ordinance") read with Section 109 PPC, at Police Station FIA/AHTC, Islamabad.

2. The brief facts, as narrated in the FIR, are that the case was registered on the complaint of the Australian High Commission, Islamabad. It is alleged by the complainant that four persons, namely, Qamar Zaman, Noman Ahmad, Tahir Latif and Naeem Akhtar, submitted their respective passports in the Australian High Commission, along with fake and forged documents for obtaining visas. During the course of their interview, it was revealed that the petitioner, acting as an agent and organizer, had provided the said fake and forged documents to the said persons. It was alleged that the petitioner had received an amount of Rs.39,00,000/- for sending the applicants abroad. Hence, this F.I.R.

3. The learned counsel for the petitioner contends that; the petitioner has been falsely implicated in the instant case; the offences under Sections 17/18 and 22 of the Emigration Ordinance, 1979 are not made out from the contents of the FIR; the accused / petitioner has been implicated in the instant case on the

statement of the co-accused; no specific date or time has been mentioned in the FIR regarding payment; there are contradictions in the statements of the witnesses and the co-accused; the offence, if any, committed by the petitioner does not fall within the prohibitory clause of Section 497 Cr.P.C.; the petitioner is behind the bars and no more required for further investigation; the petitioner has no criminal record; no case has ever been registered against him other than the present one; hence the learned counsel urges the petitioner to be released on bail. The learned counsel relies on the case reported as MUHAMMAD SHARIF VERSUS STATE (*2014 P.Cr.L.J. 297),* MAQSUD versus THE STATE *(2012 YLR 2511),* SHER AHMAD versus THE STATE (*PLD 1993 Peshawar 104),* MUHAMMAD BILAL versus State *(2014 P.Cr.L.J. 429) and* ARSHAD JAVED versus THE STATE *(2003 MLD 1073), in support* of his contention that when the law provides for two different punishments, as in this case 14 years imprisonment or fine or both, then the lesser punishment has to be taken into consideration. It is therefore contended that in this case, a fine being the lesser punishment, it has to be taken into consideration, and the accused treated as being entitled to bail as of right.

4. On the other hand, the learned Standing Counsel contends that; the petitioner has received a huge amount from the affectees; the petitioner is fully involved in the commission of the offence with a specific role; there are four witnesses who have deposed against the petitioner regarding the receipt of money in the presence of witnesses; the record reflects sufficient incriminating evidence for refusal of bail and urges dismissal of the petition.

5. After giving careful consideration to the arguments of the learned counsels, and perusal of the record with their able assistance, the findings of this Court are as follows:

6. The petitioner is the main accused who is alleged to have offered his services for sending Pakistani citizens abroad, arranging the necessary documents for them and facilitating the process of obtaining visas. It is alleged that he has been charging a substantial fee for the illegal business carried out by him. The four co accused who had presented their documents for obtaining visas disclosed that the fake and forged documents were provided to them by the petitioner, and that they had paid a substantial amount as consideration. It has been alleged that the petitioner used to solicit clients, and has been engaged in this illegal business for a substantial period. There is sufficient incriminating material on record to connect the petitioner to the offences for which he has been charged.

7. With utmost humility, I have not been able to persuade myself to agree with the legal proposition raised by the learned counsel for the petitioner, or with the wisdom in the case law cited in support of his argument, that when the law provides for an alternative sentence of a fine, then the accused should be entitled to bail as of right, and that the offence would fall outside the prohibitory clause of section 497 (1) of Cr.P.C. If this proposition is accepted as a principle or made a rule, then the sentence of 14 years imprisonment provided for the offence will have to be ignored at the bail stage, even in cases in which there is sufficient incriminating material on record for forming a tentative opinion. As a corollary, the offence, despite including a sentence which brings it within the prohibitory clause, will have to be treated otherwise. It would also give raise to an anomaly, because the same principle will become applicable and followed in even those cases where the alleged acts of the accused attracts more than one offence under a statute, falling under the prohibitory and non prohibitory clauses. Applying the same principle, the offence attracting a lesser sentence and falling within the non prohibitory clause will have to be considered, regardless of the facts and circumstances of the case. That is obviously not the law.

8. The principle that when a person is charged under two different provisions of distinct statutes, for offences which are alike and similar in nature, then the trial is to proceed against him under the statute which provides the lesser punishment for the offence alleged to have been committed, is recognised in law. Reference of this principle has been made in the judgments reported as MUHAMMAD YOUNUS and another versus THE STATE (2001 P.Cr.L.J. 157) and MURAD ALI Shah versus THE STATE (2004 P.Cr.L.J. 925). This principle is distinct, having no nexus with the present case, and as such can neither be made applicable nor extended to cases where the alternate sentences are provided for an offence under the same statute.

9. Consideration of bail is within the realm of the discretion of a court, which is to be exercised in accordance with the settled principles. The consideration for refusing or allowing bail essentially rests on the facts and circumstances in each case. If alternative sentences have been provided for an offence, which includes a fine, then the courts would form an opinion, based on the material on record and the facts of the case, whether or not to allow bail by considering the higher sentence as well and treating the offence as falling within the prohibitory clause, rather than allowing bail as a rule and its refusal an exception. The fact that a fine is provided as an alternate sentence would be one of the several factors to be considered at the bail stage, and the exercise of discretion would depend on the facts of each case instead of allowing bail as of right. The legislative intent of providing an alternative sentence would be defeated if, regardless of considering the facts of the case and the incriminating material on record, the lesser sentence such as a fine would, as a rule, entitle the accused to bail. The mere fact that alternative sentence of fine has been provided for an offence would not take it out of the ambit of the prohibitory clause if one of the

sentence is imprisonment for more than ten years. The facts and circumstances in each case, considered on the touchstone of the principles of bail, will determine whether or not the court will treat the case as falling under the prohibitory clause or not. If without deeper appreciation of evidence, the court forms a tentative opinion that there is sufficient incriminating material against an accused, then obviously allowing bail as a rule, because an alternative sentence of fine has been provided, will defeat the intention of the legislature of providing the sentence. The purpose of providing a sentence bringing the offence within the prohibitory clause of section 497 (1) of Cr. P. C will be frustrated. It is, therefore, noted that the alternative sentence provided for an offence is to be considered in the light of the facts and circumstances in each case. Where one of the alternative sentences provided for the offence in the statute falls within the prohibitory clause, the court, applying the settled principles for the grant of bail in case of offences falling under the said clause, will determine whether a case is made out for the grant of bail. It was inquired from the learned counsel whether during his research, any judgment of the Supreme Court had come to his notice on this question, to which he replied in the negative. This Court, therefore, does not concur with the proposition that if an offence provides for a higher sentence falling in the prohibitory clause and an alternate sentence of fine, then as a rule or principle the latter lesser sentence is to be considered for the purposes of bail and the former is to be excluded from consideration.

10. The illegal business of inducing innocent and desperate citizens to pay substantial amounts in return for sending them abroad, arranging forged documents and facilitating them illegally in obtaining visas from foreign missions, has become a menace throughout the country. Such illegal business on the one hand deceives innocent citizens, robbing them of their hard earned money, while on the other it has tarnished the image of Pakistan internationally. This

illegal business has made other bonafide applicants seeking travel permissions and those travelling abroad to suffer by making them suspects as well. It is for this reason that the legislature has provided 14 years imprisonment as one of the sentences, thereby bringing it within the prohibitory clause. In the present case there is sufficient material on record for refusing bail to the petitioner, and treating the offence as falling within the prohibitory clause under section 497 (1) of Cr. P. C. There are no grounds whatsoever to entitle the petitioner to the grant of bail. This Court is, therefore, not inclined to exercise its discretion in favour of the petitioner by allowing bail.

11. For what has been discussed above, the bail is refused and the petition is accordingly dismissed. However, this Court expects that the trial court shall conclude its proceedings, preferably within four months. The Investigation Officer shall ensure that there is no delay on his part nor will the petitioner cause any delay.

12. Needless to mention that this is a tentative assessment and shall not in any manner influence the proceedings before the trial court.

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on _____.

JUDGE

Approved for reporting.

Asad K/*