

HCJD/C-121  
**ORDER SHEET**

**ISLAMABAD HIGH COURT**  
**ISLAMABAD**

**CRL. MISC. NO.461-B/2014**

**Mehtab Ahmed**  
*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.
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21-08-2014    Malik Ameer Dad Awan, advocate for the petitioner.  
Raja Aftab Ahmed, advocate for the complainant.  
Malik Zahoor Ahmad Awan, Standing Counsel.  
Mr Akram S.I with record.

The petitioner Mehtab Ahmed, son of Talib Hussain, has sought post arrest bail in case, F.I.R. No.171, dated 31-05-2010, registered under Section 302/34 of the Pakistan Penal Code 1860 (hereinafter referred to as "PPC") at Police Station Kohsar, Islamabad.

2.            The brief facts, as narrated in the FIR, are that the complainant, who is the father of the deceased Sohrab, reported that his son was shot by the petitioner at 03:00 p.m. on 31-05-2010. The deceased was taken to the Poly Clinic Hospital, where he succumbed to his injuries. The motive was stated to be an altercation between the petitioner and the deceased. Hence the instant FIR.

3.            The learned counsel for the petitioner contends: that the accused was arrested on 31-05-2010, and has remained incarcerated continuously for more than four years ; eighty-nine hearings have been fixed before the trial Court, and the delay is attributed to either the prosecution or other reasons, but not due to the petitioner; the story as narrated in the FIR is concocted, as the cross version makes it clear that an offence under Section 377 PPC was committed against the petitioner and the deceased was killed by a shot fired from his own weapon;

despite repeated orders of the trial Court, the prosecution failed to submit a Challan with regard to the cross version, nor could it produce all the witnesses; the petitioner, under the circumstances, is entitled to bail as of right in accordance with the 3<sup>rd</sup> Proviso to Section 497(1) Cr.P.C. on account of statutory delay; the right arises as a consequence of being behind bars for a continuous period of more than two years; the learned counsel has placed reliance on *Ahmad Hussain...Vs...Stat* (2008 MLD 1061), *Abdul Razak Zangejo...Vs...State* (PLD 2012 Sindh 218), *Zia ud Din...Vs...State* (PLD 2012 Sindh 147), hence urges grant of bail.

4. The learned counsel for the complainant, on the other hand, has forcefully argued that the delay in concluding the trial is attributed to the petitioner as he had engaged a counsel who caused the delay, and in this regard he took this court through the relevant orders of the trial Court. It was further stressed that the accused is named in the FIR, and the murder weapon was recovered as a result of information provided by him. Moreover, the learned counsel stated that six witnesses have been examined and the remaining four witnesses will be examined shortly, and therefore the trial is almost near conclusion. It is also submitted that since it is an offence under section 302 of PPC, therefore, the petitioner is not entitled to the concession of bail on the ground of statutory delay, as he is a hardened, desperate and dangerous criminal.

5. The learned Standing Counsel contended that the petitioner is nominated in the FIR and a specific role is attributed to him. Recoveries were effected with his help. It is further contended that his previous bail application has been dismissed on merits, and in the said application the accused has confessed to having committed the murder. It is, therefore, urged that the petitioner is not entitled to the concession of bail, and that the present petition may be dismissed accordingly.

6. The present petitioner seeks bail on the sole ground of statutory delay and, therefore, it is pertinent to refer to some relevant facts. The deceased had received one shot and the petitioner was arrested on 31-05-2010. He remained on physical remand from 01-06-2010 till 14-06-2010. The murder weapon is said to have been recovered as pointed out by the accused on 13-06-2010. A cross version was also recorded on 05-06-2010; whereby it was alleged by the petitioner that the deceased, along with one Naveed, had committed an offence under Section 377 of the PPC; the petitioner was medically examined, and according to the report of the medical examiner, an offence under Section 337(f)(i) of the PPC was made out. The Challan under Section 173 of Cr.P.C. was submitted before the trial Court on 10-07-2010, which includes sixteen witnesses. On 12-06-2010, the complainant changed his previous statement regarding the involvement of accomplices, and alleged that the petitioner was the only one who committed the offence. Warrants were issued on 25-01-2012 for the arrest of Naveed, who was alleged to have committed the offence under Section 377 of the PPC as per the cross version. On 27-08-2010, the bail application moved by the petitioner was dismissed on merits. The charge was framed on 20-09-2010. From 20-09-2010 till the date of hearing of the present petition, eighty-nine hearings have been fixed before the trial Court.

7. The perusal of the order sheets reveals that the petitioner had stated on 24-11-2010 that he had engaged a lawyer but the hearing was adjourned because of absence of prosecution witnesses. On the next date of hearing i.e 11-12-2010, the petitioner brought to the notice of the court that he did not have the means to engage a lawyer. The court appointed one Rao Abdul Raheem as defence counsel at State expense. The said defence counsel failed to appear on the next three hearings and the petitioner once again informed the court that he could not engage a lawyer due to poverty, following which the trial court appointed one

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Rana Mujahid Raheem as counsel at State expense. On 18-04-2011, one prosecution witness appeared, but the defence counsel appointed by the court was absent. The defence counsel appointed by the court failed to appear till 20-07-2012, forcing the petitioner to engage a counsel despite having brought to the court's notice that he was not in a position to do so. From his date of arrest i.e 31-05-2010 till 20-07-2012, a period of two years and two months, the petitioner virtually remained unrepresented, as both the counsels appointed by the court at State expense failed to make appearances. From 20-07-2012 till 28-03-2013, 15 (fifteen) hearings were fixed and all were adjourned either because the witnesses or the Investigation officer were not in attendance. On 28-03-2013 another lawyer submitted power of attorney as defence counsel. The first witness in this case was examined on 24-05-2013 i.e three years and eight months after the framing of the charge. 31 (thirty one) hearings were adjourned because witnesses were absent. 22 (twenty two) hearings were adjourned either for administrative reasons of the court or strikes. The cross version was recorded on 05-06-2010 and after the court took notice of failure to submit a Challan, 13 (thirteen) hearings, from 22-12-2011 till 20-07-2012, were adjourned solely on the request of the Investigating Officer so as to enable him to file the same. After the first witness was examined on 24-05-2013, eight hearings were adjourned on account of the complainant, while four were on account of the absence of the counsel for the petitioner. The chequered history of this case presents a dismal picture of the inexcusable, inordinate delay in concluding the trial, which indeed is astounding.

8. 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:

9. The 3<sup>rd</sup> Proviso to Section 497(1) of the Cr.P.C. was inserted through amendment made vide Act VIII of 2011 and enforced w.e.f. 18-04-2011. The said

Proviso provides that a person accused of an offence punishable with death, is as of right entitled to be released on bail, if he has been detained for such an offence for a continuous period exceeding two years. However, this is subject to certain conditions; firstly, the Court has to form an opinion that the delay in the trial of the accused has not been occasioned by the accused, or due to omission attributed to the person acting on his behalf; secondly, he is not a previously convicted offender for an offence punishable with death or imprisonment for life ; thirdly, he is not in the opinion of the Court, a hardened, desperate or dangerous criminal and, lastly, he is not accused of an act of terrorism punishable with death or imprisonment for life.

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 3<sup>rd</sup> 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 3<sup>rd</sup> 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 3<sup>rd</sup> Proviso read with the 4<sup>th</sup> 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 3<sup>rd</sup> 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 3<sup>rd</sup> 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 3<sup>rd</sup> and 4<sup>th</sup> schedule.*
- (xi) *The object of the right to bail on statutory grounds subject to the conditions mentioned in the 3<sup>rd</sup> 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...Vs...Zia ul Haq and others* (1983 SCMR 72), *Sher Ali alias Sheri... Vs...The State* (1998 SCMR 190), *Akhtar Abbas...Vs...State* (PLD 1982 S.C. 424), *Moundar and others...Vs...The State*, ( PLD 1990 SC 934), *Abdul Rashid...Vs...The State* (1998 SCMR 897), *Zahid Hussain Shah...Vs...The State* (PLD 1995 S.C. 49). *Muhamamd Siddique... Vs...Muhammad Behram and another* (1998 P.Cr.L.J. 358). The facts and circumstances of the present case require to be analysed in the light of the above principles.

12. This is a classic case where the trial has been delayed and the delay is attributed to either the State or the complainant. The right to a fair trial is guaranteed under Article 10-A of the Constitution and the most essential constituent of a fair trial is to conclude the same expeditiously and without delay. The right to a fair trial is not merely restricted to the accused, but the complainant as well. The purpose of avoiding delay is to ensure that the sanctity of the proceedings remain protected, which inherently includes securing credible evidence. Delay defeats the ends of justice, and may seriously undermine the possibility of a fair trial. Delay in a trial results in an inherent risk of undermining and eroding the credibility of the evidence, as human memory is impaired with the passage of time; witnesses may not be traceable or documents may get lost. It is for this reason that the edifice of criminal law is premised on the principle that trials must be concluded within a reasonable time, expeditiously and without unnecessary delay. Delay in any trial, but in criminal trials in particular, is intolerable.

13. In the present case, it has been highlighted above that the accused at the commencement of the trial had made it known to the Court that he did not have the means to engage a counsel. It is pivotal for the right to defence that the accused has an effective representation. In case the accused is not in a position to engage a lawyer, the court takes it upon itself to appoint a counsel at state expense. In the present case, the trial court, after recording the statement of the accused that he could not engage a lawyer, appointed counsels on two occasions at state expense. What if the delay is on the part of the counsel appointed by the court on State expense? Will that delay be attributed to the accused for the purposes of the 3rd proviso? Will such a counsel be considered as a person acting on behalf of the accused for the purposes of the 3<sup>rd</sup> Proviso, and would his or her acts or omissions, which have occasioned the delay, deprive the accused of the right to bail on statutory grounds? It is obvious from the order sheets in the



present case that the accused was not given a choice in engaging a counsel at state expense, nor were any terms and conditions settled with the consent of the accused. The court had appointed a named counsel twice at state expense without giving the petitioner a choice. The Court appointed named lawyers who did not put up appearances for a period of more than two years. In the humble opinion of this Court, the accused cannot be held responsible for any delay due to the non appearance of a counsel, who was neither chosen by the accused, and neither did he have any control over him. Responsibility for one's actions implies making a choice out of free will, and having a measure of control over the person for who's acts or omissions liability or consequences would arise. An accused who states that he or she has no means to engage a counsel is left at the mercy of the State. This creates a fiduciary relationship between the accused and the State, in consequence of which the latter owes a duty of care to the accused. The State, therefore, in observing the fiduciary standards, has to ensure that the interests of the accused come first and that conflict of interest is avoided. It also places a heavy burden on the trial court, because it not only appoints the counsel at State expense, but has to ensure that there is no dereliction in duty. It is a settled principle that "no person should suffer for an act or omission of a court, or an act of a court should not prejudice any one". Reliance in this regard is placed on *Mian Muhammad Talha Adil...Vs...Mian Muhammad Lutfi* (2005 SCMR 720), *Dar Okaz Printing and Publishing Ltd. Liability Company...Vs...Printing Corporation of Pakistan Pvt. Ltd.* (PLD 2003 SC 808), *Fida Hussain...Vs...The State and others* (PLD 2002 SC 46).

14. It may be emphasised that the duty of the court and the State are of tremendous importance in such situations, because the state itself is a party in the shape of the prosecution. Once the court appoints a counsel at state expense, it has to ensure that the counsel not only performs his/her duty, but is effective to the satisfaction of the court. The court thus takes responsibility on behalf of the state

to provide the accused with a counsel in recognition of his/her right of defence. It would be unfair and unjust to expect from the detained accused in such circumstances to be responsible for the acts or omissions of a counsel appointed by the court at state expense. It may further be explained that in ordinary course a person has a choice to engage the services of a lawyer, settle terms and conditions at arm's length, and above all, retain the authority to withdraw the power of attorney if not satisfied with his or her professional services. Similarly, a person who appoints an agent has a contractual relationship arising out of exercising free will by the parties. In such a situation, no doubt that the client or the principal as the case may be, is responsible for the acts or omissions of the counsel or the agent. However, that is not the case with a counsel appointed by the court at state expense. It is the accused who is helpless and at the mercy of the state. It may have been a different situation if the accused had a choice in the selection of the counsel and a degree of control in retaining him. It is a settled rule of statutory interpretation that where the question of liberty of a citizen is involved, the courts are bound to interpret such law in favour of an accused, rather than to his/her detriment. When the court has appointed a counsel at state expense, it acts on behalf of the State and, thereby, assumes the responsibility of holding such a counsel accountable in case of dereliction of professional duties, and ensuring effective representation in accordance with the right of defence of the accused. The State and the court are both "fiduciaries", and cannot blame the accused for the delay. Any delay caused by a state appointed counsel is a breach of the afore mentioned fiduciary duty, and an absence of due care towards the interests of the accused. In such circumstances it is the duty of the court to not only proceed against the court appointed counsel, but to take immediate remedial measures as well. This court is, therefore, of the view that an act or omission of a counsel appointed by a court at state expense, in circumstances as in the present case, cannot be construed as an act or omission of "any other person acting on behalf of the accused" for the purposes of the 3rd proviso to section 497 (1) Cr.P.C and as

such will not prejudice the right to be released on bail on the grounds of statutory delay. Having come to this conclusion, it is obvious that after having been in continuous custody for four years, the right had accrued in favour of the accused a considerable time ago, and he should have been released on bail on completion of the two years.

15. Lastly, the argument of the learned counsel for the complainant requires consideration, that the Challan against the petitioner is for an offence punishable with death and, therefore, he would come within the exception of the 4<sup>th</sup> Proviso as being a "hardened, desperate or dangerous criminal". In the present case, the facts narrated in the FIR are to the effect that the deceased had received one bullet from the crime weapon. No doubt that the offence under Section 302 PPC is punishable with death. The accused has neither any previous conviction nor a criminal history. In case the argument of the learned counsel were to be accepted, then by implication an accused charged with any offence punishable with death would not be entitled to grant of bail on the ground of statutory delay under the 3<sup>rd</sup> Proviso. The legislative intent is manifest from the language of the 3<sup>rd</sup> Proviso which extends the right of bail to even such an accused who is alleged to have committed an offence punishable with death. However, for the purpose of forming an opinion, so as to bring a case within the ambit of the 4<sup>th</sup> Proviso to Section 497(1) Cr.P.C., the factum of the nature of the offence may be one of the several factors which a Court will take into consideration. In the present case the circumstances do not merit the formation of such an opinion. As long as an accused is not convicted he would not attract the adjective of a 'habitual' offender. The august Supreme Court in the case, Mounder versus The State, PLD 1990 SC 934, has held that the mere factum of registration of cases is not sufficient for forming an opinion under the fourth proviso to section 497(1) Cr.P.C. In the case titled, Jafar & Jafari Versus The State (2012 SCMR 606), it was held that the mere registration of a case by itself is not sufficient to declare an

accused as a habitual offender, unless it is proved / established that he has been convicted in any of the said cases and that the conviction has been upheld by superior courts. This Court is not impressed with the argument of the learned counsel for the complainant that a mere charge for an offence punishable with death is sufficient to bring the accused petitioner within the exception provided in the 4th proviso and, therefore, deny him the right under the 3rd proviso of section 497(1) of Cr P C.

16. It is obvious from the bare perusal of the order sheets that the delay in the present case has either been on account of the prosecution, non appearance of witnesses, strikes, or administrative exigencies of the court. More than four years in concluding a trial is astounding and intolerable, and undoubtedly denies the right to a fair trial to both the petitioner and the complainant. Such delays also erode public trust and confidence in the administration of justice and the courts. Since the courts regulate their own procedures, a heavy burden is placed on them in justifying delays. Courts have sufficient powers to take measures in ensuring the conclusion of trials within a reasonable time, and to take stern action against whosoever causes delay.

17. Applying the principles and law to the facts and circumstances of the present case, this Court is of the opinion that the accused is entitled to bail on the ground of statutory delay.

18. In the circumstances as mentioned above, this petition is allowed and the petitioner is admitted to bail, subject to furnishing bail bonds in the sum of Rs.200,000/- (Rupees Two Hundred Thousand) with one surety in the like amount to the satisfaction of the learned Trial Court.

19. It is expected that the trial Court shall conclude the trial expeditiously and without any further delay, preferably within three months. The

prosecution, and particularly the investigating officer, shall ensure that the witnesses are produced before the trial Court.

20. Needless to mention that this is tentative assessment, which shall not affect the trial of this case in any manner.

21. On a final note it must be mentioned that this court cannot turn a blind eye to the conduct of the prosecution, and particularly the Investigating Officer. The order sheets spanning over more than four years do not inspire confidence in the efficiency or a sense of responsibility on the part of the investigation officer. The trial court also seems to have looked the other way by not taking stern action, firstly against the two lawyers appointed by the court at state expense, and secondly, against the investigation officer who repeatedly sought adjournments and caused unreasonable delay. There seems to be no accountability at all, which perpetuates intolerable delay in numerous cases. It has become imperative that an element of accountability must be introduced, and as a first step, the relevant authorities may consider that the performance of all state functionaries and those responsible for ensuring a fair and speedy trial is judged on the basis of the record of trial proceedings. The Authorities may consider making this a part of the service record of each stakeholder responsible for conducting the trial. The courts cannot afford delays, as it's strength solely lies in public trust and confidence, which, if eroded, weakens the system of administration of justice. As one of the integral pillars of the State, the judiciary owes each and every citizen a duty not only to provide justice, but to adhere to all the norms and principles without which the meaning of justice is compromised. The right to freedom is a universal fundamental right, guaranteed in the constitution, and although that right may be taken away by the state in certain circumstances, the law ensures that those circumstances and the period of deprivation of that right are clearly and unambiguously spelt out in black and white. There has clearly been a grave violation of the right to freedom of the

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accused in this case, for which again the State and the trial court acting on it's behalf are responsible. If such trends are allowed to continue unchecked, the judiciary will lose all credibility, not only in the eyes of the citizens of Pakistan, but also in the eyes of the civilised nations of the world.

22. The office is directed to send a copy of this order to the Inspector General Police, Islamabad, for conducting an inquiry into the role of those falling within his jurisdiction for causing delay, and proceed against such officials in accordance with law if found responsible. The Inspector General shall also prepare guidelines for the investigating officers in consultation with other stake holders with the object to ensuring that trials are not delayed. A report shall be submitted to the Registrar within one month from the date of communication. A copy of this order shall also be transmitted to the Secretary, Ministry of Law and Justice Division for reviewing, in consultation with the stake holders, the system and procedure of appointment of counsels at state expense, so that the right to defence of an accused, without having the means to engage a counsel, can be effectively enforced. The Secretary, Ministry of Law and Justice Division shall submit a report to the Registrar of this Court within a month.

**(ATHAR MINALLAH)**  
JUDGE

Announced in the open Court on \_\_\_\_\_.

Judge.

Approved for reporting.

Asad K/\*