

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

Criminal Miscellaneous No. 51 of 2022

MISBAULLAH
Versus
THE STATE, ETC.

S. No. of order/ proceedings	Date of order/ proceedings	Order with signature of Judge and that of parties or counsel where necessary.
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09.02.2022.	Naveed Shahzad Choudhary, Advocate for Petitioner. Mr. Rabi Bin Tariq, State Counsel. Syed Haider Ali Shah, A.S.I., C.I.A, Islamabad. Mr. M. Abdullah Awan, Advocate for Complainant.
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Through the instant petition, the Petitioner (Misbaullah) is seeking post-arrest bail in FIR No.80/2020 dated 20.02.2020 registered for the offences under Sections 395/412, PPC with Police Station Sihala, Islamabad. Initially, FIR was registered under Section 392, PPC, however, subsequently vide Zimni No.13 dated 10.07.2020 same was exchanged with Section 395, PPC. Section 412, PPC was added thereafter on 15.07.2020 through Zimni No.17.

2. Brief facts, as per the FIR, are that the Complainant practices as Hakeem and his clinic is adjacent to his house; that on 20.02.2020 at about 01.00 pm a person aged about 50 to 55 years entered into his clinic purportedly for checkup; that in the meantime three other persons, armed with pistol, entered his clinic and covered the face of the Complainant with a cloth and forcibly dragged him into his house; that he along with his family was confined to a room with one person standing guard while the other

three unknown persons searched the cupboards in various rooms of the house: that they snatched the jewelry which his wife was wearing at the time worth 10 tolas; they also threatened to kill the Complainant's son; upon their failure to open the locker, the Complainant opened it and gave them all the jewelry, which was kept in the locker along with cash of Rs.400,000/-, hence the FIR.

3. Learned counsel for the Petitioner contended that the Petitioner was not nominated in the FIR; that his name was added by way of supplementary statement which does not disclose source of information and as such no sanctity is attached thereto in law; that there are material discrepancies between the physical features described in the FIR and that of the Petitioner; that the FIR was registered initially under Section 392, PPC as the Complainant had accused four persons for committing the crime whereas Section 395, PPC (which pertains to more than five persons) was added later without source of information; and that identification parade was required to be conducted within 21 days, however, in this case it was conducted after delay of four months.

4. It was further contended on behalf of the Petitioner that he was arrested on 22.03.2020; that interim challan has been submitted on 01.08.2020; Petitioner is previously non convict and no more required for further investigation as charge has been framed on 26.10.2020; that despite framing of charge the prosecution is using delaying tactics before the learned trial Court in concluding the trial, therefore, the Petitioner is

entitled to bail on statutory ground as envisaged in proviso of Section 497(1)(a) Cr.P.C. Learned counsel has relied upon the judgments titled "*Qurban Ali Vs. The State and others, 2017 SCMR 279*" and *Mian Sohail Ahmed Vs. The State 2019 SCMR 956*.

5. Conversely, the learned State Counsel as well as the learned counsel for the Complainant have strongly opposed this bail petition and submitted that there is sufficient evidence available on record to connect the Petitioner with the commission of offence and the offence falls within the prohibitory clause of Section 497 Cr.P.C.; that the Petitioner's 'havalati ticket' was found from the place of occurrence; recovery was affected on the identification of the Petitioner who is the main accused and that the Petitioner is prior convict, however, his previous conviction is from Karachi and as such not on record; further that he is also implicated in FIR No.92/2016 registered in the District Attock under Section 392, PPC which is on record.

6. It was contended that fifth person was identified by Complainant's neighbor by way of a statement on the same day and that the difference in description of features is marginal which is attributable to mistake of judgment on account of traumatic conditions. Both the learned counsel argued that the Petitioner was not entitled to statutory bail as the delay in proceedings is attributable to the Petitioner himself. Even otherwise the Petitioner is a hardened and desperate criminal and as such not entitled to statutory bail.

7. Arguments heard. Record perused.

8. The record shows that a 'havalati ticket' was allegedly dropped by the Petitioner at the place of occurrence of the alleged crime; that during investigation of the Petitioner, gold ornaments weighing 3 tola and Rs. 100,000/- were recovered on his identification; and that the Complainant identified the Petitioner in the identification parade. Identification of the Petitioner coupled with recovery of stolen property and recovery of incriminating evidence at the crime scene, *prima facie* provides sufficient connection of the Petitioner with the alleged offence under Section 392, PPC which carries punishment of up to ten years thereby bringing it within the ambit of the prohibitory clause of 497, Cr.P.C.

9. With regard to the Petitioner's claim on account of statutory bail, it is noted that the Petitioner was arrested on 22.03.2020 therefore, statutory period of one year has lapsed since his detention. Despite framing of charge on 26.10.2020 trial has not been concluded. Before I consider whether the delay is attributable to the Petitioner/Accused or not, I will consider the contention of the learned State counsel that the Petitioner is not entitled to bail on statutory ground on account of being a hardened and desperate criminal.

10. The record does not reflect any prior conviction. However, the record does reveal three prior FIRs namely, FIR No. 92/2016 dated 21.03.2016 under Sections 392/411 PPC, FIR

No. 37/20 dated 14.01.2020 under Section 395 PPC and FIR No. 117/20 dated 22.03.2020 under Section A.O. 13/20/65, wherein the Petitioner is implicated. The first two are for the same offences as in the instant case i.e., under Sections 392/411, PPC and 395, PPC and in both FIRs the allegation was of armed robbery. The third FIR was under Sections 13/20/65 of the Pakistan Arms Ordinance, 1965 for possession of arms without license.

11. The question arises whether involvement in other criminal cases is sufficient to consider the accused person "*hardened, desperate or dangerous criminal*" so as to disentitle him to bail on statutory ground particularly in the absence of a prior conviction as described in the fourth proviso to Section 497, Cr.P.C.

12. The Honorable Supreme Court in the case reported as *Sher Ali alias Sheri versus The State, 1998 SCMR 190* expounded on the issue as follows:

"As regards the category of the accused mentioned in fourth proviso, it will not be out of context to refer to the case of Moundar and others v. The State (PLD 1990 SC 934), in which a Full Bench of this Court comprising the then learned Chief Justice and four companion Judges (the author of the judgment was Zaffar Hussain Mirza, J.), very succinctly enunciated the import of the aforesaid fourth proviso as follows:--

"It is quite plain that the normal rule stipulated in the third proviso to section 497 was that an under trial prisoner shall be released after expiry of the respective period, without the trial concluding. The fourth proviso is in

substance an exception to the aforesaid general rule contained in the third proviso. Before the Court applies the exceptional provisions of the fourth proviso, it has to form an opinion that the accused was a previous convict or a criminal of one of the categories described therein. **The words are 'in the opinion of the Court'.** Such opinion cannot be obviously subjective but must be based upon materials placed before the Court, reasonably supporting the conclusion that the person concerned is a criminal of the classes described. **The word 'criminal' has not been defined.** It will not be proper and indeed would be difficult to define it or give it a specific meaning. However, it is a common word of the English language. **According to the Shorter Oxford Dictionary the word carries several meanings, including the meaning -- a person accused of a crime.** In the context of the provisions under construction, we feel that the word cannot be construed in the technical sense, namely, that a formal accusation must be made against the person or that he should have been adjudged guilty of a charge in a Court of law. It appears to have been used in the sense of a person who violates the law of the land. The three adjectives qualifying the word 'criminal' may also be examined.

According to the same dictionary the word "harden" has been defined to mean, inter alia, (1) to render or make hard; to indurate, (2) to embolden, confirm (3) 'to make callous or unfeeling and (4) to make persistent or obdurate in a course of action or state of mind. The word 'hardened' has also been defined to mean 'made hard' indurate; rendered callous; hard-hearted; obdurately determined in a course".

The same dictionary gives the meaning of the word 'desperate' inter alia, in relation to person: driven to desperation hence reckless, violent, ready to risk or do anything.

The same dictionary gives the meaning of the word 'dangerous', inter alia, as fraught with danger or risk; perilous, hazardous, unsafe."

12. We are in respectful agreement with the above enunciation of law. We are also inclined to hold that in order to bring an accused person within the compass of a hardened,, desperate or dangerous criminal it is not necessary to) prove that he had been previously convicted for the reason that previously convicted persons are separately dealt with in the above fourth proviso as is evident. It must, therefore, follow that if the prosecution places on record sufficient material before the Court to indicate that on the basis of tentative assessment the accused person involved can be treated as a hardened; desperate or dangerous criminal or a person involved in terrorism, the bail on the ground of statutory delay can be denied." [Emphasis added].

13. The above case was cited and followed by the Honorable Sindh High Court in the case of *The State through Assistant Collector of Customs versus Ghulam Mustafa, 2016 YLR 1526*, wherein it was held that the criminal record of the 'accused' was not the only factor which could exclude him from the exceptions contained in the fourth proviso of Section 497, Cr.P.C., "*but the 'offence', impact thereof and manner of committing thereof is also to be kept in view*".

14. The foregoing cases make it apparent that absence of a prior conviction does not automatically exclude an accused person from the ambit of a "*hardened, desperate or dangerous criminal*" for there is a separate category provided in the fourth proviso for convicts.

Equating a 'convict' with a "*hardened, desperate or dangerous criminal*" would make the latter category redundant. To sum up, a hardened, desperate or dangerous criminal may not necessarily be a prior convict.

15. In the case of a previously convicted offender for an offence punishable with death or life imprisonment, the exclusion from the benefit of statutory bail is not discretionary. On the other hand, the second limb of the fourth proviso carves out further categories of accused persons who may be denied statutory bail provided the Court forms an opinion that they meet the stipulated conditions. Such opinion must be based on the material before the Court as per the pronouncement of the Honorable Supreme Court in the case of Sher Ali alias Sheri (*Supra*).

16. I now seek to examine the material on the record in light of the principles enunciated in cases discussed above in order to form an opinion whether the Petitioner can be treated as a hardened, desperate or dangerous criminal bearing in mind that the term 'criminal' includes a person accused of a crime as held in the case of Sher Ali alias Sheri (*Supra*).

17. As discussed herein above, the Petitioner has been accused of armed robbery in two other criminal matters apart from the FIR involved in the instant case and is also accused of possessing unlicensed weapons in a third case. In such circumstances, the tentative assessment of this

Court is that the Petitioner has been accused of crimes which have been carried out in a violent, callous, reckless, dangerous and perilous manner. Based on the foregoing, and relying upon the definitions of the relevant terms provided in the case of Sher Ali alias Sheri (*Supra*), this Court is of the opinion that the Petitioner can be treated as a hardened, desperate and dangerous criminal and as such not entitled to bail on statutory grounds.

18. For what has been discussed above, there is no need to consider whether the delay in trial is attributable to the Petitioner or not.

19. The case of *Qurban Ali (Supra)* relied upon by the learned counsel for the Petitioner is distinguishable as it was specifically noted in such case that no overt act during the occurrence was attributed to the petitioner in such case and as such the case was of further inquiry. Whereas in the instant case there is sufficient evidence to connect the Petitioner with the alleged offence as discussed in detail herein above. As far as the case of *Mian Sohail Ahmed (Supra)* is concerned, the same is not relevant as it was not a bail matter and a deeper appreciation of evidence is not permissible at this stage.

20. Notwithstanding the above, the Petitioner is entitled to speedy disposal of the trial. Therefore, the learned Trial Court is directed to conclude the trial within four months from the date of this order.

21. For the forgoing reasons, the instant bail application is **dismissed**.

22. Needless to mention that the above observations are tentative in nature, which shall in no way prejudice the learned trial court.

(SAMAN RAFAT IMTIAZ)
JUDGE

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