

HCJD/C-121
ORDER SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

CRL. MISC. NO.469-B/2014

Imran Masood
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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24-09-2014 Raja Rizwan Abbasi, advocate for the petitioner.
 Mr Ansar Nawaz Mirza, advocate for the complainant.
 Malik Zahoor Ahmad Awan, Standing Counsel.
 Mr Muhammad Younas S.I with record.

The petitioner Imran Masood son of Masood Akhtar, has sought post arrest bail in case F.I.R. No.268, dated 26-06-2012, registered under Section 302 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 brother of the deceased Sohail Mushtaq Alvi, reported that the deceased was a sales man at a shop and was murdered by the petitioner on 26-06-2012. 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 26-06-2012, and has remained incarcerated continuously for more than two years ; several hearings have been fixed before the trial Court, and the delay is attributed to either the prosecution or for other reasons, but not due to the petitioner; the petitioner remained on physical remand for twelve days; three accused namely Atif Riaz, Salim Iqbal and Tauqir have been acquitted from the charge by the trial Court in the private complaint under Section 265-K Cr.P.C vide order dated 26-09-2013 due to compromise effected between the parties; the story as narrated in the FIR is concocted; the complainant is not an eye witness of

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the occurrence; there is no direct and tangible evidence against the petitioner; the petitioner, under the circumstances, is entitled to bail as of right in accordance with the 3rd 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 Additional Sessions Judge has erred in dismissing the petition on grounds which are alien to the 3rd Proviso to Section 497 Cr.P.C; the learned Judge has also erred in attributing the delay on part of the petitioner due to the requests made on behalf of the co-accused nominated in the private complaint; delay on part of co-accused cannot be attributed to the present petitioner as he had neither made a request for compromise nor adjournment was sought on that account; for the purposes of the 3rd Proviso to Section 497 Cr.P.C. the petitioner has to be treated as distinct and separate from the other co-accused; the learned counsel has placed reliance on *Panjal...Vs...The State (1990 P.Cr.L.J. 2051)*, *Nazir Hussain...Vs...Ziaul Haq and others (1983 SCMR 72)*, *Zahid Hussain Shah...Vs...The State (PLD 1995 S.C. 49)*, *Tariq Butt...Vs...The State (1990 SCMR 1090)*, *Agha Shafqat Hussain and others...Vs...The State and others (1981 P.Cr.L.J. 572)*, *Ishfaq Ahmad and another...Vs...The State (PLD 1990 Peshawar 156)*, *Zulfiqar...Vs...The State (1998 MLD 1551)*, *Rahim Bux and others...Vs...The State (PLD 1986 Karachi 224)*, 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 has caused the delay, and in this regard he took this court through the relevant orders of the trial Court, particularly highlighting the hearings date 28-05-2013, 10-06-2013, 11-07-2013, 05-04-2014, 19-04-2014, 30-04-2014, 10-05-2014 and 13-06-2014. It was further stressed that the accused is named in the FIR with specific role, and the murder weapon was recovered. 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. Learned counsel has placed reliance

on *Muhammad Sabir...Vs...The State (PLD 2008 Lahore 159)*, *Iftikhar Ahmad...Vs...The State (1990 SCMR 607)*, *Abdur Rashid...Vs...The State (1998 SCMR 897)* and *Sher Ali alias Sheri...Vs...The State (1998 SCMR 190)*.

5. Learned counsel for the complainant in addition to the above has contended that a private complaint was filed on 01-10-2013, in which besides the present petitioner three other accused were also nominated. It is argued that the counsel for all the four accused including the present petitioner was the same, who repeatedly sought adjournments on the ground that a compromise was in progress. It is the contention of the learned counsel that the delay on account of seeking adjournments on the ground of compromise being in progress is also attributed to the petitioner as he neither opposed such adjournments nor requested that to his extent the trial may continue.

6. The learned Standing Counsel contended that the petitioner is nominated in the FIR and a specific role is attributed to him. Recovery has been effected. It is further contended that his previous bail application has been dismissed on merits by the learned trial Court. It is, therefore, urged that the petitioner is not entitled to the concession of bail, and that the present petition may be dismissed accordingly.

7. In rebuttal, the learned counsel for the petitioner has argued that the present petitioner was not part of the compromise and, therefore, any delay caused on the ground of compromise will not prejudice his case for the purposes of the 3rd Proviso to Section 497 (1) Cr.P.C. The learned counsel took this Court through the order sheets to explain that the accused had neither requested for a compromise nor was ultimately a beneficiary of such a compromise. The compromise was to the extent of other three co-accused and, therefore, the delay caused cannot be attributed to the present petitioner.

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 3rd 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 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 3rd 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*

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(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. The present petitioner seeks bail on the sole ground of statutory delay and, therefore, it is pertinent to refer to some relevant facts. The FIR was registered on 26-06-2012 and the accused was arrested on the same date. The private complaint was filed on 11-07-2013 by including three other co-accused alongwith the present petitioner. The charge in the private complaint was framed on 29-10-2013. A compromise between the three co-accused named in the private complaint and the complainant was given effect vide order dated 26-09-2013. From the date of filing of the private complaint till the compromise having become effective on 26-09-2013, several adjournments were sought by the consent of the counsel for the complainant. The trial was fixed for thirty one hearings, spanning over a period of more than two years. The complainant filed a private complaint and thereafter, he appears to have entered into negotiations for compromise with the three co-accused. The counsel for the complainant with consent of the counsel for the three co-accused sought adjournments on the ground that compromise was in progress. The present petitioner was not part of this compromise as has been candidly admitted by the learned counsel for the complainant as well as the prosecution.

13. The perusal of order sheets reveals that the adjournments are on account of the complainant, prosecution, strikes observed by the lawyers or the administrative exigencies of the Court. The learned counsel for the complainant and the prosecution have not been able to point out delay which can be attributed to the present petitioner or his counsel. The delay caused on account of the filing of the private complaint and seeking adjournments on the ground of compromise negotiated between the complainant and the three co-accused can certainly not be attributed to the present petitioner.

14. It may be noted that nothing has been placed on record to suggest that the delay in the conclusion of the trial was on account of the petitioner. This

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Court cannot turn a blind eye to the conduct of the prosecution and also the failure on the part of the Court in taking appropriate measures in order to ensure that the trial is concluded expeditiously and at least within a reasonable time. It appears that by inserting the 3rd Proviso to Section 497(1) of Cr.P.C. the legislature expected that trials would be concluded within a period of two years. It may be emphasized that the object of the 3rd Proviso to Section 497(1) of Cr.P.C. is to ensure that the right to a fair trial as guaranteed under Article 10-A of the Constitution is not denied. 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.

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 4th 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 3rd Proviso. The legislative intent is manifest from the language of the

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3rd 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 4th 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. In the present case, as explained above, the delay in the trial beyond the period of two years is not attributed to the petitioner or his agent. However, the delay has been on part of the prosecution, complainant or the administrative exigencies of the Court. In the circumstances, this Court cannot deny to the petitioner the right to grant bail under the 3rd proviso to Section 397(1) Cr.P.C. The right has not been left to the discretion of this Court.

17. 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. The bail is granted on the

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condition that he shall make personal appearance on every hearing, unless exempted by the learned trial Court. In case he violates this condition, this bail shall be recalled.

18. It is expected that the trial Court shall conclude the trial expeditiously and without any further delay, preferably within six months. The prosecution and particularly the Investigating Officer shall ensure that the witnesses are produced before the trial Court.

19. Needless to mention that this is tentative assessment, which shall not affect the trial of this case in any manner. The office is also directed to provide a copy of this order to the Member Inspection Team of this Court.

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on _____.

Judge.

Asad K/*

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