

## **ORDER SHEET**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT.**

**Crl. Misc. No. 109-B of 2018**

Tufail Ahmed Khan and others

**Versus**

The State and another

<b>S. No. of order/ proceedings</b>	<b>Date of order/ Proceedings</b>	<b>Order with signature of Judge and that of parties or counsel where necessary.</b>
	22.02.2018	Sardar Muhammad Latif Khan Khosa and Malik Javed Iqbal Wains, Advocates for the petitioners. Syed Muhammad Ali Bukhari, Advocate for respondent No.2. Malik Awais Haider, State Counsel alongwith Anees, Inspector and Kasrat Ullah, ASI.

The instant application for bail before arrest was filed before this Court on 07.02.2018, in which, vide order of the same date, ad-interim bail was granted subject to furnishing bail bonds in the sum of Rs. 20,000/- each with one surety each in the like amount to the satisfaction of Deputy Registrar (Judicial) of this Court. The case was adjourned to 15.02.2018. Meanwhile, on 13.02.2018, an application was filed seeking reduction in the surety amount (C.M. No. 46/2018). The referred application was dismissed on 13.02.2018. On 15.02.2018, an adjournment was sought by the petitioners and the matter was adjourned to 21.02.2018. It is pertinent to observe that neither bail bonds nor surety had been tendered in compliance with order dated 07.02.2018, by this Court. On 21.02.2018, again adjournment was sought without tendering the bail bonds and surety.

2. On 21.02.2018, the police arrested the petitioners on the ground that since order of this Court dated 07.02.2018, has not been complied with, therefore, bail is not in the field.

3. Learned counsel for the petitioners, *inter alia*, contended that police has acted with malafide inasmuch as despite grant of ad-interim bail by this Court, they had arrested the petitioners. It was further contended that even on merit, case of the prosecution smacks with mala fide and ulterior motives inasmuch as transaction between the parties took place at Lahore and Islamabad has no nexus with the same and despite the same, a frivolous and malafide FIR was lodged with Police Station Secretariat, Islamabad. It was further contended that this Court has jurisdiction to quash the FIR while hearing the bail. It was also contended the even though the petitioners have been arrested, the liberty of the individual has to safeguard at all costs. Reliance is placed on cases reported as Hakim Ali Zardari Vs. The State and another (PLD 1998 SC 1), Khalil Ahmed Soomro and others Vs. The State (PLD 2017 SC 730), Farhat Hussain Shah and another Vs. The State and others (2010 SCMR 1986), Muhammad Aslam Vs. State (PLJ 1999 Cr.C.(Lahore) 1504) and Umar Hayat Vs. The State (1995 SCMR 1005).

4. Learned counsel for the complainant as well as the State Counsel, *inter alia*, contended that since the petitioners have been arrested, therefore, the instant petition has become infructuous and the petitioners may

now move bail after arrest. It was further contended that since the petitioners have misused concession of bail inasmuch as they have failed to comply with the conditions, therefore, the police rightly arrested them. Reliance was placed on cases reported as Muhammad Rafique Vs. The State (2007 YLR 985), Muhammad Amir Vs. The State (2007 MLD 1276) and Gen. (R) Pervez Musharraf Vs. The State and another (PLD 2013 Islamabad 66). It was further contended that the petitioners posing themselves as officials of Inter Services Intelligence and using letter heads duped the complainant and made him invest sum of Rs. 100 million. In this behalf, it was contended that the petitioners filed frivolous suit in Lahore against the complainant which was dismissed as withdrawn. It was further contended that the petitioners also sought to lodge an FIR against the complainant and in this behalf moved an application under section 22-A Cr.P.C which was dismissed by the Ex-officio Justice of Peace.

5. Arguments advanced by the learned counsels for the parties have been heard and the record perused with their able assistance.

6. Admittedly, the petitioners were granted ad-interim bail on 07.02.2018 subject to furnishing bail bonds in the sum of Rs. 20,000/- each with one surety each in the like amount to the satisfaction of Dy. Registrar (Judicial) of this Court. The petitioners despite lapse of almost two weeks, failed to comply with the order of this Court. The concept of bail was lucidly

explained by the august Apex Court in case titled Hakim Ali Zardari Vs. The State and another (PLD 1998 SC 1), in the following terms.

***"The basic conception of the word 'bail' is release of a person from the custody of police and delivery into the hands of sureties, who undertake to produce him in Court whenever required to do so.***

***The law of bails occupies an important place in the administration of criminal justice. The concept of "bail" emerges from the conflict between the police power to restrict the liberty of a man who is alleged to have committed a crime and the presumption of innocence in favour of the alleged criminal. The State in its anxiety to protect its subjects from the onslaughts of criminals, has vested the police with power of arrest and of approaching the criminal courts with a prayer for keeping the accused in custody. In a primitive society there was no conception of bail, but in a civilized society the bail has become the rule. Man's thought on the right of bail dates back from the 17th Century, or even earlier when several schools of thought came into existence with an assertion that man has certain natural or inalienable rights and that it is the function of the State to give recognition and free play to those rights, in order that human liberty may be preserved and human personality developed.***

***The concept of bail has a long history and deep roots in English and American law. In medieval England, the custom grew out of the need to free untried prisoners from disease ridden jails, while they were waiting for the delayed trials conducted by travelling justices. Prisoners were bailed, or delivered to reputable third parties of their own choosing, who accepted responsibility for assuring their appearance at trial.***

***An accused person is said at common law to be admitted to bail, when he is released from the custody of the officers of the Court and is entrusted to the custody of persons known as his sureties, who are bound to produce him to answer, at a specified time and place, the charge against him and who, in default of so doing, are liable to***

*forfeit such sum as is specified when bail is granted.*

*The law of bails is not a static law but is growing all the time moulding itself with the exigencies of time, as in times of war and crisis it leans in favour of the society and the Government, while in times of peace it leans in favour of the individual and the subject. The main purpose of keeping an undertrial accused in detention' is, to prevent repetition of the offence with which he is charged or perpetration of some other offence and to secure his attendance at the trial. Such object has to be achieved within the framework of a man's right to liberty, which is the cherished right which he enjoys alongwith other rights, collectively known as his freedom. This leads one to consideration of the fundamental rights, which are based on concepts of freedom, justice and fair play. These are not new, but are a man's natural rights which he inherits on birth. They include right to live and to earn for such living, right to have a shelter and to own a house and the right to lead free life. These rights are enshrined in Part II of the Constitution of Pakistan, 1973, and include security of person, put in Article 9, of the same. Black-Stone in his celebrated commentaries on the Laws of England propounded his philosophy of natural and absolute rights, which he reduced to three principal or primary articles: the right of personal security, the right of personal liberty and the right of private property.*

*The basic concept of bail is release of a person from the custody of police and delivery into the hands of sureties, who undertake to produce him in Court whenever required to do so. Such a purpose cannot be achieved by releasing an accused from custody on furnishing of cash security, in lieu of solvent sureties who can take effort to produce the accused released, at a given date, time and place. It is also to be noted that as per section 499 of Cr.P.C., before release of a person on bail by a Court, a bond of the requisite amount is to be executed by one or more sureties conditioned that such person shall attend the Court at the time and place mentioned in the bond. These provisions contained in section 499 of*

***Cr.P.C. would be rendered nugatory, if the person being released is asked to furnish cash security, in lieu of solvent surety or sureties. There would be no body to ensure attendance of the released person at the appointed place, date and time, if he has been released only on furnishing of cash security. This would be against the letter and spirit of law enshrined in section 499 of Cr.P.C."***

The above judgment while interpreting section 499 Cr.P.C clearly provide that bail becomes operative when the surety undertakes to produce the accused/ petitioner before the court or police authorities at given time and place until such time when surety is executed. It cannot be said that the custody of the petitioner is handed over under the charge to the surety. In this behalf, for ease of convenience, section 499 Cr.P.C is reproduced herein below:-

***"499. Bond of accused and sureties. (1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be.***

***(2) If the case so requires, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge."***

7. The bail granting order did not become operative inasmuch as it was subject to furnishing of bail bonds and surety in the sum of Rs. 20,000/- each inasmuch under the facts and circumstances, no Robkar/

Certificate was issued by the Court viz bail of the petitioner. Such being the position, the police authorities arrested the petitioners formally on 21.02.2018. The instant petition is in the nature of bail before arrest and since the petitioners now have been arrested, though were produced in the Court on the order of the Court, now have to apply for the bail after arrest.

8. In view of above, the instant petition has become infructuous and is accordingly **disposed off**.

**(AAMER FAROOQ)**  
**JUDGE**

M.Shah

*Approved For Reporting*