

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Mr. Justice Amin-ud-Din Khan

Mr. Justice Athar Minallah

CRIMINAL PETITION NO.1233 OF 2023

*(Against the judgment dated 03.10.2023 of the
Lahore High Court, Lahore passed in
Cr.Misc.No.53730-B of 2023)*

Muhammad Usman s/o Muhammad Arshad

...Petitioner

Versus

The State & another

...Respondents

For the Petitioner: Mr. Qaiser Imam, ASC

For the State: Mr. Ali Ahmed Gillani, Additional Prosecutor
General, Punjab a/w Mushtaq, Inspector.

Date of hearing: 30.11.2023

ORDER

Athar Minallah, J. Muhammad Usman, son of Muhammad Arshad ('the petitioner'), was arrested on 29.04.2021 because he was nominated in FIR No.139/2021, dated 30.3.2021, registered at the Police Station Phularwan, District Sargodha for allegedly committing the offences under sections 302, 148, 149 and 109 of the Pakistan Penal Code, 1860 ('PPC').

2. The petitioner had filed his first application seeking bail on merits and it was dismissed by the High Court on 27.9.2022. He then filed another petition which was not pressed in order to avail the remedy on the fresh ground of delay in conclusion of trial. This ground had not ripened when the two petitions were filed. Since the second petition was not pressed, therefore, it was dismissed by the High Court vide order dated 19.5.2023. Consequently, a third petition was filed on the sole ground of seeking bail on statutory delay. The petition was, however, dismissed vide order dated 10.8.2023 on account of non-prosecution. The petitioner filed a fresh petition and it was dismissed by the High Court vide the impugned judgment dated

03.10.2023. The petitioner has, therefore, sought leave against the impugned judgment.

3. We have heard the learned counsel and the learned Additional Prosecutor General, Punjab.

4. It is settled law that a second bail petition repeating the same grounds that were earlier taken is not competent.¹ Moreover, the grounds raised by an accused in a subsequent bail application which were available at the time of filing of the earlier petition could also not be treated as fresh grounds nor urged for the purposes of seeking the same relief. This Court has already highlighted the principles regarding maintainability of a subsequent bail petition.² If the ground on which bail has been sought subsists when a bail petition is withdrawn then such a ground can also not be taken again.³ However, the exception to this rule is in the case of entitlement of bail on statutory grounds as has been held by this Court. If any act or omission of the accused has hindered the conclusion of trial within the period specified in the third proviso of section 497 (1) of the Code of Criminal Procedure, 1868 ('Cr.P.C.') then a right, as contemplated thereunder, will not accrue in the latter's favour and, therefore, he or she, as the case may be, would not become entitled to be released on bail on the statutory ground of delay in conclusion of the trial. Nonetheless, if after the rejection of the plea of bail on statutory grounds, the accused has subsequently corrected himself/herself and has abstained from doing any act or omission in the following period specified under the third proviso, then a fresh ground would accrue to the accused to invoke the jurisdiction of the court for grant of bail. The third proviso to section 497 (1) of Cr.P.C. would thus become

¹ Shahbaz Akmal v. The State and another (2023 SCMR 421)

² Nazir Ahmed & another v. The State & another (PLD 2014 Supreme Court 241)

³ Shahbaz Akmal v. The State and another (2023 SCMR 421)

operative as and when the period specified therein has expired but the trial has not concluded without any fault on part of the accused.⁴

5. In the case in hand, the ground of statutory delay was not available to the petitioner when he had sought the concession of bail through the two attempts made by him. It was during subsistence of the second bail petition that the period specified under the third proviso had ripened and, therefore, a fresh ground became available to seek bail. The petition before the High Court was dismissed for non-prosecution and such dismissal did not prejudice his right to file a fresh petition before the High Court, which he did. The petition was competent because a fresh ground of delay in conclusion of trial had become available to him. There is no force in the argument advanced by the prosecution that the petition was not maintainable on the touchstone of principles laid down by this Court.

6. The next question that requires to be examined is whether a right had accrued in favour of the petitioner to be released on bail because of delay in the conclusion of the trial as contemplated under the third proviso of section 497(1). It is not disputed that the two year period specified in the third proviso of section 497 (1) of the Cr.P.C. has passed and, therefore, this crucial condition has been met. It is also not disputed that, despite more than two years of continuous incarceration of the petitioner, the trial has not concluded. The delay in conclusion of trial is not attributable to the petitioner nor his counsel, rather, it has been on account of the abscondance of the co-accused and their surrender or arrest at different times. Each time the charge had to be reframed. In response to our repeated queries, the learned State Counsel could not persuade us that the delay in conclusion of the trial could be

⁴ Syed Ayesha Subhani v. The State and others (PLD 2023 Supreme Court 648)

attributed to the petitioner. The petitioner was not at fault and yet he had to suffer the hardship of incarceration of more than two years. The co-accused are stated to be close relatives of the petitioners and, therefore, the State Counsel has argued that his complicity could not be ruled out. The legislature has expressly confined the delay under the third proviso to an act or omission of the 'accused' or 'any person acting on his behalf'. The accused cannot be made liable for the acts or omissions of a co accused regardless of the relationship, except when the prosecution can clearly show, based on undisputed facts that the accused seeking bail was complicit. The latter's acts and omissions, or those of a person acting on his behalf, are crucial and could be considered for the court to determine the right to be released on bail on the ground described under the third proviso. The delay caused by the co accused is not attributable to the petitioner because no act or omission on the latter's part nor a person acting on his behalf could be shown.

7. The object of recognition of a right to be released on bail on statutory ground, subject to meeting the conditions described under the third and fourth provisos of section 497(1) of the Cr.P.C. is to ensure that criminal trials are not unnecessarily delayed and that the prosecution is not enabled to prolong the incarceration or hardship of an accused awaiting trial. The right of an accused to seek bail on statutory grounds cannot be defeated for any other reason except on the ground as has been explicitly described under the third and fourth provisos to section 497(1) of Cr.P.C. The accused becomes entitled to bail as of right after the statutory period expressly stated in clauses (a) and (b), as the case may be, have expired and the trial has not concluded. This accrual of right is manifest from the language of the third proviso. Such a right can only be defeated if the

prosecution is able to show that the delay in the trial was attributable to an act or omission of the accused or a person acting on his behalf. If the prosecution succeeds in showing to the satisfaction of the court that the accused was at fault then the right stands forfeited. It has been held by this Court that the right recognized under the third proviso of section 497(1) cannot be denied to an accused on the basis of discretionary powers of the court to grant bail. The right has not been left to the discretion of the court, rather, its accrual is subject to the fulfillment of the conditions mentioned under the third proviso of section 497(1) of the Cr.P.C. Moreover, while calculating the quantum of delay attributable to an accused, the court is required to consider whether or not the progress and conclusion of the trial was in any manner delayed by the act and omission on the part of the accused. While ascertaining the delay, the cumulative effect in disposal of the case has to be considered and its assessment cannot be determined on the basis of mathematical calculations by excluding those dates for which adjournments had been sought by the accused or the latter's counsel. The main factor for consideration is the attendance of the witnesses and whether, despite the matter having become ripe for the recording of evidence, whether the delay was caused by the defence. The recording of the statement of a last witness would also not defeat the right recognized under the third proviso and it would be unreasonable to conclude that the trial has been completed.⁵

8. On the touchstone of the principles highlighted herein above, a right has accrued in favour of the petitioner under the third proviso of section 497(1) of the Cr.P.C., to be released on bail because the conditions have been met and the prosecution was not able to

⁵ Nazir Hussain v. Zia-ul- and others (1983 SCMR 72), Sher Ali alias Sheri v. The State (1998 SCMR 190), Akhtar Abbas v. State (PLD 1982 SC 424), Moundar and others v. The State (PLD 1990 SC 934), Abdul Rashid v. The State (1998 SCMR 897), Zahid Hussain Shah v. The State (PLD 1995 SC 49), Muhammad Siddique v. Muhammad Behram and another (1998 PCr.L.J. 358)

persuade us that the delay in conclusion of trial can be attributed to the petitioner nor that the mischief contemplated under the fourth proviso is attracted.

9. For the above reasons, this petition is converted into an appeal and is allowed. The petitioner is, therefore, extended the concession of bail subject to his furnishing bail bond in the sum of Rs.200,000/- (rupees two hundred thousands) with one surety each in the like amount to the satisfaction of the trial court. The petitioner shall be released forthwith if not required to be incarcerated in connection with some other matter. It is noted that the observations recorded in this order are based on the tentative assessment of the record which was placed before us and, therefore, it shall not in any manner prejudice the proceedings pending before the trial court.

Judge

Judge

Islamabad the

30th November 2023

APPROVED FOR REPORTING'

*Aamir Sh. /**