

JUDGMENT SHEET

**IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)**

Cr.M B.A. No. 398-M/2017.

JUDGMENT

Date of hearing: **11.09.2017.**

Petitioner:- (Salah-ud-Din) by Mr. Zarawar Khan, Advocate.

Respondents:- (the State & 1 another) by Mr. Rafiq Ahmad, Astt: Advocate General and Mr. Raza-ud-Din Khan, Advocate.

MOHAMMAD IBRAHIM KHAN, J.- Whereas the order dated 05.08.2017 in B.A. No. 147/4 of the year 2017 passed by the learned Additional Sessions Judge/Izafi Zila Qazi Kabal Swat delivered in slipshod manner only on account of the charge by the complainant for embezzlement of Rs. 38 lacs, the offence being covered under section 409 PPC which carries punishment falling within the prohibitory clause of section 497 (1) Cr.P.C and petitioner being prima facie connected with the offence, thus the bail plea of the Petitioner was dismissed.

2. This is an attempt for the grant of post arrest bail in case FIR No. 308 dated 20.06.2017 charged under section 409 PPC registered at Police Station Kanju District Swat.

3. Muhammad Idress Khan owner of the petrol pump known as Dada Khan Filling Station Bara Bandai by an application submitted to the DSP Circle Kabal District Swat narrating the details that the Petitioner Salah-ud-Din was working with him as Manager, who had embezzled an amount of Rs. 38 lacs during the period of subsistence of his managerial charge. The financial deal for which the Manager Salah-ud-Din was vested includes purchase of oil and all bank transactions. Later when the embezzlement came to surface the said Manager Salah-ud-Din given an affidavit on 19.06.2017 admitting his guilt, which is prevaricated. The contents of the application were later on reduced into registration of this case.

4. Having heard arguments of learned counsel for the Petitioner, learned counsel for

the complainant and learned Astt: Advocate General for the State, record with their assistance gone through.

5. Learned counsel for the Petitioner placed reliance on 2017 P Cr.LJ 770 (Sindh) "Masood Ahmed and another vs State through Director General NAB, 2017 P Cr.LJ 397 (Peshawar) " Mohsin Ihsan vs the State", 2000 P Cr.LJ 161 (Karachi) " Hussain Haqani vs the State", 2013 P Cr.LJ 318 (Sindh) " Muhammad Boota vs the State" and 2016 YLR 2460 (Peshawar Bannu Bench) " Qazi Fida-ur-Rehman vs the State and another" and prayed for the grant of bail. On the other hand, learned counsel for the complainant assisted by learned A.A.G referred to 2012 MLD 607 (Sindh) " Joseph Sardar vs the State", 2009 P Cr.LJ 486 (High Court AJ&K) " Chaudry Barkat Ali vs Azad Jammu and Kashmir Ehtesab Bureau Mirpur and another, 1999 P Cr.LJ 154 (Peshawar) "Azizullah vs the State" and 2014 P Cr.LJ 494 (Peshawar) " Shah Zaib

vs the State". Thereby vehemently opposed the grant of bail in favour of the accused/Petitioner.

6. According to the recovery memo dated 03.07.2017 after the accused/Petitioner Salah-ud-Din was taken into custody an amount of Rs. 100,000/- each currency of notes of 5000 in denomination 20 in numbers drawn through ATM card of the Muslim Commercial Bank in the name of the Muhammad Idress were recovered. Another ATM card is of the United Bank Limited and the 3rd one is of Habib Bank Limited. Certain cheques were also recovered from possession of the accused/Petitioner.

7. Whether in view of the application addressed to the DSP Circle Kabal District Swat on 20.06.2017 and in the light of an affidavit given by the Manager accused/Petitioner Salah-ud-Din admitting Rs. 38 lacs to have been embezzled by him this recovery would include an amount under embezzlement. The learned counsel for the complainant was unable to clarify in this behalf, rather the learned A.A.G

for the State frankly admitted that certainly an affidavit being furnished on 19.08.2017 the report made on 20.06.2017 even the recovery has been effected when has been drawn on 20.06.2017 through ATM, this amount cannot be included in the embezzled amount, which bring this case under the scope of further inquiry.

8. On the basis of levied section 409 PPC, which carries punishment falls within the prohibitory clause of section 497 (1) Cr.P.C. The relevant section 409 PPC is reproduced as under:-

409. Criminal breach of trust by public servant or by banker, merchant or agent. Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life or with imprisonment of either description for a term which may

extend to then years, and shall also be liable to fine."

It pertains to the involvement of an accused under embezzlement, while an accused admitting criminal breach of trust is a public servant or a banker, merchant or agent. Prior to section 408 PPC is referred here, which is also reproduced:-

"408. Criminal breach of trust by clerk or servant. Whoever, being a clerk or servant or employed as clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall be liable to fine."

Here criminal breach of trust is when committed by clerk or servant. Indeed the relationship between the Manager Salah-ud-Din accused/Petitioner and Muhammad Idress owner of the petrol pump known as Dada Khan Filling Station Bara Bandai is that of master and servant. The position of the accused/Petitioner

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is not better than clerk or servant, who might have been entrusted the property in such capacity. This section i.e. 408 PPC invites maximum punishment which may extend to 7 years and shall also be liable to fine. In comparison of the above sections of law, most appropriate is to levy section 408 of the Pakistan Penal Code, which is applicable in the given circumstances of this case.

9. In view of the above, the Petitioner is entitled to the concession of bail. Hence, he is asked to furnish bail bonds in the sum of Rs. 10,00,000/- (Rupees ten lacs) with two sureties each in the like amount to the satisfaction of learned Trial Court, who shall ensure that the sureties are local, reliable and men of means. The sureties shall also furnish affidavits separately that in the event the accused/Petitioner does not appear before the Court for any reason each surety shall have no objection in forfeiture of the bond to the tune of surety amount under the bail bond.

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10. Needless to mention that the observations made above are purely tentative in nature and should in no way prejudice the case of either party during trial.

Announced
Dt: 11.09.2017.


JUDGE

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