

JUDGMENT SHEET  
**IN THE PESHAWAR HIGH COURT,**  
**PESHAWAR**  
(Judicial Department)

**Cr.Misc.BA No.1382-P/2015**

Date of hearing: \_\_\_\_\_

Petitioner (s) : \_\_\_\_\_

Respondent (s) : \_\_\_\_\_

**JUDGMENT**

**ASSADULLAH KHAN CHAMMKANI, J.-**

Petitioner Sahil Muhammad, who has been declined bail on merits upto this Court in case FIR No.48/2013, dated 12.11.2013, registered under sections 409/477-A/109/34 PPC and Sections 3 & 4 AML Act as well as S.5 (2) Prevention of Corruption Act, in Police Station FIA/CBC, Peshawar, through this further petition, seeks concession of bail on fresh ground/ statutory ground under third Proviso to S.497 Cr.P.C. The learned Trial Court has declined bail to him on the ground of non-

provision of bail on statutory ground under S.5 (6) of Offences in Respect of Banks Ordinance, 1984, and that the Ordinance, 1984 being a Special law, the petitioner cannot claim bail on under third Proviso to S.497 Cr.P.C.

2. Learned counsel for the petitioner argued that co-accused, namely, Imtiaz Ali has already been granted bail by this Court on statutory ground vide order dated 10.06.2015, therefore on the doctrine of consistency the petitioner is also entitled to same treatment as under Article 25 of the Constitution all citizens are equal before the law and are entitled to equal protection of law; that petitioner is behind the bars since 07.11.2013 (one years and 10 months), and despite strict directions of this court no progress has been made in his trial so much so that charge has not been framed against the petitioner and due to the conduct of the

prosecution, he is languishing in jail; that statutory period of one year has already been elapsed while the delay in conclusion of trial has not been caused on the act or omission of the petitioner or anybody acting on his behalf; that the learned Trial Court while dismissing bail petition of the petitioner has erred in law as the relief sought under third proviso to S.497 Cr.P.C. is a statutory right, mandatory in nature and is not left to the discretion of the Court but is controlled by the Statute; that the findings of the learned Trial Court are not based on legal premises as under section 5 (6) of the Ordinance 1984, there is no specific bar or prohibition on grant of bail under section 497 Cr.P.C.; that detention of the petitioner for an indefinite period in the circumstance would be unjustified and against the provision of law; that the Code being a general criminal procedural law is not

only applicable to Pakistan Penal Code, but its application is extended by virtue of S.5 (2) Cr.P.C. to all Special Laws and where the Special Statue is silent on a point the provision of the Code can be pressed in to service; that the preamble of the Ordinance provides for speedy trial of offences committed in respect of banks, therefore, petitioner is entitled to be released on bail on statutory ground.

3. Conversely, learned DAG conceded the applicability of S.497 Cr.P.C. and contended that in light of plethora of judgments of the august Apex Court, that there would be no bar in having recourse to the provisions of general law when a special statute is silent on a point. He, however, requested that if some specific time is provided to the prosecution, trial would be concluded in the same.

4. Arguments heard and record perused.

5. Before to dilate upon the case of the petitioner to be a fit case for bail on statutory ground, I would like to first meet the question as to whether provision of third proviso to S.497 Cr.P.C. can be pressed in to service, when the Special law, is silent on the subject qua release of an accused. S.5 of the Offences in Respect of Banks (Special Courts) Ordinance, 1984, deals with the procedure of a Special Court. It regulates the manner of taking cognizance of any scheduled offence, adjournment of a case during the trial, re-call and re-hearing of the evidence and recording of evidence in absence of the accused. Sub-section (6) pertains to release of accused on bail which is reproduced below:-

**“S. (6) An accused person shall  
not be released on bail by a  
Special Court, or by any other**

**Court, if there appear  
reasonable grounds for  
believing that he has been  
guilty of a scheduled offence,  
nor shall an accused person be  
so released unless the  
prosecution has been given  
notice to show cause why he  
should not be so released”.**

Sub-Section (8) of S.5 of the Ordinance, 1984,  
lays down that **“A Special Court shall, in  
matters with respect to which no procedure  
has been prescribed by this Ordinance follow  
the procedure prescribed by the Code for the  
trial of cases by Magistrates”.**

6. Perusal of S.5 (6) of the Ordinance  
indicates that it does not place an absolute bar  
on allowing bail to an accused charged with a  
scheduled offence under the Ordinance. It is

now a well settled law that bail is a rule and is not to be withheld by way of punishment. S.5 (6) of the Ordinance provides for allowing bail to an accused by a Special Court. This is an enabling section. This section or any other provision of the Ordinance does not indicate that the powers of a Court have been taken away to grant bail to an accused under section 497 Cr.P.C.. A Special Court can allow bail to an accused charged with a scheduled offence even if there are reasonable grounds to believe that he is guilty of the charged offence, inter alia, on the grounds of age, sickness or infirmity, delay in completion of the trial, if it is found to be a case of further inquiry, if there is no likelihood of tampering with the evidence by the accused or that the continued detention of the accused may hamper his defence. Offences in Respect of Banks (Special Courts) Ordinance, has been

promulgated in 1984. S.5 (6) and (7) of the Ordinance regulating the grant or refusal of bail is in consonance with S.497 Cr.P.C. The only difference is that the Ordinance of 1984 place bar on the release of an accused, against whom reasonable grounds exist that he has been guilty of a “scheduled offence”, while the Code place bar on the release of an accused if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years, therefore, all other parts and amendments whenever made to S.497 Cr.P.C., would be fully applicable to the Ordinance, 1984. The words mentioned in S.5 (6) of the Ordinance, 1984 are similar to the words used in Section 21-D of the Anti Terrorism Court, 1997, but even then the Courts are entertaining and grant bail to the accused under the provisions of S.497 Cr.P.C.



Same is the position of section 5-A of Suppression of Terrorist activities (Special Courts) Act, 1975. The Hon'ble Supreme Court in case titled, **“The State Vs Syed Qaim Ali Shah” (1992 SCMR 2192) has held that High Court has the power to press into service S.497 Cr.P.C. with its provisos during the pendency of trials before the Special Court”**.

The Criminal Procedure Code, 1898 though was meant primarily to regulate the investigation, inquiry and trial under the Pakistan Penal Code, 1860 (in terms of S.5(1) Cr.P.C., but it stipulates an exception in terms of S.5(2) Cr.P.C. Mandate of S.5 (2) Cr.P.C. is that persons who are proceeded against under Special Law shall be dealt with and their cases inquired into, investigated and tried according to the procedure laid down in the said special law. In case where an enactment provides a special procedure only

for some matters then such matters would be dealt with according to the procedure laid down in said Special Law, but where the Special law is silent, the provision of Criminal Procedure Code 1898, shall apply. Again the Control of Narcotic Substance Act, 1997 is a Special Law and S.51 of the same particularly deals with the bail, but it has been held by the Hon'ble Supreme Court in case titled, **“Gul Zaman Vs the State” (1999 SCMR 1271)** that notwithstanding the bar contained in S.51 of the Control of Narcotic Substance Act, 1997, bail could be granted to an accused person. Applicability of S.496, 497 and 498 Cr.P.C. was held not totally barred in respect of cases under the said Act/ Special Law. Same is the view of the Apex Court in case titled **“The State through Deputy Director Anti-Narcotic Force, Karachi Vs Syed Abdul Qayyum” (2001 SCMR 14)**. Thus, the

conclusion of the learned Special Court that section 5 (6) of the Ordinance imposes absolute bar on grant of bail cannot be accepted. In **Himesh Khan's case (2015 SCMR 1092)**, the petitioner who was charged under National Accountability Ordinance, 1999, where the provisions of S.497 Cr.P.C. have been specifically ousted, was granted bail by the Apex Court on the ground of delay in conclusion of his trial. For convenience the relevant part of the judgment is reproduced below:-

**“True that the statutory law on the subject under the National Accountability Ordinance, 1999 does not recognize the grant of bail to accused persons facing charges under the said law, however, in the case of Khan Asfandiyar Wali Vs**

**Federation of Pakistan through  
Cabinet Division (PLD 2001 SC  
607), the Supreme Court has  
devised a strategy for granting bail  
to such persons through  
constitutional jurisdiction of the  
High Court provided their cases  
are arguable for the purpose of  
grant of bail.**

**The Court cannot lightly ignore  
shocking delay in the conclusion of  
the trial of an accused person,  
provided he or they is/are not  
exclusively responsible for the  
same. ....**

**Pakistan is a welfare State where  
liberty of individual has been  
guaranteed by the Constitution  
beside the fact that speedy trial is**

**inalienable right of every accused person, therefore, even if the provision of S.497 Cr.P.C. in ordinary course is not applicable, the broader principle of the same can be pressed into service in hardship cases to provide relief to a deserving accused person incarcerated in jail for a shockingly long period”.**

7. The petitioner is behind the bars since 07.11.2013, till date, but even charge has not been framed against him. According to record, the delay caused in conclusion of his trial cannot be attributed to the petitioner as it was because of the lethargic attitude of the prosecution, therefore, petitioner cannot be left at the mercy of the prosecution to rot in jail for indefinite period. The inordinate delay in

conclusion of his trial cannot be lightly ignored as the same has not been caused by his act or omission. It has been held by the Hon'ble Supreme Court in **Riasat Ali's case (PLD 1968 SC 353)**, that delay in prosecution of accused amounts to abuse of process of law and is a valid ground for bailing out accused, however, delay in prosecution of each case as a ground for bail is to be weighed and judged, in each case on its merits. This is a classic case where the trial has been delayed and the delay is attributed either to the State or the complainant. The right to a fair trial is guaranteed under Article 10-A of the Constitution and the most essential constituent of a fair trial is to conclude the same expeditiously and without delay. 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 trial in particular, is intolerable. The preamble of the Ordinance, 1984 provides for speedy trial of offences committed in respect of banks, therefore, keeping in view the preamble of the Ordinance, 1984, trial in the schedule offences is

to be concluded much earlier than as provided in the third proviso to section 497 Cr.P.C.

8. In light of the above discussion and deriving wisdom from the judgments of the Apex Court, I am of the considered view that it is a fit case for grant of bail on statutory ground. Besides, petitioner is a sweeper in the Bank where some gold of the Bank has been misappropriated while co-accused Zia Ullah Shah and Abdul Hameed Khan, the Manager and Cashier, respectively, the custodian of the Bank, have been granted bail on statutory ground, therefore, on the doctrine of consistency and under Article 25 of the Constitution that all citizens are equal before law and are entitled to equal protection of law, the petitioner is also entitled to concession of bail.

9. According,, this petition is allowed. Accused/petitioner is admitted to bail.



10. These are reasons of my short order of  
even date.

**Announced**  
**03.09.2015**

**J U D G E**



