

**IN THE PESHAWAR HIGH COURT,
PESHAWAR.**

(Judicial Department)

Cr.Misc (B A) No. 184-P/2017.

Date of hearing:..... 3.4.2017

Petitioner (Sifat Ullah) by Muhammad Ijaz Sabi, Advocate.

Respondent (s) the State by Mian Arshad Jan, AAG.

SYED AFSAR SHAH, J.- Since identical question of law is involved in the instant **Cr. Misc (B.A) No. 184-P/2017, titled Sifat Ullah vs. The State, Cr. Misc (BA) No. 165-P/2017, titled Khurshid Babar. Vs. the State and Cr. Misc (BA) No. 315-P/2017, titled Shafiq ur Rehman vs. The State,** therefore, these are being disposed of by this single judgment.

2. Facts of the **Cr. Misc:(BA) No. 184-P/2017** as spelt out from the record are that on 11.5.2015, Fazal-i-Akbar SI Incharge, Police Post, Turnab, alongwith police nafri was on gusht of the illaqa, when got information about the transportation of narcotics from tribal territory to Punjab in a motorcar No.AF-015 via G.T road and, hence, in the backdrop, he started surveillance of the road, near jaghra chowk, when, in the meanwhile, the vehicle already spotted to them emerged from Peshawar side, which was signaled to stop. The inmates of the car, on seeing the police nafri, accelerated its speed, however, on chase it was brought to halt near to the orchard of Marakachorri. The inmates of the vehicle tried to flee away in the nearby fields, but one of them was apprehended and searched personally, which led to the recovery of pistol from his immediate possession. The car was also subjected to a thorough search, which led to the recovery of chars pukhta weighing 25 k.gs smartly concealed in its secrete cavities. On recovery of narcotics, arrest of one of the accused (petitioner) and seizure of the vehicle, the

seizing officer prepared the recovery memo and recorded the murasilla, which was dispatched to Police Station, Chamkani, where on the basis of which FIR No. 484 dated 11.5.2015 was registered against the petitioner and his co-accused under section 9 (c) CNSA besides other penal sections. Later on, the petitioner applied for his post arrest bail, which was dismissed upto this Court on merits. His petition for the grant of bail on the ground of statutory delay was also dismissed by the learned trial Court and, now, he has come to this Court for his release on bail on the same ground (statutory delay).

3. In the case of accused Khurshid Babar, who is petitioner in **Cr. Misc (BA) No. 165-P/2017**, Aftab Khan SI Incharge PP Turnab is the seizing officer and on 8.1.2016, he alongwith police nafri had fenced the G.T road opposite to the Police Post, when in the meanwhile, a motorcar No. LEH 4642 was intercepted. The driver of the vehicle, on query, disclosed his name as Khurshid Babar and on his pointation, the seizing officer recovered heroin, weighing 05 k.gs, concealed in its (car) cavities, whereafter, he prepared the seizure memo and recorded the murasilla, which was dispatched to Police Station, Chamkani, where on the basis of which FIR No.47 dated 8.1.2016 was registered against the accused under section 9 (c) CNSA. After his arrest, his request for the grant of bail was disallowed upto this Court on merits. Again, he applied to the learned trial Court for his release on bail on the ground of statutory delay, which was dismissed and, now, he has come to this Court for the same relief.

4. Facts of **Cr. Misc (BA) No. 315-P/2017** as reflected from the record are that on 19.3.2015, he was found in trafficking of opium, weighing 05 k.gs 200 grams, in a Car bearing registration No.BRB 325 and, hence, in the backdrop FIR No.341 dated 19.3.2015 was registered

against him in Police Station, Hayatabad, under section 9 (c) CNSA. He was declined bail on merits upto this Court. His petition for the grant of bail on statutory delay was also dismissed by the learned trial Court and, now, he is before the Court seeking his release on bail on the same ground, i.e., statutory delay.

5. The gist of the arguments of the learned counsel for the petitioners, in all the cases, is that fair trial and its early disposal / conclusion is the right of the petitioners as enshrined under Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973, and lesser punishment, as envisaged in the Section of law, they are charged with, has to be taken into account while seizing of bail applications, that too, when it is cardinal principle of criminal jurisprudence that an accused person is presumed to be innocent till the time his guilt is proved beyond reasonable doubt by the prosecution and since the petitioners are behind the bars for the last more than one year, they are entitled to be released on bail on statutory ground.

6. The main thrust of the arguments of the learned Additional Advocate General appearing on behalf the State is that the petitioners cannot claim bail on statutory ground in view of the bar contained under Section 51 of the CNSA, 1997, which is not applicable in totality in Section 497, Cr.PC and even otherwise, they have not yet completed continues period of two years behind the bars, which is the basic ingredient for asking bail on the statutory ground as the punishment for the offence, they are charged with, is death, which is to be taken into account even while hearing petitions for bail, as such, they have to complete two years in jail and since these petitions, in the present scenario, are pre-mature, therefore, are liable to be dismissed on this score alone.

7. I have considered submissions of learned counsel for the petitioners, learned AAG representing the State and gone through the record of the case with their valuable assistance.

8. First this court will take up the applicability of the third proviso to Section 497(1) Cr.P.C, in view of the bar contained in Section 51(1) of the Control of Narcotic Substances Act, 1997. The above proposition has been dealt with in a most lucid manner by the august Supreme Court in the case of **Gul Zaman vs. the State, reported in 1999 SCMR 1271**, where it has unanimously been held by their lordship that despite the bar contained in section 51 of the Act, *ibid*, bail can be granted to an accused person charged for an offence under the Control of Narcotic Substance Act, 1997. In the year 2000, the same legal proposition came up before the Hon'ble Supreme Court in case titled **the State through Deputy Director Anti Narcotic Force Karachi vs. Mobeen Khan, 2000 SCMR 299**. The august Supreme Court re-called the bail of the respondent-accused mainly on the ground that two years had not been expired from the date of his arrest as the accused-respondent was charged under section 9 (c) CNS, Act, 1997, carrying punishment upto death. The relevant observations of their lordship in the cited case are reproduced below:-

As regards Mr. Motiani's above second submission, it may be observed that even if it is to be conceded for the sake of argument that the application of the third proviso to subsection (1) of Section 497 Cr.P.C, has not been excluded by subsection (1) of the Act (which seems to be incorrect), since clause (c) of section 9 of the Act, inter alia, carries sentence of death, the statutory period of delay would be two years under clause (b) of the above third proviso to section 497 Cr.P.C as , admittedly, in the above case the period of the two years had not expired from the date of arrest (i.e., 4.2.1997) on 10.8.1998 when the bail was granted, and therefore, bail could not have been granted on the ground of statutory delay. (Underline is supplied for emphasis).

Again, in the case of Deputy Director ANF Karachi vs Syed Abdul Qayum, reported in 2001 SCMR 14, which is later in time, the Hon'able Supreme Court ruled that despite the provisions contained in Section 51 of the Control of Narcotic Substances Act, 1997, the Sessions Court and High Court have the power to grant bail. For the sake of convenience and ready reference, the relevant part of the judgment is given below:-

“Moreover, this Court in the case of Gul Zaman V the State reported in 1999 SCMR 1271, has elaborately dealt with the application of sections 496, 497 and 498 Cr.P.C. in view of the bar contained in section 51 of the Act and it has been unanimously held that despite the provisions contained in section 51 of the Act, the Sessions Court and High Court have the power to grant bail.”

In view of the above, the arguments of the learned AAG that the third proviso of Section 497(1) Cr.P.C, in view of the bar contained in Section 51 (1) of CNSA is not applicable, are without any substance.

9. Now, I may take up the ground of statutory delay but before that it will be more appropriate to reproduce provisos third and fourth to Section 497 Cr.P.C and section 9 of CNSA, which run as under:-

“497.

(1)

Provided.....

Provided.....

Provided further that the Court shall, except where it is of the opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf, direct that any person shall be released on bail.

(a) *Who, being accused of any offence not punishable with death, has been detained for such offence for a continuous period exceeding one year or in case of a woman exceeding*

six months and whose trial for such offence has not concluded; or

- (b) Who, being accused of an offence punishable with death, has been detained for such offence for a continuous period exceeding two years and in case of a woman exceeding one year and whose trial for such offence has not concluded.*

Provided, further that the provisions of the foregoing proviso shall not apply to be previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

A bare perusal of the above quoted third proviso would show that the Court is obliged to release a person on bail, who, being accused of an offence not punishable with death, if he has been detained for such an offence for a continuous period exceeding one year and whose trial for such offence has not been concluded. Similarly, under clause (b) of above proviso, the Court is obliged to release a person, who, being accused of an offence punishable with death, if he has been detained for such offence for a continuous period exceeding two years and whose trial for such offence has not been concluded. However, this is subject to the condition provided in the above third proviso, i.e, the delay in the trial of the accused should not have occasioned by any act or omission of the accused or any other person acting on his behalf, while, fourth proviso provides a further rider on the above statutory right of an accused person to bail on the above ground of statutory delay by laying down that the third proviso to above subsection shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or a person who in the opinion of the Court is a hardened, desperate or dangerous criminal or involved in terrorism.

Simple is that the right of an accused to be enlarged on bail under the proviso, referred to *ibid*, is a statutory right which cannot be denied under the discretionary power of the Court to grant bail, however, if the case falls under the fourth proviso, bail can be refused by the Court.

9. Punishment for contravention of section 6,7 and 8.--- whoever contravenes the provisions of sections 6,7 and 8 shall be punishable with:-

- (a) Imprisonment which may extend to two years, or with fine, or with both, if the quantity of the narcotic drug, psychotropic substance or controlled substance is ten grams or less;
- (b) Imprisonment which may extend to seven years and shall also be liable to fine, if the quantity of the narcotic drug, psychotropic substance or controlled substance exceeds one hundred grams but does not exceed one kilogram;
- (c) Death, or imprisonment for life, or imprisonment for a term which may extend to fourteen years and shall also be liable to fine which may be upto one million rupees, if the quantity of narcotics drug, psychotropic substance or controlled substance exceeds the limits specified in clause (b);

Provided that, if the quantity exceeds ten kilograms the punishment shall not be less than imprisonment for life.

From the above reproduction, intent and scheme of the legislator is quite clear about the quantum of prescribed punishment under section 9 (c) (*ibid*), which could either be death or imprisonment for life or an imprisonment for a term which may extend to fourteen years, in addition to fine upto one million rupees.

10. Regarding the arguments of learned counsel for the petitioners that while seizing of bail application, court should not keep in mind maximum punishment prescribed for offence but should consider sentence which is likely to be awarded, suffice it to say that it is not a legal requirement because under section 497 Cr.P.C, which contains prohibitory clause, is with regard to punishment prescribed and not punishment, which is likely to be awarded. Moreover, the question of

categorization of sentences has already been resolved/attended by the august Supreme Court in the case of **Socha Gul vs. The State (2015 SCMR 1077).**

11. Judged on the above touchstone, if one goes through the record of the case, one could reach to the conclusion that in Cr. Misc (BA) No. 315-P/2017, petitioner-accused Shafiq ur Rehman has been arrested on 19.3.2015. His trial has not been concluded and so far as the delay of two years in the conclusion of his trial is concerned, as is evident from the record, it is not attributed to him and, hence, is entitled to be released on bail on the ground of statutory delay, moreso, when no evidence is forthcoming on record which could show that his case falls within the ambit of fourth proviso, referred to earlier. Such being the position, Cr. Misc (BA) No. 315-P/2017 is allowed, resultantly, petitioner Shafiq ur Rehman is admitted to bail on furnishing bail bonds amounting to Rs. 1,00,000/- with two sureties each in the like amount to the satisfaction of learned trial Court.

12. In Cr. Misc (B.A) No. 184-P/2017, titled Sifat Ullah vs. The State and Cr. Misc (BA) No. 165-P/2017, titled Khurshid Babar. Vs. the State, none of the accused had earned the ground of statutory delay of two years in the conclusion of their trial and when so, both the petitions being premature stand dismissed with the direction to the learned trial Court to conclude the trial of the accused expeditiously, without any further delay. Office is directed to send record of the cases to the learned trial Court forthwith.

Announced:
11.4.2017

J U D G E

M.Zafra