

I have gone through the order rendered by my learned brothers Mr. Justice Manzoor Ahmad Malik and Mr. Justice Syed Mansoor Ali Shah. With utmost respect, I do not agree with the reasonings recorded, hence, render my own findings.

**SAYYED MAZAHAR ALI AKBAR NAQVI, J.:-** The instant case bearing FIR No. 64/2016 dated 05.02.2016 offence under section 302, 324, 34 PPC read with section 7 Anti-Terrorism Act, 1997 registered with police station Samanabad, Lahore is a glaring example of atrocious act in a civilized society of 21<sup>st</sup> Century. The background of said untoward incident is that in fact there are two groups of criminals operating within the local limits of police station Samanabad, one led by Ch. Saleem while the other group is led by Sajid Chaudhary. Both the groups are at daggers drawn with each other. On 05.02.2016 at 3.15 p.m. two members of Sajid Chaudhary group were found in Rashid Amin Chowk, where they were confronted by their opponents. As a consequence, both of them were fired upon in the said Chowk. Another person from the same group namely Mashooq Butt reached there to rescue them but he was also dealt in the same manner. Thereafter, members of said group of criminals conspired with each to chalk out a plan to tackle with the situation. Hence to fulfill their nefarious design, present petitioner, co-accused Waqar under the patronage of Ch. Saleem entered into nearby street where the house of complainant is located. They resorted to reckless firing, one of the fire shot made by petitioner with rifle .223 bore hit Bahadar Ali aged 14 years on his temporal region while co-accused Waqar fired

hitting Safdar Ali on his forehead, another minor aged 13 years when both brothers were standing in the balcony of their own house. The said gruesome act was committed with nefarious designs to create a concocted counter-version against the earlier incident with ulterior motives. The mode and manner of occurrence by the assailant show their inter-se connectivity qua their mindset. After committing the double murder, petitioner alongwith others restrained inmates of deceased family inside their house on gun point while their house was locked from outside. They were threatened not to report the matter to police or even to attend their children. The most nasty aspect of this case is that after the commission of said offence, Ch. Saleem being in league with the local police lodged First Information Report as complainant while depicting a false, baseless and concocted story by distorting actual facts and circumstances **Sadaqat Ali** real Chacha of both deceased rescued himself from the clutches of the accused person, he approached police station where he lodged a complaint which was recorded u/s 161 Cr.P.C. with the intervention of high-ups of police. Due to sensational nature of this case it was investigated by senior police officers. During the course of investigation the recovery of rifle .223 bore was effected from the petitioner which was sent to Forensic Science Laboratory. It also matched with the empties collected from the place of occurrence. Therefore, report of Forensic Science Laboratory is positive in nature. The investigation concluded and found the active participation of the

petitioner in the above said double murder with a specific role of causing firearm injury to one of deceased on temporal region.

2. Vide order dated 18.05.2020, this Court requisitioned report from the learned trial court. The said report bearing No. 55 dated 01.06.2020 is placed before us. The report of the trial court is ambiguous on many aspects. The trial court has not fixed the responsibility of delay rather a confusing picture has been portrayed. Order passed by the learned Single Bench of High Court dated 24.02.2020 while dismissing the bail application has demonstrated a different picture, which actually occasioned for delay in conclusion of trial from the record. Admittedly the petitioner was taken into custody on 11.06.2016, however, the co-accused escaped from appearance before trial court one after the other on 27.04.2017, 16.05.2017, 15.06.2017, 21.6.2017, 13.09.2017, 23.10.2017, 18.12.2017, 21.12.2017, 05.01.2018, 15.01.2018 and 24.01.2018. As such the accused party practically made it impossible for the trial court to frame charge against them. Nevertheless the trial court after marking the attendance of all the accused persons framed charge on 10.07.2018. The highhandedness of the accused party continued even after the framing of charge, the accused persons once again while playing the same tactics absented themselves one by one on 06.08.2018, 22.09.2018, 19.10.2018, 09.11.2018, 19.11.2018, 29.11.2018, 05.12.2018, 11.12.2018, 24.12.2018, 26.01.2019, 30.01.2019, 07.2.2019, 20.02,2019, 27.02.2019, 13.03.2019, 26.03.2019, 13.04.2019, 23.04.2019, 18.05,2019, 29.05.2019, 11.06.2019, 21.08.2019, 07.11.2019,

13.11.2019, 30.11.2019, 19.12.2019 and 13.02.2020. The data mentioned above speaks volume qua the attitude of the accused persons towards Court proceedings. Otherwise, it has now become customary that the accused with crude criminal mindset deliberately adopt such tricks in order to delay the Court proceedings with an intent to exhaust the other party and to further avail the benefit of proviso 3 of Section 497(1) Cr.P.C. The element of ill design for the purpose of delay of trial is floating in abundance in this case. The report of trial court, wherein the complainant party was partly held responsible for delay is nothing but made beyond the real facts.

3. The real cause of non-appearance of complainant and PWs before the trial court cannot be attributed to them; as it was not intentional; rather they are forced to avoid appearance, because they are apprehending serious threats to their lives. The complainant has already made several attempts in order to seek police protection but all efforts made by the complainant proved futile. Even at one stage the police guards were deployed vide notification dated 29.08.2016 but unfortunately those were withdrawn due to influence of accused party. This very fact was not brought in our notice by the trial court. During the course of proceedings before this Court, **Sadaqat Ali** (complainant) was present in person. He was given the right of audience. He explained in the Court the reasons in detail for non-appearance of complainant and prosecution witnesses. He further apprised that he had already moved various applications to police hierarchy, even to the Chief

Justice, Lahore High Court but all efforts proved fruitless. He further informed that lawlessness of the aforesaid groups can be gauged from the fact that (364) empties of sophisticated weapons were recovered from the spot. This statement of the complainant was not controverted by anyone present in the Court from either side. Another portion of report that three PWs had compromised with the accused person before trial court is in fact settlement in between the two groups having no nexus with the case of prosecution lodged at the instance of Sadaqat Ali complainant. The prosecution version advanced by Sadaqat Ali complainant is still intact in all respects. Nevertheless, the trial court has assured this Court **that trial can be concluded within the shortest possible time** subject to the cooperation of the parties.

4. Another alarming situation has been brought in the notice of this Court during record inspection that the police file was manipulated by distracting Case Dairies from the original record, during court custody. In this regard "Rapt" has already been recorded in local police station. This very fact alone is sufficient to raise alarm towards the gravity of situation.

5. Now the pivotal question which requires determination is whether after the expiry of certain period, benefit of proviso 3 of section 497(1) Cr.P.C. could be available to the accused in all eventualities or there can be any legal restriction imposed by the law. To construe the legal imports of law, it is advantageous to reproduce it:-

**Section 497. When bail may be taken in cases of non-bailable offence.--**

1. When any person accused of non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of [an offence punishable with death or [imprisonment for life or imprisonment for ten years]]:

Provided that .....

Provided further that .....

Provided further that the Court shall, except where it is of 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 or in exercise of any right or privilege under any law for the time being in force, 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 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 whose trial for such offence has not concluded.

Provided further that the provisions of the foregoing proviso shall not apply to a 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.

The provisos 3 & 4 of section 497(1) Cr.P.C. are co-existent qua their application; hence, the imports of the same cannot be constructed in isolation rather to interpret it conjointly. The language of proviso 3 of section 497(1) Cr.P.C. demonstrates a general principle which is clear, unambiguous in its texture

rather it in express terms confers jurisdiction upon the court to entertain and extend benefit of proviso 3 of section 497(1) Cr.P.C. in the spirit of language of said provision pursuant to the intent of the legislature, however, the said concession has been controlled while imposing certain restriction while introducing proviso 4 of section 497(1) Cr.P.C. The bare perusal of proviso 4 of section 497(1) Cr.P.C. override to some extent proviso 3 of section 497(1) Cr.P.C. by limiting its efficacy by placing conditions against the general principle as such it has laid an embargo which has to satisfy prior to availing concession of proviso 3 of section 497(1) Cr.P.C., resultantly, these are practically exceptions to the general principle entails from proviso 3 of section 497(1) Cr.P.C. The proviso 4 of section 497(1) Cr.P.C. envisages distinct legal requisites in relation to its applicability.

- (i). *That the provision of third proviso of sub-section shall not apply to previously convicted offender in an offence not punishable with death or imprisonment for life.*
- (ii) *Or to a person who in the opinion of the court is hardened, desperate or dangerous criminal or involved in terrorism.*

The plane reading of first requisite depicts it to be mandatory in nature by virtue of its language which is otherwise clear unambiguous transparent in its application. It speaks about those weighed down with criminal background. In other words any criminal who is previously convicted is out rightly barred from the consideration to avail the benefit of proviso 3 of section 497(1) Cr.P.C. This condition is to apply stricto-sensu in all

fairness without compromising it in any manner; hence, all those who are stigmatized/tainted with criminal background are ousted from consideration. However, the second limb of proviso 4 of section 497(1) Cr.P.C. is discretionary in its applicability. The language itself is self explanatory ensuing the intent of said provision. While introducing this limb of said provision the legislature has empowered the court to form an opinion qua the person involved in a criminal case if brought forth while taking into consideration the act, mode and manner of occurrence and other existing circumstances placed before the court without being prejudiced by any previous record. The Court while forming opinion about the criminal declaration has to satisfy all norms of legal aspects so that opinion made should not frustrate any ethics of decency and fairness to meet the ends of justice. The opinion of the court should meet all legal justiciable requirements demanded by the law in the interest of safe administration of criminal justice.

6. The instant case exclusively relates to second limb of the proviso 4 of section 497(1) Cr.P.C. Although there is no denial that this group is involved in eight other criminal cases of serious nature but even if this aspect is kept-a-aside the heinousness of the act committed by the petitioner in the present case when evaluated/scrutinized in its entirety, it is loaded with overwhelming material available on the record which connects the petitioner as main perpetrator of double murder case. Thus no other opinion can be formed in this case except that the petitioner while joining hands with others had



committed a gruesome act of double murder. Hence, accumulative effect of the entire discussion leads towards one and the only opinion in the mind of the Court, which brings him in the category of hardened, desperate and dangerous criminal as stipulated under proviso 4 of section 497(1) Cr.P.C. The findings recorded by this Court was subject matter of an earlier case, which was dealt by a Single Bench of Sindh High Court in a salutary judgment titled "*MUHAMMAD HANIF versus THE STATE*" (**PLD 1986 Karachi 437**) in which it was enunciated by the learned Court that even in the absence of previous record, an accused can be declared hardened, desperate or dangerous criminal subject to act, mode and manner of occurrence in that very case. A number of judgments with divergent view were in fields from other Courts, hence to resolve this controversy leave to appeal was granted to pronounce an authoritative judgment on the subject, even it was considered a case of first impression before this Court, Therefore, in the case titled "*MOUNDER and others versus THE STATE*" (**1988 SCMR 1113**). A larger Bench of five Hon'ble Members was constituted which approved the judgment of Sindh High Court mentioned above in the case "*MOUNDAR and others vs. THE STATE*" (**PLD 1990 Supreme Court 934**). Relevant at p/939 reproduced:-

*"The word "criminal" cannot be given a special meaning as a person already convicted of a crime for in that case, the category of provision convicts having been separately mentioned as disentitled to the privilege of release on bail on the ground of statutory delay, the words under interpretation to the effect that the person is hardened, desperate or dangerous criminal, would be rendered completely redundant*

*and meaningless. According to the learned Judge, therefore, opinion on this question can be based upon the materials available in the case under trial as well as any other material which may be produced by the prosecution to help the Court in formation of such opinion. Somewhat similar view was expressed by another learned Judge of the Sindh High Court in Gull Khan and others v. The State PLD 1986 Karp.629, in which the word "criminal" was construed in the context of provision under consideration, to mean a person "accused of criminal offence or who is known to be or reputed to committing crime".*

*At page No. 941 it is observed as under:-*

*"In subsection (1) of section 497 the legislature has already empowered the Court even before the commencement of the trial to make a tentative assessment of the evidence collected against an accused person or likely to be produced in the trial against him, in order to reach the conclusion whether there appears a reasonable ground for believing that he has been guilty of an offence punishable with death or life imprisonment or imprisonment for 10 years. The provision under consideration here is a proviso to the same subsection, and, therefore, it will be reasonable to construe it in the same manner authorizing a Court to take into consideration the evidence collected by the prosecution for purpose of determining whether the accused is a criminal of the categories prescribed therein. Of course the Court can take into consideration and indeed in most of the cases it will take into consideration other materials produced by the prosecution in order to show that the case falls within the prohibitions contained in the 4<sup>th</sup> proviso".*

7. As a consequence of the facts and circumstances, the law on the subject, this Court has no hesitation to conclude that the allegation levelled against the petitioner regarding commission of such a heinous offence squarely comes within the ambit of a hardened, desperate and dangerous criminal, hence, he is not entitled to avail the benefit of proviso 3 of section 497

(1) Cr.P.C. Therefore, I do not find any force in the said petition which is hereby dismissed. Leave to appeal is declined.

Judge

Lahore  
24.06.2020  
Approved for reporting.  
'Athar'