

THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Bench:

Mr. Justice Athar Minallah
Mr. Justice Irfan Saadat Khan
Mr. Justice Malik Shahzad Ahmad Khan

Criminal Petition No.27-K of 2025

(Against order dated 16.01.2025 of the
High Court of Sindh, Karachi passed in
Crl. Bail Application No.2690 of 2024)

Noor Agha ...Petitioner

Versus

The State and another ...Respondents

For the petitioner:	Mr. Ali Wahid, Advocate High Court (with Court's permission) <i>(via video link from Karachi)</i>
For the State:	Ms. Rahat Ehsan, Additional Prosecutor General, Sindh
For the complainant:	Mr. Salahuddin Khan Gandapur, ASC Mr. Ghulam Rasool Mangi, AOR a/w Abdul Khanan <i>(via video link from Karachi)</i>
Date of hearing:	15.04.2025

ORDER

Athar Minallah, J.- Noor Agha ('petitioner') has sought leave against the impugned judgment of the High Court, dated 07.11.2024. He had sought bail on the sole ground of statutory delay and it was declined by the trial court vide order dated 07.11.2024 and this order was subsequently upheld by the High Court vide the impugned judgment.

2. The petitioner was arrested in crime report No.200/22 registered at Police Station Sohrab Goth, District East, Karachi for the commission of the alleged offences under sections 302, 365 and 34 of the Pakistan Penal Code, 1860 ('PPC'). It is not disputed that the petitioner was not nominated in the crime report. He was arrested under section 54 of the Code of Criminal Procedure, 1898 ('Cr.P.C.')

on 10.10.2022 along with another co-accused Muhammad Naseem. It was alleged that the petitioner's brother-in-law, namely, Wali Muhammad, who is also a co-accused in this case, had hired another person to abduct Haji Hamidullah ('**victim**') who was later murdered. The latter was alleged to have been abducted on 18.08.2022 and his dead body was found and recovered from the main road on the same day. The role attributed to the petitioner was that he had travelled to the crime scene in a separate vehicle and that after his arrest he had disclosed and led the police to the place of occurrence from where two spent bullets were recovered. The petitioner had sought bail on merit but he could not succeed since his petitions were dismissed by the trial court as well as by the High Court. He then filed a fresh petition seeking bail solely on statutory grounds which was also dismissed by the trial court. The High Court, vide the impugned judgment, declined the bail on the sole ground that in its opinion the petitioner fell within the ambit of the expression 'hardened, desperate or dangerous criminal' which is incorporated as an exception under the 4th proviso of sub-section (1) of section 497 Cr.P.C. However, it is not disputed that the other conditions mentioned in the 3rd proviso are met in this case.

3. We have heard the learned counsels for the petitioner, the complainant and the Additional Prosecutor General at great length. We have also perused the record with their able assistance

4. The petitioner was arrested on 10.10.2022 for the commission of the alleged offences and one of the prescribed legal sentence is death. Admittedly, the petitioner has been detained for a continuous period which exceeds two years from the date of his arrest. It is also not disputed that the delay in the conclusion of the trial is not attributed to the petitioner nor to an act or omission of any person

acting on his behalf. The trial court and the High Court have declined the bail on statutory grounds solely upon forming an opinion that the petitioner is a 'hardened, desperate or dangerous criminal'. We have also noted that this opinion has been mainly influenced by the nature of the offence. The prosecution did not place on record any material other than the material collected during the investigation. The prosecution had not placed before the trial court nor the High Court sufficient material to enable them to form an opinion whether the petitioner was a 'hardened, desperate or dangerous criminal'. The role attributed to the petitioner was no more than an alleged facilitator, accomplice or being part of a conspiracy to commit the alleged crime. It is not the case of the prosecution that the petitioner has a previous criminal record nor that his release could pose a threat to others. It is also not the case of the prosecution that the petitioner, after release on bail, may harm others, repeat the offence or act in any manner which may be prejudicial to the peace of the society. Was it sufficient for the trial court and the High Court to form an opinion on the basis of the material collected during the investigation and the nature and the manner in which the offence was alleged to have been committed? The only question for our consideration is whether the High Court has correctly interpreted the expression 'hardened, desperate or dangerous criminal' and has lawfully exercised its jurisdiction or not? The relevant provisions required to be interpreted need to be examined before the precedent law of this Court is surveyed.

5. The 3rd proviso to sub-section (1) of section 497 of the Cr.P.C. governs the statutory right to claim release on bail on the ground of delay in the conclusion of trial. The legislature has explicitly used the expression 'shall' in the 3rd proviso and it creates a right in favour of

an accused to be released on bail provided the conditions stipulated for claiming such a right have been fulfilled. The 3rd proviso sets out the conditions for being released on bail on the ground of statutory delay. While the 4th proviso has described three distinct exceptions. Even if the conditions specified in the 3rd proviso are met but the case falls in one of the exceptions set out in the 4th proviso, the accused would not be entitled to claim bail on statutory ground as of right. The right would come into existence if the conditions explicitly set out in the 3rd proviso have been met and the exceptions in the 4th proviso are not attracted. The ground is solely based on the delay in conclusion of trial. If an accused has been alleged to have committed an offence punishable with death, e.g under section 302 (a) or (b) of the PPC, then he or she becomes entitled to seek bail under the 3rd proviso if the detention is for a continuous period exceeding two years and, in the case of a woman, exceeding one year and the trial has not concluded. The period of continuous detention prescribed for an offence not punishable with death is one year and for a woman it is six months. The aforementioned delay must not be attributed to the accused nor to any act or omission of any other person acting on his or her behalf, as the case may be. However, the exception incorporated in the 4th proviso must not exist so that the right could be exercised. The three exceptions are; if the accused is a previously convicted offender for an offence punishable with death or imprisonment for life or '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. If one of the three exceptions stipulated in the 4th proviso is attracted then the right contemplated in the 3rd proviso could not be given effect to though the delay may not be attributable to the accused and the prescribed period of detention has been completed. The 4th proviso is an

exception and controls the bail granting power contemplated under the 3rd proviso. In this case, we are required to examine the scope and meaning of the expression “hardened, desperate or dangerous criminal”. The other two exceptions are straight forward. The opinion regarding the expression has to be formed by the court. Is the court only to confine itself to the material collected during investigation or may also consider other material not related to the alleged offence but which enables it to form an opinion whether an accused is a hardened, desperate or dangerous criminal

6. The meaning and scope of the expression ‘hardened, desperate or dangerous criminal’ was considered by this Court in the case of Moundar¹. It was held that the court has to form an opinion and such opinion could not be subjective but must be based upon material placed before it which reasonably supports the conclusion that the person concerned was a criminal of one of the classes described in the expression. It was further held that the expression ‘criminal’ used by the legislature in the 4th proviso could not be construed in its technical sense. It was not dependent on a formal charge or accusation nor that the person should have been adjudged guilty of a charge in a court of law. It was further explained that the opinion could be formed on the basis of material available in the case before it, if that was sufficient, or it may also take into consideration any other material which may have been produced by the prosecution to enable the court in forming of the opinion regarding the character of the person as a ‘hardened, desperate or dangerous criminal’. Moreover, an opinion formed by the court for the purposes of the first proviso had nothing to do with the alternate findings of the trial court and that the conclusion drawn for the purposes of bail

¹ Moundar and others v. The State (PLD 1990 Supreme Court 934)

could not be used to the prejudice of the accused. The material placed before the court was to be considered for the purposes of determining whether the accused was a criminal of the category explicitly mentioned in the expression used in the 4th proviso.

7. The above exposition of law regarding the meaning and scope of the expression used in the 4th proviso was reaffirmed by this Court in the cases of Shakeel Shah and Allah Wasaya². The principles of law laid down by this Court in the above-mentioned judgments were summarized in the case of Nadeem Samson³, and the relevant portion is reproduced as follows:

(i) The purpose and object of the 3rd proviso to Section 497(1) CrPC is to ensure that the trial of an accused is conducted and concluded expeditiously, and that the pre-conviction detention of an accused does not extend beyond the period of two years in cases involving an offence punishable with death, or one year in other cases;

(ii) The period of one year or two years, as the case may be, for the conclusion of the trial begins from the date of the detention of the accused in the case, not from the date when the charge is framed and trial commenced;

(iii) A statutory right to be released on bail accrues in favour of the accused if his trial is not concluded within the specified period, i.e., exceeding one year or two years as the case may be, from the date of his detention;

(iv) This statutory right of the accused to be released on bail is, however, subject to two exceptions: one is embodied in the 3rd proviso itself and the second is provided in the 4th proviso, which are: (a) the delay in conclusion of the trial is occasioned by an act or omission of the accused or by any other person acting on his behalf, and (b) the accused is a convicted offender for an offence punishable with death or imprisonment for life, or is in the opinion of the court a hardened, desperate or dangerous criminal, or is accused of an act of terrorism punishable with death or imprisonment for life.

² Shakeel Shah v. The State and others (2022 SCMR 1) and Allah Wasaya v. The State and others (PLD 2022 SC 541)

³ Nadeem Samson v. The State and others (PLD 2022 SC 112)

(v) The act or omission on the part of the accused to delay the timely conclusion of the trial must be the result of a visible concerted effort orchestrated by the accused. Merely some adjournments sought by the counsel for the accused cannot be counted as an act or omission on behalf of the accused to delay the conclusion of the trial, unless the adjournments are sought without any sufficient cause on crucial hearings, i.e., the hearings fixed for examination or cross-examination of the prosecution witnesses, or the adjournments are repetitive reflecting a design or pattern to consciously delay the conclusion of the trial; and

(vi) The phrase "a hardened, desperate or dangerous criminal" denotes an accused who is likely to seriously injure and hurt others without caring for the consequences of his violent act and will pose a serious threat to the society if set free on bail. Such tentative finding as to character of the accused must be based upon careful examination of the facts and circumstances of the case, supported by sufficient incriminating material.

8. It is noted that the scope and effect of the expression in the 4th proviso i.e hardened, dangerous or desperate criminal is distinct from the restriction on the power and discretion of a court under sub section (1) of section 497 of the Cr.P.C not to release an accused on bail if there appears reasonable grounds for believing that the accused may be guilty of an offence punishable with death or imprisonment for life or for ten years. This distinction highlights that the exception in the 4th proviso is not in the context of the merits of the case i.e forming an opinion whether reasonable grounds exist for believing that an accused may have been guilty of one of the offences specified by the legislature. Bail may have been declined on merits in terms of forming an opinion under sub section (1) of section 497 but if the conditions specified under the 3rd proviso are met and the case does not attract one of the exceptions specifically mentioned in the 4th proviso then it entitles an accused to claim bail on the basis of statutory delay as a fresh and independent ground. The exception of being a hardened, desperate or dangerous criminal contains four distinct expressions. Hardened, desperate or dangerous' have been

used by the legislature disjunctively and cannot be construed as conjunctive and they precede the expression 'criminal'. There must be sufficient material placed before the court by the prosecution to enable it to form an opinion that if the accused is released on bail under the 3rd proviso, then there would be a substantial risk or it would be highly probable that he or she would cause serious harm to the society and its members because of being a hardened, dangerous or desperate criminal. An accused may not have been convicted in the past and yet the court may form an opinion on the basis of sufficient material that the accused falls within one of the aforementioned classes. An accused may have a previous conviction but yet the court, on the basis of material placed before it, form an opinion that the accused does not fall within the meaning of the expression of being a hardened, desperate or dangerous criminal. The gravity of the crime alleged to have been committed by an accused could be a factor to be taken into consideration. There may be material indicating the accused's history of being involved in violence and threatening witnesses, prosecutors etc. The prosecution may place before the court material to demonstrably show that, if released, the accused could interfere with or influence the investigation by threatening or harming the witnesses or the members of law enforcement agencies. There could be several factors which the court may take into consideration in forming an opinion whether an accused seeking bail under the 4th proviso is a hardened, desperate or dangerous criminal. No general rule can be laid down as to how a court is to form an opinion because it would depend on the facts and circumstances of each case. However, the opinion cannot be based on mere presumptions, conjectures or subjective basis. The court essentially has to form an opinion that there is substantial risk or a real and high likelihood of harm to the society, if the accused is

released on bail on statutory ground. This opinion must be based on the material placed by the prosecution before the court. A history of being involved in violent crimes, disregard for humans or other living beings, risk of abscondence and many other factors may enable the court to form an opinion. An accused suffering from a pedophilic disorder, for example, would be a substantial risk leading to harm but it would require an opinion of a medical practitioner so that the court may enable itself to form an opinion. The expression hardened, desperate or dangerous criminal has a nexus with substantial risk and high likelihood of harm to the society or its members or a class of members and not to the merits of the case though that may also be considered. The court must not exclude from consideration the principle that an accused is innocent until proven guilty and the right that accrues under the 3rd proviso of section 497 (1) can only be denied when the court, on the basis of material placed before it, forms an opinion that the accused would pose a substantial risk of harm to the society, public or its members, if released on bail. This opinion must be formed on the basis of credible material and not on a subjective basis. The material may not be confined to the case because the prosecution has to show to the court that the accused seeking bail is not an ordinary criminal but a hardened, dangerous or desperate i.e someone who would be a substantial risk of causing harm to others and is a person who has disregard for the law and human life.

9. In the case before us, the prosecution had not placed before the trial court nor the High Court any material other than that which was available in the case in which bail was sought on statutory grounds. It is not disputed that the petitioner did not have any criminal record nor was involved in any serious offence prior to his

arrest in this case. There was also no material to indicate that he had remained involved in committing violent acts or that there was a substantial risk that he would cause harm to the society or its members. Even in this case, it was not alleged that he had abducted the victim nor that he had committed any violent acts or that his conduct in the past was also related to criminal violence. The only role allegedly attributed to him was that he had travelled in a different vehicle when the victim was taken to the crime scene and later murdered. It appears that the High Court had formed the opinion merely on the basis of his alleged involvement in the offence punishable with death. In the facts and circumstances of this case, particularly the material available on record, it could not have been concluded that the petitioner was a 'hardened, desperate or dangerous criminal' in the context of the 4th proviso to section 497(1) of the Cr.P.C. Moreover, the learned Additional Prosecutor General could not point out any material to suggest that the petitioner was a hardened, desperate or dangerous criminal and if released on bail he would pose a substantial risk of harm to the society or its members. It is also not the case of the prosecution that the petitioner has a history of threatening witnesses or members of the law enforcement agencies. It is also not disputed that the petitioner, after his arrest, has remained incarcerated for a continuous period of more than two years. The expression in the 4th proviso of section 497(1) of Cr.P.C. was, therefore, not attracted and the statutory right under the 3rd proviso could not be withheld or denied. The petitioner was therefore, entitled to be set-free by granting him the statutory right on account of delay in the conclusion of trial not attributed to him.

Cr.P.27-K/25

10. In view of the foregoing, the petition is converted into an appeal and the same is allowed by extending the statutory right of bail under the 3rd proviso of section 497(1) Cr.P.C.

11. The above are the reasons for our short order of even date. It is noted that any observation made in this order is on the basis of our tentative assessment of the record placed before us and, therefore, it shall not in any manner prejudice the proceedings pending before the competent court

Judge

Judge

Judge

Islamabad the

15th April, 2025

APPROVED FOR REPORTING'

(Aamir Sh.)