Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal Miscellaneous No.1644-B /2022

Muhammad Azam Khan Swati
Vs
The State and another

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	02.01.2023	M/s. Dr. Babar Awan, Malik Nasim Abbas Nasir, Tabinda Zahra Malik, Barrister Usman Khan Swati, Syed Muhammad Ali Bukhari, Nadeem Haider Panjotha, M. Sohail Khan, Fazal Maula & Malik Muhammad Fiaz Kandwal, Advocates for the petitioner. Mr. Arshad Mehmood Kiyani, Deputy Attorney-General. Sh. Sohail Anjum, A.D. (Legal) Federal Investigation Agency. M. Waseem, S.I. Federal Investigation Agency.

The petitioner (Muhammad Azam Khan Swati) seeks bail after arrest in case F.I.R. No.185/2022 dated 26.11.2022 under Sections 20 of PECA, 2016 read with 131, 500, 501, 505 & 109 PPC, Police Station Federal Investigation Agency, Cyber-Crime Reporting Centre, Islamabad.

2. The case against the petitioner is that on the complaint of respondent No.2 the aforementioned case was registered wherein it was alleged that objectionable tweets have been made from the twitter account of the petitioner; the effect of which is abetting and inciting

mutiny and derogatory remarks about the serving Army Personnel.

3. The petitioner applied for bail after arrest which was dismissed by the learned Judge, Prevention of Electronic Crime Court, Islamabad vide order dated 21.12.2022.

4. Before embarking upon recording contentions of learned counsel for the parties and the opinion of the Court on the same, it is pertinent to observe that on 28.12.2022 a copy of the letter was received; apparently handwritten by the petitioner in which the mistrust was expressed upon this Court. Today before commencement of the arguments Barrister Usman Khan Swati son of the petitioner sought to read the contents of the letter and acknowledged that the same was handed over to him by his father on jail visit. This Court observed that such like letters have become a routine wherein bias is expressed, hence in order to formulate a policy of the Court in response to such letters a larger Bench of the Court is desirable. Upon the said observation Dr. Babar Awan, Senior ASC, appearing for the petitioner, sought time to consult the petitioner's son and after consultation he submitted that the letter is not pressed. It is pertinent to observe that this Court on regular basis receives letters seeking transfer of cases from one Bench to another on the pretext of bias or otherwise without any cogent

reason or basis. Generally such letters/request for transfer are ignored by the Benches of this Court however, in the instant case even before the copy of the letter was received by this Court it was all over the media. It would not be out of place to mention here that the law on the subject of transfer of cases before Judges of Superior Courts is settled. In the words of the Hon'ble Supreme Court of Pakistan in case titled ***Asif Ali Zardari v. The State*** **(PLD 2001 SC 568)** the principle is that a Judge of the Superior Court is a keeper of his own conscience and it is for him to decide to hear or not to hear a matter before him. Similar observations have been made in quite a number of cases. In ***Ms. Benazir Bhutto v The President of Pakistan*** **(1992 SCMR 140)** the issue of transfer of case before the Judge on the basis of bias was explained and it was observed that there is a marked distinction in the approach on the question of bias between a case of a Judge of a Subordinate Court and a case pertaining to a Judge of a superior Court inasmuch as in the former case the superior Courts do grant transfer applications on the ground of Judge having personal, pecuniary or proprietary interest in the subject matter whereas in the latter case the Supreme Court does not grant transfer application on the above ground for want of power. In ***M. H. Khondkar v. The State*** **(PLD 1966 Supreme Court 140)** the Hon'ble Supreme Court of

Pakistan held that an application for transfer does not lie at all against a Judge of the High Court. Similar observation was made by the apex Court in ***Islamic Republic of Pakistan through Secretary, M/o Interior and Kashmir Affairs, Islamabad v. Abdul Wali Khan etc.*** **(PLD 1976 Supreme Court 57).** In light of the referred case law and many other judgments on the subject there is no principle of transfer of cases from one Bench to another and the matter is left to the discretion of the Judge. The menace of Bench/ forum shopping has become rampant in almost every Court, hence the matter needs to be dealt with in light of the judgments of the Hon'ble Supreme Court of Pakistan.

5. Dr. Babar Awan, Senior ASC for the petitioner, *inter alia*, contended that pursuant to the decision of the Hon'ble Supreme Court of Pakistan and this Court in W.P. No.632/2022 Standard Operating Procedures were laid down by the Federal Investigation Agency; a copy of which was circulated through letter dated 04.11.2020 (Standard Order (SO) No.5/2020). It was contended that under the said Order procedure is provided for verification proceedings and under the same the verification officer is to issue a notice under Section 160 Cr.P.C. requiring the complainant to appear before him and verify the allegations. It was submitted that again in the proceedings five days notice to be provided for doing

the needful which was not done in the instant matter and the petitioner was arrested on 27.11.2022 without any opportunity of defending himself in the matter. It was submitted that the procedure adopted by the Federal Investigation Agency is in violation of Articles 8 & 10-A of Constitution of the Islamic Republic of Pakistan, 1973 inasmuch as the requirement is due process/course which was not done. It was submitted that as such none of the offences fall in the prohibitory clause of Section 497 Cr.P.C. Learned counsel argued that under Section 131 PPC the maximum punishment is upto 10 years imprisonment; however, the Court has discretion to pass lesser sentence and where such is the case it is an established principle that for the purpose of bail lesser sentence is taken into account. It was contended that likewise, Section 505 PPC is also not attracted. It was contended that in the referred facts and circumstances since none of the offences fall in the prohibitory clause of Section 497 Cr.P.C. the grant of bail is a rule and refusal is an exception. Reliance was placed on the case titled ***Tariq Bashir v. The state*** **(PLD 1995 SC 34).** It was contended that the observations made by the Hon'ble Supreme Court of Pakistan in ***Kh. Soleman Rafiq v. The State*** **(PLD 2020 SC 456)** are also thereafter. Learned counsel pointed out that the investigation against the

petitioner stands concluded and he is not required any further for the same.

6. Learned Deputy Attorney-General initially sought adjournment on account of the fact that Special Prosecutor is not available, however, he was asked to address arguments and he submitted that though none of the offences fall in the prohibitory clause as such but the petitioner has repeated the offence inasmuch as there is an earlier FIR against him i.e. FIR No.109/2022 dated 13.10.2022. It was contended that since the petitioner has repeated the offence hence the bail was refused by the learned Trial Court.

7. In rebuttal, Dr. Babar Awan, Senior ASC contended that in the earlier case the petitioner is on bail and that he shall make himself available for trail as and when the cases are fixed for trial.

8. Submissions made by the learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

9. The petitioner is implicated in the aforementioned case. The contention of the learned counsel for the petitioner that none of the offences fall in the prohibitory clause is correct inasmuch as the maximum punishment provided for the offence with which the petitioner is implicated is upto 10 years (Section 131 PPC); however,

since the sentence is upto 10 years and it is trite law that for the purpose of bail lesser sentence is taken into consideration, hence the punishment provided for the referred Section does not fall within the prohibitory clause of Section 497 Cr.P.C. No other offence falls within the prohibitory clause. In such like cases where the case does not fall in the prohibitory clause the grant of bail is a rule and refusal is an exception. Reliance is placed on the case titled ***Tariq Bashir v. The state*** **(PLD 1995 SC 34).** In the referred case the Hon'ble Supreme Court of Pakistan has laid down exceptions and one of such exceptions being where there is apprehension that the offence might be repeated. In the instant matter the learned Trial Court has made an observation and it was also argued on behalf of the respondents that the petitioner has repeated the offence, however, this is only a second instance, hence the case does not fall within the exception of ***Tariq bashir*** case. Moreover, in case the petitioner repeats the offence the respondents have the remedy to seek cancellation of bail on account of the said fact. The examination of the record also shows that the procedure provided in the Standing Order No.5 of 2020 was not followed and the effect thereof would be examined in detail by the learned Trial Court, however, the lapse in the investigation makes the case against the petitioner one of further inquiry. The investigation stands

concluded and the continued incarceration of the petitioner would not serve any purpose. This Court was informed that the report under Section 173 Cr.P.C. has been filed on 24.12.2022 and the matter is listed for tomorrow (03.01.2023).

10. For the above reasons, the instant petition is allowed. The petitioner is enlarged on bail after arrest in the aforementioned case subject to furnishing bail bonds in the sum of Rs.200,000/- with one surety in the like amount to the satisfaction of the learned Trial Court.

11. Needless to observe that in case the petitioner repeats the offence the law shall take its course and the respondents may make an appropriate application for recalling of the instant order.

(CHIEF JUSTICE)

Approved for reporting

M.NAVEED