HCJD/C-121

ORDER SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

CRL. MISC. NO.462-B/2014

Muhammad Siyab
VERSUS
The State, etc

S.No. of order/ Proceeding	Date of hearing	Order with signature of Judge, and that of parties or counsel, where necessary.

15-09-2014 Ch. Zahoor Hussain, advocate for the petitioner.
Mr Zahid Asif Chaudhry, advocate for the complainant.
Mr Yaseen, complainant in person.
Malik Zahoor Ahmad Awan, Standing Counsel.
Mr Sultan Mehmood S.I with record.

The petitioner Muhammad Siyab son of Muhammad Razzaq, has sought post arrest bail in case, F.I.R. No.134, dated 27-11-2011, registered under Sections 302, 452, 148, 149, 109 of the Pakistan Penal Code 1860 (hereinafter referred to as "PPC") at Police Station Nilor, Islamabad.

2. The brief facts, as narrated in the FIR, are that the complainant, who is the father of the deceased Hassan Yasin, reported that the petitioner alongwith his co-accused while armed with fire arm weapons entered into his house and started firing due to which his son namely Hassan Yasin succumbed to his injuries at the spot. The occurrence took place at 09:10 p.m. on 27-11-2011. The motive is stated to be an occurrence two days prior to registration of FIR No.132 of 201. Hence the instant FIR.

3. The learned counsel for the petitioner contends; that the accused was arrested on 25-02-2012, and has remained incarcerated continuously for more than two years; the petitioner has falsely been implicated in this case; the charge against the present petitioner was framed on 12-11-2012; whereas copies of the

statements etc as required under Section 265-C Cr.P.C. were delivered to the petitioner on 15-06-2013; the statements of only 3/4 witnesses have been recorded, fifty-six hearings have been fixed before the trial Court, out of which twenty-eight adjournments have been sought by the prosecution so the delay is attributed to the prosecution, but not due to the petitioner; the story as narrated in the FIR is concocted, the petitioner has no criminal record; there is no chance of abscondance of the petitioner; the petitioner is behind the bars since 06-03-2012; the petitioner, under the circumstances, is entitled to bail as of right in accordance with the 3rd Proviso to Section 497(1) Cr.P.C. on account of statutory delay; the right arises as a consequence of being behind bars for a continuous period of more than two years; the learned counsel has placed reliance on *Ahmad Hussain...Vs...Stat (2008 MLD 1061), Abdul Razak Zangejo...Vs...State (PLD 2012 Sindh 218), Zia ud Din...Vs...State (PLD 2012 Sindh 147), Muhammad Sadiq and 2 others...Vs...State (PLJ 1996 Cr.C. (Lahore) 1713,* hence urges grant of bail.

4. The learned counsel for the complainant, on the other hand, has forcefully argued that the delay in concluding the trial is attributed to the petitioner as he had engaged a counsel who caused the delay. It was further stressed that the accused is named in the FIR. Moreover, the delay in the trail was not due to the prosecution; rather it was due to the accused / petitioner. It is also submitted that since it is an offence under section 302 of PPC, therefore, the petitioner is not entitled to the concession of bail on the ground of statutory delay, as he is a hardened, desperate and dangerous criminal. Learned counsel relies on *Muhammad Hanif....Vs....Shafqat Nazir (2007 SCMR 1857), Rehmatullah....Vs....The State and another (2011 SCMR 1332), Shahan and another....Vs....The State (2012 YLR 2432), Muhammad Hanif...Vs...The State and another (2013 YLR 321), Liaquat Khan....Vs....The State (2012 YLR 1107) and urges for dismissal of bail petition.*

5. The learned Standing Counsel contended that the petitioner is nominated in the FIR and a specific role is attributed to him. It is further contended that his previous bail application has been dismissed on merits. It is, therefore, urged that the petitioner is not entitled to the concession of bail, and that the present petition may be dismissed accordingly. He relies on *Ali Akbar....Vs....The State (2000 P.Cr.L.J 1796) and Muhammad Nawaz....Vs....The State (2002 SCMR 1381).*

6. After giving careful consideration to the arguments of the learned counsels and perusal of the record with their able assistance, the findings of this Court are as follows:

7. The 3rd Proviso to Section 497(1) of the Cr.P.C. was inserted through amendment made vide Act VIII of 2011 and enforced w.e.f. 18-04-2011. The said Proviso provides that a person accused of an offence punishable with death, is as of right entitled to be released on bail, if he has been detained for such an offence for a continuous period exceeding two years. However, this is subject to certain conditions; firstly, the Court has to form an opinion that the delay in the trial of the accused has not been occasioned by the accused, or due to omission attributed to the person acting on his behalf; secondly, he is not a previously convicted offender for an offence punishable with death or imprisonment for life ; thirdly, he is not in the opinion of the Court, a hardened, desperate or dangerous criminal and, lastly, he is not accused of an act of terrorism punishable with death or imprisonment for life.

8. Besides the above statutory ingredients, the principles and law enunciated by the courts through interpreting the said statutory provisions are summarized as follows:-

(i) *The accused under the 3rd Proviso of Section 497(1) Cr.P.C. is entitled to bail as a matter of right, if the statutory period mentioned in either clause a or b has expired and the trial has not been concluded.*

(ii) *The right of bail in case of statutory delay is clearly provided in the law, as the word "shall" cannot be read as "may".*

(iii) *Such right can be defeated only if the state or the complainant is able to show that the delay in the trial is attributable to the accused, and once it is shown, then such a right is forfeited.*

(iv) *The right under the 3rd Proviso cannot be denied under the discretionary power of the Court to grant bail and, therefore, the right is not left to the discretion of the Court but it is controlled by the 3rd Proviso read with the 4th Proviso.*

(v) *It is not the intention of the law to calculate the amount of the delay caused by the defence; rather, it is necessary to see whether the progress and conclusion of the trial has, in any manner, been delayed by an act or omission on the part of the accused.*

(vi) While ascertaining the delay, the cumulative effect in disposal of the case is to be considered, and it will not be merely mathematical calculation of excluding such dates for which adjournment was obtained by the accused or counsel.

(vii) When witnesses are in attendance and the matter is ripe for recording evidence, but the defence does not proceed, and the effective hearing is postponed by the accused or his counsel, it is an important factor for consideration.

(viii) Bail under the 3rd Proviso can be refused on the ground that delay in the conclusion of the trial had been caused on account of any act or omission of the accused or any person acting on his behalf.

(ix) Where, for any reason, the accused or his authorized agent, which necessarily included the counsel engaged for defence, caused delay, the protection under the 3rd Proviso cannot be invoked.

(x) The right of the accused for bail on statutory grounds cannot be defeated for any other reason except on the ground as provided in the 3rd and 4th schedule.

(xi) The object of the right to bail on statutory grounds subject to the conditions mentioned in the 3rd

Proviso is to ensure that criminal trials are not unnecessarily delayed.

(xii) When the statement of one of the witnesses has yet to be recorded, it cannot be said that the trial has been concluded.

9. For the above principles, reliance is placed on *Nazir Hussain...Vs...Zia ul Haq and others (1983 SCMR 72), Sher Ali alias Sheri...Vs...The State (1998 SCMR 190), Akhtar Abbas...Vs...State (PLD 1982 S.C. 424), Moundar and others...Vs...The State,(PLD 1990 SC 934), Abdul Rashid...Vs...The State (1998 SCMR 897), Zahid Hussain Shah...Vs...The State (PLD 1995 S.C. 49). Muhammad Siddique...Vs...Muhammad Behram and another (1998 P.Cr.L.J. 358).* The facts and circumstances of the present case require to be analysed in the light of the above principles.

10. The present petitioner seeks bail on the sole ground of statutory delay and, therefore, it is pertinent to refer to some relevant facts. The FIR was registered on 27-11-2011 and the petitioner was arrested on 25-02-2012. Charge was framed on 12-11-2012. The petitioner for first time engaged a counsel on 25-02-2013. It is admitted that seven hearings were adjourned on the request of the petitioner or his counsel. From the date of arrest till to-date the petitioner has remained in custody for more than two years and seven months.

11. The perusal of order sheets reveals that most of the adjournments are on account of the prosecution, strikes observed by the lawyers or the administrative exigencies of the Court. However, the delay in the trial is also attributed to the petitioner as firstly he engaged a counsel after considerable delay and secondly it is admitted that seven adjournments were sought by him or on his

behalf. In the circumstances, it cannot be claimed by the petitioner that he or his counsel had not contributed to the delay in conclusion of the trial. The prosecution has not placed on record any material which would persuade this Court to treat the petitioner as being ineligible for grant of bail in terms of the exceptions mentioned in the 4th Proviso to Section 497(1) of Cr.P.C. The petitioner however, has not been able to satisfy that the right to be enlarged on bail in terms of the 3rd Proviso has accrued in his favour, as he or his counsel have also been responsible for delay in the conclusion of the trial.

12. It may be noted that though the petitioner has been partly responsible for causing the delay in the conclusion of the trial but at the same time this Court cannot turn a blind eye to the conduct of the prosecution and also the failure on the part of the Court in taking appropriate measures in order to ensure that the trial is concluded expeditiously and at least within a reasonable time. It appears that by inserting the 3rd Proviso to Section 497(1) of Cr.P.C, the legislature expected that trials would be concluded within a period of two years. It may be emphasized that the object of the 3rd Proviso to Section 497(1) of Cr.P.C. is to ensure that the right to a fair trial as guaranteed under Article 10-A of the Constitution is not denied. 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 trials in particular, is intolerable.

13. In the present case, it has been highlighted above that the delay in the trial beyond the period of two years is also attributed to the petitioner and the same is admitted. However, most of the delay has been on part of the prosecution or the administrative exigencies of the Court. In the circumstances, this Court is of the opinion that in case of the present petitioner the right to be enlarged on bail as provided under 3rd Proviso is defeated on account of his or his counsel contribution towards the delay. The present petition is, therefore, dismissed.

14. It is expected that the trial Court shall conclude the trial expeditiously and without any further delay, preferably within six months. The prosecution and particularly the Investigating Officer shall ensure that the witnesses are produced before the trial Court. In case the trial is not concluded within a period of four months and there has been no delay on part of the petitioner or his counsel, then in that case the petitioner shall be at liberty to seek bail in terms of the 3rd Proviso to Section 497(1) of Cr.P.C.

15. Needless to mention that this is tentative assessment, which shall not affect the trial of this case in any manner. The office is also directed to provide a copy of this order to the Member Inspection Team of this Court.

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on _____

Judge.

Asad K/*

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