HCJD/C-121

ORDER SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

Crl. Misc. No.494-B of 2014

Abdul Waheed
VERSUS
Atta Ullah, etc

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

08-09-2014 Ch. Naeem Ali Gujjar, advocate for the petitioner.
Sheikh Khizar ur Rashid, advocate for the complainant.
Malik Zahoor Ahmad Awan, Standing Counsel.
Mr Ashraf, ASI with record.

The petitioner Abdul Waheed son of Mousam Khan has sought post arrest bail in case, F.I.R. No.237, dated 07-06-2013, registered under Section 489-F / 406 of Pakistan Penal Code, 1860 (hereinafter referred to as "PPC") at Police Station Industrial Area, Islamabad.

2. Brief facts as narrated in the FIR are that the complainant handed over Rs.3.96 million to the petitioner and Abid Majeed for the exchange of said amount into Dollars. The said amount was handed over in the presence of witnesses and in return petitioner issued a receipt. For the return of said amount, petitioner issued two cheques amounting to Rs.1.98 million each. The cheques were dishonoured by the Bank. Hence the FIR.

3. The learned counsel for the petitioner contends; that the story as narrated in the FIR is false; the petitioner is innocent and has no concern with the alleged offence; the offence does not fall within the prohibitory clause of Section 497 Cr.P.C.; the investigation is complete and petitioner is no more required for the purposes of investigation; the amount as claimed is disputed; there is delay of about 1-1/2 months in lodging the FIR; nothing has been entrusted to the

petitioner, so as to invoke Section 406 of PPC; the petitioner has no previous conviction; seven other FIRs have been registered i.e. FIR No. 181/2014 dated 30-03-2014, FIR No. 153/2013 dated 17-04-2013, FIR No. 553/2013 dated 04-11-2013, FIR No. 155/2013 dated 03-05-2013, FIR No. 120/2013 dated 16-04-2013, FIR No. 55/2013 dated 24-07-2013 and FIR No. 163/2013 dated 22-04-2013; in three FIRs bail has been granted; whereas in three FIRs the petitioner has been acquitted, and in one case bail has been applied; recovery suit is pending in the Court of Additional District Judge, Islamabad. Relies on 2010 YLR 624, 2009 SCMR 1488, PLD 1986 Karachi 224, and PLD 1995 S.C. 34; hence urges grant of bail.

4. The learned Standing Counsel appeared alongwith Ashraf, ASI assisted by Sh. Muhammad Khizar ur Rashid, advocate for the complainant and opposed the bail. It is argued that; it is evident from the record that there was an existing relationship between the accused and the complainant; the conduct of the accused brings his case within the exception to the general rule in case of offences falling within the non-prohibitory clause of section 497 Cr.P.C as there are seven registered cases against the petitioner; the cheques have been issued by the accused. However, it is admitted that there is no conviction. It is stated that a huge amount is involved and, therefore, in the circumstances the accused is not entitled to bail. Reliance is placed on the case *of Shameel Ahmed Versus The State,* reported *as (2009 SCMR 174),* in support of the contention that registration of other cases would disentitle the petitioner for bail on the grounds that he is "habitual offender".

5. The learned counsel for the complainant contends that; in two FIRs the petitioner obtained bail after entering into a compromise; admits the Akrarnama dated 27-03-2013 but submits that the complainant was pressurized and, therefore, he accepted to execute the said document by wrongly acknowledging

that the amount was given as a loan; admits that the two cheques were given following the Akrarnama; signatures on the cheques are not disputed; no malafide has been alleged against the complainant; the petitioner is a 'habitual offender' and relies on 2009 SCMR 174; ingredients of Section 406 of PPC are fulfilled; the petitioner was absconding for almost a year without obtaining bail; grounds taken during the arguments are not mentioned in the petition; hence vehemently opposes bail.

6. In rebuttal, the learned Counsel for the petitioner contends that the amount for which the alleged cheques have been issued is not relevant for the purposes of grant of bail. He placed reliance on several judgments of various High Courts. It is further contended that the proceedings in which bail has been sought, is for determining the criminal guilt and not for recovery of the amount for which appropriate proceedings can be initiated under the law, inter alia, Order-XXXVII C.P.C.

7. 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.

8. The offence included in the FIR i.e. Section 406 PPC is, admittedly, of the category which falls within the non-prohibitory clause of section 497 Cr.P.C. By now the law and principles for granting bail in such cases are well settled. It is important to note that in the case of *Zafar Iqbal Versus Muhammad Anwar and others (2009 SCMR 1488)*, a larger Bench of the Honourable Supreme Court has elucidated the principles for considering the grant of bail, where offences fall within the non-prohibitory clause. In the light of the said principles it has been held that where offences fall within the non-prohibitory clause, the granting of bail has to be considered favourably as a rule, but may be declined in exceptional

cases. Examples, though not exhaustive, of such extraordinary and exceptional cases have further been listed as follows:

i) Where there is likelihood of abscondance of the accused;
ii) Where there is apprehension of the accused tampering with the prosecution evidence;
iii) Where there is danger of the offence being repeated, if the accused is released on bail; and
iv) Where the accused is a previous convict.

9. The F.I.R. in this case had been registered with a delay of 1/1-2 months. The prosecution has not placed on record any material to suggest that the accused has been previously convicted. Admittedly he has not been convicted. Whether there was an obligation or a contractual relationship, and the apparent contradiction between the Akrarnama and the story narrated in the FIR calls for further probe. Admittedly, the report under Section 173 Cr.P.C. has been submitted and trial shall proceed in accordance with law. The investigations qua the petitioner have already been finalized; therefore, his continued custody is not likely to serve any beneficial purpose at this stage. The quantum of the amount involved in a case registered under section 489-F of PPC cannot be treated as an exception of the general rule that in such cases bail shall be considered favourably. Even otherwise, section 489-F of PPC is not a provision which is intended by the legislature to be used for recovery of an alleged amount. It is only to determine the guilt of a criminal act, and award a sentence, fine or both as provided under section 489-F PPC. On the other hand for recovery of any amount, civil proceedings provide remedies, inter alia, under Order XXXVII of CPC. It is also important to note that the offence does not fall within the prohibitory clause of sub-Section 1 of Section 497 Cr.P.C. In the light of principles and law laid down by the Honourable Supreme Court in cases where offences fall within the non-prohibitory clause of Section 497 Cr.P.C., his continued incarceration will not serve any useful purpose.

10. The learned Standing Counsel has raised a question which requires consideration by this Court i.e. if an accused is involved in other cases registered under the relevant laws, will he/she be entitled to bail and treated as a "habitual offender"?

11. The above proposition can be answered by addressing the question i.e. if the argument of the learned Standing Counsel assisted by learned counsel for the complainant was to be accepted, what would be the effect on the right to defence and fair trial of an accused in another case in which trial is proceeding? The presumption of innocence is the basic and fundamental pillar of criminal law. It is a universal principle that every person is to be presumed to be innocent until proved guilty. This is the basis of the right to defence of an accused, and a key to a fair trial. This cardinal principle is embedded in the fundamental right guaranteed under Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 which declares that "For the determination of ------ in any criminal charge against him a person shall be entitled to a fair trial and due process". Fair trial and due process essentially envisages being free from Bias of every kind. A person may be facing trial in multiple cases registered under the relevant laws, and in each case he or she has an independent right to defence and to be presumed innocent unless proved guilty. If registration of a case or even multiple cases is to influence a court it will be seen as giving rise to a Bias and thus depriving such an accused of his right to a fair trial. Undoubtedly, justice is not only to be done but should be seen to be done. Even a conviction in another case may only be relevant for consideration for specific purposes, as for example, when the Court is considering enhanced punishment under section 75 of the PPC, because that is what the legislature has provided or when the Court has to form an opinion regarding the conduct of the petitioner. The august Supreme Court in the case, *Mounder versus The State, PLD 1990 SC 934*, has held that the mere factum of registration of cases is not sufficient for forming an opinion under the fourth

proviso to section 497(1) Cr.P.C. In the case titled, *Jafar & Jafari Versus The State (2012 SCMR 606),* it was held that the mere registration of a case by itself is not sufficient to declare an accused as a habitual offender, unless it is proved / established that he has been convicted in any of the said cases. In order to safeguard the valuable rights to defence and fair trial of the accused, the Court cannot allow itself to be prejudiced or in any manner influenced by the registration of another case, multiple cases or even conviction. Any such influence will deny an accused the right to a fair trial and due process, as it is inherent in the said rights that the Court is not only free from bias but ought to be seen as such.

12. It is a settled principle of law that each case has to be seen through its own facts and circumstances. The grant of bail, no doubt, is the discretion vested in a Court, which cannot be exercised in a manner that is arbitrary, fanciful or perverse. If an accused has made out a case for the grant of bail on reasonable grounds, then refusing the same merely because he is convicted in some other case would give rise to the factor of bias and, thereby, take away the right of such an accused to defence, due process and above all, fair trial. The presumption of innocence until proved guilty will also be negated. It will result in an absurd situation in the sense that conviction in one case would be deemed as a conviction in every case. On the same analogy, the accused will never be able to get bail in other cases and, therefore, remain incarcerated without trial. This Court is, therefore, not impressed with the arguments of the learned Standing Counsel that being involved in multiple cases will disentitle the petitioner to the concession of bail by considering him as "habitual offender".

13. The *case of Shameel Ahmed Versus The State*, reported *as (2009 SCMR 174),* cited by the learned Standing Counsel has been examined and it has been found distinguishable on facts and circumstances. It was the overall conduct of the accused which was relevant and weighed by the august court, inter alia, his

abscondance for more than a year without obtaining bail, and ultimately when he did get bail; it was by suppressing material facts from the court, including other cases registered against him. Moreover, the aforementioned case *2012 SCMR 606* has been decided by a larger Bench. Hence, this Court is of the view that the petitioner is entitled to bail.

14. In the circumstances as mentioned above, this petition is allowed and the petitioner is admitted to bail, subject to furnishing bail bonds in the sum of Rs.200,000/- (Rupees Two Hundred Thousand) with one surety in the like amount to the satisfaction of learned Trial Court. However, keeping in view the five cases registered against the petitioner, the bail is granted on the condition that he shall make personal appearance on every hearing, unless exempted by the learned trial Court. In case he violates this condition, this bail shall be recalled.

15. Needless to mention that this is tentative assessment, which shall not affect trial of this case in any manner.

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on _____.

JUDGE

Asad K/*

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