

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MUSHIR ALAM

MR. JUSTICE DOST MUHAMMAD KHAN

Criminal Petition No.105/2017

(On appeal from the order dated 10.1.2017 passed by Lahore High Court, Rawalpindi Bench, Rawalpindi in CrI.Misc.No.2356-B/2016)

Imtiaz Ahmed

... **Petitioner(s)**

VERSUS

The State thr. Special Prosecutor, ANF

... **Respondent(s)**

For the petitioner(s): Ms. Aisha Tasneem, ASC
Mr. Mehmood A. Sheikh, AOR

For the State/ANF: Raja Inam Amin Minhas, Spl. Prosecutor, ANF
Zubiar, IO. and Ch. Ehtesham-ul-Haq, ASC

Date of hearing: 21.3.2017

JUDGMENT

Dost Muhammad Khan, J.— Impugned herein, is the order of the Lahore High Court, Rawalpindi Bench, Rawalpindi dated 10.1.2017, dismissing bail petition of Imtiaz Ahmed, petitioner, which was sought on statutory ground of delay in the conclusion of the trial.

2. The case of the prosecution against the petitioner is, that on a tip off, S.I. Shakeel Ahmed alongwith ANF staff intercepted the petitioner and co-accused Irfan Ali (since dead) when, they were shifting narcotics (**heroin powder**) in the two shopping bags from the boots of their respective cars near bus stop, *Dhoke Gujran, Misrial Road, Rawalpindi*. Similar kind of narcotics was also recovered from the boots of their respective cars on pointation of both the accused. The total weight turned to be 69 kg, which was taken into possession

and case FIR No.33 of 2014 was registered by PS, ANF/RD, R.A. Bazar, Rawalpindi on 7.5.2014, for crimes u/Ss. 9(c), 14 and 15, CNS Act, 1997. Two co-accused were also named, who were allegedly partners in the business of narcotics with them.

2. Ms. Ayesha Tasnim, learned ASC for the petitioner, vehemently argued that since his arrest, the petitioner's trial could not be concluded due to consistent absence of the prosecution witnesses who even did not turn up, despite issuance of non-bailable warrants of arrest against them; the investigating officer of this case has been declared absconder in another case, whose appearance in the Court as prosecution witness is not possible in the near future, while total detention period of the petitioner has come to almost two years and ten months.

Elaborating her point of view, learned ASC for the petitioner drew our attention to some order sheets of the Special Court where, Irfan Ali (dead accused) got sick. He applied to the Court for his treatment through specialized hands in the hospital but the matter was dragged on unnecessarily by the Presiding Judge of the Court, which aggravated the disease of the said accused and when he was taken in emergency to the hospital by the Jail authorities, he died in the hospital. Further urged that the petitioner too is a sick person of highly advanced age. His eye surgery was conducted after considerable efforts, made by him and he is still not feeling well but the Trial Court is not taking effective steps to conclude the trial nor the Prosecution is cooperating with it, as required by law.

3. On the other hand, Raja Inam Amin Minhas, learned Special Prosecutor, ANF having no case on merits, took shelter behind the technicalities and argued with vehemence that the provision of section 51 of the Control of Narcotic Substances Act, 1997 has placed clear embargo on the grant of bail and the provisions of section 497 and 498 Cr.P.C. have been excluded in its application to such offences by the said provision of special law, therefore, the petitioner cannot avail the benefit of the beneficial provision of the third proviso to section 497 Cr.P.C.

4. The provision of section 51(1) of the CNSA appears to have been borrowed from the provision of sub-section (1) of section 497 Cr.P.C. with the only difference that in the latter provision, bail cannot be granted even in offences punishable with life imprisonment or imprisonment of ten years. The bar on the grant of bail in the latter two categories of offences i.e. life R.I. and ten years R.I. were added to section 497 Cr.P.C. through Act No. XXV of 1974.

5. Although the legislature is competent to enact law, dealing with particular class of offences and offenders in different manners however, it has to undergo the test of reasonableness and has to be based on sound rationale and the distinction is to be drawn on high moral, legal and sound grounds.

6. There is a long chain of authorities where the superior courts have always jealously guarded and protected the liberty of citizens in the matter of grant of bail and in all such cases assistance, aid and guidance has always been taken from the provision of section 497 Cr.P.C. being considered the mother provision of law, regulating the grant or refusal of bail to an accused person in cases triable under

the special law, as the said provision of law has successfully undergone the test of all times, since its inception/incorporation in the Code.

7. The Liberty of a citizen has been elevated to the high pedestal by the provisions of Articles 7 and 9 of the **Constitution of 1973**, which *inter alia* provides that no citizen shall be deprived of his life and/or liberty, save in accordance with law, nor any accused person shall be detained without lawful authority of the competent court.

8. Keeping in view the entire scheme of the Constitution, particularly the **Objective Resolution**, which has now been made inseparable part of the Constitution under Article 2-A thereof, that Pakistan shall be a welfare State, therefore, one has to see whether rigours of section 51 of CNSA, are liable to be diluted by avoiding rigid adherence thereto in rare and exceptional cases.

9. In the above context, the first test case came up before this Court, was the famous case known as **Allied Bank v. Khalid Farooq** also cited as **Muhammad Aslam v. The State** (1991 SCMR 599), where a 3-Member Bench of this Court, took a contrary view, however, lately it was suggested to the then Hon'ble Chief Justice of Pakistan to constitute a larger bench to settle the controversy once for all.

10. Eventually when the case of **The State v. Syed Qaim Ali Shah** (1992 SCMR 2192) came up for re-examination of the ratio laid down in the **Allied Bank** case (Supra), the larger bench made a clear departure from the earlier view held in that case. In the case of **Syed**

Qaim Ali Shah and others, the accused were booked for crimes u/s 302/307(repealed)/120-B/34 PPC read with provision of **Suppression of Terrorist Activities Act, 1975** (repealed). The facts of the case were, that 26 persons were done to death, while several others were caused injuries on 22.8.1990, in various localities of Karachi, through indiscriminate firing on the reception camps, set up by a political party, to accord welcome reception to its leader.

11. The principal accused, namely Syed Qaim Ali Shah, in the case (supra) got sick while under detention and a Medical Board duly constituted, declared him so sick that his treatment was not possible in Jail. On this ground, a Division Bench of the High Court of Sindh at Karachi, granted him bail, pressing into service the first *proviso* to section 497 Cr.P.C. despite the fact, that similar bar was placed on grant of bail to an accused person charged for any offence contained in the Schedule to the **Suppression of Terrorist Activities Act, 1975** (repealed).

12. The 5 Members bench of this Court, to determine the question of jurisdiction in granting bail to the accused, Syed Qaim Ali Shah, formulated a single point of law, which is reproduced below: -

*“Whether the ratio of the Judgement in the case of **Muhammad Aslam v. The State** (1991 SCMR 599) can be pressed into service in this case and whether a person facing trial before a Special Court under the Act, can seek bail on medical ground under the first proviso to subsection (1) of section 497 Cr.P.C.”*

13. After elaborately dealing with all legal propositions, also drawing comparison between the provisions of sub-section (1) of section 497 Cr.P.C. and all the provisos contained therein and section

5-A(8) of the **Suppression of Terrorist Activities Act, 1975 (Special Court)** while interpreting the Statute, the Bench cited the principle laid down by **Pollock C.B.**, in the case of **Attorney General v. Sillem (1864, 2 H & C. 431 @ 515)**, which is cited below: -

"In order to know what a statute does mean it is one important step to know what it does not mean; and if it be quite clear that there is something which it does not mean, then that which is suggested or supposed to be what it does mean, must be in harmony and consistent with what it is clear that it does not mean. What it forbids must be consistent with what it permits."

The larger Bench held that the provision of sub-section (8) of section 5-A of the Special Act displaces sub-section (1) of section 497 Cr.P.C. so far it was in conflict with it, however, it has not eliminated the provisos 1 to 3 contained therein, because of lack of conflict between it and the provision of Special Act, referred to above.

14. It was also held in firm terms, that, when any Statute transgresses on the rights of a subject, whether as regards to his person or property, it must be so construed as far as possible, which may preserve such rights and no interpretation to the contrary shall be adopted, which would pose to destroy such rights.

15. In the ultimate conclusion, the larger Bench held that, the view in the case of **Allied Bank** (supra) was not based on correct interpretation thus, while making departure from the earlier view, the judgment of Sindh High Court granting bail to **Syed Qaim Ali Shah**, accused and his co-accused on the strength of first and third provisos to sub-section (1) of section 497 of the Code was declared justified and was upheld by dismissing the appeal of the State.

16. In the case of **Khan Asfandiyar Wali Khan Vs. The Federation of Pakistan and others** (PLD 2001 SC 607) various provisions of National Accountability Bureau Ordinance (XVIII) of 1999 were challenged on the ground of discrimination and being *ultra vires* to the provisions of the Constitution. The larger Bench held the number of provisions as legitimate because in view of the increasing menace of corruption and corrupt practices, however, it was observed that, no inbuilt provision is provided to regulate the grant or refusal of bail to an accused person facing charges under the said law and the clauses ousting jurisdiction of the Superior Courts not in conformity with scheme of constitution (referred in para 197 at page 885), which is reproduced below: -

"It was held in the case of Zafar Ali Shah (PLD 2000 SC 869) that the powers of the superior Courts under Article 199 of the constitution "remain available to their full extent notwithstanding anything contained in any legislative instrument enacted by the Chief Executive." Whereas, section 9(b) of the NAB Ordinance purports to deny to all Courts, including the High Courts, the jurisdiction under sections 426, 491, 497, 498 and 561A or any other provision of the Code of Criminal Procedure or any other law for the time being in force, to grant bail to any person accused of an offence under the NAB Ordinance. It is well settled that the Superior Courts have the power to grant bail under Article 199 of the section 497 of the Criminal Procedure Code, section 9(b) of the NAB Ordinance to that extent is ultra-vires the Constitution. Accordingly, the same be amended suitably."

Accordingly, suitable amendments were introduced in various provisions of NAB Ordinance, 1999. It was further held in no ambiguous terms that, the superior Courts' powers cannot be curtailed

or taken away with regard to protecting the liberty of citizens even in crimes of heinous nature and that the superior Courts' despite of no mechanism provided for grant of bail to accused person, facing charges under the said law can grant bail in fit cases under section 497 Cr.P.C. which has been re-activated by the superior Courts of the country along with all beneficial provisos with regard to statutory delay or sickness of the nature which could not be treated in jail or the same is likely to endanger the prisoner's life.

17. To have a speedy trial, is the fundamental right of accused being universally acknowledged. Under the Criminal Procedure Code, smooth methodology and scheme for speedy trial, is provided whether it is held by the Session Court or Magistrate, in recognition of the said right of an accused person. This principle shall apply more vigorously to the trials before Special Courts, constituted under the CNS Act, or any other special law so that unnecessary delay, much less shocking one in its conclusion is avoided in all circumstances. Any unreasonable or shocking delay in the conclusion of the trial, before Special Courts, like we are confronted with in the present case, would amount to denial of justice, or to say, denial of fundamental rights, to the accused, of speedy trial.

18. After careful perusal of all the order sheets of the Trial/Special Court, we are constrained to observe that the Presiding Officer has shown negligent conduct in the progress of the trial, neglecting his obligatory duty to conclude the same in minimum possible time. Majority of the order-sheets are written in Urdu version,

which appears to be in the hand of the Reader or some other official of the Court, while the Presiding Officer has put initials thereon.

19. The co-accused, namely, Irfan Ali (since dead) was seriously sick, he applied to the Court for providing specialized treatment in some government hospital, however, the Presiding Judge of the Court did pay proper attention to it and left the fate of the said accused at the mercy of the jail authorities and the Prosecution. The Jailor reported to the Court that permission of the Home Department, Punjab had been sought and on getting the same, he would be taken to the hospital for treatment and management through specialized medical experts. It was in this background that in not getting timely specialized treatment in some government hospital, his disease aggravated to unmanageable extent thus, he was shifted to the hospital in serious emergency, however, after staying 2/3 days in the hospital, his life could not be saved by then and he died there. This is uncondonable default on the part of the Presiding Judge, who had surrendered his judicial authority to the Jailor to regulate the custody of the under-trial prisoner and to take care of his health. It must be borne in mind that custody of under-trial prisoners, including health care and other facilities has to be regulated strictly by the Judges, before whom the trials are pending. The jail authorities can only deal with the custody of those prisoners who are sentenced to imprisonment. Thus, we are of the view that the Presiding Judge of the Special Court was fully oblivious of his judicial authorities to enforce the writ of the Court, keeping in view the urgent and sensitive nature of the matter. Even in a case of hardened, desperate and dangerous criminals, they are entitled to similar treatment, however, to ensure

that they may not abscond from the custody, the Court may direct that while staying in the government hospital for treatment sufficient number of security guards should be provided, however, on that ground alone urgent treatment from specialist doctors whenever is seriously needed, cannot be denied to them, being a fundamental right of every citizen, as the provision of the Constitution has not drawn any distinction between an under-trial prisoner or citizens at large.

20. The petitioner himself is also suffering from sickness as on, while in custody, he has undergone eye surgery after considerable efforts were made in that regard. He is also at advanced age as was stated at the bar by his learned counsel, which was not controverted at the bar by the Prosecution.

21. The petitioner is in Jail for almost 3 years, while conclusion of the trial is not in sight because the prosecution witnesses are not turning up, inspite of coercive process has been issued against them whereas, the investigating officer in this case, who is a star witness for the prosecution, as stated earlier is fugitive from law in another criminal case, therefore, to expect the conclusion of the trial in the near future, would be nothing but a far fetched dream. In the case **Mr. Asif Ali Zardari v. The State (1993 P Cr. L J 781)** a Full Bench of the Sindh High Court, granted him bail on the basis of statutory delay in the trial. The Full Bench of the Sindh High Court at Karachi held that in case of shocking delay in the conclusion of trial, the accused was entitled to the concession of bail on the strength of third proviso to section 497 Cr.P.C, which view has not been set aside by this Court till date.

22. In view of the above legal and factual position, in our view, the petitioner has become entitled to grant of bail as of right on the basis of shocking delay in the conclusion of the trial, more so, if further time is allowed to the prosecution, it would be absolutely impossible to conclude trial before the Trial Court, in view of the circumstances narrated above.

23. Accordingly, this petition is converted into appeal and the same is allowed.

These are the detailed reasons for our short order of even date, which is as follows: -

"For the reasons to follow, this petition is converted into appeal and allowed. The petitioner is extended bail subject to furnishing solvent bail bonds in the sum of Rs.500,000/- (five lac) with two reliable sureties in the like amount to the satisfaction of the learned trial Court. The petitioner is also directed to deposit his 'Passport' with the learned trial court."

Judge

Judge

Islamabad, the
21st March, 2017
Nisar/*

Approved For Reporting.