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IN THE HIGH COURT OF SINDH AT KARACHI

Before: Mr. Justice Ahmed Ali M. Shaikh
Mr. Justice Mohammed Karim Khan Agha

Cr. Accountability Appeal No.11 of 2012

Nazir Ahmed Soomro & another
Vs.

The State.

Date of hearing: 11-04-2016.
Date of Order 18-04-2016.
Appellants: Through Mr. Muhammad Ashraf Kazi,
Advocate for Appellants
Respondents: Through Mr. Noor Muhammad Dayo, Special
Prosecutor, NAB

ORDER

Mohammed Karim Khan Agha, J.- This is an application under section 426(1)(1-A)(C) Cr.P.C. read with Section 561-A Cr.P.C. and Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 moved on behalf of the appellants praying to suspend the operation of impugned judgment dated 15.03.2012, passed by the learned Accountability Court No.I, Karachi and further be pleased to admit/enlarge them on bail during pendency of their appeal on the ground that they are in continuous confinement since 15.03.2012, as such they may be released on bail.

2. As per reference No.07/2009 briefly stated the appellants were accused of acquiring assets beyond their known sources of income and had therefore committed acts of corruption and corrupt practices which fell within the purview of S.9 of the National Accountability Ordinance 1999 (NAO). After trial both the appellants were convicted under S.10(a) NAO and sentenced to 10 years RI each and fine of 50,00,000 each and in default of payment of fine each would under go a further period of 2 years RI, both of their properties and bank accounts were confiscated and they were disqualified from holding public office and receiving banking loans as per S.15 NAO through the impugned judgment.

3. Learned counsel for the appellants submitted that the appellants were convicted by the learned Accountability Court No.I, Karachi in reference No.7 of 2009 on 15-3-2012 and since then

they have remained in jail. He further submitted that their appeal against the impugned Judgment was filed before this Hon'ble Court on 20.3.2012. He also submitted that there is no delay on the part of the appellants in hearing their appeal hence, the impugned Judgment may be suspended and they may be released on bail on the statutory ground under S.426 Cr.PC. In support of his submissions he placed on record a photostat copy of the order dated 31.3.2016, passed by this Court in C.P. No.D-7850/2015 **Muhammad Aqeel Munawar Abro v. State and another** and the case of **Iftikhar Ahmed v. State** (PLD 2014 SCMR 7).

4. On the other hand, learned ADPGA appearing on behalf of the National Accountability Bureau (NAB) vehemently opposed the S.426 application filed by the appellants since in his view the appellants were responsible for many of the delays in hearing their appeal and thus did not qualify for relief under S.426 Cr.PC.

5. We have considered the submissions of the learned counsel for the parties at length, perused the material available on record and the case law cited by them at the bar.

6. We note that the appellants first moved an application under S.561 (A) Cr.PC for release on bail pending the hearing on their appeal which was dismissed on merits by this Court on 13-12-2012. The present application although similar in nature for suspension of the impugned Judgment and grant of bail pending hearing of the appeal is distinguishable since it has been moved solely on the ground of statutory delay under S.426 Cr.PC in hearing the appellants' appeal

7. The conditions for the grant of bail under S.426 Cr.PC have been exhaustively considered by this Court in the case of **Ghulam Shabbir Mahar V State** (Cr.Acct.Appeal No.10/2013) dated 14-04-16, which was also a NAB case, which in essence found that for S.426 (1A) (C) Cr.PC to be applicable the following pre conditions must be satisfied;

(a) the delay in the decision of appeal has not been occasioned by an act or omission of the appellant and

(b) the appeal has not been decided within two years of his conviction and

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- (c) the appellant was not a previously convicted offender for an offence punishable with death or imprisonment for life or is a person who in our opinion is a hardened desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

8. A review of the record shows that the appellants made efforts to have their appeal heard and even obtained an order from the Hon'ble Supreme Court dated 8-04-13 directing that their Appeal be decided by this Court within 2 months of the order i.e by 7-06-13. Regrettably the appeal was not able to be heard till date notwithstanding the order of the Hon'ble Supreme Court. The question therefore arises whether in the last two years the appeal has not been heard on account of any fault on the part of the appellants.

9. It would appear from the order sheets that from 30-1-14 till the date of hearing on 11-4-16 (i.e. in the last 2 years) that 8 adjournments were on account of the appellant's counsel either not being present or being unable to proceed with the matter. In our view therefore the appellants have not been able to make out a case for statutory bail under S.426 Cr.PC since a reasonable amount of the delay in hearing the appeal over the last two years has been on account of the appellants' own failings.

10. There is, however, considerable authority for the proposition that if a convict has undergone a substantial part of his sentence then he would be entitled for relief under S.426 Cr.PC. In the case of **Makhdoom Javed Hashmi V State** (2008 SCMR 165) the Hon'ble Supreme Court held as under at P.170

"The other argument of Mr. Arshad Ali Chaudhry, Advocate Supreme Court/Advocate-on-Record for the State that, in case of suspension of sentence, the object of filing the appeal would be defeated, is equally devoid of any substance. **A convict who has already undergone almost half of his sentence may seek suspension of sentence in the interest of justice keeping in view the facts and circumstances of a particular case such as**

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Adnan A. Khawaja (supra). It is also mentioned here that if ultimately the appeal of the petitioner is dismissed by the Appellate Court the provisions of subsection (3) of section 426, Cr.P.C. would come in operation and the period of suspension of sentence shall stand excluded and he would have to undergo the sentence awarded to him by the Court." (bold added)

11. We have observed that as per the most recent jail roll dated 11-4-2016 the appellants out of a total sentence of 12 years each (including fine) have to date each served 8 years and one month. As such in this case it is apparent that the appellants have undergone a substantial portion of their sentence. In addition, it is observed that one of the appellants (Nazir Ahmed Soomro) is an aged man of 64 years of age who as per record is in a poor state of health as he is suffering from diabetes, CRF, hypertension and diabetic nephropally.

12. As such taking these factors into consideration we hereby suspend both the appellant's sentences pending the final disposal of their appeal and release them on bail subject to them both furnishing solvent surety of RS 500,000 (five hundred thousand) each and PR bond in the like amount subject to the satisfaction of the Nazir of this Court. In addition both of the appellants are directed to deposit their original passports with the Nazir of this Court and in case either of the appellants does not possess a passport the Ministry of Interior shall ensure that no fresh or duplicate passport(s) are issued to either of the appellants. A facsimile copy of this order shall immediately be sent to the Secretary Ministry of Interior Government of Pakistan for information and compliance.

Dated: 18-04-2016