ORDER SHEET
IN THE HIGH COURT OF SINDH KARACHI

Cr. Bail Appl.Nos.993, 1076, 1120 & 1144 of 2016

Date	Order with signature of Judge

Present:
Mr. Justice Muhammad Ali Mazhar
Mr. Justice Abdul Maalik Gaddi

1. **Cr. Bail Appl.No.993/2016** **Dr.Asim Hussain**
2. **Cr. Bail Appl.No.1076/2016** **Usman Moazzam**
3. **Cr. Bail Appl.No.1120/2016** **Anees Qaimkhani**
4. **Cr. Bail Appl.No.1144/2016** **M.A.Rauf Siddiqui**

Versus

The State

Date of hearing 01.11.2016

M/s.Sardar Lateef Khosa, Anwar Mansoor Khan, Qadir Khan Mandokhail and Umaima Mansoor, Advocates for the applicant in Cr.B.A No.993 of 2016.

Mr.Muhammad Farooq, Advocate for the applicant in Cr.B.A. No.1076 of 2016.

M/s.M. Ilyas Khan, Muhammad Farooq, Hassan Sabir and Ms. Soofia Saeed Shah, Advocates for the applicant in Cr.B.A. No.1120 of 2016.

Mr.Shaukat Hayat, Advocate for the applicant in Cr.B.A. No.1144 of 2016.

M/s.Sajid Mehboob Shaikh and Rana Khalid Hussain, Advocates for the complainant.

Mr. Ayaz Ahmed Tunio, Special Public Prosecutor.

D.S.P Altaf Hussain, I.O of the case.

Major Asghar Hamdani, DAJAG, Pakistan Rangers.

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Muhammad Ali Mazhar-J: This common order will dispose of the aforesaid post arrest bail applications moved in Crime No.197/2015, lodged by the State through Superintendent Pakistan Rangers, 61-Wing, Abdullah Shah Ghazi Rangers Mitha Ram Hostel, Karachi on 25.11.2015 at Police Station North Nazimabad, Karachi under Section 201, 202, 216, 216 (A), 409/34 P.P.C and Sections 6 (7) a, 21(I), 21(J) A.T.A. 1997. The bail applications filed by the applicants in the trial court were rejected. For the ease of reference, the text of FIR is reproduced as under:-

"امروز ایک قطعہ تحریری نمبر LC-502 مورخہ 25-11-2015 مجھ ASI عامر اعظم کو دفتر ہیڈ محرر سے زیر دستخطی SHO صاحب بغرض کاروائی موصول ہوئی درخواست کی نقل ذیل ہے۔ SHO تھانہ نارتھ ناظم آباد کراچی، عنوان: اندراج FIR، جناب ایس ایچ او تھانہ نارتھ ناظم آباد من سپرنٹینڈنٹ رینجر محمد عنایت اللہ درانی متعینہ 61 ونگ عبداللہ شاہ غازی رینجر مٹھا رام ہاسٹل کراچی میں تعینات ہوں۔ مورخہ 26-08-2015 کو ملزم ڈاکٹر عاصم حسین ولد تجمل حسین کو زیر دفعہ 11-EEEE- of ATA - 1997 کے تحت ملزم کو متعدد الزامات اور مقدمات کی تفتیش کے لئے حراست میں لیا گیا تھا اور حکومت سندھ کی منظوری سے JIT ٹیم کے ذریعے انٹروگیٹ کیا گیا جس نے من سپرنٹینڈنٹ کے روبرو اور JIT ٹیم کے روبرو انکشاف کئے کہ اس نے اپنے ڈاکٹر ضیاالدین ہسپتال واقع نارتھ ناظم آباد اور کلفٹن برانچ میں لیاری گینگ وار، جہادی تنظیموں، متحدہ قومی موومنٹ کے زخمی دہشتگردوں مجرموں کو جو پولیس اور رینجرز سے مقابلوں میں زخمی ہوتے تھے جسے وہ جانتے ہوئے خلاف قانون ان کا رعایتی علاج معالجہ انکے رہنماؤں رؤف صدیقی، وسیم اختر، سلیم شہزاد اور انیس قائمخانی کے کہنے پر کرتا تھا جب کہ قادر پٹیل (پیپلز پارٹی) لیاری گینگ وار کے دہشتگردوں کے علاج کے لئے فون کرتا تھا اور جانتے بوجھتے اور قانون شکنی کرتے ہوئے علاج کے بہانوں سے مفرور ملزمان و دہشت گردوں کو اپنے ہسپتال میں پناہ دیتا تھا۔ مزید اپنے اختیارات کا ناجائز استعمال کرتے ہوئے PSO، SSGC میں بطور منسٹر پیٹرولیم ناجائز پیسے لیکر بھرتیاں کیں اور من پسند لوگوں کو رشوت لیکر ٹھیکے دیئے۔ ملزم ڈاکٹر عاصم حسین کی ان مجرمانہ سرگرمیوں کے تحت FIR کا اندراج کیا جائے اور تفتیش عمل میں لائی جائے۔ میں دیگر دستاویزی شہادتیں دوران تفتیش ضرورت پڑنے پر تفتیشی افسر کو حوالے کروں گا۔ (دستخط انگریزی) محمد عنایت اللہ درانی سپرنٹینڈنٹ رینجر 61 عبداللہ شاہ غازی رینجرز مٹھا رام ہاسٹل کراچی مورخہ ۲۵ نومبر ۲۰۱۵ موبائل نمبر 0315-9211786 ASI Aamir for n/a As per Law (دستخط انگریزی) ایس ایچ او تھانہ نارتھ ناظم آباد ڈسٹرک سینٹرل کراچی۔

کاروائی پولیس میں ڈیوٹی افسر ASI عامر اعظم صدیقی تصدیق کرتا ہوں کے درخواست کی نقل حرف بہ حرف کی گئی مضموں درخواست سے نوعیت جرم دفعہ 201/202/216/216(A)/409/34 ت پ ATA 6(7)A/21(i)/21(J) کا ہونا پایا جاتا ہے لہٰذا مقدمہ عنوان بالا بر خلاف نامزد ملزم ڈاکٹر عاصم حسین ولد تجمل حسین و دیگر شریک جرم ساتھیوں قائم کیا جا کر نقل FIR برائے آئندہ تفتیش ترسیل SIO صاحب تھانہ ہذا کی جارہی ہے بقیہ نقول FIR حسب قاعدہ تقسیم ہونگی۔ (دستخط انگریزی)

ASI عامر اعظم صدیقی۔ متعینہ تھانہ نارتھ ناظم آباد کراچی"

2. Sardar Lateef Khosa, learned counsel for the applicant Dr.Asim Hussain argued that the bail application was dismissed by the trial court without considering the material available on record. The applicant was taken into preventive detention for 90 days under Section 11-EEEE of the ATA 1997 on 26.8.2015 while the FIR was lodged on 25.11.2015. In the intervening period JIT was constituted and the FIR is based on the findings of the JIT without any independent investigation. The two I.Os conducted investigation one after the other. The learned Administrative Judge, ATC directed the second I.O. to submit his report. The final report was submitted on 21.12.2015 in "A" Class due to lack of sufficient evidence but the Administrative Judge disagreed the final report and took the cognizance and transferred the case to ATC Court-II for trial. He further argued that the political parties mentioned in the FIR are not proscribed or banned terrorist organizations but they are registered under the Political Parties Act. No record was produced before the Administrative Judge or the trial court that they have abetted or harboured the criminals. The entire material obtained during the preventive detention of the applicant is manufactured and concocted. After submitting report by the prosecution in "A" Class there was no justification to withhold the applicant from the right of bail. At present the case is of two versions. The applicant is suffering from physical and psychiatric disease with serious back problems and he is hospitalized on the recommendation of several board of doctors constituted from time to time. If the bail is granted to him he would not be in a position to influence any witness or change the record nor his release will prejudice the case of any party. The applicant is in custody for last considerable period but the trial court has failed to frame the charge. The track record of the trial shows that much time will be consumed for concluding

the trial. He further argued that PW-Dr.Muhammad Yousuf Sattar was the In charge of the Hospital whose statement was recorded under Section 164 Cr.P.C. when he was in custody. The case requires further inquiry. So far as the alleged bills issued for the treatment of terrorist or militants, the witness S.M. Shaiq in his 161 Cr.P.C. statement clearly stated that all the bills are forged and tampered. He further stated that besides computerized bills, they also maintained and entered the names of patients manually in the Register. Another witness Muhammad Faheem, Incharge Medical (Record) disclosed that 07 persons came and took over computer hard-disks in their possession and Dr.Yousuf Sattar was also taken into custody. Since there was no tangible evidence, therefore, I.O submitted report under Section 497 Cr.P.C. for the release of applicant but his report was not accepted by the Administrative Judge ATC.

3. Mr.M.Ilyas Khan, the learned counsel for the applicant Anees Qaimkhani argued that the applicant is president of Paksarzameen Party. FIR was lodged when he was not in Pakistan. The FIR is based on the alleged statement of Dr.Asim Hussain when he was in preventive detention. In view of the stipulations laid down under Article 37, 38 and 39 of the Qanoon-e-Shahadat Order such type of statements relating to self- incrimination are inadmissible which otherwise required to be proved against the co-accused in terms of Article 30 of the Qanoon-e-Shahdat Order. He further argued that Sections mentioned in the FIR except Section 6 (7) (a), 21 (I) and 21 (J) of ATA 1997 are bailable. As far as ATA Sections are concerned, the punishment falls between the lines of non-prohibitory clause. It is well settled principle of law that while considering the bail the courts consider lesser punishments of the offences rather than maximum

sentence. While dismissing the bail application the trial court relied upon the statement of Dr.Yousuf Sattar recorded under Section 164 Cr.P.C. which has no evidentiary value. No opportunity was provided to the applicant to cross examine Dr.Yousuf Sattar at the time of recording his statement under Section 164 Cr.P.C. No evidence of any injured/sick patient was recorded to support the case of the prosecution. No incriminating material is available on record which may reasonably connect the applicant with the offence. If the statement of Dr.Yousuf Sattar is considered to be true even then this is a case of two versions which cannot be decided unless the evidence is recorded by the trial court.

4. Mr.Shaukat Hayat, learned counsel for the applicant M.A.Rauf Siddiqui argued that reading of FIR makes it quite visible that it was lodged on the alleged discloser of Dr.Asim during his detention which is not admissible under Article 37, 38, 39 and 40 of the Qanoon-e-Shahadat Order. The JIT report cannot be equated with joint investigation conducted after registration of FIR, therefore, JIT is not a substantial piece of evidence. Earlier I.O. Rao Zulfiqar, SIO, North Nazimabad recorded eight 161 Cr.P.C statements thereafter, the investigation was transferred to Altaf Hussain, DSP/SDPO, Khawaja Ajmer Nagri, who recorded further PWs' statements. One 164 Cr.P.C statement of Dr.Yousuf Sattar was also recorded before the Magistrate. The two sets of statements recorded by two different I.Os are contradictory. Second I.O. discarded the investigation of Rao Zulfiqar and submitted the final report in "A" Class but the Administrative Judge disagreed with the investigation of the Second I.O. which shows that the case is of two versions and requires further inquiry. No name of any alleged Target Killer, militant or terrorist is mentioned whom the applicants harbored, sheltered or

caused disappearance to any evidence of the crime and knowingly or intentionally not informed the police. The trial court failed to appreciate the statement of PW-Shahzad Ali, PW-Muhammad Faheem, PW-Dr.Shreen and PW-Mst.Sabina Khalid who said that Dr.Yousuf Sattar was taken into custody on 29.8.2015 from Dr.Ziauddin Hospital. His wife filed petition against the missing of her husband in this court. No prior notice was issued to the applicant to provide opportunity to cross examine Dr.Yousuf Sattar.

5. Mr.Muhammad Farooq, the learned counsel for the applicant Usman Moazzam argued that the applicant is General Secretary of "Pasban". He has been implicated in the case with the sole purpose that he filed C.P.No.D-3656 of 2015 in this court against the law enforcement agencies for disappearance of his son Saad Siddiqui who was missing since 11.6.2015. The law enforcement agencies raided the house of the applicant between the night of 19th and 20th of July, 2015 and taken away the applicant and his another son, thereafter, his wife filed another C.P.No.D-4352/2015 for the recovery of her husband and her son in which it was disclosed that the applicant was taken into custody for 90 days under Section 11-EEEE, ATA, 1997. The name of the applicant is not mentioned in the FIR. The 164 Cr.P.C. statement was recorded without providing any opportunity of cross examination to the applicant. The learned trial court has wrongly observed that the statement of Dr.Yousuf Sattar was recorded in presence of applicant and he was duly served with the notice for availing opportunity of cross examination. The 164 Cr.P.C. statement was recorded on 30.11.2015 while the present applicant was arrested in this FIR on 30.01.2016, therefore, the question of his presence at the time of recording 164 Cr.P.C statement does not arise. No

incriminating material is available on record to connect the applicant with the alleged crime. The applicant is not known to Dr.Asim Hussain nor he has any personal or professional relationship with him.

Judicial precedents.

(1) 2016 SCMR 18 (Zaigham Ashraf v. The State and others). Section 497. Words "reasonable grounds" as contained in Section 497, Cr.P.C., required the prosecution to show to the court that it was in possession of sufficient material/evidence, constituting 'reasonable grounds' that accused had committed an offence falling within the prohibitory limb of Section 497, Cr.P.C. For getting the relief of bail accused only had to show that the evidence/material collected by the prosecution and/or the defence plea taken by him created reasonable doubt/suspicion in the prosecution case and he was entitled to avail the benefit of it. To curtail the liberty of a person was a serious step in law, therefore, the judges should apply judicial mind with deep thought for reaching at a fair and proper conclusion albeit tentatively. Such exercise should not be carried out in vacuum or in a flimsy and casual manner as that would defeat the ends of justice because if the accused charged, was ultimately acquitted at the trial then no reparation or compensation could be awarded to him for the long incarceration, as the provisions of Criminal Procedure Code and the scheme of law on the subject did not provide for such arrangements to repair the loss, caused to an accused person, detained in jail without just cause and reasonable grounds.

(2) 1995 SCMR 1249 (Chaudhry Shujat Hussain v. The State). Section 497. A Court considering a bail application has to tentatively look to the facts and circumstances of the case and once it comes to the conclusion that no reasonable ground exists for believing that the accused has committed a non-bailable offence, it has the discretion to release the accused on bail. In order to ascertain whether reasonable grounds exist or not, the Court should not probe into the merit of the case, but restrict itself to the material placed before it by the prosecution to see whether some tangible evidence is available against the accused which if left unrebutted, may lead to inference of guilt. The term "reason to believe" can be classified at a higher pedestal than mere suspicion and allegation but not equivalent to prove evidence. Even the

strongest suspicion cannot transform in "reason to believe".

(3) PLD 2014 S.C. 760 (Alam Zeb and another v. The State and others). Section 497(1). Bail refusal of. "Reasonable grounds". Scope. Reasonable grounds had to be grounds which were legally tenable, admissible in evidence and appealing to a reasonable judicial mind as opposed to being whimsical, arbitrary or presumptuous.

(4) 2014 SCMR 27 (Nisar Ahmed v. The State and others). Section 497(2). Bail, right of. Scope. Case of further inquiry. When an accused became entitled to bail as of right under Section 497(2), Cr.P.C. the same could not be withheld on the ground of practice because the latter was relatable to exercise of discretion, while the former was relatable to exercise and grant of a right.

(5) AIR 1952 Supreme Court 354 (Palvinder Kaur v. The State of Punjab). Penal Code (1860), Section 201. Evidence of offence. Circumstantial evidence. (Evidence Act (1872). Section 3). In order to establish the charge under Section 201 Penal Code, it is essential to prove that an offence has been committed, that the accused knew or had reason to believe that such offence had been committed and with the requisite knowledge and with the intent to screen the offender from legal punishment causes the evidence thereof to disappear or gives false information respecting such offences knowing or having reason to believe the same to be false.

(6) AIR (31) 1944 Privy Council 54 (K.R. Easwaramurthi Goundan v. Emperor). (a) Penal Code (1860), Section 216. Ingredients of offence laid down. Section 216 requires, if the offence is to be established, first that there has been an order for the apprehension of a certain person as being guilty of an offence, secondly knowledge by the accused party of the order, thirdly the harbouring or concealing by the accused of the person with the intention of preventing him from being apprehended.

(7) 2000 SCMR 107 (Mian Manzoor Ahmad Watto v. The State). Section 497(1). Correct criteria for grant of bail to an accused in a non-bailable case on medical ground would be that the sickness or ailment with which the accused is suffering is such that it cannot be properly treated within the jail premises and that some specialized treatment is needed and his continued detention in jail is likely to affect his capacity or is hazardous to his life.

(8) 1998 SCMR 1065 (Zakhim Khan Masood v. The State). Section 497(1). Bail on medical grounds. Ailment of accused according to medical report

was likely to have hazardous effects on his life because stress and strain could aggravate his disease. Accused was undoubtedly sick and needed treatment in conducive conditions free from any kind of pressure. Accused could not have full peace of mind in custody which could surely make his recovery from ailment slow putting seriously his life to danger. Bail was allowed to accused in circumstances.

6. The learned Special Public Prosecutor argued that during investigation by both the I.Os eighteen 161 Cr.P.C statements were recorded and 01 statement under Section 164 Cr.P.C. The investigation has been completed. The case is fixed for framing of charge in the trial court. He further argued that the second I.O. submitted the report in "A" Class for lack of evidence but the Administrative Judge ATC took the cognizance and transferred the matter to ATC for trial. When this court asked the Special Public Prosecutor whether he is conceding or opposing bail applications. He responded that the bail applications may be decided on the available documents including the "A" Class final report. He further addressed that Dr.Asim Hussain (main accused) is seriously ill and confined to bed whose proper treatment and medication is not possible in the custody or jail, therefore, the Special Public Prosecutor conveyed his no objection if Dr.Asim Hussain is granted bail but for remaining applicants/accused he opposed and countered the bail applications without supplementing any more arguments.

7. Mr.Sajid Mehboob Shaikh, the learned counsel for complainant argued when Dr.Asim Hussain was in preventive detention, JIT was constituted by the Home Department. He referred to the findings of JIT report and argued that accused Dr.Asim disclosed his involvement before the JIT members in harbouring, facilitating the Target Killers and militants of MQM and other banned

outfits by providing them medical facilities in Dr.Ziauddin Hospital and on his statement, the JIT members observed that matter requires further probe. Some other allegations are also mentioned in the JIT Report which are subject matter of NAB proceedings. He further argued that the first I.O. had completed investigation hence there was no need to appoint second I.O. Against the unlawful transfer of investigation to second I.O. the complainant filed C.P.No.D-7806/2015 which was disposed of vide order dated 18.12.2015 with observation that if the complainant/petitioner has any grievance against the transfer of investigation, he may approach to the Administrative Judge, ATC, Karachi. An application against the transfer of investigation/change of I.O has been moved to the Administrative Judge, ATC but it is pending. He has also referred to the observation of the trial court at page-07 in the bail rejection order of Dr.Asim that the intention of the second I.O. was to create evidence and get release the accused. The defence evidence was created on 10.12.2015 in presence of Dr.Sabeena Khalid and this is not mentioned in zimni dated 10.12.2015. There is also no record in the Roznamcha about these witnesses created by second I.O. The second I.O. conducted partial investigation. The learned counsel further argued that 330 FIRs of terrorists/militants were handed over to the I.O. those were provided medical treatment in Dr.Ziauddin Hospital while 27 bills issued by the Hospital against treatment were also handed over including head money Notifications of some criminals. All these documents have been provided to the accused by the trial court in compliance of Section 265-C Cr.P.C. Dr.Asim Hussain never challenged the JIT report nor he challenged the order of the Administrative Judge whereby the cognizance was taken. The opportunity to cross examine Dr.Yousuf Sattar on his 164 Cr.P.C. statement was

provided to Dr.Asim Hussain but the cross is reserved. The statement of Dr.Yousuf Sattar is clear that on the directions of Dr.Asim Hussain, injured and target killers of different political parties and banned organizations were being admitted in the hospital for treatment. The first I.O. Rao Zulfiqar prepared the memo of seizure on 28.11.2015 and sealed the documents including the JIT report, 330 FIRs against terrorists and proclaimed offenders and head money notifications issued by Home Department but when this parcel was opened in the court nine bills relating to MQM were found missing. So far as other bail applications are concerned the learned counsel argued that they are equally responsible and involved in the crime and they facilitated various criminals and terrorists and on their request Dr.Asim Hussain provided treatment in his Hospital. He further argued that overwhelming incriminating material is available against the applicants but the I.O. has submitted the final report in "A" Class with mala fide intentions. So far as the medical report submitted by the learned counsel for Dr.Asim Hussain on record, he argued that the medical board was not constituted under the directions of this court but it was constituted under the directions of the NAB court which has no legal sanctity. He concluded that Dr.Asim Hussain is involved in heinous crimes therefore even on medical grounds he is not entitled to bail.

8. The I.O.DSP Altaf Hussain frankly and straightforwardly stated that after making the thorough investigation in the matter he found nothing and due to lack of evidence, he submitted the final report in "A" Class. He further affirmed that for the same reasons he submitted a report before the Administrative Judge, ATC for the release of accused under Section 497 (2) after the approval of SSP Investigation, West-II, Central Karachi.

9. Heard the arguments. Let us first thrash out the minutiae and niceties of the offences mentioned in the F.I.R. Section 201 P.P.C makes accountable to a person who knowingly or having reason to believe that offence has been committed, causes any evidence of the commission of that offence to disappear with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false. Whereas Section 202 P.P.C. holds responsible whoever, knowingly or having reason to believe that an offences has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give. Then again Section 216 P.P.C. makes liable to any person convicted of or charged with an offence being in lawful custody for that offence, escapes from such custody or whoever, knowing of such escape or order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended. While Section 216-A. P.P.C. indicts a person who harbours the criminals with the intention of facilitating the commission of such robbery or dacoity, or of screening them or any of them from punishment. Section 409 P.P.C was deleted by the first I.O. hence it is not mentioned in the Final report. According to Schedule-II, Tabular Statement of Offences, Chapter XI, “False Evidence and Offences against Public Justice” Criminal Procedure Code, Sections 201, 202, 216 and 216-A P.P.C. are bailable offences. Now let us recommence the provisions of Anti-Terrorism Act 1997. Section 21-(I) is an offence of aiding and abetting any offence under this Act while 21-(J) is an offence of harbouring any person who has committed an offence under this Act. A person guilty of an offence under sub-section (1) shall be liable on conviction to punishment as provided in Sections 216 and 216-A of the Pakistan Penal Code. Whereas Section 6,

sub-section 7 defines the word "terrorist" in Clause (a) which means an individual who has committed an offences of terrorism under this Act, and is or has been concerned in the commission, preparation, facilitation, funding or instigation of acts of terrorism. According to Section 21-D of ATA 1997, all offences under this Act punishable with death or imprisonment exceeding three years are non-bailable. The word "Harbour" has been delineated under Section 52-A, Chapter-II, General Explanation, Pakistan Penal Code 1860 as under:-

> **"Harbour—Except in Section 157 and in Section 130 in the case in which the harbour is given by the wife or husband of the person harboured, the word "harbour" includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person by any means whether of the same kinds as those enumerated in this section or not, to evade apprehension"**

10. It is an admitted fact that Dr.Asim Hussain was taken into preventive detention for 90 days on 26.8.2015 under the provisions of 11-EEEE, ATA 1997 but the FIR was lodged on 25.11.2015 which is predominantly structured on the revelations of Dr.Asim Hussain in the course of interrogation by JIT members that he knowingly provided medical treatment on discounted rates to the injured terrorists of Lyari Gangwar, proscribed or banned organizations and MQM, who were injured in the encounters with Rangers or Police. In the beginning, matter was being investigated by I.O. Rao Zulfiqar, afterward the investigation was transferred to DSP Altaf Hussain who on 21.12.2015 put forward the final report in "A" Class due to lack of evidence with further assurance that as and when tangible evidence would be available the matter shall be resurrected and revitalized. It is also significant to point out that on 30.11.2015, statement of

Dr.Yousuf Sattar was recorded under Section 164 Cr.P.C. before the Xth Judicial Magistrate, Karachi Central who testified to have been performing duties as Deputy Medical Director since 2005. He further divulged that the Hospital was providing medical treatment to the injured militants of proscribed/banned organizations and the workers of militants' wings of MQM, TTP, Lyari Gangwar, ANP, JI, Peoples Aman Committee and Pasban Pakistan on the instructions of Dr.Asim Hussain without informing anyone and 50% discount was also being provided to them and sometimes the treatment was done free of cost. Bills of MQM injured peoples were being sent to KKF and other bills were being issued in the name of patients. It is further stated by him that Dr.Nusrat Shaukat, MQM KKF, Rauf Siddiqui, Waseem Akhter, Adil Siddiqui, Anees Qaimkkhani, Qadir Patel, Saleem Shahzad, Osman Moazzam were used to call for the discount of their private persons and party patients. When this statement was recorded, partial cross examination was conducted by Dr.Asim Hussain but further cross examination was reserved at his request. The final report in "A" Class was rebuffed and repelled by the learned Administrative Judge ATC. In the closing paragraph of the order dated 21.12.2015, the learned Administrative Judge reproduced the findings of the JIT that the accused Asim Hussain disclosed his involvement in harbouring/facilitating the target killers, militants of MQM and other banned outfits through providing medical facilities in his own Dr.Ziauddin Hospital system which needs further probe. He further remarked that deeper appreciation of evidence is not permissible at this stage. In the same order the learned Administrative Judge further observed that the I.O. was not legally justified to release the accused Dr.Asim Hussain. The concluding paragraphs of the Final Report in "A" Class are reproduced as under:-

" اس قدر تمام تر تفتیش اور تمام تر گواہیان ریکارڈ کرنے کہ بعد میں I/O اس نتیجے پر پہنچا ہوں کہ اب تک تمام تر تفتیش صرف ایک رخ پر ہوتی رہی اور زمینی حقائق کو مسخ کیا گیا۔ چناچہ اس سلسلے میں ایک تفصیلی تفتیشی رپورٹ برائے قانونی رہنمائی جناب SSP صاحب انویسٹی گیشن ویسٹ II کو مورخہ 10-12-2015 کو ارسال کی گئی جس کو جناب SSP صاحب انویسٹی گیشن ویسٹ II نے جناب DIGP صاحب ویسٹ زون کو ارسال کی جس پر PDSP صاحب ویسٹ زون نے ذریعہ لیٹر اور جناب SSP صاحب انویسٹی گیشن ویسٹ زون نے ذریعہ لیٹر ہذا (کاپی لف مثل ہے) حکم جاری کیا ملزم ڈاکٹر عاصم حسین کو ضابطہ فوجداری کی دفعہ 497-B میں مخلصی دی جائے اور مقدمہ ہذا سے سیکشن 7-ATA کو بھی حذف کیا جائے کیونکہ اس کی جزیات پوری نہیں ہوتی۔ لہٰذا مورخہ 11-12-2015 کو تعمیلِ حکم کرتے ہوئے ملزم ڈاکٹر عاصم حسین کو زیرِ دفعہ 497-II ض ف میں مخلصی دی گئی اور عدالتِ عالیہ میں منتظم جج صاحب کے سامنے پیش کیا گیا جہاں سے نیب نے اس کو اپنی حراست میں لیا۔

سابقہ PI/IO راؤ ذوالفقار پہلے ہی سیکشن 409 اور دیگر کو مقدمہ ہذا سے حذف کر چکا ہے اب تک کی تمام تر تفتیش اور شہادت، بیانات 161 ض ف، گواہان کے پیش کردہ بیانات، سابقہ I/O کی تفتیش میں جانبداری اور دستاویزی ثبوت، فوٹو، ویڈیو کی بناہ پر کسی بھی ملزم کے خلاف جرم ثابت نہیں ہو رہا ہے اور چونکہ مقدمہ ہذا کا اندراج چونکہ انسدادِ دہشت گردی کی دفعات کے تحت درج ہوا اور عدالت میں مقدمہ عنوانِ بالا کا ٹھہرنا مشکل ہے۔

لہٰذہ بعد اجازت افسران بالا مقدمہ عنوان بالا کو عدم ثبوت (Lack of Evidence) کی بناء پر فائنل رپورٹ "A" کلاس کیا جا رہا ہے جیسے ہی صفحہ مثل پر کوئی مضبوط شہادت آئیگی مقدمہ عنوان بالا میں تفتیش کو سر سبز کیا جائیگا۔

رپورٹ عرض ہے۔

sd/-

DSP/SDPO الطاف حسین"

11. At this stage, the cumulative effect of the alleged disclosures made by Dr.Asim Hussain before the JIT members, the Registration of FIR, thereafter the statement of Dr.Yousuf Sattar recorded under Section 164 Cr.P.C. all this yield to comprehend in juxtaposition with final report in “A” class. In any case three applicants have taken the obvious plea that no chance was afforded to cross examine Dr.Yousuf Sattar, while partial opportunity was given to Dr.Asim Hussain which was also done without any prior notice to him. Nothing is available on record to show that any notice was issued under Section 265-J Cr.P.C. The statement of witness under Section 164 Cr.P.C. cannot be considered substantive piece of evidence, but it can be used to contradict the person in court, who made such statement. The main object of law is to ensure the voluntariness, exactitude and truthfulness which can only

be verified by the court at trial from other corroborative evidences. Syed Muhammad Shaiq and Muhammad Faheem in their 161 Cr.P.C. Statements also disclosed that Dr.Yousuf Sattar was taken into custody by some persons out of them 02 were in civil dress while 05 persons were in uniform and they also took over the Computers hard disks and made some changes therein. The similar disclosure made by Sabina Khalid, CEO in her affidavit as well as in 161 Cr.P.C. Statement that law enforcement agencies raided in the hospital and they entered in the medical record department and asked the staff to make the changes in the record. It is also stated in the final report that CEO Sabina Khalid handed over photographs and C.D. to the I.O. She also disclosed that Dr.Yousuf Sattar was missing therefore, his wife filed petition in the High Court for his recovery. One more crucial aspect cannot be ignored that Dr.Yousuf Sattar in his statement has not disclosed the name of any criminal, terrorists and or militant who was provided any medical treatment or facilitation in the said hospital. This is also an indispensable facet which needs further probe that Dr.Yousuf Sattar was performing his duties since 2005 and under the directions of Dr.Asim Hussain, medical treatment was being provided to criminals/militants as alleged by him. If this is true then why he failed to report this unlawful act to the law enforcement agencies at an earlier time. What is his role?. All these rudiments of great magnitude are required proper inquiry to fix the responsibility of each accused which is only attainable and achievable by means of trial. At this juncture, the stringencies and exactitudes of Article 37 to Article 41 of the Qanoon-e-Shahdat Order, 1984 are somewhat germane which cannot be obliterated. Whether the Dr.Asim Hussain made some disclosures of his own accord before the JIT members and Dr.Yousuf Sattar also appeared voluntarily for his 164 Cr.P.C statement, this

fundamental questions can only be sorted out by the trial court and unless the evidence is led, the voluntariness or the truthfulness of the statement cannot be judged or adjudicated. The learned counsel for the complainant referred to some bills of Ziauddin Hospital to expose that the militants and terrorists admitted in the hospital for the treatment and copies of 330 FIRs have been handed over by the trial court to the accused persons under Section 265-C Cr.P.C. On the contrary, the final report reflects the statement of Syed Muhammad Shaiq that the said bills are fabricated. So far as copies supplied 330 FIRs is concerned, this also needs evidence to prove that these are the same terrorists or the criminals who have been admitted in the hospital with the reference of present applicants.

12. It is well settled that deeper appreciation of evidence cannot be looked into at bail stage. The "A" class report also shows the investigation made by the First I.O. that accused Dr.Asim Hussain was brought to the hospital on 28.11.2015 under custody who pointed out medical wards, ICU including six VIP Private Rooms at different floors of the hospital where he provided treatment to the injured terrorists and or criminals. Whether the applicants/accused caused any evidence of the commission of offence to disappear with the intention of screening the offender or knowingly omitted to give any information respecting any offence which he is legally bound to give or harboured or concealed any criminal or terrorist with the intention of preventing him from being apprehended or harboured the criminals with the intention of facilitating the commission of offence or of screening them from punishment or committed an offences of commission, preparation, facilitation, funding or instigation of acts of terrorism also needs further

inquiry and the allegations cannot be proved without leading evidence.

13. It is well settled that further inquiry is a question which must have some nexus with the result of the case for which a tentative assessment of the material on record is to be considered for reaching just conclusion. The case of further inquiry pre-supposes the tentative assessment which may create doubt with respect to the involvement of accused in the crime. It is well settled that object of trial is to make an accused to face the trial and not to punish an under trial prisoner. The basic idea is to enable the accused to answer criminal prosecution against him rather than to rot him behind the bar. Accused is entitled to expeditious access to justice, which includes a right to fair an expeditious trial without any unreasonable and inordinate delay. The intention of law is that the criminal case must be disposed of without unnecessary delay. It is not difficult to comprehend that inordinate delay in imparting justice is likely to cause \erosion of public confidence in the judicial system on one hand and on the other hand it is bound to create a sense of helplessness, despair feeling of frustration and anguish apart from adding to their woes and miseries. Reference can be made to orders authored by one of us (**Muhammad Ali Mazhar-J**) in the case of **Ali Anwar Ruk, Abdul Jabbar, Syed Mansoor Ali and Sardar Amin Farooqui reported in 2014 SBLR 766=2014 P.Cr.L.J. 186, PLJ 2014 Karachi 251=2014 Cr.L.J 777, PLJ 2014 Karachi 254=2014 UC 784 and PLJ 2014 Karachi 268.**

14. Albeit we are considering the question of bail but even at this stage, the court cannot lightly ignore the opinion of investigating officer but it needs to be considered in collocation. Investigating agency is an imperative instrument of the State and if they are not willing to

accentuate that the applicants are guilty, unless there are some strong circumstances otherwise so as to come to another judicious and sagacious conclusion, the court cannot get rid of or brush aside such conclusion for the purpose of bail. The conflicting findings as to the guilt of or innocence of the accused by distinct police officers ought to be resolved in favour of the accused. Where one investigating officer found the accused innocent and the other investigating officer found him involved in the case, disagreement in the opinions of two police officers with regard to question of involvement of accused have come to light therefore even at bail stage, the benefit of doubt will go to the accused persons more particularly when second I.O. declared the investigation of first I.O. defective in the final report. Hyper-technicalities are not to be recognized by courts while dealing the bail applications. The basic conception of the bail is that no innocent person's liberty should be truncated until and unless proved otherwise. Every accused is innocent until his guilt is proved. Certain basic principles regarding grant or refusal of bail are settled i.e. the bail cannot be withheld as punishment, every person is presumed to be innocent unless found guilty by a competent court, every person is entitled to a fair trial which includes a trial without inordinate delay, the basic philosophy of criminal jurisprudence is that the prosecution has to prove its case beyond reasonable doubt and this principle applies at all stages including pre-trial and even at the time of deciding whether accused is entitled to bail or not.

15. The honourable Supreme Court in the case of **Hakim Ali Zardari**, reported in **PLD 1998 Supreme Court 1**, held that "the law of bails is not a static law but is growing all the time moulding itself with the exigencies of time, as in times of war and crisis it leans in favour of the society and

the Government, while in times of peace it leans in favour of the individual and the subject. The main purpose of keeping an under trial accused in detention is, to prevent repetition of the offence with which he is charged or perpetration of some other offence and to secure his attendance at the trial. Such object has to be achieved within the framework of a man's right to liberty, which is the cherished right which he enjoys along with other rights, collectively known as his freedom. This leads one to consideration of the fundamental rights, which are based on concepts of freedom, justice and fair play. These are not new, but are a man's natural rights which he inherits on birth. They include right to live and to earn for such living, right to have a shelter and to own a house and the right to lead free life. These rights are enshrined in Part II of the Constitution of Pakistan, 1973, and include security of person, put in Article 9, of the same. Black-Stone in his celebrated commentaries on the Laws of England propounded his philosophy of natural and absolute rights, which he reduced to three principal or primary articles: The right of personal security, the right of personal liberty and the right of private property."

16. The ratio decidendi of judicial precedents alluded to by the learned counsel for the applicants in the case of **Zaigham Ashraf** (supra) makes it unequivocally clear that it is for the prosecution to show sufficient material/evidence, constituting 'reasonable grounds' that accused has committed an offence falling within the prohibitory limb of Section 497, Cr.P.C whereas the accused has to show that the evidence/material collected by the prosecution creates reasonable doubt in the prosecution. If the accused is ultimately acquitted at the trial then no reparation or compensation can be awarded to him for the long incarceration. The provisions of Criminal

Procedure Code and the scheme of law do not provide for such arrangements to repair the loss, caused to an accused person, detained in jail without just cause and reasonable grounds. According to the dictum laid down in the case of **Chaudhry Shujat Hussain** (supra), the court while deciding the bail application has to tentatively look to the facts and circumstances of the case and in order to ascertain whether reasonable grounds exist or not, the court should not probe into the merit of the case, but restrict itself to the material placed before it by the prosecution to see whether some tangible evidence is available against the accused. The rule deducible from **Alam Zeb** case (supra) is that reasonable grounds have to be grounds which are legally tenable, admissible in evidence and appealing to a reasonable judicial mind as opposed to being whimsical, arbitrary or presumptuous.

17. On 29.10.2016 counsel for the applicant Dr.Asim Hussain filed a statement along with some medical reports. The Deputy Director JPMC constituted 09 Members Board including a Chairman on 21.10.2016 with the agenda "Current medical report and treatment." This medical board constituted under the directions of Accountability Court No.IV Sindh, Karachi in Reference No.13/2016. The medical board opined as under:-

> "UTP Dr. Asim Hussain, was examined by the medical board. He remains admitted to hospital for intractable low back pain from accelerated degeneration of his lumbar spine at the L5, S1 level. Physiotherapy is not producing significant benefit. He continues to have severe symptoms of low back pain with acute spasm and limitation of mobility. He has been advised to restrict weight bearing at present and JMPC administration is requested to provide him a wheelchair. The board re-iterates its advice for hydrotherapy pending the definitive disc replacement surgery."

18. The report of MRI of Brain issued by the Department of Radiology, JPMC dated 28.10.2016 is also available on the record with the report of Consultant Neurologist and Professor of Medicine JPMC issued on 31.10.2016 which reads as under:-

> "This is to certify that, Dr. Asim Hussain, had sudden rise in his blood pressure and developed weakness of left half of the body on 29th October, 2016. He was assessed by the board physician and was referred to Neurologist for further management. MRI Brain was done and the report is consistent with multiple ischemic infarcts of variable size and duration. He is advised bed rest for 4 weeks on the basis of his clinical status".

19. In support of medical reports the learned counsel for the applicant Dr.Asim Hussain made much emphasis that not only he is entitled to be enlarged on bail as the matter requires further inquiry but due to his critical physical condition he is also entitled to be enlarged on bail on medical grounds as his treatment is not possible under custody. *(So far as Special Public Prosecutor is concerned, he also conceded to his no objection for the grant of bail on medical ground to Dr.Asim Hussain)* It was further averred that his health is deteriorating day by day and his life is in danger. The apex court in the case of **Mian Manzoor Ahmad Watto** (supra), laid down that correct criteria for grant of bail on medical ground would be that the sickness or ailment is such that cannot be properly treated in jail and that some specialized treatment is needed and continued detention in jail is likely to affect accused's capacity or is hazardous to his life. While in the case of **Zakhim Khan Masood** (supra), the apex court held that ailment of accused according to medical report is likely to have hazardous effects on his life because stress and strain could aggravate his disease. Accused is undoubtedly sick

and needed treatment in conducive conditions free from any kind of pressure and he could not have full peace of mind in custody which could surely make his recovery from ailment slow putting seriously his life to danger.

20. The applicants were granted bail vide our short order dated 1.11.2016 subject to furnishing solvent surety in the sum of Rs.5,00,000/- (Rupees Five Hundred Thousands Only) each with personal bond in the like amount to the satisfaction of the trial court. They were further directed to deposit their original valid passports in the trial court with further directions that they will not leave the country without permission of the trial court. At the same time, the learned trial court was also directed in the short order to conclude the trial within two months. Above are the reasons of our short order. The observations made in this order are tentative in nature and shall not prejudice the case of either party in the course of trial.

Judge

Judge

Karachi
Dated:11.11.2016