ORDER SHEET

IN THE HIGH COURT OF SINDH
CIRCUIT COURT HYDERABAD

Criminal Revision Application No.S-171 of 2017

DATE	ORDER WITH SIGNATURE OF JUDGE

Date of hearing: 19-01-2018.

Date of decision: 19-01-2018.

Applicant: Nazeer Ahmed Chandio through Mr. Muhammad Sachal R. Awan, advocate.

Respondents No.1&2: Through Mr. Shahid Ahmed Shaikh D.P.G. Sindh.

Respondent No.3: None present.

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ARSHAD HUSSAIN KHAN, J: - Through this criminal revision application, the applicant / accused has challenged the order dated 28.09.2017, passed by learned IVth Additional Sessions Judge, Dadu, whereby the learned trial Court recalled the post arrest bail already granted on 29.11.2016 to the applicant.

2. The facts leading to the filing of present case are that the learned trial Court vide its order dated 29.11.2016 granted post arrest bail to the present applicant / accused in crime No.06 / 2013 registered at PS Rukkan for the offence under sections 302, 114, 148, 149, 337-H (ii) PPC. The relevant portion of the order, for the sake of ready reference, is reproduced as under:-

> *"5. After hearing learned counsel for the parties and perusal of the record it transpires that no doubt the name of the applicant / accused is mentioned in the FIR, but no specific role is assigned against him, it is yet to be determined at the stage of the trial, whether the applicant / accused is vicariously liable for committing the alleged offence or not the applicant/accused is in jail and no more required to police for investigation, enmity between parties is admitted hence false implication of the applicant / accused cannot be ruled out. Co-accused Salim and Atta Muhammad are also on bail, and case of the present applicant / accused and co-accused is on same footings, hence on rule of consistency also the applicant / accused is entitled for concession of bail.*
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> *6. Moreover, abscondence of the accused is concerned, it is well settled law that mere abscondence is no ground to refuse bail if the accused is entitled for concession of bail on merits. In this respect I relied upon case law reported in 2015 YLR 235 (Sindh) and 2012 SCMR 1273.*

> *7. In view of the above facts and circumstances of the case, the applicant / accused Nazir (Ahmed) Chandio is admitted to bail, subject to furnishing solvent surety in the sum of Rs.2,00,000/- (two lac) and PR bond in the like amount to the satisfaction of this Court."*

Thereafter, the applicant had been regularly appearing before the trial Court. On 28.09.2017, the trial Court without any notice recalled the bail order, the applicant was taken into custody and remanded to Jail and since then the applicant is in Jail. The applicant being aggrieved by the said order filed present criminal revision application.

3. Notice of present application was issued to the Prosecutor General and as well as complainant however, only D.P.G appeared whereas the complainant despite service failed to put his appearance.

4. Learned counsel for the applicant during course of arguments has contended that the impugned order is nullity in the eyes of law as the same has been passed without notice and providing opportunity of being heard. It is also contended that the learned trial while passing the impugned order has failed to apply his judicious mind that once the post arrest bail has been granted, it cannot be recalled *suo moto* without notice, on the contrary, learned trial Court has exercised the jurisdiction of appellate forum not vested in him. He further contended that while passing the impugned order, learned trial Court failed to consider the material fact that the bail granted to the applicant was never challenged by complainant nor any application for cancellation thereof was preferred either before the trial Court or before this Court. He pointed out that the applicant never misused the concession of bail nor created any hindrance in the trial; that the applicant never extended threats to the complainant nor committed disobedience of the Court order. It is also argued that the surety presented before the learned trial Court in respect of bail order is still intact before trial Court. Lastly, he argued that impugned order is not sustainable in law and is liable to be set aside. In support of his contentions, he has relied upon 2010 P Cr. L J 1781.

5. Learned D.P.G. appearing on behalf of State during course of his arguments has contended that though the Judge passing bail order not debarred from cancelling it even on same material, however, for exercising such power there are certain parameters are provided which include the issuance of show-cause notice to the accused before passing any such order. In the present case, the learned trial Court before passing the order impugned in the present proceedings did not issue any notice to the applicant / accused and as such, the impugned order is suffering from material defects, hence, the

same is not sustainable in law. In this regard, he has relied upon the case of 'AMIRUDDIN v. THE STATE AND ANOTHER' [P L D 1977 Supreme Court 602].

6. I have heard arguments of learned counsel for the applicant / accused, learned D.P.G. on behalf of State and perused the record including the case law cited at bar.

7. There is no cavil to the proposition that the trial Court can recall/cancel the bail already granted to accused but this can be done in exceptional circumstances and grounds where the accused:

i. Misuses his liberty by indulging in similar criminal activity;

ii. Interferes with the course of investigation;

iii. Attempts to tamper with evidence or witnesses;

iv. Threatens witnesses or indulges in similar activities which would hamper smooth investigation;

v. Is likely of fleeing to another country;

vi. Attempts to make himself scarce by going underground or becoming unavailable to the investigating agency;

vii. Attempts to place himself beyond the reach of his surety etc.

Foremost requirement for recalling/cancelling the bail already granted to accused by the same Court is to satisfy its judicial conscious after issuing show-cause notice to the accused. In the instant case, the learned trial Court after granting the bail to accused recalled the bail granting order without issuing show-cause notice to the accused and as such the applicant/accused condemned un-heard.

8. It has been held time and again that bail granted wrongly, can be cured by punishing the accused after trial if his guilt is proved but there cannot be any compensation if a bail is wrongly refused and or recalled. It is also a principle laid down by the superior courts that the court should reluctant to cancel the bail as the discretion exercised in favour of the accused cannot be interfered with unless there are strong and exceptional grounds warranting interference because considerations for cancellation of bail and grant of bail are altogether different.

9. In the present case, from the perusal of the record it appears that the learned trial court while passing the impugned order has recalled the bail order granted earlier to the applicant merely on the ground the same was passed due to *bonafide* mistake. If, for the sake arguments, it is assumed that the

order granting bail was either erroneous or has been passed due to *bonafide* mistake, then the question would arise whether the said bail order can be recalled/cancelled *suo moto*, without providing any opportunity of being heard and further specially when the same was never challenged by the complainant nor any exceptional circumstances as mentioned in the preceding para, occurred, the answer would be in negative. Moreover, learned trial Court while passing the impugned order failed to consider the material fact that the bail granted to the applicant was neither challenged by complainant nor any application for cancellation thereof was preferred either before the trial Court or before this Court, hence, no element of misusing the concession of bail or any hindrance in the trial or extending threats to the complainant or committing disobedience of the Court order by accused has come on record. It is also settled position that in cases of cancellation of bail even if the Superior Courts are not in consonance with the observations of the trial court, but still the primary and foremost consideration to cancel/recall bail granting order is misuse of the concession of bail, which is to be proved by adducing cogent/convincing material, which absolutely is missing in the instant case. Reliance in this regard is placed on the case of *SHAHID ARSHAD v. MUHAMMAD NAQI BUTT and 2 others* **(1976 SCMR 360)**, wherein it is observed as under:-

> "Supreme Court on being informed by counsel for State that inquiry proceedings were likely to conclude soon refusing to interfere with High Court's order refusing bail to respondent. High Court, nevertheless, subsequently granted bail to respondents. Supreme Court, though not happy about order thus passed, nevertheless, in view of there being nothing to show misuse of their privilege by accused not feeling advised to interfere with High Court's order at such stage. The petitioner was advised to approach High Court for cancellation of bail should any one of the respondents misuse privilege of bail at any time".

10. In view of above facts, circumstances, it is clear that the learned trial Court has failed to exercise the jurisdiction vested in it, in a judicious manner, therefore, impugned order dated 28.09.2017 passed without providing opportunity of being heard to the accused by issuing show-cause notice, being not sustainable in law, is hereby set aside and the applicant/accused be treated on the same earlier position as that of 28.09.2017, before passing of the impugned order. The surety furnished on behalf of applicant / accused, if still intact, learned trial Court to release the accused forthwith. Office is directed to send back the R & Ps of the case to the learned trial Court for compliance.

11. This Criminal Revision stands disposed of in the above terms. Needless to say that the observations made in this order are of a tentative nature and

only for purposes of this revision application. Nothing herein shall affect the determination of the facts at the trial or influence the trial Court in reaching its decision on the merits of the case.

JUDGE

Hyderabad
Dated 19.01.2018

Abdullah Channa/PS