

ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.S-104 of 2015.

DATE	ORDER WITH SIGNATURE OF JUDGE
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1. For hearing of application u/s 426 Cr.P.C. (M.A. No.6215 of 2015).
2. For hearing of case.

15.01.2019.

M/s. Bhagwan Das Bheel and Razia Ali Zaman, Advocates for appellant Darya Khan.

Mr. Shahid Ahmed Shaikh, D.P.G.
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Zulfiqar Ahmad Khan, J. Through application made u/s 426 Cr.P.C. appellant Darya Khan seeks his release on bail through suspending the sentence awarded to him vide judgment dated 29.07.2015 passed by the learned Additional Sessions Judge, Tando Muhammad Khan in Sessions Case No.716 of 2011, emanating from Crime No.47 of 2011 of P.S Tando Muhammad Khan lodged by complainant Abdul Razzaq under sections 302, 392, 34 PPC, whereby he was convicted under section 392 PPC and sentenced to suffer R.I for 10 years and was also burdened with fine of Rs.50,000/- in terms of section 544-A Cr.P.C.

2. Precise facts of the prosecution's case are that on 11.02.2011 at 2000 hours complainant Abdul Razzaq lodged F.I.R. at P.S Tando Muhammad Khan stating that his brother Abdul Wahid used to drive the Taxi Car of Tarique Khanzada. On 02.02.2011, complainant was available in his house; meanwhile Abdul Wahid came to take meal during which, a call was made on his phone, he talked with caller and told him that he would be arriving at the taxi stand after taking meal. Abdul Wahid left for taxi stand in the said taxi car. Complainant and Gul Hassan also left with him. When they reached at Disco Hotel, they met three persons who were not known to them previously. Complainant and Gul Hassan alighted from taxi, Abdul Wahid fixed fare with those persons and went alongwith them at 1330 hours. Complainant alongwith Gul Hassan boarded in a coaster for Hyderabad and then came back in evening at Tando Allahyar, where they came to know that those three persons have killed Abdul Wahid at Shaikh Bhirkio Jalal

Mori Link Road and took away the taxi. Thereafter, on Court's order F.I.R. was lodged on 11.02.2011.

3. Learned counsel for the appellant state that in fact the appellant was arrested in Crime No.66/2011 of P.S Tando Khan on 05.03.2011 and later on vide order dated 28.12.2013 on an application moved u/s 265-K Cr.P.C. in the Court of Asst Session Judge, T.M. Khan, the present appellant alongwith Khan Muhammad, Gul Hassan and Zaheer Ahmed were acquitted of all charges in the said crime. She further states that only the name of the appellant and Zaheer Ahmad finds mention in the deposition of I.O; that the taxi-car was recovered in Crime No.66/2011 on 05.03.2011, when appellant was found travelling in that car; that in fact none of the prosecution witnesses has deposed against the appellant; that no material / incriminating evidence has been brought on record to connect the present appellant with alleged crime; that even no specific charge has been framed against the appellant and that the car has been foisted upon him. Learned counsel next state that the appellant is over 82 old sick and infirm person who has become quite frail and stays unwell; that this appeal pending as of 04.08.2018 and no decision having made thereon due to non availability of the counsel of the complainant from time to time (who is not even present today); and that the appellant is not likely to abscond and is prepared to furnish solvent surety for his appearance before this Hon'ble court; that the discretion vested in this Court u/s 426 Cr.P.C. be exercised in favour of the applicant.

4. Learned DPG contended that the appellant was in fact arrested in Crime No.66/2011 and by referring to the recovery memo (page-79 of the paper book), he alongwith co-accused Khan Muhammad, Gul Hassan and Zaheer was found traveling in the same taxi car. He admitted that no doubt the appellant was acquitted in main case i.e. Crime No.66/2011, however, he has been sentenced in the instant crime alongwith co-accused Zaheer Khan, but admittedly the applicant was not originally involved in the main offence of murder.

5. For grant of bail at post conviction stage, the Legislature has enacted the provision of S.426 Cr.P.C. Since these provisions are of significance, same are reproduced hereunder:-

426. Suspension of sentence pending appeals. Release on bail.—

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement that he be released on bail or on his own bond.

(1-A) An Appellate Court shall, unless for reasons to be recorded in writing if otherwise directs, order a convicted person to be released on bail who has been sentenced.

(a) to imprisonment for a period not exceeding three years and whose appeal has not been decided within a period of six months of his conviction;

(b) to imprisonment for a period exceeding three years but not exceeding seven years and whose appeal has not been decided with a period of one year of his conviction;

(c) to imprisonment for life or imprisonment exceeding seven years and whose appeal has not been decided within a period of two years of his conviction.

Provided that the provisions of the foregoing paragraphs shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the Appellate Court, is a hardened desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

(2) The power conferred by this section on an appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

(2-A) Subject to the provisions of section 382-A when any person other than a person accused of a nonbailable offence is sentenced to imprisonment by a Court, and an appeal lies from that sentence, the Court may if the convicted person satisfies the Court that he intends to present an appeal, order that he be released on bail for a period sufficient in the opinion of the Court to enable him to present the appeal and obtain the orders of the Appellate Court under sub-section (1) and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(2-B) Where a High Court is satisfied that a convicted person has been granted special leave to appeal by the Supreme Court against any sentence which it has imposed or maintained, it may if it so thinks fit order that pending the appeal the sentence or order appealed against be suspended, and also, if said person is in confinement, that he be released on bail.

(3) When the appellant is ultimately sentenced to imprisonment, or [imprisonment for life], time during which he is so released shall be excluded in computing the term for which he is so sentenced.

6. Interestingly, like the provisions of S.497 and 498 Cr.P.C. the guiding principle and criteria including limitations on the powers of the Court not to grant bail in offences punishable with death, or imprisonment for life or for ten years falling within the prohibitory limb of S.497 Cr.P.C. which were omitted in 2001

from the provision of S.426 sub-section (1) were inserted again in 2011 in the form of sub-section 1A. Nonetheless, the powers of Appellate Courts in granting bail at post conviction stage have been guided by the principle provided in S.497 Cr.P.C. where the Court of appeal or a High Court is not to conclusively decide the guilt or innocence of the accused, entering upon the reappraisal of evidence during pendency of appeal against the conviction and sentence being cognizant of the fact that the matter relates to liberty of a person therefore, it should not to be decided in vacuum and tentative assessment of the evidence has to be made. Similarly, a sick or an infirm person, whose treatment in prison cannot be managed properly is also to be released on bail [2016 SCMR 1325]. In the same Soba Khan vs. The State (supra) case, the Apex court held that the provision of S.426 Cr.P.C is considered to be *pari-materia* with S.497 Cr.P.C. and the Court of Appeal, more particularly the High Court, has been directed to take extraordinary caution and care not to leave the convict to rot in Jail by undergoing any sentence including the life imprisonment and in appropriate cases through tentative assessment of the evidence on record if the case of any convicted person is found fit for grant of bail then, denial of the same would amount to patent injustice.

7. Under the circumstances at hand when the appellant was primarily arrested in Crime No.66/2011 when an alleged encounter took place, wherein he has been acquitted and has only been sentenced in the present case where none of the prosecution witnesses has deposed against him; neither he was specifically named in F.I.R. nor any specific charge has been posted against him; nor any active role was assigned to him; the appellant, per counsel, is over 82 years of age and behind bar since pronouncement of the impugned judgment on 29.07.2015, tentatively makes it hard to maintain this conviction based on the evidence furnished by the prosecution thus the question that whether conviction and sentence of the applicant can be maintained on the same evidence, will require deeper appreciation to be given at the time of hearing of the main appeal.

8. In the case of Bahadar and 5 others vs. The State 1997 SCMR 1183, the Hon'ble Supreme Court held that "under section 426 (1A), Criminal Procedure

Code, a person under a sentence of imprisonment for life becomes ordinarily entitled to be released on bail if his appeal is not decided within a period of two years of his conviction. If the appellate Court denies him this benefit it must record its reason for the denial. The High Court has not recorded its reasons for not extending the benefit of this provision to the petitioners; it only directed that their appeal should be listed for hearing on 15.5.1995. It may be mentioned that their appeal was not heard on that day. In the circumstances, we convert this petition into appeal and direct that they shall be released on bail on their executing bonds in the sum of Rs.100,000/- with two sureties each in the like amount to the satisfaction of the Assistant Commissioner, Vehari”.

9. In the case of *Shabeer v. The State* 2012 SCMR 354, the Hon’ble Supreme Court while examining the amendments introduced through Act VIII of 2011 in Section 497 Cr.P.C, has held that “having considered the submission made before us by the parties’ counsel, we have also perused the newly added provision to section 497 Cr.P.C, vide Act VIII of 2011, which entitles an accused for enlargement on bail, after having remained in custody for a continuous period exceeding two years unless in the opinion of the Court a hardened, desperate or dangerous criminal or was accused for an act of terrorism punishable with death or Imprisonment for life, which is not the position in the instant case.”

10. Similarly, in the cases *Ghulam Qadir alias Azeem and another vs. The State* 2010 MLD 1948, *Ghulam Mustafa and 2 others vs. The State* PLD 2011 Karachi 394 and *Tariq Shah vs. The State* 2012 P.Cr.L.J 634, the three different judges of this High Court have granted bail to the applicants on the statutory ground of delay without having recourse to examine the merits of the case.

11. From perusal of sub-section (1A) of section 426, it appears that the word “shall” is used in this sub-section making it mandatory whereby the applicant who falls within the categories as enumerated in sub-clause (a), (b) and (c) and does not fall within the exception as provided in proviso to sub-clause (c) hereinabove, i.e. he is previously offender for an offence punishable with death or imprisonment for life, who in the opinion of Court is a “hardened”, “desperate” or “dangerous criminal” or is accused of an act of terrorism punishable with death or

imprisonment for life, is entitled to be released on bail by suspending the sentence during pendency of the appeal and there is hardly any discretion left with the Court to examine the merits of the case. Reference in this regard can be made to the case of Sikandar @ Dhuni and another vs. The State 1995 P.Cr.L.J 1522 and Raja Abdul Majeed vs. The State PLD 1997 Karachi 358

12. In the above circumstances, the execution of sentence awarded by the learned trial court to the appellant Darya Khan s/o Wali Muhammad Lashari is hereby suspended and the appellant is admitted to bail upon his furnishing solvent surety in the sum of Rs.1,00,000/- (Rupees One Lac) only and P.R. bond in the like amount to the satisfaction of the Add. Registrar of this Court.

13. M.A. No. 6215/2015 stands disposed of in above terms.

JUDGE

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