

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Amjad Ali Sahito

Criminal Bail Application No.1904 of 2022

Applicant : 1. Zubair Ahmed S/o Mohammad Iqbal
2. Rizwan S/o Muhammad Iqbal
through Mr. Fareed Ahmed Dayo,
Advocate

Respondent : The State
Through Ms. Abida Parveen Channar
Special Prosecutor ANF a/w Ms. Salma,
Assistant Director (Law)

Date of hearing : 05.01.2023

Date of order : 05.01.2023

ORDER

AMJAD ALI SAHITO, J -- Through this Bail Application, applicants/accused seek post-arrest bail in Crime No. 03 of 2014 registered at Police Station ANF Clifton, Karachi, for the offence under Section 5/9-C Control of Narcotic Substance, Act, 1997, Karachi, after their bail plea was declined by the learned Judge, Special Court-I [C.N.S] Karachi vide order dated 05.08.2022.

2. The details and particulars of the FIR are already available in bail application and the FIR, as such, need not to reproduce the same hereunder.

3. Per learned counsel, applicants/accused mainly contended that the applicants/accused are innocent and have falsely been implicated in this case with mala fide intention; that the applicants/accused are in jail since 04.03.2014 and their trial has not yet been concluded and there is a delay in conclusion of trial as such the accused persons are facing hardship; that co-accused have been granted bail by this Court, as such, they are also entitled for the post-arrest bail in view of rule of consistency.

4. On the other hand, learned Special Prosecutor ANF has vehemently opposed for grant of bail.

5. I have heard the learned counsel for the parties and have perused the material available on record.

6. It is not disputed that the applicants/accused were arrested on 04.03.2014 and they are in jail for about eight (08) years and ten (10) months. Now the question before me is that whether the delay has been caused by the applicants/accused or anyone acting on their behalf. The case of the prosecution was that on 04.03.2014 on tip of information, ANF conducted raid in the house situated at Musarrat Colony Malir City, Karachi and recovered 61.920 kilograms heroin powder from the said house and arrest the applicants/accused along with co-accused. The charge was framed against the arrested accused/applicants on 03.12.2018; after framing the charge, two prosecution witnesses were examined and subsequently one accused Muhammad Aziz was arrested on 23.10.2017 and amended charge was framed on 03.12.2018 and after framing of the charge once again two witnesses were examined out of 09 witnesses. Learned counsel for the applicants/accused submits that still further cross examination of the witnesses No.2 is also reserved in the month of December, 2021; and now the trial Court is also lying vacant. Witness No.2 is still to be examined so also the remaining witnesses and it will take sufficient time while the applicants/accused are shown to have been arrested on 04.03.2014 and they are in custody without any progress in the matter. Such a long delay does constitute **“inordinate and unconscionable delay”**. In the identical situation the Honourable Supreme Court of Pakistan has granted bail to the accused on the ground that the Petitioner was arrested on 10.06.2014 and he is behind the bars since then and inspite of efforts made by the trial Court, the prosecution has failed to produce his witnesses. It is therefore appropriate to reproduce herein-below relevant paragraph of the unreported case of Hon’ble Supreme Court of Pakistan (“Crl.Petition No.166-K/2018 Re.FAZAL MOULA vs. REGIONAL DIRECTOR ANTI-NARCOTIC FORCE, Karachi.

“4. Perusal of the record would reveal that a huge quantity of 256 Kilograms of charas was recovered from the joint possession of the present petitioner alongwith others. The request for concession of post arrest bail on merits in the above noted case was turned down earlier and now in the present round the petitioner has sought his release on bail only on the ground of delay in conclusion of his trial. Report was sought from the Director General, ANF regarding delay in conclusion of trial which was accordingly

submitted and the learned Special Prosecutor General, ANF had no words to defend the delay on the part of ANF in conclusion of trial of the case. The petitioner in the above noted case was arrested on 10.6.2014 and is behind the bars since then and in spite of efforts made by the trial court, the prosecution has failed to produce its witnesses. We were also informed that the Court is lying vacant since long after the retirement of the Judge, Special Court and the vacancy has not been filled so far. The request of learned counsel for transfer of the case by this Court cannot be accorded to in this way for which he has to apply accordingly.

5. So in view of the above discussion, we in the peculiar circumstances of the case, have no other option but to extend the concession of post arrest bail to the accused/petitioner only on the ground of delay.”

7. I am of the considered view that in the period of eight years and ten months, no prosecution witness has been examined. Article 10(A) of the Constitution of Islamic Republic of Pakistan, 1973, which includes the right to expeditious trial should be meaningful and should be fully applied to protect an under trial prisoner from prolonged period of incarceration during his trial but no fault of his own. In the case of **IMTIAZ AHMED vs. The State through Special Prosecutor ANF**, the Honourable Supreme Court of Pakistan has granted bail to the accused on the ground that a speedy trial is fundamental right of accused being universally acknowledged. It is therefore, appropriate to reproduce the relevant paragraph herein-below:-

“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”

8. In the case of SHAKEEL SHAH vs. The State and others, bail granted to the Petitioner on the ground that merely some adjournment sought by the learned counsel of the accused cannot be counted as an act or omission on behalf of the accused the delay in conclusion of the trial. It is appropriate to reproduce paragraph-5 which is reproduced herein-below:-

“5. The act or omission on the part of the accused to delay the timely conclusion of the trial must be the result of a visible concerted effort orchestrated by the accused. Merely some adjournments sought by the counsel of the accused cannot be counted as an act or omission on behalf of the accused to delay the conclusion of the trial, unless the adjournments are sought without any sufficient cause on crucial hearings, i.e., the hearings fixed for examination or cross-examination of the prosecution witnesses, or the adjournments are repetitive, reflecting a design or pattern to consciously delay the conclusion of the trial. Thus, mere mathematical counting of all the dates of adjournments sought for on behalf of the accused is not sufficient to deprive the accused of his right to bail under the third proviso. The statutory right to be released on bail flows from the constitutional right to liberty and fair trial under Articles 9 and 10-A of the Constitution. Hence, the provisions of the third and fourth provisos to section 497(1), Cr.P.C must be examined through the constitutional lens and fashioned in a manner that is progressive and expansive of the rights of an accused, who is still under trial and has the presumption of innocence in his favour. To convince the court for denying bail to the accused, the prosecution must show, on the basis of the record, that there is a concerted effort on the part of the accused or his counsel to delay the conclusion of the trial by seeking adjournments without sufficient cause on crucial hearings and/or by making frivolous miscellaneous applications.

9. During pendency of this bail application, progress report submitted in Criminal Bail Application No.797 of 2022 filed by co-accused Alam Zaib and others is perused which reflects that on 19.02.2014 the Investigation Officer submitted challan against the accused Rizwan, Zubair Ahmed, Alamzeb, Muhammad Islamuddin and Ghulam Muhammad by showing them in the custody; whereas

accused Muhammad Aziz, Muhammad Sohail, Nazeer, Shahzad, Amjad and Naseem were shown as absconderws before the Special Court No.II, Karachi, further disclosed in her report that on 03.09.2014 charge was framed against accused person shown in the custody and matter was adjourned to 19.09.2014 for evidence. On 04.10.2017 PW-SIP Umair Waheed appeared and he was examined. On 04.12.2017 absconder accused Muhammad Aziz arrested and he was produced before the trial court. On 06.02.2018 challan against accused Muhammad Aziz was submitted and after supplying of case papers amended charge was framed against the accused persons and matter was posted for evidence. It was further added that in this case prosecution has examined PW-Inspector Attaullah Jadoon who is complainant/I.O and PC Rehmatullah and mushirs. Lastly she added that on 07.12.2021 learned Presiding Officer of the trial court had been transferred to Accountability Court No.VI, Karachi, and since then Court is lying vacant. No material has been brought on the record that the applicants/accused were previously hardened, desperate or dangerous criminal. In my view Article 10-A of the Constitution which includes the right to an expeditious trial should be meaningful and should be fully applied to protect an under trial prisoner from prolonged period of incarceration during his/her trial due to no fault of his own. Further, co-accused Alam Zaib, Muhammad Islamuddin and Ghulam Muhammad have already been granted bail by this Court vide order dated 27.06.2022, hence the applicants/accused are also entitled for grant of bail on the rule of consistency. In view of above and by taking guideline from above cited supra cases, learned counsel for the applicants/accused has succeeded to make out a case for grant of post-arrest bail and as a matter of right under the 3rd proviso of Section 497(1) Cr.P.C. Accordingly, the instant bail application is allowed. The applicants/accused named above are admitted to post-arrest bail subject to furnishing solvent sureties in the sum of Rs.500,000/= (Rupees Five Lacs) **each** in the like amount to the satisfaction of the learned trial Court. In case, the applicants/accused misuse the concession of bail, the learned trial Court would be at liberty to take appropriate action against them following the Law.

10. The observations made supra are tentative in nature and learned trial Court shall decide the case of the applicant/accused specifically on merits.

JUDGE

Kamran/PA