

THE HIGH COURT OF SINDH KARACHI

Criminal Bail Application No. 2690 of 2024

Applicants/ Accused : Noor Agha son of Gul Muhammad through Mr. Raj Ali Wahid Kunwar, Advocate.

Complainant : Abdul Khanan son of Ghulam Sahibzada through Mr. Salah-Ud-Din Khan Gandapur, Advocate along with Ms. Sana Kheshgi, Advocate.

The State : Through Ms. Aisha Saeed, ADPP.

Date of hearing : 16-01-2015

Date of order : 16-01-2015

*FIR No. 900 of 2023
U/s: 302, 364, 109 & 34 PPC
P.S. Sohrab Goth, Karachi*

ORDER

Adnan Iqbal Chaudhry J. - On the merits of the case, post arrest bail was denied to the Applicant, Noor Agha, by the trial court and then by this Court by order dated 11.09.2024 passed on Cr. Bail Application No. 1645/2024. Thereafter, he moved a fresh application for bail to the trial Court on the statutory ground of delay which has been denied by order dated 07.11.2024, hence this bail application.

2. The FIR was for the abduction and murder of Hameedullah, the Complainant's brother, which took place on 18.08.2022. It was reported that the victim was abducted from Machar Colony around 00:15 hours by 4/5 unknown persons who took him away in a Toyota Vigo, which incident was witnessed by residents of the vicinity; that around 15:00 hours on the same day, the dead body of the victim was found at the Northern Bypass with a shot to the head.

3. Investigation led to the Applicant and one Muhammad Naseem, who were arrested from Machar Colony on 10.10.2022. On interrogation they disclosed that the plan to abduct and murder the

victim was made by Wali Muhammad, who was the brother-in-law of the victim, and who had hired Dawood and his men from Quetta to take revenge upon the victim for molesting Wali Muhammad's younger sister; that after abducting the victim in a Toyota Vigo, Dawood and his men took him near the link road to the Northern Bypass, shot him in the head and dumped his body further ahead. Muhammad Naseem is Dawood's brother, whereas the Applicant Noor Agha is Wali Muhammad's brother. Per the prosecution, both of them confessed during interrogation that they were complicit in the offence; that they had accompanied Dawood and his men in another car to the place where the victim was shot, and they led the police to such spot from where two empties from a 9mm firearm were recovered.

4. Heard learned counsel, the ADPP Sindh, and perused the record.

5. This bail application is confined to the statutory ground of delay available under the third-proviso to section 497(1) Cr.P.C. for an offence punishable with death if the accused person has been detained for a continuous period exceeding two years and his trial has not concluded. It has been held by the Supreme Court that the statutory ground of delay is to be considered from the date of arrest/detention of the accused and not from the date charge was framed.¹

6. It is a fact that from the date of his arrest on 10.10.2022, the Applicant has been in continuous detention for a period exceeding two years, and thus far only 6 prosecution witnesses out of a list of 20 have been examined by the trial Court. However, there are two exceptions to the grant of bail on the statutory ground of delay. The first is in the third-proviso itself *viz.* where delay in the trial has been occasioned by an act or omission of the accused or any other

¹ *Shakeel Shah v. The State* (2022 SCMR 1); *Nadeem Samson v. The State* (PLD 2022 SC 112).

person acting on his behalf. The second exception is in the fourth-proviso *viz.* where the accused is a previously convicted offender for an offence punishable with death or imprisonment for life, or a hardened, desperate or dangerous criminal, or is accused of an act of terrorism punishable with death or imprisonment for life. These exceptions have been discussed in the case of *Shakeel Shah v. The State* (2022 SCMR 1). As regards the first exception, it was held that the act or omission by the accused to delay the trial must be a visible concerted effort orchestrated by the accused. As regards the second exception, it was held that the words 'hardened, desperate or dangerous' "paint a picture of a person who is likely to seriously injure and hurt others without caring for the consequences of his violent act."

7. The prosecution does not urge the first exception to the statutory ground of delay *viz.* that the delay has been occasioned by or on behalf of the Applicant/accused. As regards the second exception, the CRO of the Applicant does not reveal any prior conviction, nor is he accused of any act of terrorism. However, it is contended by the prosecution that the Applicant is nonetheless 'a hardened, desperate or dangerous criminal' within the meaning of the fourth-proviso to section 497(1) Cr.P.C. On the other hand, it is submitted by learned counsel for the Applicant that he is being detained solely on an extra-judicial confession; and that, in the absence of a prior criminal record, the role assigned to the Applicant for abetting the murder does not make him a hardened, desperate or dangerous criminal.

8. The view expressed in *Shakeel Shah* on the meaning of the words 'hardened, desperate or dangerous criminal', was expounded by the Supreme Court in *Allah Wasaya v. The State* (PLD 2022 SC 541) while discussing the aspects a Court may consider to tentatively assess whether the accused seeking bail is such a criminal. Most importantly, it was held that since prior conviction of the accused person was a separate test under the fourth-proviso to section 497(1)

Cr.P.C., the words 'hardened, desperate or dangerous criminal' can include a first offender if the gravity and severity of the act alleged is such. It was held:

"6. The word "criminal" in the phrase "hardened, desperate or dangerous criminal" of the fourth proviso to Section 497(1), Cr.P.C., as held by a five member bench of this Court in Moundar v. State, is not to be construed in the technical sense for a person who has been adjudged guilty of a charge in a Court of law, i.e., a convicted person; it has rather been used in its ordinary sense for a person who violates the law of the land and is accused of committing a crime. Further, the fourth proviso to section 497(1), Cr.P.C. deals with the previously convicted offenders separately. Therefore, in order to bring an accused within the compass of a hardened, desperate or dangerous criminal, it is not necessary to prove that he has a previous criminal record of conviction. It is thus obvious that the previous criminal record of convictions or of pendency of other criminal cases, though may be taken into consideration as a supporting material, is not an exclusive deciding factor to form an opinion as to whether the accused is a hardened, desperate or dangerous criminal. Such an opinion is to be formed by the court mainly on basis of the facts and circumstances of the case, borne out from the material available on record, wherein the bail is applied on the ground of delay in conclusion of the trial, by considering inter alia, the nature of the offence involved, its effects on the victims or the society at large, the role attributed to the accused, the manner in which the offence was committed and the conduct of the accused. Needless to mention that the formation and recording of such opinion as to the character of the accused, like the opinion as to reasonable grounds for believing his involvement in the commission of the offence, is of tentative nature, and is thus open to re-examination and final determination on conclusion of the trial.

7. The meaning and scope of the phrase "hardened, desperate or dangerous criminal" have also been explained in Shakeel Shah, wherein this Court held that the words "hardened, desperate or dangerous" point towards a person who is likely to seriously injure and hurt others without caring for the consequences of his violent act and can pose a serious threat to the society if set free on bail, and such tentative opinion as to the character of the accused is to be formed by the court upon careful examination of the facts and circumstances of the case. We are of the considered view that the court may also refer to any previous criminal record, if available, for forming such opinion but it matters little if the accused does not have a previous criminal record. The very gravity and severity of the act alleged to have been committed by the accused, even though for the first time, may be sufficient to attract the fourth proviso to section 497(1) Cr.P.C. in the peculiar facts and circumstances of a case and may

lead the court to form opinion that the accused is a hardened, desperate or a dangerous criminal.”

9. In view of *Allah Wasaya*, the fact that the Applicant is not a person previously convicted for a grave offence nor accused of such an offence except the present one, that does not *ipso facto* settle the test of ‘hardened, desperate or dangerous criminal’. The nature of the offence presently alleged against him will have to be considered.

10. The charge of abetting abduction and murder is indeed a charge for a grave offence. The Applicant is the brother of the principal accused, Wali Muhammad, and it was the information divulged by the Applicant on interrogation that unraveled the crime. It is alleged by the prosecution that the Applicant confessed during interrogation that he was part of the plan to commit the offence, and that he was also riding in another car that accompanied the Toyota Vigo in which the victim was abducted. While it is correct that the extra-judicial confession of the Applicant by itself was of no evidentiary value, but then he led the police to the spot where the victim was shot, from where two empties of a 9mm firearm were recovered. As per the FSL report shown to the Court from the police file, those empties matched the pistol recovered from the principal accused Wali Muhammad.

11. Given the aforesaid facts and circumstances of the case, I am of the tentative view that the Applicant falls within the bracket of ‘a hardened, desperate or dangerous criminal’ within the meaning of the fourth-proviso to section 497(1) Cr.P.C. which is an exception to the right of bail on the statutory ground of delay under the third-proviso. Therefore, this bail application is dismissed.

Needless to state that the observations herein are tentative and shall not be construed to prejudice the case of either side at trial.

JUDGE

PA/SADAM