

**IN THE HIGH COURT OF SINDH
CIRCUIT COURT HYDERABAD**

Before:

Mr. Justice Mohammad Karim Khan Agha

Cr. Bail A. No.S-1239 of 2015.

Abdul Qadir alias Qadoo

v.

The State

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| Abdul Qadir alias Qadoo applicant | Through Mr. Ahsan Gul Dahri Advocate |
| Respondent the State Complainant | Through Mr. Shahid A. Shaikh, A.P.G. Through Mr. Abdul Hameed Jamali, Advocate |
| Date of hearing: | 03.04.2017. |
| Date of Order | 06-04-2017 |

ORDER

Mohammad Karim Khan Agha, J.-By this order I propose to dispose of the above mentioned post arrest bail application filed by Abdul Qadir (the applicant).

2. The brief facts of the case as per FIR 60 of 2012 lodged at PS Pabjo District Shaheed Benazirabad U/S 302, 337 (H) (ii) 34 PPC is that the applicant is accused, amongst other things, of murdering Rafique on account of enmity by making straight firing upon him with a double barrel shot gun whilst other co-accused Abdul Shakoor and Abdul Rasool made aerial firing.

3. The applicant was arrested on 15-10-12 and has remained in custody to date being a period of about 4 years and six months and

hence he has moved this application for the grant of bail on statutory grounds under S.497 Cr. PC. In support of his contentions he has placed reliance on dairy sheets of the learned trial court from 30-10-12 until 17-05-2016.

4. He has also placed reliance on the following authorities **Muhammad Afzal Butt alias APhi V. The State and others** (2015 S C M R 1696), **Abdullah v. The State** (1985 S C M R 1509), **Fida Hussain v. The State and others** (P L D 2002 Supreme Court 46), **Waheed alias Nahed v. The State** 2013 Y L R 335), **Naimat Khan v. The State** 2013 (P Cr. L J 1162), **Abdul Razak Zangejo v. The State** (P L D 2012 Sindh 218), **Syed Hasnain Raza Zaidi v. The State** (2012 Y L R 1496), **Rustam v. The State** (P L D 1986 Karachi 561), **Khuda Bux alias Khudo and 2 others v. The State** (1997 P Cr. L J 917), **Syed Muhammad Ali Hashmi v. The State** (1992 P Cr. L J 1178) and **Karimi Rahmatullah v. The State** (1993 P Cr. L J 733).

5. On the other hand learned APG has opposed the grant of bail on statutory grounds to the applicant on the grounds that the applicant had caused some of the delay, the seriousness of the offense, the direct and specific role given to the applicant and the fact that the complainant and 2 other PW's had already given evidence and that the trial was likely to conclude shortly.

6. Learned APG placed reliance on the following authorities **Sher Ali alias Sheri v. The State** (1998 S C M R 190) and **Murad ur Rehman v. The State and another** (2014 P Cr. L J 61).

7. Learned counsel for the complainant also opposed the grant of bail on statutory grounds to the applicant and largely adopted the arguments of the APG.

8. I have perused the record, considered the submissions of learned counsel and the relevant law along with the authorities cited by them.

9. It is clarified that I have only made a review of the dairy sheets and the relevant law and nothing in this order shall have any bearing on the trial proceedings which shall be determined on merit by the learned trial court after considering the evidence before it.

10. S.497 Cr.P.C. in so far as it relates to bail on statutory grounds is set out below in bold for ease of reference:

“497. When bail may be taken in case of non-bailable offence. (1) when any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years.

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

Provided further that a person accused of an offence as aforesaid shall not be released on bail unless the prosecution has been given notice to show cause why he should not be so released.

Provided further that the Court shall, except where it is of the opinion that the delay in the trial of the accused has been occasioned by any act or omission of the accused or any other person acting on his behalf, direct that any person shall be released on bail.

(a) who, being accused of any offence not punishable with death, has been detained for such offence for a continuous period exceeding one year or in case

of a woman exceeding six months and whose trial for such offence has not concluded; or

- (b) who, being accused of any offence punishable with death, has been detained for such offence for a continuous period exceeding two years and in case of a woman exceeding one year and whose trial for such offence has not concluded;

Provided further that the provisions of the foregoing proviso 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 Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life." (bold added)

11. It is clear from the above section that it will apply even to cases which may lead to the death sentence being imposed such as the instant case.

12. The following limbs need to **all** be satisfied in the instant case:

- (a) the delay in concluding the trial has not been caused by the applicant or anyone acting on his behalf and
- (b) the applicant has been in detention for a continuous period of 2 years and
- (c) the applicant has not been previously convicted for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

13. According to the applicant a review of the diary sheets reveal that from 30-10-12 until 17-05-2016. (i.e. approx 3 years and five months) the applicant has only been responsible for 3 delays. The first on 18-09-2013 which lasted approx 3 weeks, the second on

12-12-2013 which lasted approx 2 weeks and the third on 15-07-2015 again for approx 2 weeks. Thus, out of order sheets amounting to 3 years and five months the applicant has been responsible for delay for only about 7 weeks which leaves approx 3 years and 3 months detention on account of no fault of his own.

14. I have also reviewed the diary sheets which **potentially** show that delay has **also and in addition** been caused by the applicant on 25-11-2013 for 2 weeks, 29-01-2014 for 2 weeks, 02-04-2014 for 2 weeks, 16-04-2014 for 2 weeks, 19-03-2016 for 2 weeks, 09-4-2016 for two weeks and 23-4-2016 for two weeks. Making approx 14 weeks which when added to the earlier mentioned 7 weeks makes approx 21 weeks i.e. approx 5 months. Such adjournments have been requested on 10 separate occasions out of approx 99 hearings. It is also observed from the order sheets that the two co-accused (on bail) who are the brothers of the applicant have also caused delay through their absence on 09-10-2016 for 3 weeks which may have been in collusion with the applicant since they are his brothers in order to string the case out.

15. Thus, out of the approx 3 years and five months covered by the order sheets it appears that the applicant has been responsible for approx 5 months delay which would only leave 3 years continuous detention due to no fault of his own.

16. The order sheets end on 15-05-2016 and thus the applicant has been in detention for an additional period of 11 months since the date of the last order sheet (it being observed that neither the State nor the complainant alleged that the applicant caused any delay in this period) which would make a total of approx 4 years in detention due to no fault of the applicant.

17. Thus, in my view based on the material on record the applicant has spent approx 4 years in detention on account of no fault of his own or anyone acting on his behalf.

18. Neither the State nor the complainant has placed any evidence on record that the applicant has been previously convicted for an offence punishable with death or imprisonment for life or is a person who, in the opinion of the Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

19. I accept that when considering the grant of bail on the grounds of statutory delay it is not a simple mathematic calculation alone which needs to be undertaken but the entire conduct of the applicant and the proceedings are to be considered. The order sheets do reveal that some delay has been caused on the part of the applicant but a review of the order sheets reveal that the delay was mostly attributable to the prosecution/State or for circumstances beyond the control of the applicant such as case property not being produced, PW's not being present, PO on leave, lawyers strikes, adjourned due to want of time etc. I am of the view that the applicant should not suffer on account of these short comings of the state and the prosecution especially based on the particular facts and circumstances of this case where even after taking into account any delay caused on the applicants part he has still remained in detention for approx 4 years without the trial being completed. In my view in a murder case involving 3 accused (none of whom were absconders) and 11PW's 4 years and 6 months was more than sufficient time to conclude the trial provided that no substantial delay was caused by the applicant or any of the other accused as in this case.

20. It is true that the applicant has been charged with a very serious offense and has been given a direct and specific role however in my opinion this does not preclude the right to the grant of bail on the grounds of statutory delay. This is because a person is innocent until proven guilty and it is the duty of the state to carry out expeditious prosecutions rather than to allow the accused to languish in jail for years on end with out conclusion of his trial especially when little, if any, delay has been caused by the applicant or some one else acting on his behalf.

21. It is also observed that the 2 co accused in the case; although given the lesser role of aerial firing have been on pre arrest bail granted by the trial court for a considerable period of time which the State did not appeal, and that they have not absconded and are regularly appearing before the trial court. There are also a further 9 PW's to be examined which under the circumstances and based on the history of the case in my view the trial is unlikely to be completed within the next 6 months and as such it is likely to be an exercise in futility giving such a direction. It is also significant in my view that the learned trial court denied the applicant bail on statutory grounds on 08-09-2015 (approx 18 months ago) and did not allude to any delay caused by the applicant but rather largely dismissed the application (merits and statutory ground) on the ground of the applicants role and the fact that the complainant and one PW had already been examined. It appears that since this 18 months period only one further PW has been examined which tends to show the snails pace of the trial and that it is unlikely to be concluded in the near future

22. In respect of the case law cited by the State the case of **Murad ur Rehman (Supra)** is of little assistance as in that case it

found that the applicant was instrumental in the delay which is not the position in the instant case. Whereas the case of Sher Ali alias Sheri (Supra) tends to go against the State based on the particular facts and circumstances of this case since it provides at P.200 Para 10 as under:

“10. The above case-law indicates that under the third proviso to subsection (1) of section 497, Cr.P.C. an accused is entitled to bail as a matter of right if the statutory period mentioned either in clause (a) or clause (b) has expired and the trial has not been concluded in view of the use of the word ‘shall’. This right can be defeated only if the State or a complainant shows that the delay in trial is attributable to the accused person concerned. Once it is shown the above right is forfeited.” (bold added)

23. A delay as long as the one in this case (over 4 years) due to little fault on the part of the applicant also in my view appears to be unconscionable as was held by the Hon'ble Supreme Court in Abdullah's case (Supra) at P.1510. It is to be noted that bail was granted in this case when the petitioner was responsible for 5 delays and had been in custody for 2 and half years as opposed to 4.6 years in this case

“We had given notice yesterday to the Advocate-General, because we were disturbed by the gross delay in the hearing of the case and after examining the order sheet produced by Mr. Hayat Junejo, the learned Advocate-General admitted that the petitioner had been in custody for more than two years. He further drew our attention to the fact that the hearing of the case had been delayed on five occasions at the instance of the petitioner. That is true, but even if the period for which the case was adjourned at the petitioner's request are excluded the petitioner has been behind bars for more than two and a half years. Yet the learned Advocate-General is not able to give any assurance as to when the case would be heard. We are, therefore, satisfied that the petitioner is entitled to bail, because the delay in the hearing of the case, which is not due to his fault, is unconscionable. Accordingly, after hearing the learned

Advocate-General, we have converted the petition into an appeal, set aside the impugned order and released the petitioner on bail.” (bold added)

24. Likewise in the case of **Abdul Razzak (Supra)** it was held as under by this court in terms of undue delay in deciding a case in terms of statutory bail

“Expeditious and fair trial is fundamental right of accused persons. The intention of law is that criminal case must be disposed of without unnecessary delay. It will not be difficult to comprehend that inordinate delay in imparting justice was likely to cause erosion of public confidence in the judicial system on one hand, and on the other hand, it was bound to create a sense of helplessness and despair and feelings of frustration and anguish apart from adding to their woes and miseries. Reference may be made to 2003 MLD 19. At this juncture, I would also like to refer AIR 1941 Sindh 186, in which it was held that what the law contemplates is due diligence and impartiality in the prosecution of the criminal cases. It is not the law that a criminal case should linger on. Similarly in AIR 1942 Calcutta 219, it was held that policy of criminal law is to bring the accused persons to justice as speedily as possible so that if they are found guilty they may be convicted and if they are found innocent, they may be acquitted and discharged. In 2000 SCMR 107, the Hon’ble Supreme Court held that object of criminal prosecution is not to punish an under trial prisoner for the offence alleged against him. The object of criminal trial is that the accused is made to face the trial and answer the criminal charge against him.” (bold added)

25. In addition after an exhaustive study of the relevant Supreme and High Court authorities on the grant of bail on the grounds of statutory delay under S.497 Cr.PC this Court in the case of **Niamat Khan (Supra)** held as under

“16. From the perusal of above quoted judgments of the Honorable Supreme Court of Pakistan, it will be seen that through the amendment by section 3 of Act VIII of 2011 dated 20-4-2011 the applicant has been given independent right for grant of bail on the ground of statutory delay subject

to certain conditions provided therein. It has been the consistent view of the Honorable Supreme Court of Pakistan while dealing with the bail application on the ground of statutory delay and the Honorable apex Court had time and again ruled that above quoted newly-added amendment in the section 497, Cr. P.C. is statutory right which cannot be denied under the discretionary power of the Court to grant bail. The right of any accused to get bail under the aforesaid amendment in section 497, Cr.P.C. is not left to the discretion of the Court but is controlled by that provision. The bail under the newly-added proviso under section 497, Cr.P.C. can be refused to an accused by the Court only on the ground that the delay in the conclusion of the trial had occasioned on account of any act or omission on the part of the accused or any person acting on his behalf. The bail under the aforesaid provision can also be refused by the Court if the accused is previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the Court, is a hardened, desperate or dangerous criminal or is accused of any act of terrorism punishable with death or imprisonment for life." (bold added)

26. Thus, based on the particular facts and circumstances of the case and the application of the relevant law i.e. S.497 Cr.PC as interpreted by the Courts the applicant is enlarged on post arrest bail on statutory grounds subject to him furnishing a solvent surety of RS10 (ten) lacs and PR bond in the like amount to the satisfaction of the Additional Registrar of this Court.

This bail application is disposed of in the above terms

Hyderabad

Dated: 06-04-2017