

Present: Syed Mansoor Ali Shah, Qazi Muhammad Amin Ahmed and Amin-ud-Din Khan, JJ

MUHAMMAD SARFRAZ ANSARI---Petitioner

Versus

The STATE and others---Respondents

Criminal Petition No.435 of 2021, decided on 17th May, 2021.

(Against the order of Lahore High Court, Lahore dated 05.3.2021, passed in Crl. Misc. No.2378/B of 2020).

(a) Criminal Procedure Code (V of 1898)---

---S. 497---Qanun-e-Shahadat (10 of 1984), Art. 43---Bail---Accused implicated on basis of confessional statement of co-accused recorded under S. 164 of the Code of Criminal Procedure, 1898 (Cr.P.C)---Such confessional statement of a co-accused needed independent corroboration even at the bail stage.

Conviction of a co-accused could not be recorded solely on the basis of confessional statement of one accused unless there was also some other independent evidence corroborating such confessional statement. The principle ingrained in Article 43 of the Qanun-e-Shahadat was applied at the bail stage and the confessional statement of an accused could lead the court to form a tentative view about prima facie involvement of his co-accused in the commission of the alleged offence; but as in the trial, at the bail stage also, the prima facie involvement of the co-accused could not be determined merely on the basis of confessional statement of other accused without any other independent incriminating material corroborating the confessional statement.

Javed Masih v. State PLD 1994 SC 314; Faqir Ullah v. Khalil-uz-Zaman 1999 SCMR 2203; Mushtaq v. State 2012 SCMR 109; Naseem Malik v. State 2004 SCMR 283; Muhammad Irshad v. Muhammad Bashir 2006 SCMR 1292 and Ghulam Ahmed v. State 2013 SCMR 385 ref.

(b) Criminal Procedure Code (V of 1898)---

---S. 497---Bail---Appreciation of evidence---Scope---At bail stage the court was not to make deeper examination and appreciation of the evidence collected during investigation or to conduct anything in the nature of a preliminary trial to determine the accused's guilt or innocence---However, for deciding the prayer of an accused for bail, the question whether or not there existed reasonable grounds for believing that he had committed the alleged offence could not be decided in vacuum---Court, for answering the said question, had to look at the material available on record when the bail was applied for and be satisfied that there was, or was not, prima facie some tangible evidence which, if left unrebutted, may lead to the inference of the guilt of the accused.

Khalid Saigol v. State PLD 1962 SC 495 and Muhammad Hanif v. Manzoor 1982 SCMR 153 ref.

(c) Criminal Procedure Code (V of 1898)---

---S. 497(2)---Penal Code (XLV of 1860), Ss. 409, 420, 468, 471 & 109---Prevention of Corruption Act (II of 1947), S.5(2)---Criminal breach of trust by public servant, cheating and dishonestly inducing delivery of property, forgery for purpose of cheating, using as genuine a forged document, abetment, criminal misconduct---Bail, grant of---Further inquiry---Accused implicated on basis of confessional statement of co-accused---Co-accused stated in his confessional statement that the fake bills were prepared, and eighty percent of the withdrawn amount was taken by the accused---However, there was no sufficient material to corroborate the said statement---Recovered data from the mobile phone did not implicate the accused of the act besides it related to the sale tax invoices and contractor bills of a firm, which was different from the firms owned by the co-accused, in whose favour the alleged fake bills were encashed---Prosecution also failed to refer to any material to substantiate the finding recorded by the investigating officer that the accused, as a result of the fraud, had amassed wealth and purchased two apartments in a housing scheme---Accused being a former, and not a present, employee in the office of Controller Military Accounts prima facie had no control or influence on the matter of passing the alleged fake bills for encashment---Material currently available on record of the case was not sufficient to connect the accused with the commission of the alleged offences, and there were no reasonable grounds for believing that he had committed the alleged

offences; but there were sufficient grounds for further inquiry into his guilt in terms of S.497(2) of Cr.P.C.-
 --Petition for leave to appeal was converted into appeal and allowed, and accused was extended the concession of bail.

(d) Criminal Procedure Code (V of 1898)---

----S. 497---Bail, grant of---Discretion of Supreme Court---Scope---Practice of the Supreme Court was not to intervene in bail matters ordinarily, leaving them to the discretion of the courts inquiring into the guilt of the accused persons---However, in cases where the discretion was found to have been exercised arbitrarily, perversely or contrary to the settled principles of law, the Supreme Court did not hesitate to interfere with that wrong exercise of discretion, in the interest of justice.

Haider Mehmood Mirza, Advocate Supreme Court for Petitioner.

Moulvi Ijaz ul Haq, D.A.G. or the State.

Date of hearing: 17th May, 2021.

ORDER

SYED MANSOOR ALI SHAH, J.---Through this petition, the petitioner has sought leave to appeal against the order dated 05.03.2021, passed by the Lahore High Court, whereby his application seeking post-arrest bail in case FIR No.35 dated 07.8.2020, registered at Police Station FIA Anti-Corruption Circle, Islamabad, for the offences punishable under Sections 420, 468, 471, 409 and 109 of the Pakistan Penal Code, 1860 read with Section 5(2) of the Prevention of Corruption Act, 1947, was dismissed.

2. Facts of the case, as alleged in the FIR, briefly are that one Waqas Aslam ("co-accused"), in connivance with the officers/ officials of the office of Controller Military Accounts (CMA) fraudulently withdrew an amount of Rs.52,254,074/- through thirty three fake bills of Central Ordinance Depot (COD), Rawalpindi, in favour of his four firms and deposited in five different bank accounts of those firms, operated by him. It was mentioned in the FIR that the role of the other persons involved in the said fraud would be thrashed out during investigation. The co-accused, Waqas Aslam, implicated the present petitioner, an ex-official of the CMA, during investigation in his confessional statement recorded under Section 164 of the Code of Criminal Procedure, 1898 (Cr.P.C.), for being his partner in, rather mastermind of, the whole fraud. One Muhammad Haider Altaf, an official of the CMA, was also found to have abetted in the commission of the alleged offences, and was arrested in the case, during investigation; he has, however, been admitted to post arrest bail by the High Court vide order dated 12.11.2020.

3. We have heard the learned counsel for the parties and have gone through the record of the case. We have noticed that the petitioner is not nominated in FIR; he has rather been implicated in the case by the co-accused Waqar Aslam, the prima facie beneficiary of the alleged fraud, in his confessional statement during investigation, which has been relied upon by the learned counsel for the State to oppose the prayer of the petitioner for bail. No doubt, as per Article 43 of the Qanun-e-Shahadat Order, 1984 when more persons than one are being jointly tried for the same offence and a confession made by one of such persons admitting that the offence was committed by them jointly, is proved, the court may take into consideration the confessional statement of that co-accused as circumstantial evidence against the other co-accused(s). However, this Court has, in several cases,¹ held that conviction of a co-accused cannot be recorded solely on the basis of confessional statement of one accused unless there is also some other independent evidence corroborating such confessional statement. The principle ingrained in Article 43 of the Qanun-e-Shahadat is applied at the bail stage and the confessional statement of an accused can lead the court to form a tentative view about prima facie involvement of his co-accused in the commission of the alleged offence;² but as in the trial, at the bail stage also, the prima facie involvement of the co-accused cannot be determined merely on the basis of confessional statement of other accused without any other independent incriminating material corroborating the confessional statement. Therefore, we have to examine whether there is any other tangible incriminating material available on the record that corroborates the confessional statement of the co-accused, by connecting the petitioner with the commission of the alleged offences.

4. We are fully cognizant of the well-settled principle that at the bail stage the court is not to make deeper examination and appreciation of the evidence collected during investigation or to conduct anything

in the nature of a preliminary trial to determine the accused's guilt or innocence. However, for deciding the prayer of an accused for bail, the question whether or not there exist reasonable grounds for believing that he has committed the alleged offence cannot be decided in vacuum. The court, for answering the said question, has to look at the material available on record when the bail is applied for and be satisfied that there is, or is not, *prima facie* some tangible evidence which, if left un rebutted, may lead to the inference of the guilt of the accused.³

5. The co-accused, Waqar Aslam, stated in his confessional statement that the fake bills were prepared, and eighty percent of the withdrawn amount was taken by the present petitioner. However, there is no sufficient material to corroborate the said statement. The recovered data from the mobile phone does not implicate the petitioner of the act besides it relates to the sale tax invoices and contractor bills of a Firm, namely, Ali Traders, and not to the Firms owned by the co-accused, Waqar Aslam, in whose favour the alleged fake bills were encashed. The learned counsel for the State also failed to refer to any material to substantiate the finding recorded by the investigating officer that the petitioner, as a result of the above fraud, has amassed wealth and purchased two apartments in top housing schemes in Rawalpindi. The petitioner being a former, and not a present, employee in the office of C.M.A. *prima facie* had no control or influence on the matter of passing the alleged fake bills for encashment. We, therefore, find that the material currently available on record of the case is not sufficient to connect the accused with the commission of the alleged offences, and there are no reasonable grounds for believing that he has committed the alleged offences; but there are sufficient grounds for further inquiry into his guilt in terms of section 497(2) of Cr.P.C.

6. No doubt, it is the practice of this Court not to intervene in bail matters ordinarily, leaving them to the discretion of the courts inquiring into the guilt of the accused persons. However, in cases where the discretion is found to have been exercised arbitrarily, perversely or contrary to the settled principles of law, this Court does not hesitate to interfere with that wrong exercise of discretion, in the interest of justice. In the present case, the trial court and the High Court have not exercised their discretion in accordance with the principles of law governing such discretion. We, therefore, convert this petition into appeal and allow the same, and extend the concession of bail to the petitioner subject to his furnishing bail bond in the sum of Rs.500,000/- with two sureties in the like amount to the satisfaction of the trial Court. Needless to say that the observations made in this order are tentative and will not influence the trial Court while concluding the said case.

MWA/M-31/SC Bail granted.

¹ See Javed Masih v. State PLD 1994 SC 314; Faqir Ullah v. Khalil-uz-Zaman 1999 SCMR 2203 and Mushtaq v. State 2012 SCMR 109.

² See Naseem Malik v. State 2004 SCMR 283; Muhammad Irshad v. Muhammad Bashir 2006 SCMR 1292 and Ghulam Ahmed v. State 2013 SCMR 385.

³ See Khalid Saigol v. State PLD 1962 SC 495 and Muhammad Hanif v. Manzoor 1982 SCMR 153.