

Present: Umar Ata Bandial, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ

MUHAMMAD ARSHAD NADEEM---Appellant

Versus

The STATE---Respondent

Criminal Petition No.408-L of 2021, decided on 13th July, 2021.

(Against the order of Lahore High Court, Lahore dated 14.12.2020, passed in Crl. Misc. No. 62691-B of 2020).

Per Syed Mansoor Ali Shah, J; Umar Ata Bandial, J agreeing; Qazi Muhammad Amin Ahmed also agreeing but with different reasons.

(a) Supreme Court Rules, 1980---

---O.XXIII, R. 2, Second proviso.---Constitution of Pakistan, Art. 185(3)---Petition for leave to appeal in a criminal matter filed before the Supreme Court---Condonation of delay---Sufficient cause, determination of---Sufficiency of the cause was to be determined in each case on the basis of its own peculiar facts and circumstances.

Sherin v. Fazal Muhammad 1995 SCMR 584 ref.

(b) Supreme Court Rules, 1980---

---O.XXIII, R. 2, Second proviso.---Constitution of Pakistan, Arts. 9, 10A, 14, 185(3)---Petition for leave to appeal in a criminal matter filed before the Supreme Court---Condonation of delay---Sufficient cause--
-In cases relating to imprisoned accused (seeking post-arrest bail) or convicted persons sufficient cause for condoning delay was to be viewed through the lens of fundamental rights to liberty, dignity and fair trial, and determined with a lenient and liberal approach for providing such persons with equal access to court and proper opportunity to defend themselves---Person approaching a court of law for the redressal of his grievance from behind bars, suffered a disability in comparison to those who enjoyed liberty and freedom of movement---Incarceration of an accused seeking post arrest bail by itself constituted sufficient cause to allow condonation of delay, unless it was established that the delay was caused by the accused due to some ulterior motive.

Per Syed Mansoor Ali Shah, J [Majority view]

Consistent practice of the Supreme Court was to lean in favour of deciding on merits, the petitions including jail petitions, for leave to appeal and the appeals filed by or on behalf of the persons imprisoned against their convictions and sentences by condoning the delay with a lenient and liberal approach, in the interest of justice. The reason for taking such a permissive view of sufficient cause in the said cases appeared to be founded on the assumption that a person behind bars had a restricted access to the outside world; as a result he faced numerous impediments in pursuing his legal remedies before the courts. The delay, therefore, usually occurred due to constraints imposed on him for being in prison and not because of his contumacious conduct or some ulterior purpose.

Muhammad Bakhsh v. State 1968 SCMR 1269; Amjad Ali v. M.C.B. 2002 CLD 1143; Mureed v. State 2003 SCMR 64; Zafar v. Muhammad Abad 2011 SCMR 218 and Director FBR v. Akhtar Zaman 2011 SCMR 1951 distinguished.

Muhammad Nawaz v. State PLD 2002 SC 287; Qalab Ali v. Sipahia 2005 SCMR 1857; Badar Munir v. State 2009 SCMR 569; Razia v. State 2009 SCMR 1428; Muhammad Fayyaz v. State 2012 SCMR 522; Faiz-Ur-Rehman v. State 2012 SCMR 538 and Asia Bibi v. State PLD 2019 SC 64 ref.

In a criminal case where the liberty and freedom of a person was at stake, sufficient cause was to be viewed by the Court through the lens of fundamental rights guaranteed under the Constitution, in particular through the right to liberty, dignity and fair trial guaranteed to an accused under Articles 9, 14 and 10A of the Constitution, which primarily translated into providing the accused, behind bars, with equal access to court and proper opportunity to defend and avail remedies allowed by law, as were available to a free person.

The reasons to condone delay in jail petitions or criminal appeals filed against convictions applied with same force to matters of post-arrest bail, as it also attracted the right to liberty, human dignity and fair trial. A person approaching a court of law for the redressal of his grievance from behind bars, suffered a disability in comparison to those who enjoyed liberty and freedom of movement. Therefore, incarceration of the accused-petitioner seeking post arrest bail by itself constituted sufficient cause to allow condonation of delay, unless it was established that the delay was caused by the petitioner due to some ulterior motive. Per Qazi Muhammad Amin Ahmed, J [agreeing with his own views]

Supreme Court being the highest Court of appeal ordinarily did not interfere with the discretion exercised by a High Court in bail matters, if found reasonably within the remit of law; it was only in those extraordinary situations, manifestly requiring further probe into the guilt of an offender that may represent a compelling option for the Supreme Court to substitute finding recorded by the High Court and in so doing the Supreme Court had shown a consistent generosity in condoning a belated approach beyond prescribed period of limitation. It was even more generous in examining the propriety of a conviction, impugned beyond the period of limitation.

Prosecution of offences was essentially a State attribute as well as a responsibility that it owed to its people to protect their life and liberty; it was also important to safeguard the society by placing an effective and meaningful control on criminal behaviour to deter the potential offenders and it was for this reason that right of freedom was subject to observance of laws as well as under the shadow of equal protection thereof. However, the forfeited freedom may be restored through recourse to mechanisms provided under the procedural law. Grant of bail, having regard to the categories of offences providing different sentences, was one form of restoration of interim freedom pending trial. Thus, in the given statutory framework, consideration of a motion warranted a dynamic and liberal approach being the only appropriate course to ensure a judicial oversight on an unjustified detention, though temporary, even beyond the prescribed period of limitation as it conferred no vested right on the prosecution.

Another reason for this latitude was that flux of time could not validate a flawed adjudication in criminal jurisdiction involving one sided irreversible corporeal consequences for an alleged offender and, thus, such a liberal approach was most essential to ensure safe administration of criminal justice.

Per Syed Mansoor Ali Shah, J [Majority view]

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

---S. 497---Constitution of Pakistan, Art. 185(3)---Petition for leave to appeal before the Supreme Court seeking bail---Bail, grant of---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, unless it was found that those courts had exercised the discretion arbitrarily, perversely or contrary to the settled principles of law regulating bail matters.

Haq Nawaz v. State 1969 SCMR 174 and Zaro v. State 1974 SCMR 11 ref.

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

---S. 497---Constitution of Pakistan, Art. 185(3)---Petition for leave to appeal before the Supreme Court seeking bail---Offence falling within prohibitory clause of S.497(1), Cr.P.C---Bail, grant/refusal of---Principles.

Bail was not to be withheld as a punishment. However, refusal of bail to an accused found *prima facie* involved in the commission of offences falling within the prohibitory clause of section 497(1), Cr.P.C. was not a punitive measure but was more of a preventive step, taking care of the bi-focal interests of justice towards the right of the individual involved and the interest of the society affected. The law presumed that the severity of the punishment provided for offences falling within the prohibitory clause of section 497(1), Cr.P.C. was such that it was likely to induce the accused person to avoid conviction by escaping trial or by tampering with the prosecution evidence including influencing the prosecution witnesses. The law allowed bail, in such cases, if there were no reasonable grounds for believing that the accused had committed a non-bailable offence, but there were sufficient grounds for further inquiry into his guilt. Otherwise by declining bail, the courts ensured the presence of the accused person to face trial and protect the prosecution

evidence from being tampered with or the prosecution witness from being influenced. The courts attempted to balance the interest of the society in bringing the offenders to justice and the presumption of innocence in favour of the accused person, by determining whether or not there were reasonable grounds for believing that the accused person had committed the offence, in exercising their discretion to grant or decline the relief of bail.

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

---S. 497---Constitution of Pakistan, Art. 185(3)---Penal Code (XLV of 1860), Ss. 409, 420, 468, 471, 477-A & 109---Prevention of Corruption Act (II of 1947), S. 5(2)---Preparing forged deed, managing fake Bank guarantees, and misappropriation of public money---Bail, refusal of---Allegation against the accused was that he along with the co-accused prepared forged deed of Joint Venture for a builder and contractor, obtained two construction contracts worth Rs.67,92,88,000/- on the basis of that deed for construction of the building of the government school, managed fake Bank guarantees, and misappropriated an amount of Rs.13,79,06,538/- of the Provincial Government paid for construction of the building of the school---Counsel for accused was unable to explain why the accused had been a beneficiary of Rs 20 million, in the absence of any construction supplies made to the contractors of the Joint Venture---Counsel although submitted that said payment was the commission due to the accused, yet remained unable to explain the nature of the said commission---In such background, the conclusion of the High Court that there were reasonable grounds for believing that the accused had committed the offences alleged was consistent with the incriminating material available on the record of the case, and was in no manner perverse or arbitrary--Petition for leave to appeal was dismissed, and accused was refused bail.

Zahid Saleem, Advocate Supreme Court for Petitioner.

Syed Nayab Hussain Gardezi, D.A.G. for the State with Aftab Gohar, S.I.

Syed Najaf Hussain Shah, Advocate Supreme Court for the Complainant.

Date of hearing: 13th July, 2021.

ORDER

SYED MANSOOR ALI SHAH, J.--- Application for condonation of delay in a post-arrest matter Crl. M. A. No. 123-L of 2021

There is a delay of 72 days in filing the present petition for leave to appeal against the order of the High Court whereby post-arrest bail has been declined to the petitioner. In the application for condonation of delay the petitioner submits that he is behind bars and there is no male member in his family to pursue the case; the delay has occurred in contacting and engaging the counsel for filing the petition, hence it is neither deliberate nor intentional. The counsel for the State and the complainant have opposed the application and have placed reliance on the judgments of this Court reported as Muhammad Bakhsh v. State 1968 SCMR 1269, Amjad Ali v. M.C.B. 2002 CLD 1143, Mureed v. State 2003 SCMR 64, Zafar v. Muhammad Abad 2011 SCMR 218 and Director FBR v. Akhtar Zaman 2011 SCMR 1951.

2. Rule 2 of Order XXIII, Supreme Court Rules, 1980 provides that a Petition for leave to appeal, under Article 185(3) of the Constitution, in criminal matter shall be lodged within thirty days from the date of judgment or final order sought to be appealed from. The second proviso to the said Rule authorizes the Court to condone the delay, if "sufficient cause" is shown. The expression "sufficient cause" cannot be defined with any precision or exactitude; the sufficiency of the cause is, therefore, to be determined in each case on the basis of its own peculiar facts and circumstances.¹

3. It has been the consistent practice of this Court to lean in favour of deciding on merits, the petitions including jail petitions, for leave to appeal and the appeals filed by or on behalf of the persons imprisoned against their convictions and sentences by condoning the delay with a lenient and liberal approach, in the interest of justice.² The reason for taking such a permissive view of "sufficient cause" in the said cases appears to be founded on the assumption that a person behind bars has a restricted access to the outside world; as a result he faces numerous impediments in pursuing his legal remedies before the courts. The delay, therefore, usually occurs due to constraints imposed on him for being in prison and not because of his contumacious conduct or some ulterior purpose. In a criminal case where the liberty and freedom of a

person is at stake, "sufficient cause" is to be viewed by the Court through the lens of fundamental rights guaranteed under the Constitution, in particular through the right to liberty, dignity and fair trial guaranteed to an accused under Articles 9, 14 and 10A of the Constitution, which primarily translates into providing the accused, behind bars, with equal access to court and proper opportunity to defend and avail remedies allowed by law, as are available to a free person.

4. The reasons to condone delay in jail petitions or criminal appeals filed against convictions applies with same force to matters of post-arrest bail, as it also attracts the right to liberty, human dignity and fair trial. It would be fair to assume that a person approaching a court of law for the redressal of his grievance from behind bars, suffers a disability in comparison to those who enjoy liberty and freedom of movement. Therefore, incarceration of the petitioner seeking post arrest bail by itself constitutes "sufficient cause" to allow condonation of delay, unless it is established that the delay was caused by the petitioner due to some ulterior motive.

5. The cases referred to and relied upon by the counsel for the State and the counsel for the complainant have different facts and do not negate the said rule of practice. The cases of Zafar and Akhtar Zaman relate to petitions for leave to appeal filed by the complainants and not by the imprisoned accused persons. They were filed against bail granting order and not against refusal of bail and order refusing to cancel the bail granted, respectively. The case of Amjad Ali arose out of a civil matter, i.e., an application for setting aside an ex-parte decree. In the case of Mureed, the Court after hearing the argument of the parties, dismissed the petition on merits as well as on the ground of limitation, and not solely on the point of limitation. In the case of Muhammad Bakhsh, the ground of ignorance of law, viz, "a relative of the petitioners who was pursuing the case for them was under the impression that there was no time limit for filing a petition in this Court in a bail matter" was pleaded for condoning the delay which the Court did not accept stating it to be "manifestly untenable." Even otherwise, there is no discussion in these cases on the points deliberated above; they can, therefore, hardly be cited as guiding precedents on the point.

6. The ground stated by the petitioner for condonation of the delay, in the present case, has not been disputed on behalf of the State and the complainant. We, therefore, accept it as a "sufficient cause" for condoning the delay, in the facts and circumstances of the present case, by following the practice of taking a lenient and permissive view in cases of persons imprisoned, for the above reasons. We, therefore, allow the application and condone the delay.

Petition for leave to appeal

CrI.P.L.A. No. 408-L of 2021

7. The petitioner seeks leave to appeal against order dated 04.11.2020 of the High Court whereby his application for grant of post-arrest bail filed under section 497, Cr.P.C. has been dismissed, in case FIR No.37/2020 dated 07.10.2020 registered at Police Station FIA/CCC, Lahore for the offences under sections 409, 420, 468, 471, 477-A/ 109 of the P.P.C., and section 5 of the Prevention of Corruption Act, 1947.

8. As per the crime report (FIR), the allegations against the petitioners, briefly stated, are that he along with other co-accused prepared forged deed of Joint Venture for Ajwad Builders with Mehsud Engineers and Contractors, obtained two construction contracts of worth Rs.67,92,88,000/- on the basis of that deed for construction of the building of the Danish School in District Bhakkar, managed fake bank guarantees, and misappropriated an amount of Rs.13,79,06,538/- of the Punjab Government paid for construction of the building of the Danish School.

9. We have heard the arguments of the learned counsel for the parties, on merits of the petition, at some length and perused the record of the case minutely.

10. The High Court, after thorough and careful examination of the material available on record of the case, has observed in the impugned order that "there is sufficient incriminating material available on record showing strong nexus of the petitioner with this case", and has therefore declined the grant of relief of post-arrest bail to the petitioner. 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, unless it is found that those courts have exercised the discretion arbitrarily, perversely or contrary to the settled principles

of law regulating bail matters.³ The learned counsel for the petitioner has failed to point out that the said observation of the High Court and the exercise of discretion in declining the relief of bail to the petitioner in offences, some of which fall within the prohibitory clause of section 497(1), Cr.P.C. as well as the prohibitory provisions of Section 5(6) of the Offences in Respect of Banks (Special Courts) Ordinance, 1984, are the result of gross misreading of the material available on record, and are thus arbitrary and perverse, or that the High Court has acted contrary to some settled principle of law in exercise of that discretion.

11. It is by now well-established that bail is not to be withheld as a punishment. However, refusal of bail to an accused found *prima facie* involved in the commission of offences falling within the prohibitory clause of section 497(1), Cr.P.C. is not a punitive measure but is more of a preventive step, taking care of the bi-focal interests of justice towards the right of the individual involved and the interest of the society affected. The law presumes that the severity of the punishment provided for offences falling within the prohibitory clause of section 497(1), Cr.P.C. is such that it is likely to induce the accused person to avoid conviction by escaping trial or by tampering with the prosecution evidence including influencing the prosecution witnesses.⁴ The law allows bail, in such cases, if there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt. Otherwise by declining bail, the courts ensure the presence of the accused person to face trial and protect the prosecution evidence from being tampered with or the prosecution witness from being influenced. The courts attempt to balance the interest of the society in bringing the offenders to justice and the presumption of innocence in favour of the accused person, by determining whether or not there are reasonable grounds for believing that the accused person has committed the offence, in exercising their discretion to grant or decline the relief of bail.

12. In the present case, the learned counsel for the petitioners has been unable to explain why the petitioner has been a beneficiary of Rs. 20 million, in the absence of any construction supplies made to the contractors of the Joint Venture. The learned counsel although submitted the said payment was the "commission" due to the petitioner, yet remained unable to explain the nature of the said commission. In this background, we find that the conclusion of the High Court that there are reasonable grounds for believing that the petitioner has committed the offences alleged is consistent with the incriminating material available on the record of the case, and is in no manner perverse or arbitrary. The impugned order, therefore, does not call for any interference by this Court. The petition being devoid of merit is hereby dismissed. It is needless to mention that the observations made in the impugned order as well as in this order are tentative and shall not influence the trial court while concluding the case after recording evidence.

Sd/-

JUDGE

Sd/- Sd/-

JUDGE JUDGE

QAZI MUHAMMAD AMIN AHMED, J.---I agree with the conclusions drawn by Syed Mansoor Ali Shah, J. with concurrence of Umar Ata Bandial, J., Judges with erudition par excellence, both on condonation of delay in filing of Criminal Petition No.408-L of 2021 as well as its dismissal on merit, however, my agreement on condonation of delay in filing of criminal petitions, both by under-trial prisoners or convicts, is structured upon reasons, somewhat different; these are elaborated below:

Though the Statutes provide period of limitation for filing an appeal against conviction or acquittal, as the case may be, there is no timeframe restricting an under-trial prisoner to make a motion for his release on bail before a Magisterial Court, Court of Session or the High Court pending conclusion of the trial, however, his approach to the Supreme Court for interlocutory relief, through leave of the Court, is subject to a statutory timeframe. The Supreme Court being the highest Court of appeal ordinarily does not interfere with the discretion exercised by a High Court in bail matters, if found reasonably within the remit of law; it is only in those extraordinary situations, manifestly requiring "further probe" into the guilt of an offender

that may represent a compelling option for this Court to substitute finding recorded by the High Court and in so doing the Court has shown a consistent generosity in condoning a belated approach beyond prescribed period of limitation. It is even more generous to examine the propriety of conviction, impugned beyond the period of limitation.

Prosecution of offences, injury to an individual notwithstanding, is essentially a State attribute as well as a responsibility that it owes to its people to protect their life and liberty; it is also important to safeguard the society by placing an effective and meaningful control on criminal behaviour to deter the potential offenders and it is for this reason that right of freedom is subject to observance of laws as well as under the shadow of equal protection thereof. However, the forfeited freedom may be restored through recourse to mechanisms provided under the procedural law, principles whereof are by now well settled. Grant of bail, having regard to the categories of offences providing different sentences, is one form of restoration of interim freedom pending trial and, thus, in the given statutory framework, consideration of a motion warrants a dynamic and liberal approach being the only appropriate course to ensure a judicial oversight on an unjustified detention, though temporary, even beyond the prescribed period of limitation as it confers no vested right on the prosecution.

Yet another reason for this latitude is that flux of time cannot validate a flawed adjudication in criminal jurisdiction involving one sided irreversible corporeal consequences for an alleged offender and, thus, such a liberal approach is most essential to ensure safe administration of criminal justice.

Sd/-
JUDGE

MWA/57/SC Bail refused.

¹ See *Sherin v. Fazal Muhammad* 1995 SCMR 584.

² See *Muhammad Nawaz v. State* PLD 2002 SC 287; *Qalab Ali v. Sipahia* 2005 SCMR 1857; *Badar Munir v. State* 2009 SCMR 569; *Razia v. State* 2009 SCMR 1428; *Muhammad Fayyaz v. State* 2012 SCMR 522; *Faiz-Ur-Rehman v. State* 2012 SCMR 538 and *Asia Bibi v. State* PLD 2019 SC 64

³ See *Haq Nawaz v. State* 1969 SCMR 174 and *Zaro v. State* 1974 SCMR 11.

⁴ The constitutionality of the presumption as embodied in the prohibitory clause of section 497(1), Cr.P.C., wherein an accused, applying for bail is not provided with an opportunity to rebut it, is yet open to examination on the touchstone of the fundamental rights.