

Present: Sardar Tariq Masood, Syed Mansoor Ali Shah and Jamal Khan Mandokhail, JJ

NADEEM SAMSON---Appellant

Versus

The STATE and others---Respondents

Criminal Petition No. 1016-L of 2021, decided on 6th January, 2022.

(Against the order dated 08.06.2021 passed by the Lahore High Court in Criminal Miscellaneous No.20944-B of 2021).

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

---S. 497---Withdrawal of first bail petition without any arguments---Second bail petition, filing of---Fresh grounds---Scope---Withdrawal of an earlier bail petition before addressing any argument on the merits of the case, does not preclude filing of a subsequent bail petition for the same relief on the same grounds before the same court.

Nazir Ahmed v. State PLD 2014 SC 241 ref.

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

---S. 497---First bail petition before the High Court dismissed as withdrawn with direction to the Trial Court for expeditious conclusion of the trial---Second bail petition, filing of---Fresh grounds---Scope---Non-compliance by the Trial Court of the direction to conclude the trial within the specified period per se is not a fresh ground for bail only to the extent that an accused cannot, claim bail on this ground as a matter of right, but it is certainly a fresh ground to be assessed and examined by the court for exercise of its discretion in either way, in the overall facts and circumstances of the case.

Talat Ishaq v. National Accountability Bureau PLD 2019 SC 112 ref.

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

---S. 497(1), third and fourth provisos---Bail---Delay in conclusion of the trial---Scope of statutory bail under third proviso to S.497(1), Cr.P.C explained.

(i) The purpose and object of the third proviso to section 497(1), Cr.P.C. is to ensure that the trial of an accused is conducted and concluded expeditiously, and that the pre-conviction detention of an accused does not extend beyond the period of two years in cases involving an offence punishable with death, or one year in other cases;

(ii) The period of one year or two years, as the case may be, for the conclusion of the trial begins from the date of the detention of the accused in the case, not from the date when the charge is framed and trial commenced;

(iii) A statutory right to be released on bail accrues in favour of the accused if his trial is not concluded within the specified period, i.e., exceeding one year or two years as the case may be, from the date of his detention;

(iv) This statutory right of the accused to be released on bail is, however, subject to two exceptions: one is embodied in the 3rd proviso itself and the second is provided in the 4th proviso, which are: (a) the delay in conclusion of the trial is occasioned by an act or omission of the accused or by any other person acting on his behalf, and (b) the accused is a convicted offender for an offence punishable with death or imprisonment for life, or is in the opinion of the court a hardened, desperate or dangerous criminal, or is accused of an act of terrorism punishable with death or imprisonment for life;

(v) 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 for 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;

(vi) Any delay attributable to the accused after the expiry of the periods stipulated under the 3rd proviso to section 497(1) Cr.P.C. is not relevant for determining his right to be released on bail on the statutory ground; and

(vii) The phrase a hardened, desperate or dangerous criminal denotes an accused who is likely to seriously injure and hurt others without caring for the consequences of his violent act and will pose a serious threat to the society if set free on bail. Such tentative finding as to character of the accused must be based upon careful examination of the facts and circumstances of the case, supported by sufficient incriminating material.

Saif-ul-Malook, Advocate Supreme Court for Petitioner.

Syed Nayab Hasan Gardezi, D.A.G. for the State.

Date of hearing: 6th January, 2022.

ORDER

SYED MANSOOR ALI SHAH, J.---The petitioner seeks leave to appeal against the order dated 08.06.2021 passed by the Lahore High Court, whereby the post-arrest bail, on the statutory ground of delay of over two years in the conclusion of the trial since his detention, has been denied to him in case FIR No. 123/2017 registered for offences punishable under sections 3, 4, 11, 13, 16 and 20 of the Prevention of Electronic Crimes Act 2016. ("PECA") and sections 295A, 295C, 298A, 419, 420, 468, 471 and 109 of the Pakistan Penal Code 1860 ("P.P.C.").

2. The allegations against the petitioner, briefly stated, are that he created a fake Facebook account in the name of complainant (respondent No.3) and posted blasphemous material on the said account. The case FIR No. 123/2017 was registered against him on 23.11.2017, and he was also arrested on the same date. Since that date, he is detained and his trial has not yet been concluded.

3. As a background, the petitioner moved a post arrest bail petition¹, among others, on the ground of statutory delay under the 3rd proviso to section 497(1), Cr.P.C. on 27.02.2020, which was dismissed by the trial court on 10.06.2020. The petitioner approached the High Court praying for the same relief; however, on the date of hearing, counsel for the petitioner, instead of arguing the petition on merits, withdrew the petition praying for a direction to the trial court to conclude the trial within a period of three months, which was accordingly passed by the High Court. The trial could not be concluded within the direction period, and the petitioner once again approached the High Court through a fresh bail petition² mainly agitating the ground of statutory delay in conclusion of the trial. The High Court dismissed the bail petition vide the impugned order dated 08.06.2021, by considering the conduct of the petitioner in the trial proceedings during the direction period of three months. The High Court found that it was the petitioner who had failed to cross-examine the prosecution witnesses during the said period; therefore, the delay was attributable to him. With this finding, the High Court denied the relief of post arrest bail to the petitioner. Hence this petition.

4. Learned counsel for the petitioner has submitted that the first bail petition before the High Court had not been argued on merits and was simply withdrawn availing the option of a direction to the trial court for expeditious conclusion of the trial within the specified period. Therefore, the second bail petition was as good as the first bail petition and had to be heard on merits. He argued that the petitioner was arrested on 24.11.2017 and the first prosecution witness was recorded on 27.02.2020 after over a period of two years and during that period, except the framing of the charge on 03.04.2018, no proceedings took place; therefore, the right to be released on bail on the basis of the lapse of the statutory period of two years from the date of detention had accrued to the petitioner on 25.11.2019 and any conduct of the petitioner after that date was not relevant. He has, in this regard, relied upon the judgment of this Court passed in *Shakeel Shah v. State*³.

5. Learned Deputy Attorney General, appearing for the State, has submitted that after the dismissal of the first bail petition with a direction to the trial court for expeditious conclusion of the trial, the second bail petition could have been filed by the petitioner only on any fresh ground which was not available at the time of the first bail petition, and that the statutory ground of delay in conclusion of the trial was

available to the petitioner at the time of the first bail petition, therefore it was not a fresh ground for the second bail petition, nor could the non-compliance with the said direction constitute a fresh ground for maintaining a second bail petition. He has placed reliance upon the Talat Ishaq case⁴ and Nazir Ahmed case⁵, in support of his submissions.

6. We have considered the arguments of the parties, read the cases cited by them and examined the record of the case.

7. There is no mention of arguments made by the counsel for the petitioner in the order of the High Court whereby the first bail petition of the petitioner had been dismissed as withdrawn with direction to the trial court for expeditious conclusion of the trial. As the presumption is always in favour of the negative (*semper praesumitur pro negante*), we are to assume, and proceed on that assumption, that arguments had not been advanced by the counsel for the petitioner before the High Court in that bail petition. Withdrawal of an earlier bail petition before addressing any argument on the merits of the case, as held by this Court in the Nazir Ahmed case, does not preclude filing of a subsequent bail petition for the same relief on the same grounds before the same court. Therefore, we see no bar on the petitioner to agitate statutory ground of delay in conclusion of his trial, which was available to him at the time of withdrawal of first bail petition, before the High Court in the second bail petition. While the second submission of the counsel for the State that the non-compliance of the direction to conclude the trial within the specified period per se is not a fresh ground for bail is correct only to the extent that an accused cannot, as held by this Court in the Talat Ishaq case, claim bail on this ground as a matter of right, but it is certainly a fresh ground to be assessed and examined by the court for exercise of its discretion in either way, in the overall facts and circumstances of the case. Before us, however, the counsel for the petitioner has not pressed non-compliance of the direction as a ground for grant of bail to the petitioner, he instead has argued for right of the petitioner to be released on bail on the statutory ground of delay within the scope of the 3rd proviso to section 497(1), Cr.P.C.

8. The scope of the 3rd proviso to section 497(1), Cr.P.C. has recently been expounded by this Court in the Shakeel Shah case, cited by the counsel for the petitioner, by examining and interpreting its provisions as well as the provisions of the related 4th proviso, in detail. We, therefore, think it unnecessary to re-examine the scope of those provisos again in this case, especially when we find ourselves in agreement with what has been held in that case. What we consider appropriate to do is to recapitulate the main principles enunciated therein, as to the meaning, extent and scope of the 3rd proviso, for clear understanding of, and compliance by, all the other courts in the country in terms of Article 189 of the Constitution of the Islamic Republic of Pakistan 1973. They are:

- (i) The purpose and object of the 3rd proviso to section 497(1), Cr.P.C. is to ensure that the trial of an accused is conducted and concluded expeditiously, and that the pre-conviction detention of an accused does not extend beyond the period of two years in cases involving an offence punishable with death, or one year in other cases;
- (ii) The period of one year or two years, as the case may be, for the conclusion of the trial begins from the date of the detention of the accused in the case, not from the date when the charge is framed and trial commenced;
- (iii) A statutory right to be released on bail accrues in favour of the accused if his trial is not concluded within the specified period, i.e., exceeding one year or two years as the case may be, from the date of his detention;
- (iv) This statutory right of the accused to be released on bail is, however, subject to two exceptions: one is embodied in the 3rd proviso itself and the second is provided in the 4th proviso, which are:
 - (a) the delay in conclusion of the trial is occasioned by an act or omission of the accused or by any other person acting on his behalf, and
 - (b) the accused is a convicted offender for an offence punishable with death or imprisonment for life, or is in the opinion of the court a hardened, desperate or dangerous criminal, or is accused of an act of terrorism punishable with death or imprisonment for life.

- (v) 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 for 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; and
- (vi) The phrase "a hardened, desperate or dangerous criminal" denotes an accused who is likely to seriously injure and hurt others without caring for the consequences of his violent act and will pose a serious threat to the society if set free on bail. Such tentative finding as to character of the accused must be based upon careful examination of the facts and circumstances of the case, supported by sufficient incriminating material.

In the light of the above principles, we proceed to appreciate the statutory ground of delay in conclusion of the trial pleaded by the counsel for the petitioner, for grant of bail to the petitioner.

9. The petitioner was arrested and detained, in this case, on 24.11.2017. The charge against the petitioner was framed on 03.04.2018. Two prosecution witnesses were recorded on 27.02.2020. Till that date, a continuous period of exceeding two years since the detention of the petitioner in the case had lapsed without conclusion of the trial; therefore, a right to be released on bail had prima facie accrued to the petitioner, which could have been denied to the petition only if his case fell into any of the above-stated two exceptions: (a) if the delay in conclusion of the trial had been occasioned by an act or omission of the petitioner or by any other person acting on his behalf, and (b) if the petitioner was found to be a convicted offender for an offence punishable with death or imprisonment for life, or was in the opinion of the court a hardened, desperate or dangerous criminal, or was accused of an act of terrorism punishable with death or imprisonment for life.

10. We have examined the record of the case and found that there is no delay in conclusion of the trial till expiry of the two year period of detention of the petitioner on 25.11.2019, which can be attributed to the petitioner or to any person acting on his behalf reflecting a design or pattern to consciously delay the conclusion of the trial. Any delay attributable to the petitioner after the expiry of the said period is not relevant for determining his right to be released on bail on the statutory ground provided in the 3rd proviso to Section 497(1), Cr.P.C. Nor he appears, in the facts and circumstances of the case, to be a hardened, desperate or dangerous criminal" who is likely to seriously injure and hurt others without caring for the consequences of his violent act and will thus pose a serious threat to the society if set free on bail. The petitioner is, therefore, entitled to be released on bail as a matter of right, not as a concession. The delay in conclusion of the trial, noted by the High Court, attributable to the counsel for the petitioner representing him before the trial court, relates to the period after expiry of the continuous two year period since detention of the petitioner in the case; therefore, it could not have been considered by the High Court for determining the right of the petitioner to be released on bail under the 3rd proviso to section 497(1), Cr.P.C.

11. The High Court has thus failed to correctly appreciate the scope of the 3rd proviso to section 497(1), Cr.P.C. This petition is, therefore, converted into appeal and allowed: the impugned order is set aside, the bail petition of the petitioner is accepted and he is admitted to post-arrest bail 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. MWA/N-1/SC Bail granted.

[1](#) Criminal Miscellaneous No. 42206/B/2020.

[2](#) Criminal Miscellaneous No. 20944/B/2021

- 3 Criminal Petition No. 1072/2021 decided on 04.10.2021, available online at https://www.supremecourt.gov.pk/downloads_judgements/crl.p._1072_2021.pdf
- 4 Talat Ishaq v. National Accountability Bureau PLD 2019 SC 112.
- 5 Nazir Ahmed v. State PLD 2014 SC 241.