

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

Syed RAZA HUSSAIN BUKHARI---Petitioner

Versus

The STATE through D.A.G. and others---Respondents

Criminal Petition No. 636 of 2022, decided on 10th August, 2022.

(Against the order of the Lahore High Court, Lahore, dated 28.04.2022 passed in CrI. Misc. No.20132-B of 2022).

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

---Ss. 497(1), third proviso, 497(2) & 561-A---Offences in Respect of Banks (Special Courts) Ordinance (IX of 1984), Ss. 5(6) & 12---Constitution of Pakistan, Arts. 9, 10A, 14 & 199---Scheduled offences under the Offences in Respect of Banks (Special Courts) Ordinance, 1965---Bail---Delay in conclusion of the trial---Principles relating to grant of post arrest bail on the ground of delay in the conclusion of trial in respect of offences falling under the Offences in Respect of Banks (Special Courts) Ordinance, 1984 ('the Ordinance') and the Constitutional jurisdiction of the High Court to grant bail stated.

Section 5(6) of the Offences in Respect of Banks (Special Courts) Ordinance, 1984 ('the Ordinance') has borrowed the language of the second part of Section 497(1), Cr.P.C., which extends to offences falling under the prohibitory clause, and has made it applicable to all the scheduled offences under the Ordinance. However, the exceptions of prohibitory clause of Section 497(1), Cr.P.C. have not been so adopted and made applicable to the scheduled offences under the Ordinance. Therefore, the only ground for grant of bail in a schedule offence under the Ordinance is that which is provided in Section 497(2) Cr.P.C., that is, if the court finds that there are no reasonable grounds for believing that the accused has committed the Scheduled Offence and that there are sufficient grounds for further inquiry into his guilt.

Allied Bank of Pakistan v. Khalid Farooq 1991 SCMR 599 and Chaudhry Shujat Hussain v. State 1995 SCMR 1249 ref.

Delay in the conclusion of a criminal trial is antithetic to the very concept of a fair trial and due process guaranteed by Article 10A of the Constitution. Conclusion of trial within a reasonable time is an essential component of the right to a fair trial. The prolonged pre-trial detention of the accused also defies the presumption of innocence, another essential element of the right to a fair trial.

Chairman, NAB v. Nasar Ullah PLD 2022 SC 497 ref.

In appropriate cases, a High Court can grant bail on the ground of delay in conclusion of the trial, similar to that which is available under the third proviso to section 497(1), Cr.P.C., under its inherent powers under section 561-A, Cr.P.C. to secure the ends of justice or to prevent the abuse of the process of court, but going further, a High Court also enjoys constitutional jurisdiction under Article 199(1)(c) of the Constitution for the enforcement of fundamental rights. This constitutional jurisdiction of High Courts cannot be abridged by any sub-constitutional legislation. So, while section 5(6) of the Ordinance is binding on the Special Court, it is not so on a High Court which fashions its jurisdiction on the basis of the enforcement of the fundamental rights under the Constitution. Undue delay in the trial of the accused infringes his fundamental rights to liberty, fair trial and dignity under Articles 9, 10A and 14 of the Constitution, if the delay cannot be attributed to him.

Chaudhry Shujat Hussain v. State 1995 SCMR 1249 ref.

If a High Court observes that the conclusion of the trial has been unduly delayed for no fault of the accused, thereby depriving the accused of his fundamental rights to liberty, fair trial and due process, it may, rather should, interfere to enforce these fundamental rights of the accused. In order to assess the reasonable time for the conclusion of the trial, the High Court may be guided by, and structure its discretion on the basis of, the statutory timeframe provided in the third proviso to section 497(1), Cr.P.C.

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

---Ss. 497 & 498---Constitution of Pakistan, Arts. 9, 10A, 14 & 199---Bail---Constitutional jurisdiction of the High Court to grant bail---Scope---High Court while hearing a bail petition under Sections 497/ 498, Cr.P.C, other than possessing inherent jurisdiction under Section 561-A, Cr.P.C., also enjoys its constitutional

jurisdiction as a guardian of the fundamental rights of the accused---Such protective constitutional jurisdiction of the High Courts cannot be circumscribed by any sub-constitutional legislation---If a High Court while hearing a bail petition is of the view that the facts and circumstances of the case offend and impair the fundamental rights of the accused, it can grant bail in exercise of its constitutional jurisdiction without being limited by the legislation that regulates the grant of bail in the offence.

Ahmad Khan Gondal, Advocate Supreme Court (Through video link - Lahore Registry) and Ch. Akhtar Ali, Advocate-on-Record for Petitioner.

Iftikhar Hussain Shah, Advocate Supreme Court and Anis Muhammad Shahzad, Advocate-on-Record for Respondent No.2.

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

Date of hearing: 10th August, 2022.

ORDER

SYED MANSOOR ALI SHAH, J.---Petitioner seeks leave to appeal against the order dated 28.04.2022 passed by the Lahore High Court, whereby the second post-arrest bail petition of the petitioner, based on the ground of delay in the conclusion of the trial was dismissed in case FIR No.52/2019 dated 30.01.2019, offences under sections 420, 468, 471, 409 P.P.C. read with Section 5(2) of the Prevention of Corruption Act, 1947 registered at Police Station FIA, Gujranwala.

2. Briefly, as per the crime report, it is alleged that the petitioner while posted as an officer (OG-II) at the National Bank of Pakistan, Main Branch, Hafizabad, Punjab, misappropriated a large sum of money from the Bank. The first post-arrest bail petition of the petition was declined on merits on 24.03.2021. The second bail petition on the basis of the statutory ground under the third proviso to section 497(1), Cr.P.C. was rejected through the impugned order.

3. Learned D.A.G. and the learned counsel for respondent Bank at the outset raised a preliminary objection that the grant of bail on the ground of delay in the conclusion of the trial under the third proviso to section 497(1) of the Cr.P.C. is not available to the petitioner under the Offences in respect of Banks (Special Courts) Ordinance, 1984 ("Ordinance"). Referring to sections 5(6) and 12 of the Ordinance, they pointed out that a limited ground of bail is provided under the Ordinance and the petitioner cannot claim bail on the ground of delay in conclusion of the trial under the third proviso to section 497(1), Cr.P.C. They relied on the cases of Khalid Farooq¹ and Chaudhry Shujat Hussain² in support of their contention. Learned counsel for the petitioner submitted that the High Court enjoys the power to grant bail under the third proviso to section 497(1), Cr.P.C. using its inherent powers under section 561-A, Cr.P.C. to secure the ends of justice and also relied on Allied Bank³ for this contention. He further contended that the petitioner has been behind bars for almost two years now and the undue delay in the conclusion of the trial cannot be attributed to the conduct of the petitioner.

4. The Ordinance provides for speedy trial of certain offences committed in respect of banks and for matters connected therewith or incidental thereto.⁴ A Special Court has been established under the Ordinance to try Scheduled Offences, which are offences specified in the First Schedule of the Ordinance and alleged to have been committed in respect of or in connection with the business of a bank.⁵ The offences involved in the present case punishable under sections 420, 468, 471, 409, P.P.C. and section 5(2) of the Prevention of Corruption Act, 1947 form part of the Scheduled Offences under the Ordinance.⁶

5. For attending to the preliminary objections raised by the respondents, we examine the relevant provisions of the Ordinance. section 5(6) of the Ordinance and section 497(1) of the Cr.P.C. are reproduced hereunder in a comparative chart for ease of reference and convenience of understanding:

Section 497(1) of the Cr.P.C: 497. When bail may be taken in cases 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	Section 5(6) of the Ordinance: 5(6) An accused person shall not be released on bail by a Special Court, or by any other Court, if there appear reasonable grounds for believing that he has been guilty of a scheduled offence; nor shall an accused
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a Court, he may be released on bail, but he shall not be so released if there appears 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 an 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 an offence punishable with death, has been detained for such offence for a continuous period exceeding two years and in case 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.	person be so released unless the prosecution has been given notice to show cause why he should not be so released.
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The first part of section 497(1), Cr.P.C. provides that if a person accused of a non-bailable offence is arrested, he may be released on bail. Because of the enabling expression, "may be released on bail", used in this part, read with the basic principles of criminal justice,⁷ the grant of bail in a non-bailable offence that does not fall within the second part of section 497(1), Cr.P.C. is said to be a rule and refusal, an exception. The second part of section 497(1), Cr.P.C. provides that an accused shall not be released on bail 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. This part of section 497(1), Cr.P.C. which prohibits the grant of bail in certain offences is popularly known as the prohibitory clause of section 497(1), Cr.P.C.

6. Bail in offences that fall within the prohibitory clause of section 497(1), Cr.P.C. may be granted under section 497(2), Cr.P.C. if there are no reasonable grounds for believing that the accused committed the offence, but there are sufficient grounds for further inquiry into his guilt. The other grounds of bail in such offences is available under the first and third provisos to section 497(1), Cr.P.C., on the grounds of being a minor, or a woman or a person who is sick or infirm and undue delay in the conclusion of the trial.

7. Section 5(6) of the Ordinance has borrowed the language of the second part of section 497(1), Cr.P.C., which extends to offences falling under the prohibitory clause, and has made it applicable to all the scheduled offences under the Ordinance. However, the exceptions of prohibitory clause of section 497(1), Cr.P.C. have not been so adopted and made applicable to the scheduled offences under the Ordinance. Therefore, the only ground for grant of bail in a schedule offence under the Ordinance is that which is provided in section 497(2), Cr.P.C., that is, if the court finds that there are no reasonable grounds for believing that the accused has committed the Scheduled Offence and that there are sufficient grounds for further inquiry into his guilt. In Khalid Farooq, this Court held:

Section 5(6) of the Ordinance clearly states that an accused shall not be released if there appear reasonable grounds for believing that he has been guilty of a scheduled offence. The provisions of this section have effect, notwithstanding, anything contained in the Code. The first and third provisos to subsection (1) of section 497 of the Code, which create exceptions to the rule contained in that subsection, cannot be read into subsection (6) of section 5 of the Ordinance. Where the law-maker wanted to provide an exception or departure to the rule contained in section 5(6) of the Ordinance, he did so by adding such words akin to the second proviso to subsection (1) of section 497 of the Code. Where the law-maker did not desire to provide further exceptions to the rule, such as those akin to the first and the third provisos to the same subsection, he did not add specific words similar to those provisos in subsection (6) of section 5. ... Therefore, whilst the provisions of the first and third provisos to subsection (1) of section 497 of the Code may be treated as not available to the Special Court or the High Court, such a situation would not apply to subsections (2) to (5) of section 497 of the Code, as they do not affect the rule stated in subsection (6) of section 5 of the Ordinance.

This view was reiterated by this Court in Chaudhry Shujat Hussain. However, dealing with the third proviso to Section 497(1), Cr.P.C, this Court in Khalid Farooq held:

...The position of the third proviso to subsection (1) of section 497 of the Code is somewhat nebulous. Though its provisions provide an exception to the rule contained in subsection (1) of section 497, it is founded in public policy, namely, that an accused shall not be made to suffer for the long delay arising out of the commencement of his trial, unless the same has been occasioned by his own conduct, and assuming that the same is also not available, the possibility of its application through section 561-A of the Code to prevent an abuse of the process of the Court or otherwise to secure the ends of justice, cannot be totally excluded.

Thus, in appropriate cases, a High Court can grant bail on the ground of delay in conclusion of the trial, similar to that which is available under the third proviso to section 497(1), Cr.P.C., under its inherent powers under section 561-A, Cr.P.C. to secure the ends of justice or to prevent the abuse of the process of court as held in Khalid Farooq but going further, a High Court also enjoys constitutional jurisdiction under Article 199(1)(c) of the Constitution for the enforcement of fundamental rights. This constitutional jurisdiction of High Courts cannot be abridged by any sub-constitutional legislation.⁸ So, while section 5(6) of the Ordinance is binding on the Special Court, it is not so on a High Court which fashions its jurisdiction on the basis of the enforcement of the fundamental rights under the Constitution. Undue delay in the trial of the accused infringes his fundamental rights to liberty, fair trial and dignity under Articles 9, 10A and 14 of the Constitution, if the delay cannot be attributed to him.

8. "Delay in the conclusion of a criminal trial is antithetic to the very concept of a fair trial and due process guaranteed by Article 10A of the Constitution. The right to a fair trial is a cardinal requirement of the rule of law. If an accused cannot be tried fairly for an offence, he should not be tried for it at all. Conclusion of trial within a reasonable time is an essential component of the right to a fair trial. The prolonged pre-trial detention of the accused also defies the presumption of innocence, another essential element of the right to a fair trial, for an accused is presumed innocent until he is proven guilty by proof beyond reasonable doubt. Even before the

addition of Article 10A in the Constitution, the right to a fair trial and due process was well-entrenched in our jurisprudence and considered to be a part of the right of access to justice enshrined in the constitutional right to be dealt with in accordance with law guaranteed by Article 4 and the fundamental right to life and liberty guaranteed by Article 9 of the Constitution."⁹

9. It is therefore underlined that a High Court while hearing a bail petition under sections 497/498, Cr.P.C., other than possessing inherent jurisdiction under section 561-A, Cr.P.C., also enjoys its constitutional jurisdiction as a guardian of the fundamental rights of the accused. This protective constitutional jurisdiction of the High Courts cannot be circumscribed by any sub-constitutional legislation, including section 5(6) of the Ordinance. If a High Court while hearing a bail petition is of the view that the facts and circumstances of the case offend and impair the fundamental rights of the accused, it can grant bail in exercise of its constitutional jurisdiction without being limited by the legislation that regulates the grant of bail in the offence. If a High Court observes that the conclusion of the trial has been unduly delayed for no fault of the accused, thereby depriving the accused of his fundamental rights to liberty, fair trial and due process, it may, rather should, interfere to enforce these fundamental rights of the accused. In order to assess the reasonable time for the conclusion of the trial, the High Court may be guided by, and structure its discretion on the basis of, the statutory timeframe provided in the third proviso to section 497(1), Cr.P.C.

10. Under clause (a) of the third proviso to section 497(1), Cr.P.C., an accused is entitled to bail if there is a delay in the conclusion of the trial, for no fault of the accused, for a period exceeding one year, in cases of offences not punishable with death. In the present case, according to the latest report of the Special Court, the petitioner was arrested on 20.11.2020, the trial commenced on 28.06.2021 and the last date of hearing was 26.07.2022. In this span of almost two years, out of 22 prosecution witnesses only 12 witnesses have been recorded so far. A close perusal of the Report shows that the conduct of the petitioner is not the reason for the delay in the conclusion of the trial. He was, therefore, entitled to be released on bail by the High Court in exercise of its inherent powers under section 561-A, Cr.P.C. to secure the ends of justice or to prevent the abuse of the process of court, as well as in exercise of its constitutional jurisdiction under Article 199 of the Constitution to enforce his fundamental rights. However, the High Court has not exercised both the jurisdictions vested in it.

11. For above reasons, we converted this petition into appeal and allow the same: the impugned order of the High Court is set aside and the bail petition of the petitioner is allowed. He is admitted to bail subject to his furnishing bail bond in the sum of Rs.100,000/- with two sureties in the like amount to the satisfaction of the trial court.

MWA/R-9/SC Bail granted.