1996 M L D 157

[Lahore]

Before Muhammad Asif Jan, J

QAISER MEHMOOD---Petitioner

Versus

THE STATE---Respondent

Criminal Miscellaneous Application No591/B of 1995, decided on 30th August, 1995.

(a) Constitution of Pakistan (1973)---

----Arts.10 & 15---Fair trial---Fundamental rights provided by Arts.10 and 15 of the Constitution are based on the concept of a fair trial---Every accused person is entitled to a fair trial and the concept of fair trial necessarily proceeds on the premise that a trial shall be held without inordinate delay.

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

----S.497(1), third proviso, cl(b)---Penal Code (XLV of 1860), S302/ 324/452---Bail on statutory ground---Accused had continuously been in jail for more than two years and the trial had not even commenced---Adjournments granted on the request of accused's counsel in terms of time amounted to 4 months and 12 days and if such delay in conclusion of trial was deducted from the statutory period of two years, then the remaining period of 21 months and 7 days was less than the minimum period of two years--- Held it was unfair to withhold his right from the accused because of an adjustment or an accommodation given by the Court to his counsel---Accused was, thus, entitled to the benefit of cl. (b) of the third proviso to S.497(1), Cr.P.C. and he was admitted to bail accordingly.

Nawab Ali v. The State PLD 1991 Pesh. 42; Akhtar Abbas v. The State PLD 1982 SC 424; Muhammad Yousuf v. The State 1992 MLD 1814; Khalid v. The State 1994 PCr.LJ 12; Amir v. The State 1991 PCr.IJ 534 and Zahid Hussain Shah v. State PLD 1995 SC 49 ref.

Muhammad Fayyaz Ahmed Khawaja for Petitioner. Mrs. Farzana Rauf for the State. Syed Zulfiqar Abbas Naqvi for the Complainant.

ORDER

Qaiser Mehmood petitioner was arrested on the 11th of July, 1993, in pursuance of a case registered against him vide First Information Report No.148, dated the 11th of July, 1993, under section 302/452/324, P.P.C. at Police Station Westridge, Rawalpindi.

Thus, Qaiser Mehmood petitioner has now been continuously in jail for a period of 2 years, l month and 19 days.

2. Bail is sought on the ground that the petitioner is entitled to the benefit of clause (b) of 3rd proviso to subsection (1) of section 497, Cr.P.C.

3. The challan was submitted on the 7th of September, 1993, no evidence has been recorded so far.

4. Learned counsel for the petitioner submits that there have been seven adjournments in all, that two out of these seven adjournments were granted by the learned trial Court on the joint request made by the learned counsel for the accused, the complainant and the State. Therefore, according to learned counsel for the petitioner five adjournments were sought and granted on the request of counsel for the accused. These five adjournments in terms of time amount to 4 months and 12 days. If this period of 4 months and 12 days' delay in conclusion of trial are deducted from the statutory period of two years mentioned in clause (b) of 3rd proviso to subsection (1) of section 497, Cr.P.C. then the remaining period is 21 months and 7 days which is admittedly less than the minimum period of two years.

5. Learned counsel for the State assisted by the learned counsel for the complainant assert that as a matter of fact 5 months and 20 days' delay has occurred in conclusion of the trial on account of adjournments that were sought by the learned counsel for the accused.

6. Be that as it may, nothing really revolves around this unnecessary controversy because on the showing of the learned counsel for the petitioner himself there is an admitted delay of 4 months and 12 days on account of the adjournments sought by the learned counsel for the accused. Learned counsel for the accused/petitioner has candidly and gracefully conceded that in case this period of 4 months and 12 days is deducted from the minimum period of 2 years the remaining period works out to be 21 months and 7 days.

7. I have observed that nothing really revolved on this unnecessary controversy regarding a period of 1 month and 8 days. The real question which arises for determination is a question of law. Whether it was the intention of the law-makers to deduct such period of time from the minimum period of 2 years mentioned in clause (b) of 3rd proviso to subsection (1) of section 497, Cr.P.C. as may have been utilized by counsel for an accused person by asking for an adjournment.

8. Before attempting to answer the broad legal question, it becomes necessary to examine the whole question in its background and development. Prior to the introduction of the 3rd proviso to subsection (1) of section 497, Cr.P.C. delay per se was not considered a ground for the grant of bail particularly in cases which fell within the prohibition contained in subsection (1) of section 497, Cr.P.C. which specifically prohibits the grant of bail to a person against whom there are reasonable grounds to believe that he is guilty of an offence punishable with death or imprisonment for life or imprisonment for 10 years. However, with the passage of time the superior Courts started feeling that no person should be kept in jail without a trial indefinitely and therefore, through a process of judicial activism superior

Courts started taking the view that in case the delay in conclusion of trial of an accused person was perverse and scandalous it could then be seen as an abuse of the process of law and a negation of the machinery of justice. This view flows from the established old English Common Law principle "justice delayed is justice denied". Nonetheless, this was an area in which there was no black or white and can, therefore, be described as a gray area. There were no guidelines as such, no schedule nor time-table. Courts had to decide the matter of grant or refusal of bail on the ground of delay on a case to case basis. This uncertain scenario continued till such time that the law-makers in their wisdom thought that it was necessary in the interest of justice, equity and clarity that a criteria be laid down by giving a definite schedule and hence the provisos were introduced by the Law Reforms Ordinance of 1972. The 3rd proviso to subsection (1) of section 497, Cr.P.C. provides that: ---

"Provided further that the Court shall, except where it is of 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 or in exercise of any right or privilege under any law for the time being in force, direct that any person shall be released on bail:---

(a)???????????????..

(b).who, being accused of an offence punishable with death, has been d tamed for such offence for a continuous period exceeding two years and whose trial for such offence has not concluded:

Provided further that the provisions of the third proviso to this subsection shall not apply to 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 involved in terrorism."

9. A bare reading of the abovementioned proviso, clearly indicates that a right has been created by the law in favour of very accused person. However, it is not an unbridled right but is subject to certain constraints which may even be considered as exceptions. The first limitation placed upon the right is that if in the opinion of the Court the delay in the conclusion of trial has been occasioned by the accused person or by another person acting on behalf of the accused then the Court may withhold the right created in favour of the accused. Second exception to the rule is that where the accused person is a previous convicted offender for an offence punishable with death or imprisonment for life and the third exception is where in the opinion of the Court a person is a hardened, desperate or dangerous criminal. Last and the fourth exception is where an accused person is involved in terrorism.

10. There is little doubt that a counsel for an accused person is a person acting on his behalf within the meaning of the 3rd proviso to subsection (1) of section 497, Cr.P.C.

This established legal position leads to yet another specific question, whether in the computation towards the statutory period for the purposes of 3rd proviso the time spent by a counsel for an accused by seeking and obtaining adjournments can be said to be an act or omission of the accused which has occasioned the delay in conclusion of the trial?

11. Unfortunately there seem to be different and even conflicting views on this spec question.

12.Learned counsel for the State submits that the answer to this specific question is in the affirmative and places reliance upon the cases of Nawab Ali v. The State reported in PLD 1991 Pesh. 42 and Akhtar Abbas v. The State reported in PLD 1982 SC 424. It is the case of the learned counsel for the State that any period spent by a counsel of the accused must necessarily be deducted in computation towards the minimum statutory period of 2 years mentioned in the 3rd proviso to subsection (1) of section 497, Cr.P.C.

13. Learned counsel for the petitioner has referred to cases which have taken contrary view and wherein the ratio decidendi is that for the purpose of 3rd proviso to subsection (1) of section 497, Cr.P.C. an accused person cannot be penalized on account of an act or omission of a counsel acting on his behalf. In this context learned counsel for the petitioner places reliance upon the following cases: ---

(1) Muhammad Yousuf v. The State 1992 MLD 1814 (Karachi);

(2) .Khalid v. The State 1994 PCr.LJ 12;

(3) Amir v. The State 1991 PCr.LJ 534 (Karachi) and

(4) Zahid Hussain Shah v. State PLD 1995 SC 49

14. The matter of accepting or refusing a request for the grant of an adjournment by learned members of the Bar is essentially a matter between the Bar and the Bench. While it is necessary and essential for the safe administration of justice to give utmost accommodation to the learned members of the Bar yet at the same time it is also necessary in this context for the Courts not to indulge in judicial extravagance by granting an adjournment whenever a request to that effect is made. It is also necessary for the safe administration of justice to strike balance in this matter. However, whenever a genuine request for an adjournment is made by an honourable member of the legal profession, there is no reason why it should not be granted by a Court. But I cannot think of any reason why an accused should be made to

suffer in this whole process and why should a right be denied to an accused person which has been granted to him by the law.

15. The Constitution of the Islamic Republic of Pakistan, 1973, guaranteed certain fundamental rights to every citizen of Pakistan in Chapter II of the Constitution. Article 10 provides that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice. Article 15 guarantees freedom of movement for every citizen. These fundamental rights are based on the concept of a fair trial. Every person who is an accused of an offence is entitled to a fair trial. Concept of fair trial necessarily proceeds on the premise that a trial without inordinate delay shall be held. It is not the policy of the law in a democratic civilized society to hold people to languish in jails which are notoriously overcrowded indefinitely without a trial. In my view it would be i unfair to withhold a right from a citizen because of an adjustment or an, accommodation given to his counsel. However, this is not to say that the Courts are to act as calculating machines. Courts still have discretion in this i context, where for example an accused person has been an absconder, he cannot claim the benefit of the 3rd proviso on the basis of this own abscondence.

16. In the instant case although the petitioner has continuously been in jail I for more than 2 years, the trial has not even commenced while the law provides that it should have concluded within 2 years. Delays of over 2 years in the commencement of a trial are now becoming quite common and are indeed a sad commentary.

17. I think it is the time to do some serious thinkings in this matter.

18. 1 am of the considered opinion that the petitioner is entitled to the benefit of the clause (b) of the 3rd proviso to subsection (1) of section 497, Cr.P.C. ?? I

19. Resultantly, the petitioner is granted bail provided he furnishes bail bond in the sum of Rs.50,000 with one surety in the like amount to the satisfaction of the trial Court.

N.H.Q./Q-41/L??
Bail granted.

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