

Judgment Sheet
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Crl. Misc. No. 10162-H/2024
(Mujtaba Saleem Butt vs. Incharge Investigation, etc.)

JUDGMENT

Date of hearing:	20.02.2024
Petitioner by:	Mr. Sajid Naseer Ch., Advocate.
State by:	Hafiz Asghar Ali, Deputy Prosecutor General with Liaqat Ali Malik, DIG (OCU) and Zahid, DSP
Respondents No.3 and 4 by:	Mr. Tahir Khokhar, Advocate.
Amicus Curiae	Mr. Amad Tahir Ch, Advocate.

ALI ZIA BAJWA, J.:- Through this Habeas Petition filed under Section 491 of the Code of Criminal Procedure, 1898 (hereinafter '*the Code*'), the petitioner seeks the recovery of his son, namely Rashid Hassan Butt ('*the Detenu*'). In pursuance of the order of this Court, the Detenu was produced before the Court by Respondent No. 2, Afzal Sub-Inspector of Anti Vehicle Lifting Squad ('*AVLS*'), Mustafa Town Police Station, Lahore. It has been stated by Respondent No.2 that the Detenu was arrested in connection with Case FIR No. 2219/23 initially registered under Section 381-A of Pakistan Penal Code, 1860 ('*PPC*') with Shera Kot Police Station, Lahore.

2. Earlier the Detenu applied for his ad-interim pre-arrest bail in the afore-referred criminal case, which was confirmed by the Court of Sessions vide consolidated order dated 21.09.2023. That order

remained unchallenged, hence, the same attained finality. Thereafter the investigating officer i.e. Respondent No.2 added offences under Sections 420, 468 and 471, PPC in the case and arrested the Detenu. The short but crucial question of law involved in this case is whether an accused person, who has been granted bail in a criminal case by the Court of competent jurisdiction, can be arrested in the same case under the garb of the addition of new offences.

3. Arguments of parties heard and record perused.

4. In the evolving landscape of criminal jurisprudence, a pivotal issue emerges when additional charges are levied against an accused who has already secured bail for the initial charge(s). This scenario presents a complex interplay between the rights of the accused and the interests of justice, necessitating a judicious approach to bail proceedings. Traditionally, the addition of new charges against a bailed-out accused has prompted a debate on the procedural steps that should follow. On one hand, there exists a perspective that mandates the accused to seek bail afresh for the newly added offences, treating them as separate grounds for judicial scrutiny. This view emphasizes the autonomous nature of each offence and its distinct implications for the accused's liberty. However, a more nuanced approach considers the procedural economy and the overarching principles of fairness and justice that when additional offences are added to an accused's charges, though it is imperative to re-evaluate the grounds upon which bail was initially granted but, this reconsideration does not necessitate a redundant plea for bail by the accused rather, shifts the onus onto the prosecution to seek the cancellation of the existing bail. Under this approach, the prosecution bears the responsibility to demonstrate that the addition of new charges substantively alters the landscape of risk and considerations that underpinned the original bail decision.

5. For the proposition in hand, it will be advantageous to consider the relevant Rule i.e. Rule 26.21(6) of The Punjab Police Rules, 1934 (hereinafter '*The Rules*') which has been reproduced below: -

"26.21. Bail and recognizance. -

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(6) No police officer has power to re-arrest an accused person who has been released on bail under section 497, Code of Criminal Procedure. When re-arrest is deemed necessary, the police shall apply to a competent court for the cancellation of the bail bond and the issue of a warrant in accordance with the provisions of Section 497(5) Code of Criminal Procedure."

The Rules, particularly those outlined in Volume-III, stipulate clear procedure for the conduct of police officers during the investigation and process to be opted for the arrest of the accused. The above-provided Rule explicitly requires that in cases where an accused has already been released on bail for certain charges, any intention to arrest the accused for additional charges must be accompanied by an application for the cancellation of bail, presented before the competent court as envisaged under Section 497(5) of the Code, which shall be decided after issuance of notice to the accused. Reliance can be placed on the *ratio* rendered in Waqar Ahmed¹ wherein while considering a situation where subsequently some offence(s) were added by the investigating agency it was ruled by the Division Bench as infra: -

"However it would not be justified to commit him to custody straightaway but what the law of propriety would demand is that such person be not deprived of his liberty without providing him an opportunity of hearing by serving him with such show cause notice by the court."

In Pradeep Ram² Supreme Court of India while considering a legal proposition that whether in a case where an accused has been bailed out

¹ Waqar vs. Chairman NAB, Islamabad – PLD 2015 Sindh 295

² Pradeep Ram vs. The State Of Jharkhand – AIR 2019 SC 3193

in a criminal case, in which case, subsequently new offences are added, is it necessary that bail earlier granted should be canceled for taking the accused in custody, after an exhaustive deliberation ruled as under: -

“In a case where an accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the accused, but for arresting the accused on such addition of offence or offences it need to obtain an order to arrest the accused from the Court which had granted the bail.”

The legal position that emerges from the above discussion is that once an accused person has been granted bail, he cannot be arrested by the investigating agency without seeking cancellation of bail granted by the court of competent jurisdiction by way of filing an application under Section 497(5) of the Code. Rule 26.21(6) of the Rules mandates that any such action must be taken with explicit permission of the Court, ensuring judicial oversight, and safeguarding the rights of the accused.

6. Allowing the police to arrest an accused who has already been granted bail by merely adding new offences to the case, without first seeking the cancellation of the existing bail, would effectively grant law enforcement agencies the unrestricted authority to circumvent judicial orders. This practice, if left unchecked, portends a perilous shift towards a regime where the liberties of individuals are held in abeyance by the caprices of prosecutorial discretion. The jurisprudence surrounding bail is predicated on the presumption of innocence, a cornerstone of criminal law, and serves as a bulwark against the potential for arbitrary detention. To permit law enforcement agencies to nullify this judicial safeguard by the mere expedient of adding charges *post hoc* is to erode the foundations of our legal system. Such a course of action not only flouts the explicit mandates of the law but also infringes upon the accused's fundamental right to liberty, as enshrined in the Constitution.

7. Moreover, this approach opens Pandora box of legal uncertainties, where the grant of bail could be rendered nugatory by the subsequent prosecutorial maneuvers. It establishes a precedent that could lead to rampant abuse of power, allowing for the detention of individuals *ad infinitum*, by the simple device of adding new offences against them. The prospect of such unbridled discretion vested in the investigating agency is antithetical to the rule of law and the principles of justice and equity. This practice would not only undermine the sanctity and finality of judicial decisions but also endanger the foundational principles of our legal system that aim to protect individual liberties against arbitrary detention. Such an approach would give law enforcement agencies a *de facto* license to frustrate judicial orders, enabling them to detain any bailed-out accused at will by the simple expedient of adding new charges.

8. Therefore, it is incumbent upon this Court to staunchly oppose such practices that imperil the liberty of the citizenry and detract from the integrity of the judicial process. The arrest of an individual granted bail by a Court of competent jurisdiction, without first seeking the cancellation of said bail on legitimate grounds, is an affront to the procedural safeguards designed to protect against the misuse of state power. The addition of offences after the grant of bail cannot serve as a *carte blanche* for investigating agencies to circumvent the due process rights of the accused. This would lead to a dangerous precedent, eroding trust in the judicial process and the principle of fairness that underpins our legal system, ultimately rendering the concept of bail meaningless and jeopardizing the rights of the accused to fair and impartial treatment under the law. The approach advocating for the prosecution's initiation of bail cancellation proceedings upon the addition of new offences offers a balanced mechanism for reassessing an accused's eligibility for bail. By placing the evidentiary burden on the prosecution to justify bail revocation and concurrently allowing the

accused an opportunity to defend their continued entitlement to bail, the legal framework honors both the dynamics of criminal litigation and the fundamental rights of individuals. Thus, this Court holds that even if during the interrogation new offences are added or during the trial, additional offences are added in the charge framed against a bailed-out accused, the prosecution has to seek cancellation of his bail before arresting such accused against these newly added offences. This approach will not only reaffirm the supremacy of the judiciary in matters of bail but will also serve as a necessary check on the potential for police overreach, ensuring that the scales of justice remain evenly balanced.

9. The contention of the learned Law Officer is that Rule 26.21 (6) of the Rules only deals with the cases where the accused is released on post-arrest bail under Section 497 of the Code and not with the cases where the accused is admitted to pre-arrest. I am afraid the objection raised by the learned Law Officer is highly misconceived, stemming from a bare and superficial reading of the Rule *ibid* without grasping its underlying essence and purpose. The argument overlooks the fundamental principles of justice and liberty that the Rule seeks to protect, failing to appreciate its broader applicability in safeguarding the rights of individuals against arbitrary arrest. It is essential to consider beyond the mere text and understand the Rule in the context of its intent to uphold the sanctity of judicial decisions granting bail, ensuring that such decisions are not circumvented without proper legal process. To address the challenge of applying the principle that an accused, once released on bail, cannot be re-arrested without first seeking the cancellation of that bail to cases of pre-arrest bail, it is essential to understand both the historical context and the underlying rationale of the law.

10. The protection provided in Rule 26.21(6) of the Rules, was crafted in a legal environment where only post-arrest bail was recognized. The Constitutional Courts have always been actively engaged in filling legislative gaps and ensuring that the law evolves in response to emerging challenges. It was perhaps for the first time in December 1948 that by interpreting the latter part of Section 498 of the Code in Hidayat Ullah Khan's Case (PLD 1949 Lah. 21 =AIR 1949 Lah. 77), the power vesting in the High Courts and the Courts of Sessions to admit persons to bail before they could be arrested, was authoritatively discovered by a Full Bench of the Lahore High Court.³ The evolution of the law of pre-arrest bail as a judge-made law post-partition starting from the *Hidayat Ullah Khan supra*, reflects the legal system's adaptability and its commitment to protect the individual's rights and liberties. This landmark judgment laid the foundation for the legal construct of pre-arrest bail in our country, which has since evolved through the diligent scrutiny and thoughtful adjudications of our Constitutional Courts. The Jurisprudence on pre-arrest bail evolved through a series of judgments by the Superior Courts of Pakistan.⁴ These judgments have not only interpreted but also expanded the contours of the law of pre-arrest bail, adapting it to the changing dynamics of criminal law and societal needs.

11. In arguing for the application of the principle expounded in Rule 26.21(6) of the Rules to cases of pre-arrest bail, one must lean on the foundational tenets of justice, liberty, and the Rule of law. The essence is to protect the liberty of an accused who has been deemed eligible for bail, regardless of the bail's temporal stage, before or after

³ Rana Muhammad Arshad vs. The State – PLD 2009 SC 427

⁴ The Crown v. Khushi Muhammad (PLD 1953 F.C. 170), Muhammad Ayub v. Muhammad Yaqub (PLD 1966 SC 1003), Sadiq Ali v. The State (PLD 1966 SC 589), Zahoor Ahmad v. State (PLD 1974 Lah. 256) (cited with approval in PLD1983 SC 82), Muhammad Anwar Samma & another v. The State (1976 SCMR 45), Murad Khan v. Fazal-e-Subhan & another (PLD 1983 SC 82), Muhammad Safdar and others v. The State 1983 SCMR 645), Zia-ul-Hassan v. The State (PLD 1984 SC 192) and Mst. Qudrat Bibi v. Muhammad Iqbal and another (2003 SCMR 68)

his arrest. It stands to reason that its framers would have explicitly extended its protection to pre-arrest bail scenarios, had the concept been legislatively or judicially recognized at that time. The principle of not re-arresting a bailed-out accused without seeking cancellation of bail aligns with the broader legal principles of fairness, predictability, and respect for judicial decisions. Extending this principle to pre-arrest bail cases does not represent a radical departure from established legal norms but rather an affirmation of the law's inherent values. It acknowledges that the rationale preventing arbitrary re-arrest post-bail applies with equal force to those admitted to pre-arrest bail, as both scenarios involve individuals who, in the eyes of the law, should not be detained without compelling, judicially scrutinized reasons.

12. Therefore, applying this principle to pre-arrest bail cases is both a logical extension of existing legal protections and a necessary step to ensure consistency, fairness, and respect for individual liberties across the Criminal Justice System. It underscores the principle that bail, once granted, recognizes an individual's right to freedom and should not be undermined without due process and judicial oversight. This approach strengthens the integrity of the bail system and reaffirms the judiciary's role in safeguarding against the arbitrary exercise of power. This procedural sanctity is not merely perfunctory; it is the cornerstone upon which the edifice of justice rests, ensuring that the liberties of individuals are not trifled with capriciously.

13. Therefore, it is held that the arrest of the accused, in blatant contravention of Rule 26.21(6) of the Police Rules, 1934, and the principles enshrined within our legal edifice, is both untenable and impermissible. The essence of justice demands that once a Court has granted bail, pre-arrest or post-arrest, considering the gamut of facts

and allegations, such a decision must be respected and cannot be superseded by subsequent police action without first seeking judicial recourse for the cancellation of said bail. To uphold otherwise would be to sanction a travesty of justice, undermining both the authority of the judiciary and the rights of the accused. It is upon these grounds that the sanctity of bail, granted after due deliberation of all pertinent facts, must remain inviolable, thereby reinforcing the paramountcy of the judiciary in the preservation of justice and the rule of law.

14. Now, after having held that this Rule is equally applicable to the cases of accused who are admitted to pre-arrest bail, it is imperative to note that the core issue revolves around the infringement of the fundamental rights, particularly the right to life and liberty as enshrined under Article 9 of the Constitution of Islamic Republic of Pakistan, 1973 (*'the Constitution'*), which unequivocally states that "No person shall be deprived of life or liberty save in accordance with law." It is incumbent upon the state and its apparatuses to ensure that no individual's life or liberty is curtailed without due process. Moreover, the procedural safeguards surrounding arrest and detention, as stipulated under Article 10 of the Constitution, have been ostensibly disregarded in this case. It has been reiterated more than once by the Constitutional Courts of our country that the state and its organs must adhere strictly to the legal provisions when depriving any individual of his liberty to ensure that the fundamental rights to life and liberty are not transgressed. Respondent No.2, by arresting the Detenu without adhering to the proper legal channels, has not only disregarded the authority of the Court but also violated the rights of the Detenu as enshrined under the law. Therefore, the arrest of the Detenu was patently illegal having no legal justification.

15. Today, DIG, OCU, Lahore appears before the Court and submits that he has taken cognizance of the matter. He further submits that the Detenu should not have been arrested without filing an application for cancellation of his bail granted by the Court of Sessions. He assures the Court that proper inquiry shall be carried out and delinquent police official(s) shall be dealt with strictly as per the law.

16. While declaring the arrest of the Detenu illegal, this petition stands **disposed of.**

(ALI ZIA BAJWA)
JUDGE

The judgment was pronounced on 20.02.2024 and after completion it was signed on **01.03.2024.**

JUDGE

Approved for Reporting

JUDGE

*Athar**