

Form No.HCDC/C-121

ORDER SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Crl.Misc.No.44216-B/2021

Sheraz Khan

Vs

The State, etc.

S.No. of order/Proceedings	Date of order/Proceedings	Order with signature of Judge and that of parties or counsel, where necessary
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27.07.2021 Shahzada Muhammad Zeeshan Mirza, Advocate
for the petitioner.

Malik Khaliq Shafique, Assistant Attorney
General for Pakistan with Shafqat Sub-
Inspector/FIA.

Complainant in person.

Sheraz Khan, petitioner, seeks post arrest bail in case FIR No.24 dated 21.04.2021 under sections 13, 14, 16 of The Prevention of Electronic Crimes Act, 2016 (PECA, 2016) read with sections 109, 419, 420, 468 and 471 PPC registered at FIA, Cyber Crimes (Circle) Gujranwala.

2. The precise allegation levelled in the FIR is that the complainant was established contact by one Masih Hayim Michelle through Facebook Profile, who introduced her as Manager Standard Chartered Bank of USA and by hatching a story that one Abbas, a Pakistani, account holder of said Bank has deposit of \$19,00000, who has been died without any legal heir; said amount can be transferred in your account if custom clearance and cargo fee are paid and provided the complainant a WhatsApp number (0018153243505) for further communication. In furtherance of his above WhatsApp link, the complainant made total deposits of Rs.28,57,230/- in different bank accounts, where-after, the accused persons switched off their mobile numbers and petitioner sensed that he had been defrauded. The complaint was lodged and during inquiry it was revealed that out of four, two of the bank accounts (i) Bank Islami Account No.0202800402580001 and (ii) Meezan Bank Account No.0105036467, wherein, amounts of Rs.1157520/- and Rs.254000/- respectively had been deposited by the complainant, belonged to the present petitioner and said amount was withdrawn through ATM.

The petitioner was arrested from “My Phone Number 1” mobile shop and after a while co-accused Ginikanwa who reached at the same mobile shop to get his share in the defrauded amount, was also arrested on the pointing of the accused/petitioner. Further on collection and analysis of Mobile data, the Investigating Officer opined that it was the petitioner who was in contact with co-accused namely Ginikanwa and Peter who were using the WhatsApp for communication.

3. Heard. Record perused.

4. We all know that internet technology is progressing thick and fast and we are all benefited by it in almost all fields of life but at the same time it has multiple disadvantages as well. Unless we exhibit maximum maturity and protect ourselves by self-imposed restrictions, we can easily fall victim of this latest technology and chances of being misled or even defrauded become more obvious when personal spite, selfishness or greed take charge of our social activities, whereas, a strong selfish desire of having more and more of something, especially the money is so damaging that it can destroy everything in a man’s life and take away even what is his hard-earned. This instant case appears to be a classic example, where, more than cleverness of the accused, simplicity or we must say greed of the complainant played more effective role in the accomplishment of the fraudulent intent of the accused persons.

5. Learned counsel for the petitioner contends that offences of PPC cannot be investigated by FIA along with offences under PECA, 2016 nor they can be tried by court constituted under the said Act; therefore, application of sections 419, 420, 468, 471, 109 PPC in present FIR is not legally justifiable.

6. A question arises whether offences under any other laws if being committed in relation to or through the use of an information system would be investigated and tried under Prevention of Electronic Crimes Act, 2016 (PECA) or their legal recognition shall not be affected for the purposes of investigation and trial under other

laws? Such contention of learned counsel requires a thorough examination of provisions of PECA, 2016 which exercise resulted in certain observations.

7. The main object of PECA, 2016 as reflected from the preamble is to prevent unauthorized acts with respect to information system; in the light of definition clauses, the recitation and examination of relevant provisions of PECA, which are Sections 27, 28, 30, 36 (3) (b & C), 44 & 50, makes it clear that offences under PPC or any other laws cannot be tried jointly with any coordinate offence under PECA, 2016, even if it is committed in the same transaction. There is no specific provision for joint trial in PECA; relevant provisions of PECA are discussed as under;

Section-27: Legal recognition of offences committed in relation to information system.

Notwithstanding anything contained in any other law for the time being in force, an offence under this Act or any other law shall not be denied legal recognition and enforcement for the sole reason of such offence being committed in relation to or through the use of an information system.

(2) References to "property" in any law creating an offence in relation to or concerning property, shall include information system and data.

By virtue of above provision, all the offences under this Act or any other laws will be recognized and enforced under said laws even if they are committed in relation to or through the use of an information system. The phrase "*legal recognition and enforcement shall not be denied*" means the applicability of offences in that law for the purpose of trial will not become redundant on the premise that it is now like an offence under PECA, 2016 and would be tried only by the court constituted under PECA, 2016.

8. Nature of offences under this Act is different from offences under other laws; most of the offences under this Act have a status of **predicate offences** which are committed to facilitate the commission of main offence. A **predicate crime** or **offence** is a crime which is a component of a larger crime. Crimes are predicate to a larger crime if they have a similar purpose to the larger crime. For example, using **false identification** is itself a crime; it may be a predicate

offence to **larceny or fraud** if it is used to withdraw money from a bank account. If the offence of money laundering is committed for terrorism financing, then money laundering becomes a predicate offence; though money laundering is a separate offence which is separately tried under Money Laundering Act, 2010. This law deals only with those persons who possess know-how or expertise in using the information system; it has nothing to do with ordinary offenders who commit the offence with conventional methods. More clearly, PECA, 2016 deals with white collar crimes through the use of information system; white collar crime is "a crime committed by a person of respectability and high social status in the course of their occupation". Typical white-collar crimes could include wage theft, fraud, bribery, Ponzi schemes, insider trading, labour racketeering, embezzlement, cybercrime, copyright, infringement, money laundering, identity theft and forgery. Offences under this Act are not alike the offences under different laws like Telegraph Act, 1885, Anti-terrorism Act, 1997, Pakistan Telecommunication (Re-organization) Act, 1996, Electronic Transaction Ordinance, 2002 and Pakistan Penal Code, 1860 etc. The language employed for offences under PECA is different from somewhat like offence under other laws. It has a clear-cut distinction, even most of the **offences under PECA are non-cognizable except offences under section 10, 20 & 21**. They are Cyber Terrorism, Offences against modesty of a natural person or minor and Child Pornography. From the above expression, it is clear that if an offence under other laws is committed by **uploading data or information generally on face book or sending messages through any mobile application, it would not be an offence under PECA, 2016** until it is transmitted through unauthorized access for the purpose or through a required action as depicted in the relevant sections of PECA or target a particular person in case of offences of cyber stalking, spamming or spoofing.

9. Some more provisions of PECA, 2016 throw light to differentiate trial of offences under PECA or other laws, which are as under;

Section-36 (3) (b) & (c) of PECA, 2016 talks about **another ongoing investigation or criminal proceedings**; which fortifies that the offence defined in other laws shall be investigated and tried separately by the respective courts.

Section-30 of PECA, 2016 mandates about Joint Investigation Team, to investigate an offence under PECA or any other law for the time being in force which gives a distinct mark and clear indications to deal with the trials separately, if different offences have been committed.

Section-44 of PECA, 2016 permits the application of Cr. P.C and QSO, 1984 subject to inconsistency with PECA, if any.

Section 235 Cr. P.C is the only section which explains the charging of different offences committed in same transaction. Section 235 (2) of Cr. P.C, reads as under:-

“Offence falling within two definitions: If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for; each of such offences.”

It deals with offences falling within two or more separate definitions of **any law**; the word **“any law”** does not mean different laws but by the **same law**; as is evident from illustration to sub-section (2) of Section 235 which is as under;

(i) A wrongfully strikes B with a cane. A may be separately charged with and convicted of, offences under Sections 352 and 323 of the Pakistan Penal Code.

(j) Several stolen sacks of corn are made over to A and B, who know they are stolen property, for the purpose of concealing them, A and B thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain pit. A and B may be separately charged with, and convicted of, offences under Sections 411 and 414 of the Pakistan Penal Code.

(k) A exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. A may be separately charged with, and convicted of, offences under Section 317 and 304 of the Pakistan Penal Code,

(l) A dishonestly uses a forged document as genuine evidence, in order to convict B, a public servant, of an offence under Section 167 of the Pakistan Penal Code. A may be separately charged with, and convicted of, offences under Sections 471 (read with 466) and 196 of the same Code.

Thus, court constituted under PECA, 2016 cannot try offences of PPC. As per section 26 of General Clauses Act, 1897, an offence falling under two definitions of different laws shall be tried separately. Unlike section 17 read with Section 21-M of Anti-

terrorism Act, 1997, there is no specific provision for holding joint trial in PECA. As per Section 50 of PECA, Provisions of this Act shall have effect not in derogation of Pakistan Penal Code or any other laws; which means, if similar offence under PPC and PECA is committed then offender shall be charged under PECA only. Offender is usually charged with offence only under special law which has an effect on any other law for the time being in force; like CNSA, offender is charged under section 9 of CNSA and not under Article 3 or 4 of Prohibition (Enforcement of Hadd) Order, 1979. Some personal offences like Cyber Stalking, Spamming or Spoofing would only be tried independently under PECA even if they are offences under any other law because provisions of PECA shall have effect on other laws and no charge under other laws shall be part of trial in the court constituted under PECA. Similarly, if different offences under different laws are committed in the same transaction; joint trial by one court is prohibited unless there is a provision of holding joint trial in that law. For instance, if an offender is apprehended on the spot for committing robbery; on his personal search, Pistol and Narcotics are also recovered; trial for possession of unlicensed pistol and Narcotics shall not be held in one court, rather by different courts. Similarly, offences under PPC, if are committed through use of an information system shall be tried by the ordinary court and not by Court constituted under PECA; if such acts are committed through unauthorized access to information system, then main offence shall be tried by the ordinary court and offence of unauthorized access shall be tried by court under PECA.

10. Learned Assistant Attorney General maintains that Section 28 of PECA mandates applicability of PPC; according to the statute the said section runs as under,

Section-28; Pakistan Penal Code, 1860 to apply.

The provisions of the Pakistan Penal Code, 1860 (Act XLV of 1860), to the extent not inconsistent with anything provided in this Act. shall apply to the offences provided in this Act.

From the perusal and analysis of above provision, it is clear that it does not support omnibus application of all provisions of PPC rather

application is limited to those provisions which relate to vicarious liability like common intention or common object, abetment or criminal conspiracy and provisions relating to General Exceptions in PPC, if they are not inconsistent with provisions of PECA.

11. After going through the prosecution case, from the perspective of the complainant one can feel that a well-planned net was thrown, to which the complainant fell prey, as a result whereof he has been defrauded with quite handsome amount. But, irrespective of the loss occurring to the complainant, on legal premises the court has observed that maximum sentence of imprisonment provided under section 13 and 16 of PECA is three years, while punishment under section 14 is two years imprisonment. Furthermore, under section 43 of the PECA, all these offences are non-cognizable as well as bailable. So far as offences under sections 419, 420, 468, 471 PPC are concerned, they do not fall within prohibitory clause and applicability of such offences along with provisions of PECA in the light of above discussion would be decided by the learned trial court after recording of evidence.

12. The petitioner is behind the bars, the investigation to his extent is complete, therefore, his person is not required anymore for the purposes of investigation. As detailed above, none of the offences with which the petitioner is charged falls within prohibitory clause. The Hon'ble Supreme Court of Pakistan in a recent order dated 14.07.2021 passed in Criminal Petition No.529 of 2021 "Iftikhar Ahmad versus The State" has shown its concern by observing that courts are not exercising the discretion while declining bail to the accused in offences not falling within prohibitory clause. The apex Court has further observed:-

"4. The main purpose of keeping an under-trial accused in detention is to secure his attendance at the trial so that the trial is conducted and concluded expeditiously or to protect and safeguard the society, if there is an apprehension of repetition of offence or commission of any other untoward act by the accused. Therefore, in order to make the case of an accused person fall under the exception to the rule of grant of bail in offences not covered by the prohibitory clause of Section 497(1) CrPC, the prosecution has to essentially show from the material available on the record, such

circumstances that may frustrate any of the said purposes, if the accused person is released on bail”

In the same order, the Hon’ble Supreme Court of Pakistan while referring the judgment “Muhammad Tanveer v. State” (PLD 2017 SC 733), reproduced the caution part of the said judgment, which is reproduced hereunder:-

“Once this Court has held in categorical terms that grant of bail in offences not falling within the prohibitory limb of section 497, Cr.P.C. shall be a rule and refusal shall be an exception, then the Courts of the country should follow this principle in its letter and spirit because principles of law enunciated by this Court are constitutionally binding [under Article 189] on all Courts throughout the country including the Special Tribunals and Special Courts.”

The above dictum of the apex Court, here in the instant case, favours the petitioner. Consequently, this petition is allowed and the petitioner is admitted to bail on his furnishing bail bond in the sum of Rs.200,000/- with one surety in the like amount to the satisfaction of learned trial court.

13. Needless to add that the observations made hereinabove are tentative and shall not affect the case of either side during trial. The learned trial court is directed to proceed with the trial expeditiously in accordance with law, and in case of abuse or misuse of the concession of bail by the petitioner, including causing delay in conclusion of the trial, the prosecution may approach the competent court for cancellation of bail under Section 497(5), Cr.P.C.

Muhammad Amjad Rafiq
Judge.

Approved for reporting.

Judge.

Javed*