IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE GULZAR AHMED
MR. JUSTICE DOST MUHAMMAD KHAN
MR. JUSTICE FAISAL ARAB

Criminal Petition No.634 of 2015
(On appeal from the judgment dated 8.7.2015 passed by the Lahore High Court, Multan Bench in Crl.A.NO.8/15))

Soba Khan

...Petitioner

Versus

The State and another

..Respondents

For the petitioner: Sardar Khurram Latif Khosa, ASC
Syed Rifaqat Hussain Shah, AOR

For the State: Mr. Asjad Javed Goral, APG, Pb.

Complainant: N.R.

Date of hearing: 4.3.2016

JUDGEMNT

Dost Muhammad Khan, J.—

CMA NO.952/15 for condonation of delay is allowed.

Crl.P.634/15: The petitioner, Soba Khan, s/o Khan Muhammad has sought leave to appeal against the order/judgment of the learned Single Judge of the Lahore High Court, Multan Bench dated 8.7.2015 whereby, during pendency of his appeal against conviction and life imprisonment awarded to him by the Trial Court, his petition for grant of bail by suspending his sentence till disposal of the appeal was dismissed.

We have heard Sardar Khurram Latif Khosa, learned ASC for the petitioner, Mr. Asjad Javed Goral, learned Additional Prosecutor General, Punjab while the complainant has left the country and was not represented.

2. The petitioner along with five co-accused were charged for effectively firing at the deceased namely Ghulam Mustafa, uncle of the complainant, namely, Allah Yar and causing his death while other two co-accused namely, Amir Bakhsh and Yar Muhammad were charged for conspiracy/abetment for the crime. Allegedly the occurrence took place at 5:30 pm while the report of the crime was lodged at the spot with S.I. Farid Bakhsh at 7:30 pm, on 11.04.2012, the day on which the tragedy took place.

3. Learned ASC for the petitioner vehemently contended that the impugned order/judgment of the learned Judge of the Lahore High Court has altogether thwarted the way of grant of bail in post conviction case, which is not in consonance with the provisions of S.426 Cr.P.C. empowering the Appellate Court to grant bail to the convict by suspending his sentence and that, the mere view of the learned Judge that the points raised before him relate to deeper appreciation of evidence was based on misconception. No innocent person shall be left to rot in Jail if his case is fit for grant of bail, by way of suspension of his sentence because if in the long run he is acquitted like his co-accused then, he cannot be compensated for the long incarceration in Jail.

4. Learned State Counsel for the Government of Punjab defended the impugned order/judgment of the learned Single Judge of the Lahore High Court on the same grounds, given therein.

5. In the instant case, six accused in all were charged and it is alleged that all of them encircled the deceased and fired at him after one another with quick succession, hitting him on different parts of his body.

6. Learned ASC for the petitioner invited our attention to the postmortem report and the pictorial, annexed therewith, which contradict the ocular account, because the petitioner and the absconding co-accused have been attributed inflicting injuries on left neck of the deceased and the other acquitted accused has been attributed firing at the deceased which hit him on the back of his neck. The autopsy report and the pictorial, both undeniably reveal that the deceased has sustained only one firearm entry wound on the left side of neck while there are two exit wounds, one on the right side of the neck and the other on the lateral top of right shoulder, above the armpit.

7. It was stated at the bar that the majority of the accused, charged in the FIR were declared innocent in two consecutive investigations, conducted by the police; the one initially carried out by the first investigating officer and the second one on the application of the complainant, thus they were not recommended for trial and were placed in column No.II of the *"Chalan"* however, on a private complaint, lodged by the complainant with inordinate delay, the learned Trial Court took cognizance of it, after getting report from the Magistrate, who held inquiry into the matter and summoned all the accused, charged in the FIR to face the trial.

8. True that the principle of law is well settled that police opinion, even conclusive in nature, is not binding on the Court and it may disagree with the same but for the cogent reasons to be recorded. However, as it appears from the record, the learned Trial Judge has omitted to record such reasons.

9. The next crucial point in the matter is that, according to the allegations contained in the FIR and the complaint lodged with considerable delay, the crime was committed by all members of the unlawful assembly and each one of them participated in the crime, playing effective and active role of causing injuries to the deceased and evidence recorded at the trial is also the same so much so that one of the acquitted co-accused who has been attributed similar fatal injury like the petitioner, has been acquitted. Such a decision was taken by the Trial Court despite applicability of the provision of S.149 PPC attracting vicarious liability to each member of the unlawful assembly committing cognizable offence in prosecution of common object of that assembly. This provision further states that even a member of such assembly having simple knowledge that the offence was likely to be committed in prosecution of that object, shall be deemed to be guilty for that offence. This criminal liability is judicially phrased as, ***"A vicarious liability"***.

10. It is indeed disturbing feature that similarly charged accused have been acquitted on the same set of evidence but the petitioner was convicted alone because the injury on the neck was found to be one of the fatal injuries in the autopsy report by the Medico-legal officer, ignoring the fact that for this solitary entry wound three persons have been charged including the petitioner. Whether it happened in the present case or not, but the probability is definitely there in view of the consistent opinion of the Jurists on Medicolegal science/jurisprudence that a single bullet after entering the deceased's body either due to its spin, speed or hitting the hard part of the body like bone, fragmented and splintered pieces of bullet caused multiple exit wounds.

11. For grant of bail at post conviction stage, the Legislature has enacted the provision of S.426 Cr.P.C. which consists of main three sub-sections, three clauses and a proviso as well. These are of significance and are reproduced below:-

> ***426. Suspension of sentence pending appeals. Releas on bail.--*** *(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.*
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> *(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.*
>
> *(2B) Where High Court is satisfied that a convicted person has been granted special leave to appeal to the the Supreme Court against any sentence which it has imposed or maintained, it may if it so thinks fit order that pending the appeal the sentence or order appealed against be suspended, and also, if the said person is in confinement, that he be released on bail.*
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> *(3) When the appellant is ultimately sentenced to imprisonment, or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced."*

12. Like the provisions of S.497 and 498 Cr.P.C. the guiding principle and criteria including limitations on the powers of the Court not to grant bail in offences punishable with death, or imprisonment for life or for ten years falling within the prohibitory limb of S.497 Cr.P.C. has been omitted from the provision of S.426 Sub-S.(1) Cr.P.C.

13. Considering from a legal angle, the omission of these prohibitions, limitations and guidelines is meaningful because the Legislature did not deem it appropriate to borrow the guidelines/criteria, provided for grant of bail in the provision of S.497 Cr.P.C. however, the principle of law has been since long developed by the superior courts that the powers of the Appeal Court in granting bail at post conviction stage, shall be guided by the criteria/principle provided in S.497 Cr.P.C. while in some cases it has been further provided that the Court of appeal or a High Court shall not conclusively decide the guilt or innocence of the accused, entering upon the re-appraisal of evidence during pendency of appeal against the conviction and sentence, subject of course that the matter relates to liberty of a person therefore, it shall not be decided in vacuum and tentative assessment of the evidence has to be made. Similarly, a sick or an infirm person, whose treatment in prison cannot be managed properly, has been released on bail. Also woman, having a suckling baby has been granted bail even in life imprisonment cases by suspending her sentence.

14. In view of above guidelines by the superior courts now the provision of S.426 Cr.P.C is considered to be *pari-meteria* with S.497 Cr.P.C. The contention that after conviction the initial presumption of innocence in favour of the accused disappears, will have little bearing on the mind of the Appeal Court because appeal is always construed to be continuation of the same proceedings and fair balance is to be struck between the two extreme views so that justice is done in all circumstances and technicalities of procedural law, shall in no manner thwart the same because if in the end of the day after spending years in the prison, the convict is acquitted, there is no reparatory

arrangement so far provided in any law including the Criminal Procedure Code, to compensate him for incarceration in prison for years. While to the contrary sub.S.(3) of S.426 Cr.P.C. provides that while computing the sentence of the convict, the period during which his sentence was suspended and he was released on bail, shall be excluded from the total period of sentence he has to undergo. Thus, the State or the complainant is compensated in that manner but for the convict no such relief is provided in law.

15. In view of the above legal position, emanating from the construction of the provision of S.426 Cr.P.C. the Court of Appeal, more particularly the High Court, shall take extraordinary caution and care not to leave the convict to rot in Jail by undergoing any sentence including the life imprisonment and in appropriate cases through tentative assessment of the evidence on record if the case of any convicted person is found fit for grant of bail then, denial of the same would amount to patent injustice.

16. What is the tentative assessment of evidence/materials and how it differs from deeper appreciation of evidence, has been appropriately distinguished from one another in the case of ***Khalid Javed Gillan v. State*** **(PLD 1978 SC 256),** however, if on reconsideration of the evidence the Court of Appeal is of the view that the conviction and sentence is not liable to be maintained then, slightly touching the merits of the case without recording conclusive findings therein, would be a permissible course in the interest of justice because such assessment of evidence would not be binding on the court of appeal, or to say the High Court, while hearing the appeal. It is for this reason that the Legislature has enacted sub-S.(3) of S.426 Cr.P.C. envisaging how to the court of appeal to deal with in future

course when the sentence awarded by the Trial Court is maintained. Almost similar principle is laid down by the superior courts while interpreting the provision of S.497 Cr.P.C. and it has been held in numerous reported judgments that the provision of S.426 Cr.P.C. is at par and parallel to the provision of S.497 Cr.P.C. where such assessment is not prohibited by the words and phrases used therein then, why extra limitations and prohibitions shall be read into S.426 Cr.P.C. The principle that the court of appeal or the High Court while considering the suspension of sentence and grant of bail to the convict shall take extra care, is not a rule of law but a rule of caution.

Keeping in view the above legal position squarely spelt out after placing construction on the provision of S.426 Cr.P.C there appears no much difference between the two provisions of law regulating the grant of bail at pre and post conviction stages.

17. It is by now well settled principle of law relating to re-appraisal of evidence that once co-accused, similarly charged and attributed same and similar role in a particular crime, is acquitted on the basis of same set of evidence where the witnesses have maintained no regard for truth while deposing on oath to tell the truth and nothing else then, ordinarily they shall not be relied upon with regard to the other co-accused unless their testimony/evidence is strongly corroborated by independent cogent and convincing evidence.

18. Keeping in view the above principle of law, tentatively it appears to us that the evidence furnished by the prosecution in this case appears to be indivisible and in absence of additional corroboration of the nature stated above, whether conviction and sentence of the petitioner can be maintained on the same evidence, on the basis of which the co-accused have been acquitted with the same

and similar role, thus, this fact has entitled the petitioner to the concession of bail.

18. Accordingly, this petition is converted into appeal and the same is allowed. The appellant is granted bail by suspending his sentence of life imprisonment in the sum of Rs.4,00,000/- with two reliable sureties to the satisfaction of the Additional Registrar (Judicial), of Lahore High Court, Multan Bench, Multan.

Judge

Judge

Judge

B-V
Islamabad, the
4th March, 2016
Nisar /-
Approved For Reporting