

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE MUHAMMAD ALI MAZHAR
MR. JUSTICE SYED HASAN AZHAR RIZVI

CRIMINAL PETITION NO.52-K OF 2023

(Against Order dated 06.03.2023 passed by the
Sindh High Court Bench at Sukkur in Criminal
Bail Application No.S-399 of 2022)

Allah Dewayo Shahani ...Petitioner

Versus

The State through Prosecutor General, Sindh ...Respondent

For the Petitioner : Mr. Ubedullah Ghoto, ASC
Mr. Muhammad Iqbal Chaudhry, AOR

For the State : Mr. Hussain Bux Baloch, Addl. AG
: Mr. M. Yasin, SHO
: Mr. M. Aslam, SI

Complainant : In-Person

Date of Hearing : 17.08.2023

JUDGMENT

MUHAMMAD ALI MAZHAR, J:- This Criminal petition for leave to appeal is directed against the impugned order dated 06.03.2023 passed by the Sindh High Court Bench at Sukkur in Criminal Bail Application No.S-399 of 2022, whereby the petitioner was declined post arrest bail in FIR No.96 dated 13.11.2021, lodged under Sections 302, 324, 114, 147, 148 & 149 PPC at Police Station Adilpur, District Ghotki.

2. The gist of allegations in the FIR is as under:-

The complainant along with Sardar Bux, Shoukat and others was cultivating land when on 12.11.2021, at about 08:00 am, the accused each (i) Aslam with repeater; (ii) Azharuddin armed with Kalashnikovs; (iii) Tarique with Kalashnikov; (iv) Allah Dewayo (petitioner) with gun; (v) Saleem with repeater; and (vi) Nadeem with gun, appeared and said that today they will commit murder of Sardar Bux. The accused Tarique made two fires of Kalashnikovs with intention to commit murder upon deceased Sardar Bux which inflicted him on flank; accused Aslam made straight fire of repeater with intention to commit murder upon deceased Sardar Bux which inflicted him on his bladder; accused Azharuddin made fires of Kalashnikov upon Sardar Bux which inflicted him on his thigh; accused Allah-Dewayo (petitioner) made straight fire of gun with

intention to murder upon deceased Sardar Bux which injured him on the palm of his right hand; accused Saleem made straight fire of repeater upon Sardar Bux which inflicted him on flank; and Nadeem made straight fire of gun which injured the deceased Sardar Bux on his thigh, after which he raised cries and fell down on the ground. Sardar Bux sustained through and through firearm injuries on his flank, thigh, and palm, and was oozing blood. Thereafter he was admitted in the Taluka Hospital Ghotki, but was subsequently referred to Sukkur Hospital and on the way he expired.

3. The learned counsel for the petitioner argued that the petitioner has been falsely implicated in the case due to some previous enmity. The High Court failed to consider that eye witnesses are interested witnesses. He further argued that there was delay of more than 29 hours in lodging of FIR without a plausible explanation and possibility of deliberation and consultation for false implication of petitioner cannot be ruled out. It was further argued that according to the statements of PWs recorded under 161 Cr.P.C., the petitioner caused gunshot on palm of right hand however, the post mortem report of the deceased reveals that he sustained one fire arm injury near wrist which amounts to a contradiction between the ocular and medical evidence. It was further avowed that the petitioner was arrested in FIR Cr.No.71/2022 and when he was produced before the Magistrate Hyderabad, he was acquitted. Documentary/official evidence, including the CDR of the petitioner, was collected and verified by the I.O/Police of the case during investigation, and proved the petitioner was innocent on the ground of plea of alibi as the distance between Ghotki to Hyderabad, approximately 400-450 kilometers, would be impossible to traverse within an hour or hour and a half. On this ground the investigation agency found the petitioner, as well as the other co-accused, innocent and placed their names in column No.2 of challan on the defense plea, but the learned Magistrate has not accepted the report.

4. The Additional Advocate General opposed the petition and argued that the High Court rightly declined the bail after due consideration. The police report is not binding on the Court and the learned Magistrate after considering the all facts and circumstances, declined to accept the report and issued a warrant of arrest for the petitioner. It was further contended that in the FIR, the specific role of causing fire shot injury to deceased on his right hand has been assigned to the petitioner and, in a similar role, co-accused Aslam has already been refused bail by the High Court.

5. Heard the arguments. It is an admitted position that the death of Sardar Bux was caused due to fire arm injuries. The delay of one day in lodging FIR has already considered by the High Court with ample reasoning which is not fatal to the prosecution case in the given circumstances. According to the ocular account, the petitioner caused fire arm injury to deceased on his right hand but on investigation, he was let off by the police by placing his name in column No.2 of the charge sheet. The learned counsel tried to assert that the injury attributed to the petitioner was on the right palm, but according to the postmortem report the said injury is shown at the wrist, hence it is a case of further inquiry, but we do not rely on a sole ground for the enlargement on bail when the ocular account is assigning a specific role to the petitioner. It is a well settled exposition of law that the police report is not binding being *ipse dixit*, and therefore merely an assertion at this stage without proof or opinion. Despite inserting the name in column No.2, the Magistrate did not accept the report and the petitioner was called upon to join the trial for which non-bailable warrant was issued for the arrest of petitioner. It is also reflected from the impugned order that co-accused Muhammad Aslam in a similar role was refused pre-arrest bail by the High Court and he subsequently withdrew his bail application from this Court, and according to the learned counsel for the petitioner, co-accused Muhammad Aslam is still behind bars.

6. Besides lodging an FIR under Section 302, other offences under Section 147, 148, and 149, PPC have also alleged to have been committed by the accused persons. Section 149, PPC envisages that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

7. In the present case, six accused persons have been implicated, including the petitioner, and have been assigned a specific role in the commission of the offence. The offence was said to have committed by the petitioner and other co-accused when the complainant party was cultivating their own land, therefore, the

possibility of common object which stands for and connotes a prearrangement and common intention/objective of committing the murder of the deceased cannot be ruled out. In order to decide the question of common object of an unlawful assembly, the demeanor of each of the members of the said assembly is relevant for consideration of the Court during trial. In the present case, all the accused persons, including the petitioner, were armed with firearm weapons, the details of which are already mentioned in the FIR, therefore under the niceties of Section 149, PPC, every member of any unlawful assembly stands to be accountable for committing the crime, provided the said criminal act is perpetrated with a common object or such as every member of the assembly was mindful that such offence is likely to be committed and there must be some nexus between the common object and the offence committed. According to Section 141 PPC, an assembly of five or more persons is designated an unlawful assembly for a common object of the persons composing that assembly. No doubt that the common object of the assembly must be one of the five objects mentioned in Section 141 PPC which can be gathered from the milieu of the assembly including the arms used by them and the behavior of the assembly at the scene of crime, but it is quite noticeable from the language used in Section 149 PPC which makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence, and in this case at least six persons assembled at the place of complainant and committed murder with fire arms including automatic weapons and each accused has been assigned a specific role, including the petitioner, and the prosecution case is supported by the ocular account.

8. So far as the plea of alibi is concerned, nothing is said that at the time of commission of the offence mentioned in the FIR, no proper details were provided to demonstrate that the petitioner was actually behind bars in some other case and on which date and time he was released by the Magistrate in the other case. Even otherwise, the plea of alibi cannot be taken at this stage of bail, which was also not given any consideration by the Trial Court and the High Court. The learned counsel for the petitioner referred to the case of Zaigham Ashraf v. The State (2016 SCMR 18). In this case bail was allowed on the ground that, though the accused was initially implicated by the complainant for being present at the crime scene

and made direct fire on the deceased, but during the course of investigation it was discovered that the accused was behind bars in some other case at the time of occurrence, hence the presence of the accused at the crime scene at the time of commission was excluded. The learned counsel also referred to another order of this Court rendered in the case of Chaudhary Nadeem Sultan v. The State (2022 SCMR 663). In this case also the plea of alibi was taken. The findings recorded by this Court in the order depict that, though the petitioner was ascribed the direct role of causing firearm injury to the deceased, but the CPO present in the Court stated that about 100 persons appeared before the investigating officer; amongst those, 18 persons furnished their duly verified affidavits that at the time of occurrence the petitioner was present in the *chelum* of a fellow villager, and even the son of the deceased had furnished an affidavit in which he specifically stated that at the time of occurrence the petitioner was present in the *chelum*. We have considered both the aforesaid orders cited by the learned counsel for the petitioner in support of his submissions, but, in our considered view, the aforesaid orders are distinguishable to the facts and circumstances of the present case. Even otherwise, in criminal cases, including bail matters, each case has its own peculiar facts which are to be considered according to the facts and circumstances of each case.

9. In view of the above discussion, we do not find illegality or perversity in the impugned order passed by the learned High Court. Leave is refused and this Criminal Petition is dismissed. The observations made in this order are tentative in nature and shall not prejudice the case of either party during trial.

Judge

Judge

Judge

KARACHI

17.08.2023

Khalid

Approved for reporting.