

JUDGMENT SHEET

PESHAWAR HIGH COURT, ABBOTTABAD BENCH

JUDICIAL DEPARTMENT

Cr.Misc.B.A.No.360-A/2020

JUDGMENT

Date of hearing.....14-05-2020.....

*Petitioner (s)...(Khan Afsar) by M/s Shad Muhammad Khan
and Junaid Anwar Khan, Advocates.....*

*Respondent (s).....(The State etc) by M/S Sardar Muhammad
Asif, AAG, Ghulam Mustafa Khan Swati
and Shah Nawaz Asim, Advocates.....
.....*

AHMAD ALI, J.- Khan Afsar son of Muhammad Akbar, accused-petitioner, seeks his post arrest bail in case FIR No.35 dated 13.01.2020 for offences under Sections 302/324/337-A(i)/427/452/34 PPC, registered at Police Station, Ghari Habibullah, District Mansehra.

2. The report of the occurrence was lodged by complainant Mst. Saira Ajmal on 13.01.2020 at 22.25 hours in the Emergency Ward of Civil Hospital, Ghari Habibullah, where she brought the dead body of her deceased husband, Muhammad Ajmal son of Miskeen alongwith injured Mst. Nazima Shaheen, sister of her husband, wherein, she stated that at 09.50 PM, the main gate of the house was knocked, she opened the gate and

saw that Khan Afsar (accused-petitioner) son of Muhammad Akbar alongwith his brothers, Arif and Akram, their co-villagers and Waqar Shah alias Shah Ji were standing, who asked her to send Ajmal outside, she turned back inside, they all four duly armed with firearms followed her inside the house. Khan Afsar made firing, which hit his husband who sustained injuries to his abdomen, left leg and ear and died on the spot, while Arif made firing with which sister of her husband, Mst. Nazima Shaheen received an injury on his left wrist; Waqar Shah alias Shah Ji also injured Mst. Nazima Shaheen on his right leg with a sharp object, while Akram gave a stick blow to complainant on her head. Besides her, the occurrence was seen by Mst. Nazima Shaheen and mother-in-law, Mst. Rehmat-un-Nisa. After the occurrence, the accused ran away from the spot. The motive for the occurrence is stated to be enmity between the parties due to divorce of Mst. Nazima Shaheen by brother of Khan Afsar. Accordingly, FIR ibid was registered against the accused.

3. Arguments of the learned counsel for the parties heard at great length and record perused with their valuable assistance.

4. Perusal of record reveals that the occurrence which took place on 13.01.2020 at 9.50 PM inside the

house of deceased Muhammad Ajmal in village Porr, Ghari Habib Ullah, District Mansehra, was reported to the police by injured wife of deceased, Mst. Saira Ajmal at Emergency Ward of Civil Hospital, Ghari Habib Ullah, at 22.25 hours i.e. within 35 minutes of the occurrence. Accused/petitioner, Khan Afsar, who during the days of occurrence was serving as Inspector Traffic, District Battagram, has been given the major role of firing in the occurrence causing the death of deceased Muhammad Ajmal. In the report, the complainant has also charged Arif for causing firearm injury to injured Mst. Nazima Shaheen, sister of deceased, while Akram was charged for inflicting stick blow to complainant on her head alongwith Waqar Shah alias Shah Ji for causing injury to Mst. Nazima Shaheen on her leg. Arif and Akram are real brothers of present accused/petitioner, while Waqar Shah alias Shah Ji is personal servant of the petitioner.

5. Accused/petitioner obtained bail before arrest from the Court of Additional Sessions Judge, Balakot, Camp Court at Mansehra on 18.01.2020, wherein, he raised plea of alibi and stated that at the relevant time, he alongwith his friends gunman and driver was proceeding to Islamabad in their motorcars bearing registration Number AFX-006 and LE-435, both

white colour via Motorways through Havelian-Shah Maqsood, Chechian-Islamabad Interchanges. In this regard, the police during investigation took into possession three USBs containing CCTV footages regarding entry and exit of said motorcars from the concerned Interchanges.

6. Subsequently, during investigation co-accused Waqar Shah alias Shah Ji was arrested on 16.01.2020, who recorded his confessional statement, wherein, he stated that on 12.01.2020 there was marriage of one Waqas Anwar, when he reached the house of marriage alongwith family of accused/petitioner Khan Afsar, Ajmal and his brother Akmal were giving fists and kicks blows to Arif, brother of accused/petitioner. He went to rescue them but they both threatened him. A case was registered against Ajmal and Akmal on the report of Waqas Anwar in police station. Akmal was arrested while Ajmal ran away. Afterwards, Ajmal came to the house of Arif and threatened them of dire consequences. He further stated that he alongwith co-accused Arif and Akram duly armed with '*kalashnikov*' and sticks planned to visit the house of deceased Ajmal on 13.01.2020. Akram knocked the gate and they heard the voice of Ajmal from inside, who after hearing our voice started firing from inside, while he also started firing with

‘*kalashnikov*’ from outside, as a result, Ajmal hit and died while his sister sustained injuries.

7. In this backdrop, this Court would like to dilate upon the plea of alibi taken by the accused/petitioner. ‘*Alibi*’ or ‘*plea of alibi*’ is a claim of innocence brought forth by the accused in which he alleges that at the time when the offence with which he is charged was committed, he was elsewhere. Plea of alibi is the weakest type of plea and cannot be given any weightage unless same is proved through very cogent, convincing and plausible evidence therefore, setting up a false plea of alibi does not lead to an inference of guilt but at the same time it can be a confirmatory circumstance to prove the guilt. The burden of substantiating the plea of alibi and making it reasonably probable lies on the person who sets it up i.e. accused and this burden is heavy and strict. In ‘**Said Akbar Vs. Gul Akbar and another**’ (1996 SCMR 931), the Apex Court has held that:-

“It is true that in such cases when bail is sought on the basis of a particular plea, the Court considering the bail plea has, to make tentative assessment of evidence proposed to be produced by the prosecution and all material available on the record including material in support of defence plea, which is to be placed in juxtaposition with material in support of prosecution case to arrive at conclusion whether bail should be granted or not.”

8. As earlier stated that the evidence collected by the I.O during investigation is the CCTV footages from the concerned authorities, however, in the stated footages only vehicles are visible, while the faces of the person travelling in those vehicles are not visible. Admittedly, the accused/petitioner is a police officer i.e. Inspector and was posted in Battagram as Inspector in Traffic Branch during the days of occurrence. As per his version he was on leave on eventful day with the permission of the D.P.O, but nothing was available on record in black & white regarding the leave. A departmental inquiry is being initiated against him and he has been suspended from service by the competent authority. In past there was registered a case against him in PS Kot Najibullah District Haripur under section 322 PPC for causing '*Qatl-Bissabab*' of a person during investigation when he was posted as SHO PS Kot Najibullah. It was the plea of accused/petitioner that at the relevant time he was travelling with his friends, driver and gunman in their motorcars and stayed at night in Islamabad where they met many others. All these friends, gunner and driver including inmates of the Flat at Islamabad submitted their affidavits and recorded statements in line with the plea of alibi of the accused/petitioner. Similarly, Call Data Record

pertaining to different cell numbers including the accused/petitioner was also brought on record.

9. On the other hand, the case of the prosecution is supported by eyewitnesses account furnished by injured P.Ws, medical evidence and other circumstantial evidence. The occurrence was taken place inside the house of deceased and both the parties are closely related to each other i.e. deceased was first cousin of present accused/petitioner and one injured witness Mst. Nazima Shaheen was divorced by brother (not charged in this case) of the accused/petitioner. The accused/petitioner and others were duly identified in the light of bulb installed at the spot and was also recovered during investigation. So far as the argument of the learned counsel for the accused-petitioner that co-accused Waqar Shah alias Shah Ji has committed the offence and in this regard he confessed his guilt is concerned, no empties were recovered from outside the gate from where firing was made on the deceased. All the recoveries of 7.62 bore were made from inside the gate, which as per firearms expert report matched with the '*kalashnikov*' recovered on the pointation of co-accused. Though the I.O has showed holes in the gate from both sides but no empty allegedly fired by deceased from inside could be recovered. The accused/petitioner

obtained bail before arrest after five days of the occurrence and then he taken the plea of ‘*alibi*’. In case of ‘*Iqbal-ur-Rehman Vs. The State*’(PLD 1974 Supreme Court 83), the august Apex Court has observed that:

“We have no intention of recording any finding as to the truth or otherwise of the plea of alibi raised on behalf of the respondent Iltafu Rehman, as that is the function of the trial Court. All that we are called upon to examine at this stage is whether this was a case where there were, or not, reasonable grounds for believing that the respondent was guilty of an offence punishable with death or transportation for life.”

Similarly in the case of ‘*Bahadur Vs. Muhammad Latif and others*’(1987 SCMR 788), the same principle has been annunciated, in the following words:-

“We heard the learned counsel for the parties and have gone through the impugned judgment of the learned High Court as also the reasons given for rejection of bail by the learned Sessions Judge. There is no denying the fact that the respondent Muhammad Latif is directly charge in the F.I.R. for having killed Muhammad Munir with a rifle shot. The F.I.R. was promptly lodged within 45 minutes by the petitioner. As respects the contention that the Investigating Officer had found the plea to alibi to be correct, it was contended by the learned counsel for the petitioner, that in fact both the respondents have since then been challaned for the commission of the offence. This fact was not controverted by the learned counsel for the respondents and was confirmed by the learned Assistant Advocate-General. It is needless to comment that the alleged theory of alibi has still to stand the test of scrutiny on the basis of evidence.”

In case titled '**Muhammad Afzal Vs. The State**'(2012 SCMR 707), the Honourable Supreme Court of Pakistan has held that:-

“Learned counsel for the petitioner only pressed into service the alleged alibi that the petitioner being an employee of Daewoo Company, was at Sargodha and not at his house at Jhang at the time of occurrence. The High Court has rightly observed that this is a matter, the veracity whereof will be determined at the trial.

In view of the foregoing discussion, we find no justification for differing with the High Court and granting bail to the petitioner. This petition is, therefore, dismissed and leave is declined”.

10. This Court considers that it is for the trial Court to determine the veracity of confession of the co-accused, ocular account of the eyewitnesses coupled with medical and circumstantial evidence as well as defence evidence and draw its conclusion in light thereof. This Court at this stage on tentative assessment of the material placed on record is not inclined to grant bail to the accused/petitioner. The offence squarely falls within the prohibitory limb of Section 497 Cr.P.C.

11. Needless to mention here that the observations made above are purely tentative in nature and should in no way prejudice the case of either party during trial. In this regard, reliance is placed on case law reported in **(1996 SCMR 1845)** wherein it has been held that:-

“However we would like to point out in no certain terms that the observations made by the High Court in the orders granting bail and by us in this order are confined to tentative assessment made for the purpose of disposal of bail applications and not intended to influence the mind of the trial Court, which is free to appraise the evidence strictly according to its merits and the law of the time of disposal of the case, which of course, needless to say, is the function of the trial Court”.

12. For what has been discussed above, this bail petition being bereft of merit, is dismissed accordingly.

Dt. 14-05-2020.

J U D G E

M.Saleem/*

(SB) Mr. Justice Ahmad Ali