

Reporting

Judgment Sheet

IN THE PESHAWAR HIGH COURT,
ABBOTTABAD BENCH
JUDICIAL DEPARTMENT



WP No. 825-A/2016.

JUDGMENT

Date of hearing 24.07.2017

Petitioner/s (Riaz Muhammad Khan)

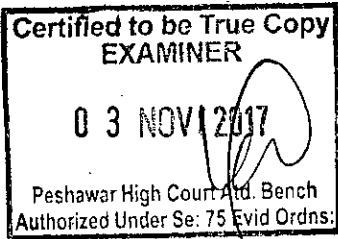
Respondent/s

SYED ARSHAD ALI, J:- Petitioner seeks

constitutional jurisdiction of this Court praying that:

*" on acceptance of instant writ petition,
the proceedings under section 169 Cr.
P.C for respondent No. 6 and
subsequently granting him bail through
personal bond may kindly be quashed
by declaring the entire process as
without lawful authority, misuse of
power, void ab-initio and the local
police be directed to arrest the
respondent NO. 6 by submitting
complete challan against all the accused
including respondent No. 6 accordingly
for trial.*

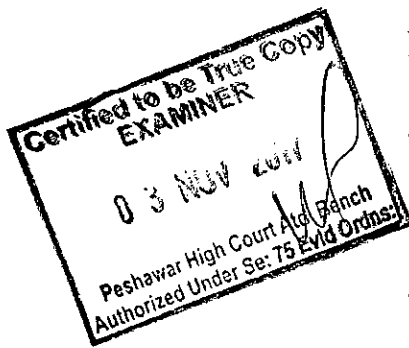
*Any other remedy which deems fit by this
Hon'ble Court may also be granted in
favour of petitioner."*



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2. Brief and essential facts of the case are that case FIR No. 68 dated: 09.05.2016 under section 302/324/148/149 PPC at Police Station Banna Allai, was registered by the petitioner against respondents No. 6 and others.

3. It was reported by the petitioner that he along with Fazal Ghafar (deceased) Ilyas Khan Durrani, and Khanzada "Complainant Party" when reached at their land near Mosuma Adda, Gohar Ali son of Sher Ali respondent No. 6, Gullu Kohistani, Chappu Kohistani along with seven others "Accused" armed with weapons asked the Complainant Party that Accused, under the instructions of Professor Mukhtiar Ali, directing the Complainant Party not to use the thoroughfare/pedestrian track and if the Complainant Party did not return back, the Accused will open fire at them. During this time accused Gohar Ali opened fire at Fazal Ghafar (deceased), resultantly Fazal Ghafar sustained firearm injury on his face from Gohar Ali and another fire injury from Gulla, which caused his death. The accused surrounded the Complainant Party and started indiscriminate firing.



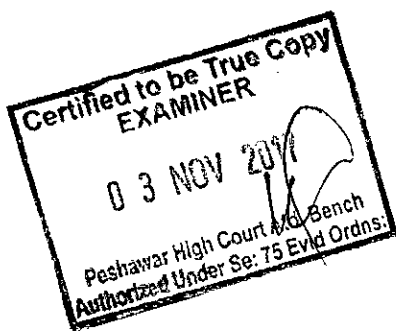
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4. At the time of registration of case, since petitioner was already nominated in FIR No. 67 by Muhammad Khan for firing at him, was arrested by police. The place of occurrence and dispute has been the use of thoroughfare in both the FIRs.

5. The perusal of medical report/autopsy of the deceased Fazal Ghafar shows that deceased had received entry wound on his mouth with an exit entry and another entry and exit at the right deltoid muscle region. It was further alleged that the occurrence was also seen by the brother of Complainant.

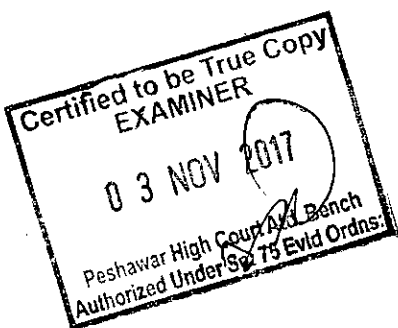
6. On 23.05.2016, respondent No. 6 was granted ad-interim bail before arrest by learned Additional Sessions Judge.

7. Respondent No. 6 pleaded his innocence before the investigation officer and also raised plea of *Alibi*. The investigation officer recorded statements of various persons in support of the plea of *Alibi* of the accused/respondents. The investigation officer found the Respondent No 6 innocent while believing his plea of defense qua other evidence collected by him during the course of investigation.



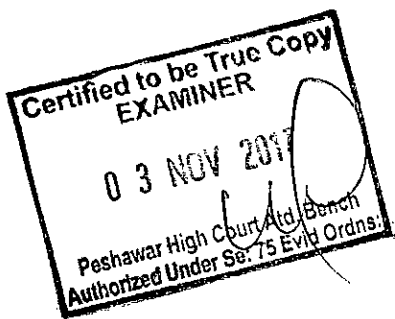
8. Not contended with the mode and manner of investigation of local police, the present petitioner filed an application to the competent authority for transfer of investigation. The said request was acceded to and investigation was transferred to crime branch. Crime branch also concurred with the investigation of the local police. On 04.06.2016 investigation officer solicited the opinion from the office of District Public Prosecutor for deferment of arrest of respondent No. 6. However, the office of District Public Prosecutor did not give any opinion as the application for bail before arrest was pending before the competent court.

9. During the investigation, the eye witnesses recorded their statements under section 164 Cr.P.C stating to have not witnessed the occurrence. The investigation officer after evaluating the prosecution evidence qua the defense witnesses, believed the defense version and declared Respondent No 6 innocent and accepted bails bonds from respondent No. 6 on 6-6-2015 purportedly under section 169 Cr. P.C, despite the fact that respondent No. 6 was not in his custody. However, while preparing the final investigation report under



section 173 Cr.P.C he did not mention the factum of releasing Respondent No 6 on his personal bond. In the said report he has stated to have deferred the arrest of respondent No 6 being innocent.

10. The learned counsel appearing on behalf of the petitioner has stated that the investigation officer has illegally allowed release of respondent No. 6 against submitting bail bonds to the investigation officer and further stated that investigation officer had no mandate under section 169 Cr. P.C to accept bail bond from respondent No. 6. On the other hand learned counsel appearing on behalf of respondent No. 6 stated that the findings of investigation office are factually correct and this Court has no jurisdiction to interfere in the investigation of police.

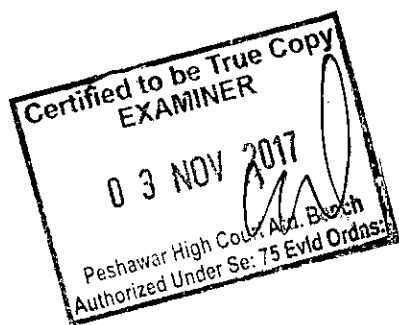


11. Arguments heard and record perused.

12. Admittedly the respondent No. 6 has been directly charged by the petitioner for the murder of Abdul Ghafar (deceased) and the presence of Complainant at the spot is further established by registration of FIR No. 67, wherein, Muhammad

13. Although, the investigation officer has the mandate to unearth the truth and collect the entire evidence relating to the occurrence and provide the investigation report in terms of section 173 of Cr. P.C and also to state his opinion on the case, however, he has no authority to arrogate to himself the role, and the function of adjudicating and to evaluate the evidence of prosecution viz-a-viz that of defense. However, the core issue before us is as to whether the investigation officer has rightly accepted bail bonds from respondent No. 6 under section 169 of Cr. P.C. For sake of convenience, **section 169** Cr.P.C is reproduced as under:-

deficient: If, upon an investigation under this Chapter, it appears to the officer Incharge of police station, or to the police officer making the investigation that there is not sufficient evidence or reasonable ground or suspicion to justify the forwarding of the accused to the Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or



without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report and to try the accused or (send) him for trial.

The bare perusal of section 169 *ibid* lays down the following circumstances for release of accused on bonds (personal or with sureties);

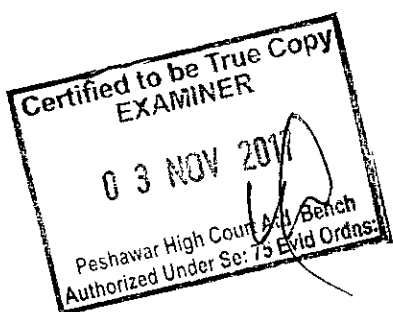
(i). *That the evidence is insufficient or there are reasonable grounds of suspicion to justify the forwarding the accused to the Magistrate.*

(ii) *Insufficiency of evidence means inadequate evidence to prove or support a finding.*

(iii) *the Investigation officer has no authority to evaluate the evidence of prosecution viz-a-viz of defense*

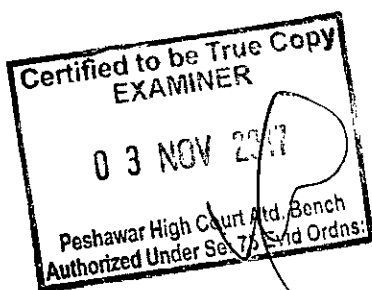
(iv). *The accused has to be in custody.*

15. In the present case admittedly the investigation officer while accepting the bail bond from respondent No. 6, respondent No. 6 was not in his custody. Furthermore, under section 173 of Cr.P.C the investigation officer is required to state in the said report, if the accused is released on bond with or without sureties, apprising the magistrate of such bond so that the Magistrate can pass order on such bonds under section 173 (3) Cr.P.C. The



investigation officer has prepared complete challan in the present case, wherein the factum of release of the accused on personal bond has not been stated, instead it has been mentioned that the arrest of the Respondent No 6 has been deferred. Hence, the releasing of respondent No. 6 on bond when he was not in custody is illegal and without lawful authority.

16. From the aforesaid facts and law on subject, we hold that the impugned action of the investigation officer is arbitrary and has transgressed and travelled beyond the scope of his jurisdiction under section 169 Cr.P.C. The investigation officer had no authority to arrogate to himself the function of adjudication and do determine the nature of offence and to give pre-trial verdict of innocence of accused.



17. In view of the above, this writ petition is accepted and impugned order of respondent/investigation officer releasing respondent No. 6 against personal bond is set-aside, however, at this stage we cannot give any findings on the action of Investigation officer deferring the arrest of Respondent NO 6, as the same is his jurisdiction and is subject to the orders of Magistrate under section

173 read with section 193 of Cr.P.C and thereafter, the trial court taking cognizance of the case shall pass appropriate order under the law. With these observations this writ petition is accepted and investigation officer is directed to submit the complete challan before the competent Court immediately.

Announced.
24.07.2017.
(Date)

Sd./Judges
Syed M. Attique Shah
Justice Anwar Ali

