

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

Cr.Misc.BA NO.1878-P/2015

Date of hearing: _____

Petitioner (s) : _____

Respondent (s) : _____

ORDER

ASSADULLAH KHAN CHAMMKANI, J.- Petitioner

Aurangzeb, being unsuccessful before the two courts below to get the concession of post arrest bail, through this further petition, seeks the same concession from this Court, in case FIR No.311 dated 22.08.2015, registered under sections 302/324/427/34 PPC, in Police Station Lahor, District Swabi.

2. On 22.08.2015 at 14.30 hours, complainant Danish, in company of dead body of his brother Shahzad Khan deceased reported to local police that on fateful day he alongwith his mother Mst. Samina and deceased while returning home from the house of his relative in a motorcar No.LX-57, when reached "Sawabi Jehangira road Beka Shakh", petitioner Aurangzeb alongwith his son Shah Zeb (absconding co-accused), duly armed with firearms present there, opened fire at them with the intention to commit

their Qatl-e-Amd, as a result, the deceased got hit and died on the spot, while he and his mother luckily remained unscathed. Damage to his motor car due to firing of the accused has also been alleged. A dispute over landed property is stated to be a motive behind the incident.

3. Learned counsel for the petitioner while arguing the case on merits contended that the incident is unseen and alleged eyewitnesses Danish and Mst. Samina, being brother and mother of the deceased, respectively, are procured witnesses. He while referring to the dimensions of injuries on the person of the deceased in autopsy report contended that charge has been exaggerated. He, however, strongly stressed for release of the petitioner on bail on the plea of alibi by contending that petitioner left Pakistan for Abdu Dhabi on 20.08.2015 at 04.15 hours i.e. (two days prior to the incident) from Benazir International Airport Islamabad, and landed there in UAE on 20.08.2015 at 08.40 hours, wherefrom he left for Bangkok Thailand and landed in Airport of Bangkok at 18.20 hours on the same day; that getting knowledge of his false involvement in the instant case, the petitioner on 24.08.2015 at 23.00 hours, reached Pakistan and landed at Lahore airport. He produced original passport and Boarding Pass of the petitioner qua his above travelling for perusal of the Court

(original seen and returned). He further contended that petitioner took the plea of alibi soon after his arrival to Pakistan by submitting application to DIG Mardan Region, on which inquiry was conducted and according to report of the Inquiry Officer furnished on the basis of record of the concerned Airports, petitioner was abroad on the day and time of occurrence. He contended that the plea of alibi of petitioner get supports from the documentary evidence of the Airports, his passport, ticket and boarding card coupled with the opinion of the Inquiry Officer; therefore, he is entitled to the concession of bail. He placed reliance on the following judgments:-

- 1. 19980 SCMR 920**
- 2. 1997 SCMR 1829**
- 3. PLD 1998 Supreme Court 97.**
- 4. PLD 2006 (Lahore) 689**
- 5. 2015 YLR (Lahore) 2441**
- 6. 2012 MLD (Sindh) 1876**
- 7. 2013 P Cr L J (Peshawar) 1318.**

4. Conversely, learned counsel for the complainant while controverting the arguments of learned counsel for the petitioner on merits contended that petitioner is directly charged for murder of the deceased by the eyewitnesses in a promptly lodged report eliminating the possibility of consultation and deliberation; that being a broad daylight incident, question of mistaken identity does not arise; that autopsy report of the deceased and

recoveries from the spot supports the ocular version and prima facie connects the petitioner with the commission of offence. On plea of alibi, learned counsel contended such plea cannot be taken into consideration at bail stage, rather can be considered by the Trial Court in light of the evidence led by prosecution and defence during trial. He added that if such plea is allowed at this stage it would amount to giving of a clear chit of acquittal to the accused before the learned Trial Court. In support of his contentions he placed reliance on the following judgments:-

- 1. 2013 SCMR 385**
- 2. 2012 SCMR 707**
- 3. 2015 P Cr L J (Peshawar) 1083**
- 4. 2010 P Cr L J (Peshawar) 1386**

5. Learned AAG adopted the arguments of learned counsel for the complainant.

6. I have considered the exhaustive arguments advanced from either side.

7. Since the main stress of the arguments from both the sides was on the plea of alibi, therefore, I would like to dilate upon the same to the extent of bail.

8. Plea of alibi is that form of defence through which accused attempts to prove that he was in some other place at the time when alleged offence was committed. Alibi is Latin word, which means elsewhere. Plea of alibi

means that accused was physically not present at the time of commission of offence. When the accused suggests to the Court that he was somewhere else at the time of commission of alleged offence, such suggestion is called **“plea of alibi”**. In simple words the plea of absence of a accused person from the place of occurrence at the time of the commission of offence is called the plea of alibi, which should be raised at the earliest time/ stage.

9. In the instant case the incident took place on 22.08.2015 at 13.30 hours and the petitioner alongwith absconding co-accused has been charged directly in the FIR by complainant for murder of the deceased. Petitioner submitted application to DIG Mardan Region alleging his innocence on the plea of alibi that two days prior to the incident i.e. 20.08.2015 he left Pakistan for Abu Dhabi and from Abu Dhabi to Bangkok and returned Pakistan on 24.08.2015. The application was marked to Hazrat Nabi Khan Inspector Police Station Yar Hussain Swabi for inquiry, who after conducting inquiry, submitted report. During pendency of the instant proceeding, on 26.10.2015, learned counsel for the petitioner requested for requisition of the Inquiry report and personal attendance of Inspector Hazrat Nabi, resultantly, he was summoned for 28.10.2015, on which date, he turned up alongwith Inquiry

report. After hearing the arguments, the case was posted to 30.10.2015, but while writing judgment the inquiry was being found incomplete was directed to be returned to the Inquiry Officer on 30.10.2015 with following observations:

“The case was fixed for order. It appears from the record that besides merits, petitioner Aurangzeb is also seeking bail on plea of alibi. During the course of arguments the said plea was strongly pressed by his counsel. He contended that petitioner left Pakistan for Abu Dhabi on 20.08.2015 i.e. two days prior to the incident, wherefrom he allegedly proceeded to Bangkok, where on getting information qua his false involvement in the instant case, the petitioner rushed to Pakistan on 24.08.2015.

While writing judgment, it revealed from inquiry report conducted by Hazrat Nabi Khan Inspector Police Station Yar Hussain, on the application of the petitioner regarding his plea of alibi that on one hand, the I.O. has not furnished any final opinion qua the authenticity or otherwise of the plea of alibi of the petitioner, while on the other hand, he has not recorded the statements of the concerned officials of the relevant departments/sections of the Airports wherefrom the petitioner departed from Pakistan and arrived back to Pakistan. He has neither taken into possession the passport of the petitioner, the boarding pass/card of the concerned airports in respect of his travelling well as other relevant record from emigration department of the airports. Besides, it is the era of advance technology and in each airport CCTV cameras are installed for the purpose of surveillance of the passengers entering into the airports in respect of their travelling. But the I.O. has not taken pain to collect all these material for digging the truth. He has also not verified about the travelling ticket of the petitioner. It is case of murder, on one hand precious life of the deceased while on the other hand the liberty of the petitioner claiming innocence are involved. The Enquiry Officer has only placed on file a

copy of R-11 (Travel History) of the petitioner from Federal Investigation Agency Integrated Board Management System, but this document too does not bear any stamp or signature of the responsible Officer and well in its bottom it has been mentioned that the same is not for Court use. The I.O. has also annexed an undertaking tendered by the complainant and Legal heirs of the deceased regarding their stance qua involvement of the petitioner in the commission of offence. There was no need of annexing this document with the inquiry. What was essential and inevitable in the matter has not been done by the Enquiry Officer. The real job of the Enquiry Officer, was to unearth the real facts by collecting all relevant material in respect of the travelling of the petitioner coupled with the statements of the concerned officials of the airports, in light whereof he had to furnish his opinion, which though would not be binding upon the court, but an inquiry without final opinion of the Enquiry Officer in light of what he has collected, would not be complete and would serve no purpose. The purpose of an inquiry is always to dig out the real facts without any fear and favour in the interest of justice.

In view of the above, order could not be announced. The inquiry qua the plea of alibi of the petitioner has not been properly conducted, therefore, in the interest of justice, the same is returned to Hazrat Nabi Inspector Police Station Yar Hussain, with the direction to re-inquire the plea of alibi of the petitioner in light of observations made in the order and to submit report within a fortnight, positively and to appear in person on the next date i.e. 16.11.2015”.

10. In light of the above directions, Hazrat Nabi Khan Inspector, after completing the inquiry resubmitted his report. According to his opinion furnished on the basis of documentary evidence collected from Benazir International Airport Islamabad and Lahore Airport in

connection with the passport number of the petitioner i.e. AJ-5094182, the petitioner left Pakistan on 20.08.2015 for Abu Dhabi wherefrom he left for Thailand Bangkok on the same day and reached there at 18.20 hours. He returned to Pakistan on 24.08.2015 at Lahore Airport. All the relevant documents showing exit and entry of the petitioner on the relevant dates in the Airports of Pakistan have been annexed with the inquiry report. Besides, the Inquiry Officer in his opinion has categorically mentioned that keeping in view the travelling record of the petitioner, according to which on 20.08.2015, he left Pakistan for Abu Dhabi, his participation and presence on the spot at the time of commission of offence on 22.08.2015, is beyond his understanding. The relevant words of the Inquiry Officer read as under:-

No doubt, the opinion of the I.O or the inquiry Officer in respect of plea of alibi of the accused is not binding upon the Court, but it can be considered for grant of bail, if same is based on sound reasoning. Apart from above, this court by itself examined the original passport, ticket and boarding Card of the petitioner, showing his departure from Pakistan on 20.08.2015 to Abu Dhabi at 0840 hours,

via flight EY 408 and his arrival to Pakistan on 24.08.2015 at 19.40 hours at Lahore via flight TG345. Thus, the plea of alibi taken by the petitioner is not only, prima facie, supported by the documents available on the record but augmented by report of the Inquiry Officer.

11. True that normally the Courts are reluctant to consider plea of alibi at bail stage, but this is not a principle of universal applicability and in appropriate cases where a strong plea of alibi has been put forward without any loss of time and the same has been found to be authentic, Court can grant bail on the plea of alibi. In case titled **“Khalid Javaid Vs the State (PLD 1978 SC 256)** the Hon’ble Supreme Court granted bail to the accused on the plea of alibi. The learned Lahore High Court in case titled, **“Arshad Mehmood Vs the State” (PLD 2006 Lahore 689)**, case titled, **“Malik Noor Ahmad and others Vs the state (PLD 1993 Lahore 500)**, case titled, **“Iqbal Ahmad and two others Vs the State ” (1989 P Cr L J 2122)** has granted bail to the accused on the plea of alibi. I would like to refer case titled, **“Malik Muhammad Saleem and others Vs Arshad Siddiq and 2 others” (1997 SCMR 1829)**, wherein in similar circumstances the august Apex Court refused to cancel the bail granted to the accused on the plea of alibi by the

august High Court. The relevant Paragraph of the judgment read as under:-

“We have already referred to the discussion of the three relevant authorities referred to by the learned counsel for the petitioner in the petitions but see no reason to come to the conclusion that the learned Judge in the High Court had acted unreasonably or perversely in declining the cancellation of bail to the two accused-respondents and granting bail to the two other respondents in the two petitions. The crux of the matter is that the learned Judge in the High Court had himself “examined the Passport, P.I.A. Ticket and other documents” produced by the learned counsel for Kamran Siddique and Laiq Siddique and had reached the conclusion that the plea of alibi taken by the said respondents was not only prima facie supported by the documents available on the record but was augmented by the report of ASDPO Chamkani recorded by him on 22.12.1996”.

In case titled, **“Ajmal Khan Vs Liaqat Hayat and another” (PLD 1998 Supreme Court 97)**, the Hon’ble Supreme Court granted bail to the accused on the plea of alibi by observing as under:-

“Bail can be granted in a case of capital charge on the plea of alibi if peculiar facts and circumstances of that case so justify”.

In case titled, **“Muhammad Azeem and others Vs the State and others” (2015 YLR (Lahore) 2441)** the learned Lahore High Court while granting bail to the accused observed that plea of alibi raised in a bail matter

may not be outrightly rejected and can be gone into for the purpose of grant or refusal of bail.

12. Deriving wisdom from the judgments (supra) and keeping in view the mandate of S.497 Cr.P.C. which does not contain any restriction on court's power to assess tentatively the material placed before it for the purpose of grant or refusal of bail. Such material would not only be the material collected in favour of the prosecution and against an accused but would include all the material in favour of the prosecution as well as in favour of the defence. Court, however, had to refrain directly or indirectly from giving any conclusive finding on the question of guilt or innocence of accused. On tentative assessment of the material available on record, I am not going to give any findings qua innocence of the petitioner in light of his plea of alibi rather would just hold that in presence of documentary evidence in support of plea of alibi of the petitioner coupled with the opinion of the Inquiry Officer, at the moment the case of the petitioner is that of the two versions, which one is correct, is yet to be determined during trial, however, it makes the case of the petitioner that of further inquiry into his guilt within the meaning of sub-section 2 of S.497 Cr.P.C. and when an accused became entitled to bail as of right under section

497 (2) Cr.P.C. the same cannot not be withheld as a punishment on mere ground of he being directly charged for heinous offence. It is settled law that a mistaken relief of bail can be repaired by convicting the accused, if proved guilty at the end of trial, but no proper reparation can be offered to an accused for his unjustified incarceration, albeit his acquittal in the long run.

13. For what has been discussed above, this petition is allowed. The accused/petitioner is admitted to bail provided he furnishes bail bonds in the sum of Rs.3,00,000/- with two local, reliable and resourceful sureties each in the like amount to the satisfaction of learned Illaqa Judicial Magistrate/MOD concerned.

14. Before parting with the judgment, I would like to point out that the observations made in the bail granting being based on tentative assessment of the material for the purpose of disposal of bail application only, will not influence the mind of the learned Trial Court, which shall decide the case on merits by appraising the evidence strictly according to its merits on the available evidence.

Announced
23.11.2015

J U D G E

7. For what has been discussed above, Suo motu notice given to accused Shakir stands withdrawn. He is admitted to bail on already existing bail bonds, on merits. Since this court has already directed expeditious conclusion of trial while dealing with the bail petition of co-accused Farman, therefore, office is directed to send the record to the quarter concerned within two days, positively.

announced:
19.10.2015

J U D G E