

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

Cr. Misc BA.No.105-B/2018

Mishqatullah Vs The State and others

For appellant: M/S. Pir Liaquat Ali Shah and Sultan Mehmood
Advocates

For respondents: Mr. Shahid Hamed Qureshi, AAG and Asghar
Ali Khan Daim Khel Advocate.

Date of hearing: 25.05.2018.

JUDGMENT

SHAKEEL AHMAD, J.- Through this criminal miscellaneous bail petition, the appellant Mishqatullah seeks post arrest bail in crime report No. 159 dated 04.05.2014, registered under section 302/324/34 PPC at police station Basia Khel, district Bannu.

2. The prosecution case, as set forth in the crime report, are that on 04.05.2014, at 810 hours, the complainant Abdur Rehman Khan reported the matter to the police in the mortuary of civil hospital, Bannu; that on the day of occurrence, he alongwith his son Israr Khan were present at their chowk in the village, when at about 07:15 hours, the accused Qismatullah (now acquitted),

Kashif and Mishkatullah (present petitioner), duly armed with .30 bore pistol came there and started firing at him and his son Israr Khan, resultantly, Israr Khan was hit and got seriously injured, while the complainant escaped unhurt, luckily. After commission of offence, the accused decamped from the spot. The complainant with the help of his co-villagers shifted the injured Israr Khan to the civil hospital Bannu, however, he succumbed to his injuries in the Hospital. Motive as alleged in the crime report is scuffling between the son of Hafizullah (son of the complainant) and the accused party some 2/3 days ago prior to the occurrence, hence, the accused were charged in the crime report. Vide order dated 05.04.2018, the petitioner was declined bail by the learned Additional Sessions Judge-V, Bannu, hence, this petition.

3. It has been argued by the learned counsel for the petitioner that the petitioner is suffering from ailment; that he was examined by the standing Medical Board, where he was advised regular physiotherapy; that he needs to stay in Hospital where the facilities of

physiotherapy is available; that on 04.05.2014, supplementary statement of the complainant was recorded under section 161 Cr.P.C, wherein, he charged Qismatullah, Latifullah and Kashif Ali for committing murder of his son and attempting at his life, excluding the name of the petitioner; that in the supplementary statement, the complainant alleged that the accused had come to the spot on motorcycle, but in the crime report, he had not stated so; that vide judgment dated 24.05.2017, the co-accused Qismatullah has already been acquitted by the learned Additional Sessions Judge-IV, Bannu on the same set of evidence; that the petitioner resides at Karachi and when he learnt about the instant case, he appeared before the Court, on 05.4.2018, his ad-interim bail was recalled; that bail could not be withheld merely on absconsion, if the accused is otherwise entitled for bail; that the prosecution case requires further inquiry into the guilt of the accused/petitioner, therefore, he deserves the concession of bail.

4. Conversely, the learned counsel for complainant vehemently opposed the contention of the learned counsel for the petitioner and argued that the medical report relied upon by the learned counsel for petitioner for grant of bail to the petitioner is neither satisfactory nor sufficient for this purpose; that after commission of offence, the petitioner remained at large for quite sufficient time; that acquittal of co-accused is of no help to the petitioner; that the complainant disowns his supplementary statement.

5. The learned Additional Advocate General appearing on behalf of the State while supporting the contention of the learned counsel for the complainant, added that the petitioner has specifically been charged in the FIR; that the medico-legal report, site plan and version of the complainant, if placed in a juxta-position are consistent inter alia; that there exists a prima facie case against the petitioner, therefore, he does not deserve the concession of bail.

6. I have carefully considered the arguments of the learned counsel for the parties and perused the material placed on record.

7. Perusal of the record reveals that petitioner is involved in crime report No.159 dated 04.05.2014, registered under sections 302/324/34 PPC at police station, Basia Khel for committing murder of one Israr Khan and attempting at the life of the complainant. The petitioner claims to have chequered history of ailment. He applied for grant of bail on medical ground as well as on merits, but, vide order dated 06.04.2018, the learned trial Court declined bail to the petitioner. On the previous date vide order dated 27.04.2018, with the mutual consent of the parties, the Superintendent Jail was directed to make arrangements to refer the petitioner to the Medical Board for examination of his condition, framing the following questions.

1. Nature and type of ailment, the petitioner is suffering from?

2. *Whether the petitioner needs specialized treatment outside the jail hospital?*
3. *Whether the petitioner cannot be treated inside the jail?*
4. *Whether further detention of petitioner in jail is hazardous to his life.*
5. *Whether facility of physiotherapy cannot be provided to the petitioner inside the jail.*

8. The petitioner was accordingly produced before the Standing Medical Board, consisting of Dr. Jamal Abdul Nasir, Chairman Standing Medical Board, Medical Superintendent Police Services Hospital, Peshawar, Dr. Faridullah, Physician Police /Services Hospital Peshawar, Dr. Ameenullah Ophthalmologist Police/Services Hospital, Peshawar, Dr. Mumtaz Ali Neuro Surgeon LRH, Peshawar and Dr. Umar Ayub Khan, Secretary/Chief Orthopedic Surgeon. The Standing Medical Board, after examining the petitioner submitted its report. The sum and substance of the report of Standing Medical Board are as under.

“The Standing Medical Board is of the opinion that the petitioner has history of Ankylosing Spondylitis Grade-I, on examination chronic low backache morning stiffness, the pain and stiffness increases with prolonged rest. On examination restricted spinal movements by with bilateral facet arthropathy, SLR effected bilaterally, HLA 27 is positive, MRI shows that degenerative changes without cord/root compression.

He is advised regular physiotherapy with strengthening exercise, T.A.B CARA 20 mg (BD) tab: muscorim (BD) cap: Esso 40 mg (OD). He is advised to follow up the visits regularly. For his regular physiotherapy he needs to stay in Hospital set up where such facilities are available for minimum six to twelve weeks. (6/12) weeks time.

9. It is pertinent to mention here that the Standing Medical Board constituted to examine the petitioner gave a definite finding that he has the history of Ankylosing Spondylitis Grade-I and he is suffering from low backache morning stiffness, the pain increases with prolonged rest and restricted spinal movements with

bilateral facet arthropathy and suggested regular Physiotherapy and stay in the Hospital for minimum six to twelve weeks, where such the facilities of physiotherapy are available. Admittedly, this facility is not available inside the Central Jail of Bannu.

10. Under similar circumstances, the August Supreme Court of Pakistan in Ismail Sheikh's Case (1993 SCMR 11460) admitted the accused on bail with following observations.

“Now the question arises for consideration whether finding of three medical experts making diagnosis of the illness of the petitioner with positive recommendation that he needs medical treatment which may not be possible in jail can be rejected and brushed aside particularly when there is no challenge to the authenticity of the report of the Board that it is factually incorrect or obtained for extraneous consideration. Since there was no challenge, Chairman or Members of the Medical Board were not called in the Court to explain any aspect of the report which was deficient.

6. In a non-bailable case punishable with death or imprisonment for life or imprisonment for 10 years, proviso to section 497, Cr. P.C. envisages that the Court may direct that any person under the age of 16 years or any woman or any sick or infirm person accused of such offence be released on bail. Mr. Naeemur Rehman, Standing Counsel for the Federal Government was unable to satisfy us about the sustainability of order of Special Appellate Court rejecting bail in view of positive finding of Medical Board constituted by the Court with the consent of the counsel appearing for the parties particularly when no challenge was made or dispute raised with regard to the authenticity of report of three medical experts.”

11. From the above discussion, it becomes crystal clear that the bail on medical ground can be granted under Section 497 Cr.P.C, if the Court comes to the conclusion on the basis of medical report that the ailment, with which, the petitioner is suffering is such that it cannot be properly treated while custody in jail and

that he needs some specialized treatment. In the case before me there is specific report of the Standing Medical Board constituted to examine the condition of the petitioner that he needs regular physiotherapy for six to twelve weeks in the hospital wherever such facility of treatment is available.

12. Averting to the merits of the case, no doubt, the petitioner is one of the nominated accused in the crime report, but on 04.05.2014, supplementary statement of the complainant was recorded, wherein, he stated that at the time of report, he was not in senses, however, he added that the accused had come to the spot on a motorcycle bearing registration No. MLF-8186 and after commission of offence, they left the said motorcycle on the spot and charged Qismatullah, Latifullah and Kashif Ali, excluding the name of the petitioner, which leads me to the conclusion that the case of the petitioner squarely falls within the ambit of sub-section 2 of Section 497 Cr.P.C, therefore, he deserves the concession of bail even on merits.

13. Adverting next to the absconsion of the accused admittedly, the petitioner was arrested on 05.04.2018, when his pre-arrest bail was declined but, he stated that he was residing at Karachi to earn his livelihood and after arrival, he came to know about the case, he surrendered before the Court. It is now settled that bail cannot be refused to the accused merely on absconsion, if his case is otherwise fit for grant of bail. In this respect reliance can well be placed on the case reported as “Muhammad Aslam Vs the State”(2016 SCMR 1520), wherein it was observed as under:

“S. 497(2)---Bail---Case of further inquiry into guilt of accused--- Abscondment of accused--- Effect--- Person absconding after an occurrence and declared as a proclaimed offender may lose his claim to exercise of discretion in his favour by a court of law on the basis of propriety but at the same time it was equally true that an accused person involved in a case calling for further inquiry into his guilt was to be admitted to bail as a matter of right--- Whenever a question of propriety was confronted with a question of right the latter must prevail.”

In the case reported as “Safdar Hussain Vs The State etc” (PLJ 2017 SC 115), the august Supreme Court of Pakistan, while granting bail to the petitioner held that mere abscondance or commencement of trial is no ground for refusal of bail, if the petitioner is entitled to the same on the ground of further inquiry.

14. For what has discussed above, I accept this petition and admit the petitioner to bail subject to furnishing bail bond in the sum of Rs. 200000/- (two lac) with two sureties each in the like amount to the satisfaction of the Illaqa/Judicial Magistrate concerned.

15. These were the reasons of my short order of the even date.

Announced.
25.05.2018

Minshas/*

JUDGE

(S.B)
Mr. Justice Shakeel Ahmad, J