

**[Peshawar]**

**Before Rooh-ul-Amin Khan, J**

**AHMAD JAN---Petitioner**

**Versus**

**The STATE and 5 others---Respondents**

Criminal Miscellaneous Bail Application No.45-B of 2013, decided on 2nd May, 2013.

**Criminal Procedure Code (V of 1898)---**

---S. 497(2)---Penal Code (XLV of 1860), Ss. 302, 324, 148 & 149---Qatl-e-amd, attempt to commit qatl-e-amd, rioting and common object---Bail, grant of---Further inquiry---Allegations against the accused were that he along with co-accused committed murder of the uncle of the complainant---Delay of 11 hours and 30 minutes in lodging F.I.R. and consultation of complainant with his elders---Occurrence had taken place in nocturnal darkness and no source of light had been shown by the complainant in his report nor had any instrument of light been taken into possession by the Investigation Officer from the spot---Motive of previous blood-feud---Question as to whether the accused-petitioner had committed the crime or his implication was the result of the previous enmity/motive which was considered a double edge sword in criminal cases, was yet to be determined after recording evidence---Tentative assessment of the record and circumstances of the case showed that the possibility of throwing a wide net on the part of the complainant to involve male members of one family could not be ruled out which made the case of accused-petitioner that of further inquiry into his guilt---No blueprint or sketch of the crime spot had been outlined---Role of firing had been attributed to all the accused and common object of the accused and fixation of responsibility of fatal shot on the person of the deceased was yet to be determined during trial after recording evidence---Deeper appreciation of material on record at the bail stage was always deprecated---Material which was to be seen while deciding bail application was tentative assessment of the material collected during investigation and determination of reasonable grounds as to whether those prima facie connected the accused with the crime or there were sufficient grounds warranting further inquiry into his guilt---No doubt, the accused-petitioner was charged for an offence entailing capital punishment but mere heinousness of the offence would not debar the accused from his right of bail, if otherwise, on merit he had made out a case of further inquiry---When case required further inquiry into the guilt of the accused, bail was to be allowed to him as a matter of right and not by way of grace or concession---No doubt, bail was sometimes refused to accused person on the basis of his abscondence, but such refusal proceeded primarily upon the question of propriety, and whenever a question of propriety was confronted with a question of a right, the latter must prevail---Cases

which would fall within the ambit of further inquiry, bail was to be allowed to the accused as of right and not by way of grace or concession and abscondence alone would not be sufficient to refuse bail---Commencement of trial of the accused was not a clog on grant of bail and the practice of refusal of bail in such cases where the challan was submitted should not be a bar to refuse a right and that the observations made by the superior courts dealing with bail matter were always tentative in nature---Bail was granted to the accused accordingly.

*Ikram-ul-Haq v. Raja Naveed Sabir and others* 2012 SCMR 1273; *Ehsanullah v. The State* 2012 SCMR 1137; *Mitho Pitafi v. The State* 2009 SCMR 299 and *Abid Ali alias Ali v. The State* 2011 SCMR 161 rel.

Salahuddin Khan Marwat for Petitioners.

Ahmad Farooq Khattak, A.A.-G. for the State.

Date of hearing: 2nd May, 2013.

## JUDGMENT

**ROOH-UL-AMIN KHAN, J.**---Accused-petitioner Ahmad Jan son of Wali Muhammad, seeks bail in case F.I.R No.133, dated 3-7-2008, registered under sections 302/324/148/149, P.P.C., at Police Station Tajori District Lakki Marwat.

2. The prosecution case is that Najeebullah complainant in company of dead body of his uncle Taj Muhammad, reported to the local police in Police Station Tajori that on the eventful day, at morning, he along with his uncle namely Naqshband, in order to see his Aunt, proceeded to her house, situated in village War Hassan Khel. On their return, at Sham Vela, from the said village, at about 2100 hours, when they reached near Marwat Canal, within the limits of fields of village Hassan Khel, accused Wali Muhammad, Ahmad Khan, Farogh Khan sons of Wali Muhammad and Naseer Muhammad and Badshah, duly armed with Kalashnikovs, already ambushed in the trees, came out and resorted to firing at them with intention to commit their Qatl-e-Amd, as a result, his uncle Taj Muhammad was hit and fell down while he luckily survived unscathed. The accused, after the occurrence, decamped from the spot. When, complainant attended his uncle, he was breathing last, and succumbed to the injuries. Motive for the crime as stated by complainant is previous blood feud on women folk. The complainant has explained the delay in lodging the report as none-availability of transport and consultation with his elders.

3. The respondents/legal heirs of the deceased as well as the complainant were served, as manifest from the note of the Additional Registrar, but none of them bothered to turn up, as such, this petition cannot be kept pending for an indefinite period, hence, arguments of the learned counsel for the petitioner and learned A.A.G. were heard.

4. Perusal of the F.I.R divulges that the occurrence has taken place on 2-7-2008 at 2100 hours, while it was reported on 3-7-2008 at 8.30 a.m. i.e. after a delay of 11 hours and 30 minutes. The explanation put forth by the complainant in his report qua the delay is his consultation with the elders and non-availability of the transport. The occurrence has taken place in nocturnal darkness and no source of light has been shown by the complainant in his report nor has any instrument of light been taken into possession by the I.O. from the spot. Keeping in view the inordinate delay in reporting the occurrence, consultation of complainant with his elders and non-recovery of any article of light from the crime spot coupled with the motive of previous blood feud, the question as to whether the accused-petitioner has actually been committed the crime or his implication is the result of the alleged previous enmity/motive which is always considered a double edge sword in criminal cases, is yet to be determined after recording evidence. Five accused are charged for the murder of the deceased, out of whom, Wali Muhammad is father of accused Ahmad Khan and Farogh Khan while rest of the two accused are closely related to the former. On tentative assessment of the record and circumstances of the case, the possibility of throwing a wide net on the part of the complainant to involve male members of one family cannot be ruled out which makes the case of the accused-petitioner that of further inquiry into his guilt. Moreso, no blueprint or sketch of the crime spot, has been outlined notwithstanding the fact that the I.O. has so many times. informed the complainant to accompany him to the spot for preparation of the site plan. Besides, the role of firing has been attributed to all the accused as such the common object of the accused and fixation of responsibility of fatal shot on the person of the deceased is yet to be determined during trial after recording evidence, because at the moment, in absence of any site plan and attribution of any specific role of the fatal shot to any of the five accused, in pitch black dark of night occurrence, could not be possible at this stage.

6. Deeper appreciation of material on record at the bail stage is always deprecated. What is material to be seen while deciding bail application is tentative assessment of the material collected during investigation and determination of reasonable grounds as to whether these prima facie connect the accused with the crime or there are sufficient grounds warranting further inquiry into his guilt. No doubt, the accused-petitioner is charged for an offence entailing capital punishment but mere heinousness of the offence would not debar the accused from his right of bail, if otherwise, on merit he has made out a case of further inquiry.

7. As regard the arguments of the learned A.A.G. that the accused remained fugitive from law for considerable time and that challan has been put in Court and trial is in progress, as such he may not be extended the concession of bail. Suffice it to say that when case requires further inquiry into the guilt of the accused, bail is to be allowed to him as a matter of right and not by way of grace or concession. No doubt, bail is sometimes refused to accused person on the basis of his abscondence, but such refusal proceeds primarily upon the question of propriety, and whenever a question of propriety is confronted with a question of a right, the latter must prevail. In cases, which fall within the ambit of further inquiry, bail is to be allowed to the accused as of right and not by way of grace or concession and abscondence alone would not be sufficient to refuse bail to him. Reliance placed on case titled, "Ikram-ul-Haq v. Raja Naveed Sabir and others" (2012 SCMR 1273) and case titled, "Ehsanullah v. The State" (2012 SCMR 1137) and case titled, "Mitho Pitafi v. The State" (2009 SCMR 299). Similarly commencement of trial of the accused in the case, is not a clog on grant of bail. The Hon'ble Supreme Court in case titled, "Abid Ali alias Ali v. The State" (2011 SCMR 161) has held that if prima facie the case of the accused appears to be one falling under the category of further inquiry, then it becomes right of the accused that he be enlarged on bail. The practice of refusal of bail in such cases where the challan is submitted should not be a bar to refuse a right and that the observations made by the superior Courts dealing with bail matter are always tentative in nature.

8. For the reasons discussed above, instant petition is allowed. The accused petitioner is admitted to bail provided he furnishes bail bonds in the sum of Rs.2,00,000 (two lacs) with two sureties each in the like amount to the satisfaction of Illaqa/Judicial Magistrate concerned.

AG/265/P

Petition allowed.