

34/23

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa
Mr. Justice Yahya Afridi
Mr. Justice Syed Hasan Azhar Rizvi

Criminal Petition No. 183-P of 2022

(Against the order dated 7.11.2022 passed by
the Peshawar High Court, Peshawar in Cr.
Misc. (Bail Application) No. 2923-P of 2022)

Ahmad Ali

... Petitioner

Versus

The State through A.G. Khyber Pakhtunkhwa, Peshawar, etc.

... Respondents

For the Petitioner:

Mr. Shabbir Hussain Gigyani, ASC
(through video-link, Peshawar)

For the complainant:

Mr. Burhan Latif Khaisori, ASC

For the State:

Sardar Ali Raza, Addl. A.G. KPK
Mr. Ghaffar Ali, DSP
Mr. Nazeefur Rehman, Inspector
Mr. Muhammad Ghani, Inspector

Date of Hearing:

07.03.2023

ORDER

Qazi Faez Isa, J. Notice was issued to the complainant and the State. Learned Additional Advocate-General, Khyber Pakhtunkhwa ('AAG') states that the police report ('challan') has been filed in court on 3 February 2023 wherein both the sides have been attributed blame, however, the motive which prompted the occurrence and resulted in the death of two and injures to six lay on the petitioner's side. The complainant went to the house of Lal Bahadar who had contracted a second marriage and to get documents for obtaining a computerized national identity card ('CNIC') for Lal Bahadar's son, namely, Haqan, who was born from another wife of Lal Bahadar and an altercation ensued and which inflamed the second wife's relative who proceeded towards the complainant side. Both sides fired upon each other leaving five persons injured from the petitioner's side and from the complainant's side two were killed and one was injured. The police arrested both parties. The complainant's side managed to secure bail and

the petitioner's side sought cancellation of bail but then subsequently withdrew it.

2. Learned counsel for the petitioner states that the ground on which the complainant's side obtained bail on the grounds that no specific role was attributed to each individual accused and that recovery of firearm(s) had not been affected, and that these grounds are equally applicable to the petitioner's case and the petitioner is also entitled to bail. He further states that this is a case of cross-versions, which makes it a case of further inquiry, and relies upon the judgment in the case of *Muhammad Shahzad Siddique v The State* (PLD 2009 SC 58) and also on the judgment referred to therein in the case of *Shoaib Mehmood Butt v Iftikhar-ul-Haq* (1996 SCMR 1845).

3. Learned AAG and the complainant oppose the bail. Learned AAG states that the discretion exercised by the learned Judge of the Trial Court and the learned Judge of the High Court should not be interfered with by this Court even if a different view may be taken of the matter. It is further stated that the case is not of two versions as the petitioner's side has not mentioned facts which are different from those asserted by the complainant's side. And, that since no one was killed from the petitioner's side the cases of both the sides cannot be equated.

4. We have heard the learned counsel and examined the referred to judgments. As regards the cited case of *Muhammad Shahzad Siddique* the petitioner therein who secured bail was not implicated for the murder of the deceased but he was alleged to have fired at and injured two other persons, one on his small finger and the other on his leg, that is, on non-vital parts of their bodies. With regard to the case of *Shoaib Mehmood Butt* paragraph 16 of the decision therein clearly reveals that in that case there were two different versions of the incident. However, in the present case the daily diary, which the learned counsel for the petitioner states records the petitioner's version of events, simply states that the petitioner's side was fired upon by the complainant's side, but it is not stated why the petitioner's side had fired, or returned fire, let alone taking the plea of self-defence. The daily diary also does not attribute motive to the complainant's side. What the police daily diary records in our opinion does not constitute a cross or different version of events, and which may have persuaded us to grant bail to the petitioner. The daily diary on which reliance the petitioner relies confirms his presence at the crime scene, where two persons from the

complainant's side were killed and one was injured. Moreover, the State did not move for cancellation of bail granted to the complainant's side and though the petitioner's side did move for cancellation of bail of one of the co-accused it then withdrew the same.

5. Therefore, we are not inclined to set aside two concurrent orders and interfere with the discretion exercised when no illegality has been pointed out therein. Consequently, leave to appeal is declined and this petition is dismissed. Needless to state any observation made herein is tentative in nature and shall not affect the case of either party before the Trial Court.

6. This order has been passed with a majority of two to one. Mr. Justice Yahya Afridi, who was inclined to grant bail to the petitioner, will be writing his separate reasons.

Islamabad

07.03.2023

Not approved for reporting.

Arif

14/3/23

[Handwritten signatures and marks]

Yahya Afridi, J.- There appears to be judicial consensus that the application of principles for the grant or refusal of bail in ‘cross-cases’ depends on the particular facts and circumstances of each case. This proposition can be illustrated by the *ratio decidendi* of the following cases:

- I. To constitute a cross-case, the mere assertion of a counter-case is not enough. Courts are to tentatively assess that the parties, the venue, and the transaction *prima facie* led to the result of a single incident narrated differently by the opposing party. The rationale is that frivolous and false counter-cases, which can exaggeratedly be set up by the opposite party, do not gain an advantage of the general rule and benefits arising out of a counter-case.¹
- II. In cases of counter versions arising from the same incident, one given by the complainant in the F.I.R., and the other given by the opposite party, bail in appropriate cases is granted as a rule on the grounds of *further inquiry* for the reason that the question as to which version is correct is to be decided after the recording of *pro* and *contra* evidence during the trial, and also to ascertain which party was the aggressor and which party was aggressed upon. The refusal of bail in such cases is an exception.²
- III. The exception to the rule of the grant of bail is in cases of counter versions or cross-cases, where *prima facie* the facts of the case suggest that the party seeking bail was an aggressor and/or the material on the record suggests that the said party had an effective role in causing fatal injury.³
- IV. In counter versions of opposing parties, without specifying an effective role in causing fatal injury, leaves room for consideration of rendering a case within the purview of

¹ Arif Din v. Amil Khan 2005 SCMR 1402; Mushtaq v. Lakhkar Khan 2013 YLR 2046; Liaqat Ali v. State 2013 SCMR 1527.

² Fazal Muhammad v. Ali Ahmed 1976 SCMR 391; Shafiqan v. Hashim Ali 1972 SCMR 682; Khalid Mehmood v. Muhammad Kashif Rasool 2013 SCMR 1415.

³ Nasir Muhammad Wassan v. State 1992 SCMR 501; Rashid Ramzan v. State 2022 SCMR 2011.

further inquiry, as provided under section 497 of Cr.P.C.⁴

V. In cross-cases, wherein one party is granted the concession of bail, similar treatment is also rendered to the other side.⁵

2. In the instant case, distinct versions of how the events unfolded, which lead to the commission of the crime, have been put forth by the contesting parties. The time and place of the occurrence are admitted by both parties. However, the facts of the present case do not *prima facie* put forth which party was an aggressor, as it was a common path close to the dwelling place of both parties, and both were armed with firearms.

3. Admittedly, both parties have recognised the general role of firing firearms at each other, leading to injuries on both sides. In particular, the petitioner has not been reported to having had an effective role in causing injury to any of the two deceased or injured persons.

4. It is also noted that the complainant party in FIR No. 681, who are accused of the general role of firing resulting in injury to five persons belonging to the petitioner's side, have all been granted bail after arrest *vide* orders dated 07.09.2022, 12.10.2022, and 27.10.2022. And thus, denying bail to the petitioner in FIR No. 681, when the two cases *prima facie* are cross-cases, would not be appropriate.

5. It would also be pertinent to note that a counter version put forth by a party which is contrary to the one already rendered by a complainant in an FIR, if it fulfils the essentials of a cross-case as to the time and place of the commission of an offence; would constitute a cross-case, and it cannot be declared to be otherwise solely on the ground that the party claiming its version to be a cross-case did not allege self-defence in the counter version of the events leading to the commission of the offence and recording of the FIR in which he is nominated as an accused.

6. Accordingly, this petition is converted into an appeal, and the same is allowed. Consequently, the petitioner is admitted to bail subject to

⁴ Jaffar v. State 1980 SCMR 784; Muhammad Aslam v. State 1997 SCMR 251.

⁵ Hamza Ali Hamza v. State 2010 SCMR 1219; Muhammad Ashiq v. State 2013 YLR 1133.

furnishing a bail bond in the sum of Rs. 100,000/- (Rupees one hundred thousand only), with two sureties in the like amount to the satisfaction of the trial court.

7. Above are the reasons for respectfully differing from the majority opinion of my learned brothers in the instant case.

Judge

Islamabad

07.03.2023

Not approved for reporting.

Arif