IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Sardar Tariq Masood
Mr. Justice Amin-ud-Din Khan
Mr. Justice Syed Hasan Azhar Rizvi

CRIMINAL PETITION NO.475 OF 2022

(On appeal against the order dated 15.04.2022 passed by the Lahore High Court, Lahore, in Crl. Misc. No.11519-B of 2022)

Amir Faraz ... ... Petitioner

Versus

The State ... ... Respondent

For the appellant : Mian Pervaz Hussain, ASC
(via video link from Lahore)
Mr. Anis M. Shahzad, AOR

For the State : Mr. Muhammad Jaffar, Addl. PG Pb
(via video link from Lahore)

For respondent No.2 : Sardar M. Latif Khan Khosa, Sr. ASC
Syed Iqbal Hussain Shah Gillani, ASC

Date of hearing : 08.12.2022

JUDGMENT

SARDAR TARIQ MASOOD, J.- Through this Criminal Petition, Amir Faraz complainant of case FIR No.201/2021, dated 15.05.2021, registered at Police Station City Farooqabad, District Sheikhupura, impugns the order dated 15.04.2022, through which post arrest bail was granted to respondent No.2-Nadeem Zulf who is accused in the above said FIR.

2. Learned counsel for the petitioner/complainant contends that within one hour and twenty minutes of the occurrence, the matter was reported to the police and in the said prompt FIR it was specifically mentioned that respondent Nadeem Zulf fired with his pistol hitting Naseem Zulf deceased on right side of his forehead, who succumbed to the said injury; that Nadeem Zulf alongwith others committed murder of his two brothers (Naseem Zulf and Waseem Zulf) when they were present in the land of Naseem Zulf, the brother-in-law of the complainant; that it is an occurrence

wherein two brothers have been done to death by their own brother Nadeem Zulf and others; that the statements of the eye witnesses are available on record confirming the prosecution version mentioned in the FIR; that the High Court while granting bail to the respondent has relied upon the opinion of the second Investigating Officer which was based upon a single case Diary dated 22.09.2021, when Rizwan Akram, Abdul Razzaq and Muhammad Ishtiaq made statements that, when they were passing near the place of occurrence, they saw the accused and complainant party quarreling with each other; that said Rizwan Akram, Abdul Razzaq and Muhammad Ishtiaq earlier appeared before the Investigating Officer, but after about four months they took another stance before the second Investigating Officer and on their assertion the said Investigating Officer concluded that although the respondent was present there but he was empty handed; that said Rizwan Akram, Abdul Razzaq and Muhammad Ishtiaq neither made witnesses in this case nor their statements under section 161 of the Code of Criminal Procedure (**Code**) were recorded and even their names were not mentioned in the report under section 173 of the Code; that according to the second Investigating Officer, the complainant party was aggressor but surprisingly no one from the respondent's side received even a single scratch but on the other hand, two persons lost their lives from the side of the complainant party; that no cross-case was ever got registered by the respondent's side against the complainant party regarding their alleged aggression; that respondent after getting bail is misusing the concession of bail by hampering the trial as on 18.03.2022 the charge was framed and thereafter, on numerous dates of hearing, the witnesses had appeared but the defence counsel avoided again and again by requesting for adjournment; that, on the other hand, the respondent is pressurizing his own family members including the complainant not to pursue the case against him; that the misuse of concession of bail can be considered from this fact that on 18.07.2022, statements of two witnesses were recorded but on the request of the defence counsel the cross-examination was reserved and they have not been cross-examined till now.

3. On the other hand, learned counsel for the respondent, at the very outset, relied upon the case of ***Mst. Sughran Bibi vs. the State*** (PLD 2018 SC 595) and contends that it is the duty of the Investigation Officer to dig out the truth which was done in this case; that it was the case of Hanan Zulf son of Nadeem Zulf that he actually committed murder of both the deceased when they made aggression upon respondent Nadeem Zulf; that from the place of occurrence six crime empties were recovered and found wedded with the pistol which was recovered from Hanan Zulf; that bail was granted by a competent Court and cannot be cancelled until the order is perverse, patently illegal and factually incorrect and has resulted into miscarriage of justice which is lacking in this case; that as trial has commenced, bail should not be cancelled. Besides ***Sughran Bibi's*** case (*supra*) the learned counsel has relied upon certain other judgment in the cases of ***Muhammad Sharif vs. Shafqat Hussain alias Shaukat etc*** (1999 SCMR 338), ***Sami Ullah and another vs. Laiq Zada and another*** (2020 SCMR 1115), ***Sidra Abbas vs. the State and another*** (2020 SCMR 2089) and ***Muhammad Shoaib vs. the State and another*** (2022 SCMR 326).

Lastly contends that the co-accused Hasan Iqbal who fired upon the other deceased namely Waseem Zulf hitting on his right arm, was granted bail by the High Court while taking into consideration his role and opinion of the Police Officer and case of the respondent is at par with the case of Hasan Iqbal, co-accused

4. Learned Addl. PG., while supporting the arguments of the learned counsel for the petitioner/complainant contends that commencement of trial is not a hurdle when bail granting order is perverse and factually incorrect, as in the present case, the impugned order is based upon an opinion of a Police Officer which is not backed by strong material and data; that bail was granted to the respondent when charge had already been framed and if bail can be granted when trial had already been commenced, the same can be cancelled on the same principle; that due to the dispute over the inherited property, the respondent committed murder of his two real brothers and in that eventuality, he was not entitled to concession of bail, especially when the subsequent investigation

was not based on solid material. Further contends that although six empties were recovered from the place of occurrence and the same were found to have been fired from the weapon recovered from Hanan Zulf but said recovery is just a corroborative piece of evidence and even the negative report of FSL being a corroborative piece of evidence cannot be considered at the time of grant or refusal of a bail. On the other hand, the deceased Waseem Zulf received the injuries having different dimensions and the injury attributed to the respondent on the person of Naseem Zulf was totally of different dimension than the injuries on the person of Waseem Zulf, indicating that different weapons had been used in the occurrence.

5. Heard, perused the record. Although two persons lost their lives but complainant thereafter approached the Police while going to the Police Station and lodged the report within one hour and twenty minutes of the occurrence, when the Police Station was at a distance of 2½ kilometers and while lodging the FIR, he categorically attributed fatal injury on the head of Naseem Zulf deceased, to respondent Nadeem Zulf. He is the sole accused who caused solitary fatal firearm injury with pistol to Naseem Zulf deceased, whereas the remaining accused fired upon other deceased i.e. Waseem Zulf. A specific pistol shot injury is attributed to respondent Nadeem Zulf which got full support from the medical evidence and the injury attributed to him was sufficient to cause death of the said deceased. The witnesses mentioned in the FIR, got recorded their statements on the same day under section 161 of the Code and supported the version put forward by the complainant in the FIR.

6. In the earlier investigation the respondent was found guilty but subsequently the Investigation was conducted by SHO/Investigating Officer who, after recording the statements of Rizwan Akram, Abdul Razzaq and Muhammad Ishtiaq on 22.9.2021, opined that although the respondent was present at the place of occurrence but he was empty handed. According to learned Addl. PG., the three witnesses even appeared before the earlier Investigating Officer but they again appeared before the second Investigating Officer after more than four months and

stated that they saw both the parties quarreling. We have observed that while relying upon their assertion, the Investigating Officer opined as mentioned above. No independent statement of Rizwan Akram, Abdul Razzaq and Muhammad Ishtiaq under section 161 of the Code, was recorded. They were not mentioned in the report under section 173 of the Code as PWs in this case. Except the above mentioned statement of these witnesses, no other material was collected by the second Investigating Officer who opined that it was the complainant party who was aggressor. According to the Investigating Officer Hanan Zulf, one of the accused, claimed that he had committed the murder of these persons. Although the second Investigating Officer opined that complainant party was aggressor but surprisingly, nobody from the respondent side received even a single scratch. The Investigating Officer did not make effort to get recorded the statement of Hanan Zulf under section 164 of the Code, so a bald inadmissible statement of co-accused that too, before the police, was taken into consideration for forming such opinion. No doubt, the opinion of the Investigating Officer has some persuasive value, if the same is based upon a strong and concrete material which is lacking in the present case.

7. We have also observed that Nadeem Zulf respondent, alongwith two co-accused earlier filed petition for protective pre-arrest bail before the Lahore High Court and in the said petition, it is nowhere asserted that complainant party was aggressor nor any ground regarding cross-version, was agitated, meaning thereby that at that time, this plea was not taken by the respondent and was subsequently agitated, due to which the subsequent Investigating Officer formed the said opinion and due to this circumstance his opinion has no persuasive value at the stage of bail and it would be the trial Court which after recording the evidence will appreciate this aspect of the case.

As far as the cases referred by the learned counsel regarding opinion of the Investigating Officer is concerned, the facts of ***Sughran Bibi's case*** (*supra*) are different because in the present case the respondent side did not make any effort to lodge any report regarding the aggression of the complainant side and even

any private complaint was never filed by the respondent side against the complainant party. We have also observed that in ***Sughran Bibi's case*** *(supra)* it was observed that it is the duty of the Investigating Officer to dig out the truth but the said exercise should be based upon concrete admissible material and not a bald opinion, and Courts are not bound to accept the bald opinion of any Investigating Officer which is not based upon a reasonable, plausible and strong material. Even otherwise, ***Sughran Bibi's case*** *(supra)* has different facts and was decided on different proposition i.e. regarding registration of second or subsequent FIR.

8. It is settled that in criminal matters, each case has its own peculiar facts and circumstances and the same has to be decided on its own facts. In the present case, the petitioner is specifically nominated in the FIR for causing firearm injury on the head of the deceased and the said injury was spelt out from the medical evidence. He was found involved in the commission of offence in the first investigation and the *ipse dixit* of the second Investigating Officer, especially in the above mentioned circumstances, had no persuasive value. Although learned counsel for the respondent has relied upon certain judgments and even the learned counsel for the petitioner has also placed reliance on certain judgments qua opinion of the Investigating Officer but we observe that in all the said judgments, the basic thing, which has to be considered by the Court, is whether the said opinion is based upon cogent and concrete material. In the absence of any material/data no credit can be given to such *ipse dixit* of the Police Officer. If the plea i.e. *ipse dixit* of the police, on the basis of which the respondent has been released on bail is accepted, the same would amount to discredit the version of the eye witnesses at this initial stage of the case which of course is not permissible in the peculiar circumstances of the case. The practice adopted by the learned High Court through the impugned order is not appreciable. The High Court while granting bail to the respondent has ignored the relevant material indicating, *prima-facie,* involvement of the accused in the commission of the crime and took into account irrelevant material which had no nexus to the question of grant of bail to the accused. It is settled law that bail granting order could be cancelled if the same was perverse. An order which is, *inter-alia,*

entirely against the weight of the evidence on record, by ignoring material evidence on record indicating, *prima-facie,* involvement of the accused in the commission of crime, is always considered as a perverse order, which is in present case as material evidence on the record brought by prosecution promptly, was not given any weight by the High Court and a perverse order was passed upon a baled opinion of second Investigating Officer.

9. So for principle of rule of consistency is concerned, although Hasan Iqbal was granted post arrest bail by the High Court vide order dated 18.01.2022 but we observed that he was attributed a fire shot, hitting on right arm of Waseem Zulf another deceased but said injury was not fatal and was not the cause of death. In that eventuality, learned counsel for the respondent could not satisfy our query as to how respondent's case is at par with Hasan Iqbal because the fire shot attributed to the present respondent, on the head of Naseem Zulf, was the cause of death. So far argument of the learned counsel for respondent that six empties recovered from the place of occurrence were found to have been fired from the pistol allegedly recovered from Hanan Zulf, cannot be considered at this stage as the same at the most could be considered as a corroborative piece of evidence but in the present case there is substantive ocular account, whose names are mentioned in the FIR. Likewise, non-recovery of weapon from the respondent is not sufficient for not cancelling the bail because it is always considered as a corroborative piece of evidence. It is settled principle of law that corroboratory piece of evidence, if missing, cannot discard the ocular account recorded on the day of occurrence, at bail stage.

10. So far argument of the learned counsel that the trial has commenced, we observed that the charged was framed on 18.03.2022 but the High Court granted bail to respondent on 15.4.2022 when trial had already been commenced and if bail can be granted after the commencement of trial, the same can be cancelled even after the commencement of trial, especially when bail granting order is perverse and based upon *ipse dixit* of Police, which is not based upon strong material or data. Of course, bail

can be cancelled if bail granting order is erroneous and resulted into miscarriage of justice, as done in this case.

11. It is also a circumstance that after getting bail, according to learned counsel for the petitioner, the respondent is misusing the same by hampering the trial as on numerous dates of hearing the prosecution witnesses appeared before the Court but their statements were not recorded on the request of defence counsel. Even on 18.07.2022, statements of two prosecution witnesses were recorded but their cross-examination was reserved on the request of the defence counsel and subsequently, till date, the said witnesses have not been cross-examined. This aspect of the case is also indicative of the fact that the bail is being mis-used by hampering the trial. Even otherwise, no hard and fast rule can be laid down that bail should not be cancelled merely for the reason that the trial has commenced or is likely to commence because every case is to be examined in the light of its own facts, and the crucial question that arises for determination would be as to whether a person is entitled to grant of bail under the provision of section 497 Cr.P.C. which, as already observed, the respondent was not entitled to, especially, when there is sufficient material available against him in the shape of ocular account as well as the medical evidence and the circumstance that he alongwith other accused committed the murder of his two real brothers. The judgments relied upon by the learned counsel for the respondent, to this effect, having different facts and circumstances, could not be applied in this case.

12. All the above mentioned circumstances have been ignored by the High Court while granting bail to the respondent, record to that extent has not been examined by the High Court and same order can be considered as perverse, because the material collected by the first Investigating Officer, on the day first, was totally ignored by the High Court while granting bail in such a double murder case.

13. Due to the above mentioned reasons, while converting this petition into an appeal the same is allowed and the impugned order passed by the High Court is set aside and the bail granted to

the respondent Nadeem Zulf is hereby cancelled/recalled. The above observations are tentative in nature and will have no bearing upon subsequent proceedings during trial as the trial Court is required to decide the case on its own merits and the evidence recorded during the trial, without being influenced by this order. These are the reasons of our short order dated 08.12.2022, which is reproduced as under :

> "For reasons to be recorded later, this petition is converted into appeal and allowed. Bail already granted to the respondent is hereby recalled."

Judge

Judge

Judge

Islamabad
09.01.2023
*M.Saeed/**

APPROVED FOR REPORTING.

Judge

* Even otherwise, no hard and fast rule can be laid down that bail should not be cancelled merely for the reason that the trial has commenced or is likely to commence because every case is to be examined in the light of its own facts, and the crucial question that arises for determination would be as to whether a person is entitled to grant of bail under the provision of section 497 Cr.P.C. which, as already observed, the respondent was not entitled to the concession of bail especially when there is sufficient material available against him in the shape of ocular account as well as the medical evidence and the circumstance that he alongwith other accused committed the murder of his two real brothers. The judgments relied upon by the learned counsel for the petitioner, having different facts and circumstances could not be relied upon in this case.

** It is settled that in criminal matters, each case has its own peculiar facts and circumstances and the same has to be decided on its own facts. In the present case, the petitioner is specifically nominated for causing firearm injury on the head of the deceased and the said injury was spelt out from the medical evidence. He was found involved in the commission of offence in the first investigation and the ipse dixit of the investigating officer, especially in the above mentioned circumstances, had no persuasive value. Although learned counsel for the respondent has relied upon certain judgments and even the learned counsel for the petitioner has also placed reliance on certain judgments qua opinion of the investigating officer but we observe that in all the said judgments, the basic thing, which has to be considered by the Court, is whether the said opinion is based upon cogent and concrete material. In the absence of any material/data no credit can be given to such *ipse dixit* of the police officer. If the plea i.e. *ipse dixit* of the police, on the basis of which the respondent has been released on bail is accepted, the same would amount to discredit the version of the eye witnesses at this initial stage of the case which of course is not permissible in the peculiar circumstances of the case. The practice adopted by the learned High Court through the impugned order is not appreciable. The High Court while granting bail to the respondent has ignored the relevant material indicating, *prima-facie,* involvement of the accused in the commission of the crime and took into account irrelevant material which had no nexus to the question of grant of bail to the accused. It is settled law that bail granting order could be cancelled if the same was perverse. A perverse order was defined as an order which was, *inter-alia*, entirely against the weight of the evidence on record, by ignoring material evidence on record indicating, *prima-facie,* involvement of the respondent in the commission of crime.

Due to the above mentioned reasons, while converting this petition into an appeal, the impugned order passed by the High Court is set aside and the bail granted to the respondent is hereby recalled. These are the reasons of our short order dated 08.12.2022 which is reproduced as under :
“For reasons to be recorded later, this petition is converted into appeal and allowed. Bail already granted to the respondent is hereby recalled.”