

## IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

*Crl. Misc: Appln: No.S-732 of 2024.*

DATE	ORDER WITH SIGNATURE OF JUDGE
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1. *For orders on O/objection at flag-.A*
2. *For hearing of main case*

**07.03.2025**

Mr. Mohammad Ali Naper, Advocate for applicant.  
Mr. Mohammad Ali Dayo, Advocate for complainant.  
Syed Sardar Ali Shah, Addl.P.G Sindh for the State.

### **ORDER**

***Ali Haider 'Ada',J;-*** The applicants by way of Crl. Misc. Application under section 561-A Cr.PC, have impugned the order dated 12.11.2024 passed by learned Civil Judge & Judicial Magistrate-I, Sukkur in FIR bearing Crime No.33/2024 u/s 302, 114, 148, 149 PPC as did not agree with the findings of Investigating Officer, regarding applicants Hamadullah son of Asadullah alias Abdul Hameed and Asadullah alias Abdul Hameed son of Moula Bux Kalhorro were declared innocent and they were released them u/s 497 Cr.P.C, by placing their names in column No.2 of the challan-sheet.

3. The facts in nutshell are that complainant Javed Ali Abbasi lodged FIR on 24.02.2024 at Police Station, Bagerji stating therein that he has dispute with accused Asadullah alias Abdul Hameed Kalhorro over landed property and accused persons asked to see him. On 23.02.2024 he alongwith his brothers Saddaruddin aged about 49 years, Qamaruddin and nephew Shafique Ahmed were available at the gate of Scarp Colony Military Road Sukkur, it was about 10:00 p.m. night they saw on the lights fixed on road accused Hamadullah, Samiullah, Asadullah alias Abdul Hameed, Ali Sher alias Guddu and Nasrullah R/o Bashirabad Military

Road Sukkur came there on the motorcycle, on coming they stopped their motorcycles and lighted from it and took out pistols from their folds, accused Asadullah alias Abdul Hameed instigated other accused persons not to spare Saddaruddin and commit his murder as he is not settled the dispute with them. On his instigation accused Hamadullah made straight fire upon brother of complainant Saddaruddin with intention to commit his murder which hit on his right ear who raised cries, accused Samillah made straight fire of pistol upon him which hit on back side of head, accused Saddaruddin alias Abdul Hameed made straight fires of pistol upon Sadaruddin which hit on right side of his shoulder, accused Ali Sher made straight fire upon Saddaruddin which hit on his left side muscle of shoulder, while accused Nasrullah made straight fire upon Saddaruddin which hit on his right side of shoulder who fell down on the ground by raising cries, blood was oozing, they gave the name of 'Almighty Allah' to accused persons they fled away towards Bashirabad side. Complainant party saw saddaruddin who died at spot. They took dead body to hospital and after funeral right buried and after receiving condolence after three days lodged FIR against accused persons.

4. Firstly, Investigation was carried by I.O, on the request of complainant, the investigation was transferred and second I.O, placed their names in column No.2.

5. Learned Counsel for the applicants/accused contended that the investigation was transferred to second I.O, in which second Investigating Officer after collecting CDR as well as recorded the statements of PWs u/s 162 Cr.P.C, of complainant party and even recorded the statements of some independent witnesses let-off applicants and their names were placed in column No.2 in which the Investigating Officer opined that they be released u/s 497 Cr.P.C, while the learned Magistrate did not agree as the material was not considered by the learned Magistrate as they were excluded for the commission of the offence. He further submits that after recording the statement of complainant party u/s 162 Cr.P.C, one Waris Ali

son of Abdul Razzak Kalhoro was implicated by complainant party and confessed his guilt same was recorded in USB which was sent to forensic expert. He, further submits that rule 26.21 of Police Rules, 1934 empowers the police officer to release on bail at any stage of an investigation and such powers correctly exercised by the I.O, but learned trial Court dis-agree with such momentum. He, therefore, prays for setting-aside the impugned order. In support of his contentions he places reliance upon the cases of *Muhammad Rizwan v. The State and others* (2018 MLD 410)

6. Conversely, learned Additional Prosecutor General for the State has sought for dismissal of the instant Crl. Misc. Application by contending that the impugned order is well reasoned on the ground that role of the applicants are available with specific allegation as they have direct role upon commission of murder of deceased. He further submits that opinion of the I.O, depends of collecting of CDR as well as some independent witness as even one accused who were nominated through 162 Cr.P.C, statement has confessed his guilt but such fact is not useful for present applicants. He submits that learned Magistrate has not committed any illegality in the impugned order. In support of his contentions he places reliance upon the case of *Khalida Bibi v. Nadeem Baig* (PLD 2009 Supreme Court 440) as well learned counsel for complainant adopted the arguments advanced by learned Addl.P.G and he has relied upon the cases of, *Anwar Shamim and another v. The State* (2010 SCMR 1791) and *Naeem Akhtar and another v. Learned Civil Judge and Judicial Magistrate and 5 others* (2018MLD 1173).

7. I have heard the learned Counsel for the parties and have examined the material available on record.

8. It is settled law that opinion of Investigating Officer is not binding upon the Courts as the same is *Ipsi dixit* and the Magistrates are competent to agree or disagree with the opinion of police while exercising their administrative jurisdiction on a report submitted before him within the

meaning of Section 170/173 Cr.P.C. The Honourable Supreme Court in PLD 2009 Supreme Court 440 (supra) held that;

*“thus, it has never been the practice of the Courts and under section 497(2), Cr.P.C to make probe into a defence version in order to advance a plea of bail, rather it has to tentatively assess the material produced before it and to see if reasonable grounds exists to believe, of prima facie, involvement of accused in the commission of the offence. The second admitted aspect of the case is that if the plea on the basis of which the respondent has been released on bail is accepted would impugn with the version of the eyewitness namely Khalid Bibi, Zubair and Sami-ul-Hassan which have been discarded at this initial stage of the case by observing contra to the version of ocular witnesses; which course was at all not permissible and later on no such evidence is furnished, then it would not be free from doubt in accord with the above quoted provisions of law, evidence of eyewitnesses has been discarded even in view of the medical opinion by the learned Sessions Judge, as well as by the High Court. This is also to be noted that during the course of investigation the police is not required to examine hundreds of people in order to inquire as to whether the accused is involved in the offence or not. They are required to consider the material available on the record and not to disregard the eyewitnesses in support, to say that he is not involved in the commission of the offence, and thus would not only be entitled to the grant of bail but at the same time to earn acquittal. In the peculiar circumstances of the case the practice adopted by the learned trial Court as well as by the High Court is not appreciated.”*

The defence plea of the applicants regarding their excluding from commission of offence has no bar for conducting trial and it is a pure prerogative jurisdiction of trial Court to give weight of evidence as lead by both sides.

The Police Rules 1934, Volume-III Chapter-XXVI Rule-26.21 as referred by learned counsel for applicant for essential; the same is being re-produced as under;

26.21. **Bail and recognizance**—(1), When a person accused of a bailable offence can give good and sufficient bail, the police shall accept it unless the law requires such person to be brought before the magistrate having jurisdiction.

(2) An officer in charge of police station is empowered under Section 497(1), Code of Criminal Procedure to release on bail a person accused of a non-bailable offence (not punishable with death or transportation for life) who he has arrested or detained without warrant. These powers are permissive and not obligatory and should be exercised with caution. The police officer must satisfy himself that the release on bail is not likely unduly to prejudice the prosecution or to be followed by the absconding of a person prima facie guilty.

(3). An officer in charge of a police Station, shall, in accordance with section 497(2), Code of Criminal Procedure at any stage of an investigation release on bail or recognizance a person accused of a non-bailable offence when it appears that there are not reasonable grounds for believing that a non-bailable offence has been committed by him, although sufficient grounds may exist further investigation.

(4) .....

(5) .....

(6) .....

9. The Officer in charge must used such powers not in mechanical manner as to exercise with care and caution to satisfy himself that to release on bail did not cause any prejudice the prosecution as in instant matter the findings of I.O. may cause prejudice and even the complainant himself disown version of I.O. The I.O exercised his powers without follow the law as prescribed under rule 26.21 that there is a bar to release the accused who are involved in offence which are punishable with death or transportation for life and this FIR pertains to Section 302 PPC and its

punishment for death and imprisonment for life. The record reflects that applicants are nominated in commission of offence with their specific role with corroboration piece of evidence by supporting witnesses as well as medical evidence.

10. So far as the independent witnesses are concerned, the credibility of that witnesses must be carried and given weight by the learned trial Court at the time of trial as the applicants have remedy to produce them in their evidence at the time of recording their statements. The powers which were exercised by the I.O, with subject that if their appears reasonable ground for non-believing that accused are guilty of an offence but there is prosecution witnesses examined and stated against them while the other material evidence also supports the version of complainant party.

11. In view of above discussion, no illegality irregularity has commenced on record and does not call for any interference by this Court . Consequently, instant Crl. Misc. application stands dismissed being devoid of any legal substance.

**J U D G E**

*Ihsan/PA*