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IN THE HIGH COURT OF SINDH AT KARACHI

Before: Mr. Justice Ahmed Ali M. Shaikh
Mr. Justice Mohammed Karim Khan Agha

Cr. Bail Application No.75 of 2016

Syed Mashud Ali @ Imran Ali

Vs.

The State.

Date of hearing:	05-05-2016.
Date of Order	20-05-2016
Applicant:	Through Mr. Munawar Hussain, Advocate.
Respondent:	Through Ms. Akhtar Rehana, APG for State alongwith Inspector Syed Balagat Hussain, I.O. P.S. Ferozaabad.

ORDER

Mohammed Karim Khan Agha, J. The applicant seeks bail after arrest in FIR No.02/2014, under section 302/324/34 P.P.C. r/w section 7 A.T.A. & Protection of Pakistan Ordinance, 2013 registered at Police Station Gulshan-e-Iqbal, Karachi.

2. The charge against the applicant/accused as per contents of the FIR are that S.I. Naveed Iqbal recorded statement of the complainant under section 154 Cr.P.C. wherein he stated that he received an information through telephone that a firing has been made in the shop of his son in which his son and other persons have been injured and taken to Abbasi Shaheed Hospital. On such information he reached at Abbasi Shaheed Hospital where he saw the dead bodies of his son Hussain Ali and his employees Nadir Ali son of Haji Bostan and Abdul Wahid son of Ghulam Ali in the mortuary. On inquiry, he came to know that at about 0220 hours his son alongwith his employees after closing the shop had boarded in his Suzuki Hi-roof No.CS-8470 white colour and his employees were standing outside. In the meantime six armed persons came there on three motorcycles and with deadly weapons started straight firing upon his son and employees. Due to firing of armed persons his son Hussain Ali, Nadir Ali, Abdul Wahid, Ghulam Sakhi, Tasawar Hussain, Jawad Hyder, and Raseed

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Ahmed sustained severe injuries on their bodies and his son Hussain Ali and his employees Nadir Ali and Abdul Wahid succumbed to their injuries, whereas remaining injured persons with the help of available people were sent to Agha Khan Hospital. He further stated that the complainant belongs to a Shia sect, thus they have been targeted. The sole aim/purpose of the accused was to spread terrorism and harassment in the society, hence this FIR.

3. Learned counsel for the applicant/accused has contended that the applicant/accused is absolutely innocent and has been falsely implicated in this case with malafide intention by the police in collusion with the complainant to achieve ulterior motives. He argued that there is inordinate delay of 05 hours in lodging FIR and the complainant failed to mention any plausible explanation for such delay. He next submitted that the applicant was neither nominated in the FIR nor any description/role has been given and the applicant was not arrested on the spot. He submitted that no recovery has been affected from the possession of the applicant/accused and the recovery has been foisted upon him by the police. He further submitted that the prosecution miserably failed to show any motive or enmity of the alleged crime, nothing in this regard has been mentioned in FIR as well as in statements u/s 161 Cr.PC. and there is clear violation of section 103 Cr.P.C. It is further contended that the applicant/accused is behind the bar since his arrest and a lot of time has passed but the case has not been concluded yet on account of the delay caused by the prosecution. He argued that the applicant's confessional statement before the police has no legal value in view of article 38 & 39 of the Qanoon-e-Shahadat Order, 1984. Finally he submitted that the complainant is neither eye witness to the incident nor the incident occurred in his presence, therefore, the case of the applicant/accused comes within the ambit of section 497(2) Cr.P.C and for all the reasons above the applicant was entitled to be enlarged on post arrest bail.

4. In support of his contentions learned counsel for the applicant/accused placed reliance upon **Malik Muhammad Ishaque v. The State & others** (2011 SCMR 1350), **Imam Bux alias Amoo and another v. The State** (PLD 2012 Sindh 212), **Jehangir v. The State** (2012 YLR 2942 (Sindh)) and **Zaigham Ashraf v. The State & others** (2016 SCMR 18)

5. Learned counsel for the State vehemently opposed the grant of bail of the applicant/accused and supported the bail order dated 12.12.2015 passed by the learned Anti-Terrorism Court No.IV, Karachi. She submitted that sufficient material has been collected by the prosecution to connect the applicant/accused to the commission of offence which is heinous in nature and as such the bail application is liable to be dismissed.

6. We have considered the submissions raised by the learned counsel for the applicant/accused, learned APG for the State, perused the record and the authorities cited by them at the Bar.

7. The earlier bail application moved on behalf of the applicant/accused before the learned Anti-Terrorism Court No.IV, Karachi was dismissed by order dated 12.12.2015.

8. It would appear that the ATC declined bail in the aforesaid order mainly based on the severity of the offense and the fact that the case was at the initial stage and no witness had yet been examined.

9. It is true that the crime is of a very serious and heinous nature whereby three persons were murdered in cold blood and numerous others wounded allegedly on sectarian grounds and that the case is at the initial stages.

10. However not with standing the heinous nature of the offense for the grant of bail we must apply the relevant law as set out in S.497 Cr.P.C. We must be satisfied based on the material placed before us that there are reasonable grounds to connect the applicant to the commission of the offense. Under the law we cannot keep a person in custody simply because the crime is a heinous one no matter how disgusted we may feel by it. All will turn on the material place before us and whether this connects the accused to the offense.

11. In this case neither do we regard the delay in lodging the F.I.R by 5 hrs to be inordinate nor the fact that no independent persons were made mushirs to be of much significance based on the facts and circumstances of this case.

12. However from the material placed before us it seems that the applicant was not nominated in the FIR, no description of him was

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given in the FIR, no particular role was assigned to him in the FIR, on his arrest no recovery was made from him, the prosecution has shown no motive such as enmity etc as to why the applicant would commit the offense, no identification parade has been carried out, no eye witness has identified the applicant, no CRO has been produced to show that the applicant is a habitual offender or has been convicted of heinous or even other crimes in the past, the applicant has been in custody since his arrest on 2-8-2015 (approximately 9 months),the trial has not yet started and no evidence has come on record that this was due to the fault of the applicant. Indeed, the only piece of evidence against the applicant appears to be a statement of a co accused before the police which will not be of any evidentiary value during the trial.

13. When State Counsel was pointedly asked about the material connecting the applicant to the offense the learned counsel was only able to point to the above statement of the co-accused and re iterate that it was a crime of a both a serious and heinous nature. In this respect we note that in the case of **Pir Mazhar Ul Haq V State** (1992 PCr.LJ P.1910) it was held that a statement of the co-accused in the absence of any corroborative evidence would not be sufficient to convict the accused at trial and as such in the absence of any corroborative evidence, as in this case, the accused would be entitled to bail.

14. In this respect we may usefully refer to the Supreme Court case of **Malik Muhammad Ishaque v. The State & others** (2011 SCMR 1350) which at P.1351 held as under:

> "We have searchingly and repeatedly required the learned Additional Prosecutor-General, Punjab appearing for the State to point out any legally admissible piece of evidence supporting the above mentioned allegation against the petitioner but he has not been able to refer to any such piece of evidence. The investigation of this case has already been completed and a Challan has been submitted and, thus, physical custody of the petitioner is no longer required at this stage for the purpose of investigation. **According to the learned Additional Prosecutor-General, Punjab the petitioner is a known terrorist who is involved in many heinous offences but, it goes without saying, we cannot brutalize justice in the name of terrorism if no legally admissible evidence has been shown to us to be available on the record against the petitioner**". (bold added)

15. Thus for the reasons mentioned in paragraph 12 above we are of the considered view that there are not reasonable grounds to connect the applicant to the commission of the offense and as such he has successfully made out a case for bail and is hereby enlarged on bail subject to furnishing solvent surety in the amount of RS 500,000 (five lacs) and PR bond in the like amount to the satisfaction of the Nazir of the Court. However the trial court is directed to decide this matter within 6 months of the date of this order and a copy of this order shall be provided by the office to the concerned trial court forthwith which shall submit fortnightly progress reports through MIT II.

16. It is made clear that we have only made a tentative assessment of the material placed before us and this order shall not prejudice the case of either party at trial which shall be decided by the trial court based on the evidence before it.

Dated: 20-5-2016