

ORDER SHEET

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IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Ist Crl. Bail Appln. No.S-481 of 2016.

DATE OF HEARING	ORDER WITH SIGNATURE OF HON'BLE JUDGE

1. For orders on office objection as flag A.
2. For Hearing.

27.02.2017

Mr. Akbar Ali Bangwar, advocate for the applicant along with applicant.

Mr. Ashfaque Hussain Abro, advocate for the complainant.

Mr. Khadim Hussain Khooharo, D.P.G.

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Heard arguments. For the reasons to follow, interim pre arrest bail granted to the applicant Bakhat Ali in terms of order dated 07.10.2016 is confirmed on the same terms and conditions. 


Judge

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Crl. Bail Avo. S- 481 of 2016
Crl. Bail Avo. S- 08 of 2017.
Bakrat Ali v/s The State.
Quadratullah Qadri v/s The State.

SINDH HIGH COURT

Composition of Bench

Single/D.B.

Before Hn Justice Muhammad Saleem Jessor

Dates of hearing: 27-02-2017

Decided on : 27-02-2017.

(a) Judgement approved for reporting.

YES

NO

CERTIFICATE

Certified that the judgment / Order is based upon or enunciates a principle of law / decides a question of law which is of first impression / distinguishes / over-rules / reverses / explains a previous decision.

*Strike out whichever is not applicable.

NOTE:—(i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

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ORDER-SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA
Crl. Bail Appln. No. S- 481 of 2016.
Crl. Bail Appln. No. S- 08 of 2017.

Date of hearing	Order with signature of Judge
Date of hearing : 27.02.2017.	
Date of Order: 27.02.2017	

Mr. Akbar Ali Bangwar, Advocate for applicant Bakhat Ali in Crl. Bail Appln. No. S- 481 of 2016.

Mr. Saeed Ahmed Bijrani, Advocate for applicant Qudratullah in Crl. Bail Appln. No. S- 08 of 2017.

Mr. Ashfaq Hussain Abro, Advocate for complainant.

Mr. Khadim Hussain Khooharo, D.P.G.

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Muhammad Saleem Jessar-J: By this common order, I propose to dispose of above captioned two bail applications bearing Crl. Bail Appln. No. S- 481 of 2016 under Section 498, 498-A Cr.P.C filed on behalf of applicant Bakhat Ali and Crl. Bail Appln. No. S- 08 of 2017 under Section 497/498 Cr.P.C filed on behalf of applicant Qudratullah; as both the applications arise out of same F.I.R bearing Crime No.71/2016 registered with P.S Buxapur, under Sections 302, 337-F (i), 337-H (2), 148 & 149 P.P.C. The Crl. Bail Appln. No. S- 481/2016 arisen out of impugned order dated 22.8.2016, whereas applicant Qudratullah preferred 1<sup>st</sup> bail plea before the trial Court, which was declined by order dated 19.9.2016. The said order was assailed before this Court in terms of 1<sup>st</sup> Crl. Bail Appln. No. S- 484/2016 and same was dismissed as not pressed with permission to file fresh before learned trial Court on the ground of counter version, vide order dated 26.12.2016; therefore, he moved 2<sup>nd</sup> bail application before trial Court, which met with same fate vide order dated 05.01.2017 and same has been impugned before this Court by means of this bail application.

2. The crux of prosecution case as unfolded by complainant Mst. Sehtaan Khatoon are that on the fateful evening accused Zaffar Ali with gun, Piyaro with Kalashnikov, Muhammad Ashraf with pistol, Machhi Khan with gun, Qudratullah with hatchet, Bakhat Ali with lathi (both applicants herein) and one unidentified person, whose face was opened

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and will be recognized having gun, have come from western side. It is further alleged that while reaching, the bandits having weapons loaded their weapons, accosted to her husband Aarab that he will not be spared today and will be killed. By saying so, accused Zaffar Ali made straight fire from his gun upon her husband Aarab, which hit him on left side of his skull, who fell down. Accused Qudratullah caused wrong side of hatchet blows and accused Bakhat Ali caused lathi blows to PW Shah Ali, the brother-in-law of the complainant, which hit him and he fell down, while seeing him falling down the accused persons decamped towards western side. The accused having weapons have made fires in air aims to create harassment. The complainant party notices Aarab had sustained lacerated fire injury over left eye on skull; blood was oozing and was serious. The injured/PW Shah Ali sustained two blows on left side of his iliac region and abrasion marks duly swelled on his back. The complainant with the help of community people after obtaining letter from Police station shifted the injured to Taluka Hospital Kashmore, where husband of complainant Aarab after first aid treatment was referred for further treatment towards Rahim Yar Khan, where he was admitted and on 13.8.2016 at about 02.30 a.m. of night he succumbed to injuries. His dead body was brought towards Police station and his autopsy was got conducted from Kashmore Hospital and after his burial ceremonies; leaving injured/PW Shah Ali for treatment at hospital the complainant appeared at Police Station and lodge instant F.I.R on the pretext that above named accused in their pre concert duly armed with weapons, hatchet and lathi; accused Zaffar Ali while causing firearm from his gun to her husband Aarab has caused his murder, whereas accused Qudratullah with wrong side of hatchet and accused Bakhat Ali with lathi have caused blows to PW Shah Ali have injured him and rest of the accused have made fires in air aims to create harassment; to such effect present F.I.R was lodged.

3. The police after registration of the case has started investigation and meanwhile have arrested co-accused Machhi Khan and Qudratullah on 26.8.2016, while accused Muhammad Ashraf, Bakhat Ali and Piyaro

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have succeeded in getting pre arrest bail from Court of law. After completion of legal formalities challan of the case was submitted before the competent Court of law having jurisdiction on 09.9.2016, placing name of main co-accused Zaffar Ali as absconder.

4. The accused Muhammad Ashraf and Bakhat Ali (present applicant) and Piyaro had applied for pre arrest bail before learned Sessions Judge, vide Crl. Bail Appln. No. 650/2016, where they were admitted to interim pre arrest bail on 20.8.2016 and after hearing of the same the interim pre arrest bail of co-accused Muhammad Ashraf and Piyaro was confirmed while interim pre arrest bail to the extent of applicant Bakhat Ali was dismissed and earlier order was recalled/ cancelled vide order dated 22.08.2016.

5. Learned counsel for the applicants contended that there are counter F.I.Rs, as F.I.R No.70/2016 lodged by co-accused Zaffar Ali regarding murder of deceased Altaf Hussain and Akhtiar and injured Zia-ul-Haq, Piyaro and Nadir has been challaned and one of deceased of counter F.I.R No.70/2016 namely Altaf Hussain was brother of applicant Qudratullah. Learned counsel further contended that date and time of incident in both F.I.Rs is same, but the trial Court has not considered such essential aspect of the case. Learned counsel further submitted that applicant Qudratullah has been assigned role of causing wrong side of hatchet blow to P.W Shah Ali and the said injury as per medical evidence has been opined as Jurh Ghayr Jaifah Hashimah defined under Section 337-F (v) P.P.C, which carries maximum punishment upto five years and injuries No.2 and 3 have been reported as other hurts falling under Section 337-L (2) P.P.C, which entail punishment of two years. Learned counsel further submitted that per F.I.R the injuries attributed to applicants are two but medical evidence suggests three injuries on the person of injured PW Shah Ali. Learned counsel also focused upon challan sheet/ charge sheet of the case, which is available with the file and reflects that injured PW Shah Ali has not been examined under Section 161 Cr.P.C; he has absconded away in

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crime No.70/2016, under Section 302 P.P.C. therefore, the alleged injured/ PW, who is star witness of the occurrence has not joined investigation nor recorded his statement to substantiate claim of complainant against the applicants. Learned counsel further submits that co-accused Ashraf, Piyaro and Machhi Khan have been granted bail by trial Court and to some extent the case of the applicants is identical to that of these co-accused.

6. On the other hand learned DPG appearing for the State duly assisted by Mr. Ashfaq Hussain Abro, Advocate for complainant has opposed the applications and prayed for dismissal of the same. However, both the learned counsel could not controvert the fact that the injured/ PW Shah Ali has not been examined by the police under Section 161 Cr.P.C and there is no existence of his 161 Cr.P.C statement in the police papers.

7. I have heard the arguments of either side, perused the police file with assistance of learned counsel for respective parties and have gone through the material made available before me.

8. Admittedly, the parties are on inimical terms and there is no denial that in earlier F.I.R No.70/2016 lodged by co-accused Zaffar Ali, in which two persons of applicant's side namely, Altaf Hussain and Akhtiar were murdered and one Zia-ul-Haq, Nadir and co-accused Piyaro have sustained injuries at the hands of complainant party in same incident, but the complainant has not disclosed this fact and has willfully suppressed this fact only to defeat the case of applicants.

9. Mere urgency or delay alone are not sole criterion to take the F.I.R as gospel truth or disbelieve the same as a whole while dealing with an application for bail but criterion in cases, falling within prohibitory clause of Section 497 Cr.P.C shall remain the same as has been chalked out i.e. 'bringing the case out of subsection (i) to subsection (ii) of Section 497'. Either of two can well be one of the ground to appreciate tilt but not a decisive fact to decline or earn liberty in cases; falling

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within prohibitory clause of Section 497 (i) Cr.P.C. Be that as it may, admittedly, the parties are at strange relations and undisputedly the applicants are not alleged to have caused any injury to deceased. The injury, attributed to the applicants have been declared by the medico legal officer as Jurh Ghayr Jaifah Hashimah, which carries maximum punishment upto five years as defined under Section 337-F (v) P.P.C. Further, allegation of common intention has now stood settled to be normally one of further enquiry unless there are other compelling reasons and circumstances to reach a different conclusion. Reference in this regard may well be made to the case of *Dilmurad v. State* 2010 SCMR 1178, wherein Hon'ble Apex Court has held as under:

*"6. .... In our opinion in so far as the issue of common intention is concerned, it is now well-settled that at the bail stage the same is normally one of further enquiry unless there are other compelling reasons and circumstances to reach a different conclusion i.e. by way of other pieces of evidence, which could definitely connect the applicant/accused with the crime in question..."*

10. In the instant case, the applicants were alleged to have caused a wrong side hatchet blow and lathi blow to PW Shah Ali but the said PW being an absconder could not be able to get his statement recorded under Section 161 Cr.P.C during investigation and therefore, his testimony is not helpful for the prosecution as learned DPG has also conceded that there is no 161 Cr.P.C statement of PW Shah Ali in the police file. The learned DPG and counsel for complainant when confronted with such conflict, they both could not controvert the position. The name of injured Shah Ali is also not mentioned in the challan sheet as witness. The injuries of injured witness Shah Ali though are mentioned in the mashirnama of injuries dated 12.8.2016, but his statement under Section 161 Cr.P.C was not recorded nor is available in the police file. I am conscious that normally the deeper appreciation of material is not permissible at bail stage but *prima-facie* lacuna shall always tilt the scale in favor of the accused, because for whom the law allowed to enjoy presumption of innocence. It is well settled principle of

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law that every accused presumed to be blue eyed boy of law until and unless he is found guilty of the charge. Prima-facie missing of material document i.e. 161 Cr.P.C statement of injured witness Shah Ali vis-à-vis in this case is sufficient to bring the case of applicants within scope of further enquiry; particularly when none of the D.P.C or counsel for complainant placed reasonable justification for such discrepancy.

11. Further it is matter of record that investigation of the case is over and challan has been submitted. This is so, that it is settled principle of law that concession of bail ought not to be withdrawn by way of premature punishment. The position, being so, also tilts the scale of justice in favor of bail rather jail. Reference may well be made to the case of *Syed Khalil Hussain Shah v. The State and another* reported in 2014 SCMR-12, wherein it is held as under:

*"6. .... The fact that the petitioner has been in jail for more than seven months would also tilt the scales of justice in favor of bail rather than jail. Reference to the case of Mumtaz v. The State (supra) 2012 SCMR 556, will not advance the case of the respondents, as each case being captive of its own facts and circumstances has to be decided accordingly. The case of Syed Abdul Baqi Shah v. The State 1997 SCMR 32, may well be referred to in this behalf, where such aspect was considered as ground for grant of bail."*

12. As for as question of their common intention is concerned, same can only be determined after recording evidence and in these circumstances one cannot be kept behind the bars for an indefinite period. Reference can be had from the case of *Wajid Ali v. The State and another* reported in 2017 SCMR 116, whereby Hon'ble Supreme Court of Pakistan has held in para 5 of the judgment as under:

*"The conclusion that there was common intention can only be reached after the evidence in the matter comes on the record. So far as the role of causing injury on the person of the complainant is concerned, it is admitted position that the said injury was reported to be ghair jaifa. The petitioner in this view of the matter cannot be kept behind the bars for an indefinite period. In the circumstances, the petitioner has made out a case for post-arrest bail. This petition is therefore*

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converted into appeal and is allowed and the impugned order is set aside. Petitioner is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs.300,000/- with two sureties in the like amount to the satisfaction of Trial Court."

13. Moreover, there are cross cases in between the parties and two F.I.Rs have been registered; the earlier one bearing crime No.70/2016 was got registered by the applicants side, whereby two persons of the applicants' side namely, Altaf Hussain and Akhtiar lost their precious lives and who was aggressor and who was aggressed upon is a question, to be determined by the trial Court after recording evidence and at this juncture case against applicant requires further enquiry. In this context, reference can be had from the case of Mir Hassan and another v. The State reported in 1987 P.Cr.LJ 1336. In case of Mir Hassan (supra) the specific role of causing sharp side injury to accused on vital parts of the complainant party was assigned but being the cross cases, the Hon'ble bench of this Court had held in following terms:

*"I do not like to discuss the merits of the case but suffice to say there will be a serious question for consideration at the trial as to which party was aggressor and the mala fide and false implication due to influence of the complainant with police, therefore, it is a case of further enquiry."*

14. Therefore, looking to the above peculiar circumstances and non examination of injured PW Shah Ali in terms of Section 161 Cr.P.C by the Investigating Officer, the foundation of allegation leveled against the applicants is in the air. Perusal of police file reveals that alleged injured/ PW Shah Ali's injuries were noted down by the Investigating Officer under memo, prima-facie the alleged injured appeared before the I.O but his statement was not recorded. Such conduct of prosecution while discharging its legal duties had casted serious doubt upon veracity of prosecution evidence, which prima-facie entitle applicants to concession of pre and post arrest bail. Consequently, the applications in hand were allowed by separate short orders dated 27.2.2017, in the following terms and these are reasons for the same.

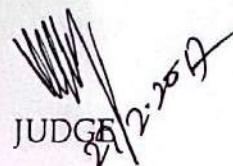
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"Heard arguments. For the reasons to follow, interim pre arrest bail granted to the applicant Bakhat Ali in terms of order dated 07.01.2016 is confirmed on the same terms and conditions."

"Heard arguments. For the reasons to follow, applicant Qudratullah is granted bail in Crime No.71/2016 registered at Police Station Buxapur for offence punishable under section 302, 337-F (i), 337-H (2), 148, 149 P.P.C subject to his furnishing solvent surety in the sum of Rs.100,000/- and P.R bond in the like amount to the satisfaction of trial Court."

15. Needless, to mention that observations made hereinabove are tentative in nature and would not prejudice case of either party at trial.



JUDGE  
V. Ansari

Ansari/\*