

ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Bail Application No.S-137 of 2018

DATE	ORDER WITH SIGNATURE OF JUDGE(S)
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Date of Hearing : 11.05.2018.

Date of Order : 18.05.2018.

Mr. Mir Muhammad Narejo, Advocate for applicants.

Mr. Muhammad Jamil Ahmed, Advocate for complainant.

Ms. Sana Memon, Assistant P.G.

ORDER

SHAMSUDDIN ABBASI, J:- Through this bail application, applicants Muhammad Achar, Malook and Ali Gul seek their enlargement on bail in Crime No.89 of 2017 registered at P.S Shahpur Chakar for offence under Sections 302, 337-A(i), 337-H(ii), 337-L(ii), 147, 148, 149 PPC.

2. Briefly, the facts as disclosed in the FIR are that on 19.11.2017 at 2300 hours the complainant Hadi Bux lodged report, stating therein that he was residing in Village Bachal Khan Bargani, Taluka Shahdadpur and they had dispute with Muhammad Achar and Malook Bhanjo over agricultural land. On 18.11.2017, the complainant, his brother Babar Mirza and relatives Ali Gul and Gul Muhammad left on their motorcycle for irrigating their lands situated in Deh Saroi. At about 1400 hours, when they reached Shahdadpur Burhoon Road near village Sultan Bhanajo, they saw accused (i) Muhammad Achar S/o Muhammad Ishaque Bhanajo armed with rifle (ii) Shabbir S/o Mooso Bhanajo armed with pistol (iii) Malook S/o Nihal Bhanajo armed with Gun (iv) Arbab S/o Muhammad Hassan (v) Ali Gul S/o Mooso and (vi) Moharram S/o Dodo having lathies were standing there, who seeing the complainant party, accused Achar challenged them by saying that why they

had come on land when they were directed not to come, saying so he made fire from his rifle, which was missed, meanwhile accused Shabbir fired straightly from his pistol with intention to kill, which hit to complainant's brother Babar Mirza on right side of back and crossed through and through from front side of chest. Thereafter, the complainant tried to rescue his brother, whereon Malook caused butt blow of his Gun on complainant's right side head, while accused Arbab, Ali Gul and Moharram caused lathi blows to the complainant on his head and other parts of body and his relative Gul Muhammad and Ali Gul tried to rescue but accused Achar, Malook and Shabbir on the force of weapons did not allow to come forward by extending threats that if they come forward, they would be killed. Thereafter, the accused by making aerial firing went away. Complainant's brother died at the spot. In the meanwhile, the villagers reached there and brought them to Shahdadpur Hospital and admitted the complainant for treatment. Thereafter, dead body was sent to Shahpur Chakar Hospital, where the concerned Doctor conducted postmortem of the dead body and after conducting postmortem dead body was handed over to the complainant party for burial. Thereafter, the complainant after his treatment appeared at P.S and lodged report against the accused.

3. After usual investigation, the police submitted challan against the accused, showing their names in column of absconders, while showing the name of accused Ghulam Shabbir in jail custody.

4. The applicants / accused have firstly approached to learned Additional Sessions Judge, Shahdadpur, for pre-arrest bail, bail application was dismissed and accused were taken into custody.

5. Learned Counsel for the applicants / accused submits that there is recorded enmity in between the parties. He further contended that there is delay of 33 hours in lodging of FIR and the complainant has failed to explain this inordinate delay. He further contended that due to this inordinate delay, it cannot be ruled out that FIR has been registered after due consultation. He further contended that the main role of firing upon deceased has been assigned to main accused Ghulam Shabbir who is in custody, whereas the role of present applicant / accused Muhammad Achar is concerned, he raised *Lalkara (Hakkal)* upon complainant party and made fire from his rifle, which did not hit anyone of the complainant party. He further contended that role of applicant Malook is concerned, he gave butt blow of his gun to complainant on his head, whereas the role of Ali Gul is that he alongwith co-accused Moharram were armed with Lathis and caused Lathi blow to complainant on his head and other parts of the body. Thereafter, all the accused made aerial firing and went away from the scene of occurrence. He further contended that as per medical report, the injuries sustained by the complainant were declared as *Shuja-e-Khafifa*, which falls under Section 337-A(i) PPC, whereas the injuries No.2, 3, and 4 were also declared and falling under Section 337-L(ii) PPC. He further contended that so far as Section 337-A(i) is concerned. The punishment provided which may extend to 02 years as Ta'zir. The punishment provided in Section 337-L(ii) which also may extend to 02 years or with Daman or with both. He further contended that both the sections areailable, which does not come within the prohibitory clause of Section 497 Cr.P.C. Learned Counsel for the applicants in support of his contentions has relied upon the cases reported as (i) 2017 P.Cr.L.J Note 54 (ii) 2017 P.Cr.L.J Note 103 (iii) 2009 P.Cr.L.J 719 (iv) 2006 P.Cr.L.J 1611 (v) 2010 P.Cr.L.J 537 (vi) 2007 MLD 294 (vii) 2006 PLD 470 (viii) 2010 P.Cr.L.J 379 (ix) 2009

P.Cr.L.J 1008 (x) 2017 P.Cr.L.J Note 102 (xi) 2017 P.Cr.L.J Note 108 (xii) 2015 MLD 226 (xiii) 2009 P.Cr.L.J 1085 and (xiv) 2018 MLD 127.

6. Learned Counsel for the complainant has vehemently opposed to the grant of bail on the ground that there is strong motive against the applicants / accused as there was serious apprehension of murderous attack on the complainant party, therefore, brother of the complainant had approached to the Additional Sessions Judge / Ex-Officio Justice of Peace by filing Cr.M.A No.1126 of 2017 (re: Dilbar Hussain v. SHO P.S Shahpur Chakar & others alongwith present applicant / accused Muhammad Achar) for protection, where the learned Court directed the SHO to maintain the law and order situation in the area and nobody should be allowed to take law in their hands. He has produced certified copy of the order dated 10.11.2017 passed in Cr.M.A filed by the cousin of the complainant. He further contended that so far as the role of applicant Achar is concerned, he fired upon the complainant party but luckily fire was missed. He further contended that there is strong motive against the applicants / accused and specific role has been assigned to them and applicant Malook has caused head injury to complainant and applicant Ali Gul caused Lathi blows to the complainant on his other parts of the body. He further contended that applicants / accused are involved in heinous offence of capital punishment and they were members of unlawful assembly and would be guilty of the offence in prosecution of common object. In support of his arguments, the learned Counsel for complainant has relied upon the cases reported as (i) 2014 P.Cr.L.J 473 (ii) 2017 MLD 829 (iii) 2014 YLR 2685 (iv) 2013 P.Cr.L.J 1387 (v) 2015 P.Cr.L.J 1531 (vi) 2016 YLR 1629 (vii) PLD 2009 Supreme Court 385 and (viii) 2017 SCMR 325 (ix) 2015 SCMR 655.

7. Learned Assistant P.G has adopted the arguments as advanced by the learned Advocate for the complainant and raised objection to the grant of bail.

8. Heard the learned Counsel for the applicants, learned Counsel for the complainant as well as learned D.P.G and perused the material available on the record.

9. It is an admitted position, that applicant / accused Malook has been assigned a role of ineffective firing as he was armed with rifle and he fired from his rifle on complainant party but fire was missed. The role of co-accused Malook is concerned, he was shown armed with gun and he caused butt blow of his gun to complainant's right side head, whereas the role of applicant Ali Gul is concerned, he alongwith co-accused Moharram and Arbab caused lathi blows to the complainant on his head and other parts of the body.

10. I have perused the medical evidence of the complainant, which shows that single injury was found on the head of complainant caused by hard and blunt substance and declared as *Shuja-e-Khafifa* falling under Section 337-A(i), whereas the injuries No.2, 3, and 4 have been declared under Section 337-L(ii). So far as, the role of applicant / accused Muhammad Achar is concerned, he has been attributed the role of ineffective firing as he has not repeated fire and the question of intention to kill the complainant party calls for further inquiry. The law cited by the learned Counsel for the complainant is distinguishable to that of the present case. The role of applicants / accused Malook and Ali Gul is concerned. Accused Malook has been attributed the role of butt blow on complainant's head, while applicant Ali Gul and co-accused Arbab and Moharram have also been assigned the role of causing

lathi blows to the complainant on his head and other parts of the body, which is inconsistent with the medical evidence as the medical certificate issued by M.L.O shows single injury on complainant's head.

11. I have also taken the notice of inordinate delay in lodging of FIR, it is admitted fact that there is delay of 33 hours in lodging of the FIR as the incident had taken place on 18.11.2017 at 2:00 p.m whereas FIR was lodged on 19.11.2017 at 11:00 p.m. and no plausible explanation has been furnished for such inordinate delay. It cannot be ruled out that in the background of murderous enmity, apparently FIR has been lodged after due consultation. The main role has been assigned to the principal accused Ghulam Shabbir, who is in custody. It is settled position that if doubt comes at bail stage would entitle accused for extension of concession of bail on the ground of further enquiry. It has been ruled out by the Honourable Supreme Court of Pakistan in the case of *ZAIGHAM ASHRAF V/S. THE STATE AND OTHERS*

as under:-

“9. To curtail the liberty of a person is a serious step in law, therefore, the Judges shall apply judicial mind with deep thought for reaching at a fair and proper conclusion *albeit* tentatively however, this exercise shall not to be carried out in vacuum or in a flimsy and casual manner as that will defeat the ends of justice because if the accused charged, is ultimately acquitted at the trial then no preparation or compensation can be awarded to him for the long incarceration, as the provisions of Criminal Procedure Code and the scheme of law on the subject do not provide for such arrangements to repair the loss, caused to an accused person, detaining him in Jail without just cause and reasonable ground. Therefore, extraordinary care and caution shall be exercised by the Judges in the course of granting or refusing to grant bail to an accused person, charge for offence(s), punishable with capital punishment. The Courts are equally required to make tentative assessment with pure judicial approach of all the materials available on record, whether it goes in favour of the Prosecution or in favour of the defence before making a decision.

10. In the case of Amir v. The State (PLD 1972 SC 277) it was held that, “for purposes of bail, law not to be stretched in favour of prosecution—Benefit of doubt, if any arising, must go to accused even on bail stage”. Similar view was taken in the case of Manzoor v. The State (PLD 1972 SC 81). These principles so laid down, are based on enunciation of law in interpreting the provision of section 497, Cr.P.C. and boarder principle of justice. Till date, no departure or deviation has been made therefrom by this Court then, these are the principles of law and have binding effect and shall be construed as guiding principles of all the Courts in the matter of grant or refusal of bail.”

12. Keeping in view the facts, I am of the opinion that the case of the present applicants / accused is of further inquiry and is not free from reasonable doubt, the benefit of which must go to the accused. The Hon’ble Supreme Court has granted the concession of bail in such circumstances. I am fortified in my view from the judgments of the Honourable Supreme Court in the cases of *FARAZ AKRAM V/S. THE STATE* (1999 SCMR 1360), *MUHAMMAD V/S. THE STATE* (1998 SCMR 454), *MUMTAZ HUSSAIN & 05 OTHERS V/S. THE STATE* (1996 SCMR 1125), *MUHAMMAD IRFAN V/S. THE STATE & OTHERS* (2014 SCMR 1343), *FAQUIR HUSSAIN @ BALI V/S. THE STATE & OTHERS* (2014 SCMR 1502), *EHSAN-UL-HAQ @ SHANI V/S. THE STATE & OTHERS* (2017 SCMR 114).

13. In a case of *WAJID ALI V/S. THE STATE & ANOTHER* reported as 2017 SCMR 116, the Honourable Supreme Court has observed as under:-

“5. From the contents of the FIR, it cannot be out-rightly said that there was a common intention to commit crime. It *prima facie* appears that repairing of the common wall was the reason that provoked the accused. 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 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”.

14. I am of the considered view that the case of the present applicants / accused calls for further inquiry in terms of Section 497(2) Cr.P.C. Therefore, the applicants / accused are admitted to bail in the sum of Rs.200,000/- (Rupees Two Hundred Thousand) each and P.R Bonds in the like amount to the satisfaction of the trial Court.

15. Needless to mention here that the observations made hereinabove are of tentative nature and shall have no effect upon the trial Court to decide the matter on merits.

JUDGE

Shahid