

## IN THE HIGH COURT OF SINDH AT KARACHI

Present:

**Mr. Justice Amjad Ali Sahito**

Criminal Bail Application No.146 of 2019

Applicant : (i) Syed Umer S/o Syed Muhammad Amin Madni  
(ii) Syed Umair S/o Syed Umer  
(iii) Rahmatullah S/o Mir Akbar Khan  
Through M/s. Khawaja Shamsul Islam and Shahzad Mehmood, Advocates for the applicants/accused

Complainant : Ghulam Ali Awan S/o Ghulam Hussain  
Through Mr. Habib Ahmed, Advocate for the complainant

Respondent : The State  
Through Mr. Sagheer Ahmed Abbasi, Assistant Prosecutor General, Sindh alongwith SIP Umer Din

Date of hearing : 01.09.2020 & 08.09.2020

Date of order : 11.09.2020

### **ORDER**

**AMJAD ALI SAHITO, J** -- Through this Bail Application, the applicants/accused seek pre-arrest bail in Crime No.8/2019 registered under Sections 302/34 PPC at PS Baloch Colony, Karachi East, after their bail plea has been declined by the XIIth Additional District & Sessions Judge, Karachi South vide order dated 24.01.2019.

2. Briefly, the facts of the case, as per the contents of the FIR, are that the complainant Ghulam Ali Awan, who resides in House No.320, Gali No.B-25, Mahmoodabad No.1/2-5, Karachi, presently residing at House No.D-74, Koocha Panjabian, Mahmoodabad No.3, Karachi and is engaged in the business of Estate Agency in Mehmoodabad. As per the complainant on 5.1.2019 at about 10.30 p.m. when he was sitting in a hotel at Street No.26/C, his brother Kashif Ali aged 40/41 years came to him and after taking some cash from him, went back. At about 2245 hours some firing noise was heard from Street No.25/C. Thereafter, people told him

that his brother Kashif Ali has received a bullet injury. He immediately rushed at the spot and found his brother lying in front of the gate of Masjid Haft-e-Sultan, with a bullet injury on his back from which blood was oozing. The complainant with the help of people took his brother to the nearby Azam Clinic, Manzoor Colony, where his brother Kashif Ali told him that when he was passing near the gate of Masjid Haft-e-Sultan, when in presence of Mullah Syed Umer, Umair S/o Syed Umer and Rehmat S/o Muhammad Akbar Khan to kill him fired from their pistol, which bullet hit his brother. The doctor told the complainant that it is a police case. Thereafter, he took his brother in the ambulance to Jinnah Hospital where the doctor declared that his brother has expired. Then this FIR was registered on 6.1.2019.

3. Khawaja Shamsul Islam has appeared for the applicants/accused and stated that long-standing enmity exists between the parties hence false implication cannot be ruled out; that there was a dispute between the complainant and the applicants/accused about the possession of Masjid Haft-e-Sultan. He further stated that two other FIRs bearing Nos.6 and 7 of 2019 have also been registered on 5.1.2019 at PS Baloch Colony by Sub-Inspector Iftikhar Ahmed under sections 147/148/353/186/427 PPC and Rehmatullah S/o Syed Mir Akbar Khan under sections 448/186/353/34 PPC read with section 7 of Anti-Terrorism Act, hence malafide on the part of the complainant could not be ruled out; that the instant FIR was lodged after a delay of one day; that there are contradictions concerning the injury caused to the deceased as according to the FIR No.8 of 2019 the deceased Kashif Ali received injury on his backside whereas according to some of the witnesses the deceased received the injury either on his stomach or on his right thigh. He submitted that this aspect surely requires further enquiry; that as per the statement of the doctor of Azam Clinic when the deceased was taken to his clinic he was already dead. He also submitted that the statements of some of the alleged injured persons were recorded under section 161 Cr.P.C. with a delay of more than

seventeen days of the incident on the direction of one Nasir of Dawat-e-Islami; that even if the declaration of the deceased is considered to be a dying declaration that is a weak type of evidence. He further stated that allegedly if any role assigned against applicant/accused Syed Umer to be present at the spot only. He also stated that it is strange to note that the deceased Kashif Ali received the fire from his back, hence how it has seen the person making firing upon him. It has been urged by the learned counsel for the applicant that deceased received bullet injury but it is not clear that who fired upon him whether it was Syed Umair or Rehmatullah and even if for the argument's sake it is assumed that it was one of these persons but the question is who fired upon the deceased whether Syed Umair or Rehmatullah; that all these aspects require deeper examination and the applicants/accused are entitled to the relief claimed. In support of his above contentions, learned counsel for the applicants/accused has placed reliance upon the cases of (1) Riaz Ahmad Khan v. The State (FIA) (2019 PCRLJ Note 33), (2) Muhammad Pervez and others v. The State and others (2007 SCMR 670), (3) Nazir Ahmad v. Muhammad Iqbal and another (2011 SCMR 527), (4) Amin Ali and another v. The State (2011 SCMR 323), (5) Muhammad Jahangir Afzal v. The State through PG Punjab and another (2020 SCMR 935), (6) Muhammad Tanveer v. The State and another (PLD 2017 Supreme Court 733), (7) Sajid Ali and another v. The State (2000 YLR 1351) and Ashraf and another v. The State (2018 MLD 1685).

4. Mr. Habib Ahmed has appeared on behalf of the complainant and stated that there was no enmity between the parties. He stated that there was a dispute on the possession of the Masjid between the applicants/accused and some residents of the Muhalla but the complainant and deceased were not a party in that matter. He further stated that the complainant was sitting quite near to the place of incident and rushed to the scene when people informed him that his brother Kashif Ali has received a firearm injury. He also stated that due to the oozing of blood the exact location on

the body was not identified and due to this reason there is a difference that on which part of the body the bullet hit. He submitted that all the points raised by learned counsel for the applicants/accused require deeper examination which could not be made at bail stage and no malafide has been attributed by the applicants/accused on the complainant and the applicants/accused have failed to make out a case of confirmation of interim pre-arrest bail to the applicants/accused. In support of his contentions, learned counsel for the complainant has relied upon the cases of (1) Rana Muhammad Arshad v. Muhammad Rafique and another (PLD 2009 Supreme Court 427) and (2) Aashique Ali Chandio and another v. The State (2016 MLD 1377).

5. Mr. Sagheer Ahmed Abbasi, Assistant Prosecutor General, Sindh has appeared for the State and has adopted the arguments of learned counsel for the complainant.

6. Before this, the interim bail was granted to the applicants/accused vide order dated 24.10.2019, and subsequently, same was confirmed on same terms and condition vide order dated 14.06.2019. Being aggrieved to the order, the complainant filed a **Criminal Petition No.149-K of 2019** before Hon'ble Supreme Court of Pakistan; wherein the Apex Court vide order dated 07.07.2020 has set aside the impugned order by observing the following directions:

***We have heard learned counsel for the petitioner and perused the available record. Prima facie, the ingredients of pre-arrest bail are missing in this case. we are inclined to remand the case back to the High Court to decide the same afresh after affording proper opportunity of hearing to the parties. The impugned judgment is set aside and this petition is converted into appeal and allowed to the above extent. However, the interim bail granted by the High Court shall remain intact till the bail application is finally decided.***

7. I have heard the learned counsel for the parties and have gone through the material available on record. The concession of pre-arrest bail cannot be allowed to an accused

person unless the Court feels satisfied with the seriousness of the accused person ascertained regarding his intent arrest being actuated by malafide on the part of the complainant party or the police but not a word about the crucial aspect of the matter is found as no malafide made on the part of the complainant to believe that the applicant/accused has been implicated in this case falsely. In the case of **Rana Muhammad Arshad vs. Muhammad Rafiq (PLD 2009 Supreme court 427)** wherein the Hon'ble Supreme Court Pakistan has provided the guideline for grant of pre-arrest bail. It is appropriate to reproduce the operative part of the said judgment.

***“...9 (a) grant of bail before arrest is an extraordinary relief to be granted only in extraordinary situations to protect innocent persons against victimization through abuse of law for ulterior motives;***

***(b) pre-arrest bail is not to be used as a substitute or as an alternative for post-arrest bail;***

***(c) bail before arrest can not be granted unless the person seeking it satisfies the conditions specified through subsection (2) of section 497 of Code of Criminal Procedure i.e. unless he establishes the existence of reasonable grounds leading to a belief that he was not guilty of the offence alleged against him and that there were, in fact, sufficient grounds warranting further inquiry into his guilt;***

***(d) not just this but in addition thereto, he must also show that his arrest was being sought for ulterior motive, particularly on the part of the police; to cause irreparable humiliation to him and to disagree and dishonour him;***

***(e) such a petitioner should further establish that he had not done or suffered any act which would disentitle him to a discretionary relief in equity e.g. he had no past criminal record or that he had not been a fugitive at law, and finally that;***

***(f) in the absence of a reasonable and a justifiable cause, a person desiring his admission to bail before arrest, must, in the first instance approach the Court of first instant i.e. the Court of Session, before petitioning the High Court for the purpose.***

8. In this case, the learned counsel for the applicants/accused has pleaded *malafide* on the part of the

complainant on the ground that long admitted enmity exists between the party as the applicant No.1 filed suit for declaration and permanent injunction before the Senior Civil Judge in the year 1981 and same was decreed in favour of the applicant No.1 and the said litigation reached up to Hon'ble Supreme Court of Pakistan and finally applicant succeeded to get possession of the Masjid Haft-e-Sultan on 03.05.2016. The applicant filed Execution Application and same was allowed but due to interference of complainant party, possession was not handed over to applicant and an application was moved before learned 3<sup>rd</sup> Civil Judge/Rent Controller for the aid of police as well as rangers, such application was allowed and on the day of the incident, the Nazir and police have reached Masjid Haft-e-Sultan to get possession where the police found 100/150 persons they refused to hand over the possession and started throwing stones upon the police party as such police also lodged FIR being Crime No.06/2019 against the complainant party. Learned counsel for the applicants/accused submits that due to such enmity, the complainant *malafidely* with ulterior motive has lodged the FIR against the applicants, to victimized them, otherwise they are innocent having no concerned with the alleged offence.

9. A perusal of record, it appears that the complainant Ghulam Ali Awan is not an eye witness of the incident. Initially, the injured Kashif was shifted to Azam Medical Centre for his treatment where he/Kashif informed the complainant that the applicants have fired upon him, but from the perusal of OPD slip of Azam Medical Centre it is written that **“patient brought dead in emergency”**. Furthermore, the complainant has not disclosed that at the time of shifting the injured to the hospital, any other person has received the injury. The statement of PWs namely Yameen Ali and Mehboob Ali were recorded under section 161 Cr.P.C. by I.O. of the case with the delay of about seventeen (17) days to the incident on the direction of the one Nasir Sahib of Dawat-e-Islami who have called both witnesses in the ADJ-XII

South wherein the presence of the advocate their statements were recorded. Belated examination of the witnesses by the police was not fatal to prosecution but where the delay was unexplained, such delay adversely affects the prosecution case, hence, due deliberation and consultation can not be ruled out. The PW Yameen Ali in his 161 Cr.P.C. statement states that he was present in the street, from inside of the mosque on the instigation of Molana Umer the applicants were firing, one bullet hit to deceased Kashif and he has also received a bullet injury on his foot. Surprisingly, he has not disclosed that in his presence PW Mehboob Ali also received injury on his thigh, even PW Mehboob Ali has also not stated in his 161 Cr.P.C. statement that in his presence Yameen has received the injury on his foot. It is important to note that eye witness Yasmeeen Ali is claiming the firing was made from inside of the Mosque but how he knew that the firing is being made by the applicants/accused. The deceased has received only one injury which is yet to be determined at the trial when the evidence will be recorded that who had fired upon the deceased. In the circumstances, the case of the applicants/accused requires further enquiry.

10. The case has been challaned and the applicants/accused are no more required for further investigation. The charge has been framed on 05.03.2019 but no progress has been made before the trial Court. The applicants/accused are attending the Court regularly for the last two years. The learned counsel for the applicants claimed that the witnesses are not attending the court. The learned counsel for the complainant has failed to plead that after granting of pre-arrest bail, the applicants/accused have made any attempt to tamper with the prosecution evidence or misuse the concession of bail. In the case of **Nadeem v. The State (2016 SCMR 1619)**; wherein the Hon'ble Supreme Court of Pakistan has held that:

**“...3 In the absence of any evidence that the petitioner had tried to misuse the concession of bail or attempted to tamper with the prosecution evidence, it was not open for the**

**learned High Court to recall the bail already granted to the petitioner. The learned Additional Prosecutor General has also confirmed that challan has already been submitted in the trial Court.”**

11. At the bail stage, only a tentative assessment is to be made and deeper appreciation is not permissible. The learned counsel for the applicants/accused has succeeded to make out a case for confirmation of interim pre-arrest bail to the applicants/accused in terms of subsection (2) of Section 497 Cr.P.C. By taking the guideline from the above-cited cases, the instant bail application is allowed. The interim pre-arrest bail granted to applicants/accused vide order dated 24.01.2019 is hereby confirmed on same terms and conditions. Applicants/accused are directed to attend the trial. However, the learned trial Court is directed to expedite the matter and conclude the same preferably within three months.

12. The cases relied by learned counsel for the complainant is distinguishable from the facts and circumstances of the present case.

13. Needless to mention here that the observations made hereinabove are tentative in nature and would not influence the learned trial Court while deciding the case of the applicants/accused on merits.

JUDGE

Kamran/PA