

IN THE HIGH COURT OF SINDH, AT KARACHI
Cr. B.A No.1489 of 2019

Wakeel Khan Applicant
Son of Fateh Khan

V/s

The State Respondent

Mr. Mushtaque Ahmed Jahangiri advocate for the applicant.
Mr. Irshad Khan Yousufzai advocate for the complainant.
Mr. Zahoor Shah, DPG.

Date of hearing
& decision: 26.12.2019

ORDER

ADNAN-UL-KARIM MEMON, J:- Through instant bail application, Applicant Wakeel Khan is seeking post arrest bail in F.I.R. bearing No.364/2019 for offences under section 302, 34 read with Section 109 PPC registered at Police Station Site-A, Karachi.

2. The case of the Applicant is that he was booked in crime No.364/2019, registered under offences 302/34, read with Section 109 PPC at Site-A Police Station, Karachi at the instance of co-accused under Section 109 PPC, both were arrested in the aforesaid crime on 13.7.2019 and Investigating Officer recorded statements of eyewitnesses under Section 161 and 164 Cr.P.C., prepared Mushirnama of place of incident, obtained Chemical Report of recovered Articles from Co-accused and submitted Charge Sheet against Applicant and others before concerned Judicial Magistrate on 09.8.2019. He being aggrieved by and dissatisfied with the inclusion of his name in the aforesaid crime moved Post arrest Bail Application No.2443/2019 before VI-Additional Sessions Judge, Karachi West, which was heard on 26.09.2019 but relief was declined on the analogy that alleged incident took place on 06.07.2019 at 0800 hours, near Falcon School, Shamshi Hospital, Metrovil Site, Karachi and reported promptly; that the applicant is nominated by the complainant in the said FIR due to dispute between the brothers inter-se, towards the immovable property, though he was not available at the place of incident when such crime took place. Hence, the Applicant has approached this Court through instant Bail Application.

3. Mr. Mushtaque Ahmed Jahangiri, learned counsel for the applicant has mainly contended that the role of the applicant is nothing but Abettor of the crime and he is at all allegedly involved under Section 109 PPC, therefore, he cannot be saddled with murder of deceased step brother namely Hanif Muhammad; that applicant has shown to have been booked in the aforesaid crime by the statement of co-accused Muhammad Ibrahim Khan as his statement involving the applicant is clear violation of Article 38 and 39 of Qanoon-e-Shahdat Order, 1984; that even otherwise no confessional statement of the applicant is on record to book him in the aforesaid crime; that no recovery has been effected from him during the course of investigation; that the complainant has admitted that there is civil dispute between the parties on proper share in inheritance as such he cannot be saddled with criminal liability; that chemical report of alleged empty recovered from the spot does not involve the applicant in the crime; that case of the applicant requires further inquiry into his guilt under Section 497(2), Cr.P.C. He lastly prayed for admission of the applicant on Post arrest Bail in the crime discussed supra.

4. Conversely, Mr. Irshad Khan Yousufzai learned counsel representing the complainant namely Umar Rehman vehemently opposed the grant of bail to the applicant on the premise that he is real brother of main accused Ibrahim Khan and is nominated in the crime under question; that complainant suspected both step brothers to be involved in the murder of his deceased brother on property dispute; that the PWs have fully supported the case of the prosecution; that the murder of deceased has taken place in presence of his son aged about 7 years at the date, time and place as discussed supra; that no charge has been framed yet, therefore, he is not entitled for concession of Post Arrest Bail at this stage. He lastly prayed for rejection of his Post Arrest Bail. In support of his contentions, he relied upon the case of *Mst. Parveen Akhtar Vs The State and others (2002 SCMR 1886)* and argued that the law laid down by the Honorable Supreme Court in the case of *Asmatullah Khan v. Bazi Khan and another (PLD 1988 SC 621)* wherein it has been held that merely for such reason of the case to be of further inquiry, accused would not be entitled for grant of bail because mere possibility of further inquiry which exists almost in every criminal case, is no ground for treating the matter as one under section 497(2),

Cr.P.C., therefore, the applicant is not entitled for concession of post arrest bail. He emphasized that Chemical Examination Report of recovered pistol is positive; that medical evidence supports the prosecution case; that there is nothing on record which could suggest or indicate false implication of Applicant in the present crime. He further added that there is no delay on the part of prosecution, therefore; Applicant is not entitled to concession of bail and prayed for rejection of bail application of the applicant.

5. Mr. Zahoor Shah learned D.P.G has adopted the stance of the complainant.

6. I have heard learned counsel for Applicant, learned D.P.G for the State as well as learned counsel representing the Complainant and perused the material available on record.

7. I am conscious of the fact that while deciding a bail application this court has to make tentative assessment of the record. In this regard I am fortified by the decision of Honorable Supreme Court of Pakistan rendered in the case of *Shahzad Ahmed vs. The State (2010 SCMR 1221)*.

8. Tentative assessment of record reflects that there was a dispute between the step-brothers on certain land left behind by their father and in this regard suspicion was shown regarding culpability of the applicant but no independent ocular testimony has come on record yet as to whether the applicant was involved in the murder of his deceased step-brother as the record shows that the deceased was hit with one bullet, which alleged weapon has reportedly been recovered from the possession of the co-accused, such narration requires evidence to be recorded by the learned trial Court.

9. Prima facie prosecution has not collected incriminating material which could attract section 109, P.P.C. against the Applicant. Mere saying that they had bad intention to get rid of deceased over the property dispute, does not lead at this stage to the conclusion that Applicant was hatching any conspiracy in connivance with the main accused or he abated the offence of murder of his own brother with co-accused and on that basis he is booked under section 109, P.P.C which factum needs thorough probe and that can be thrashed out in evidence. Prima facie, in the instant case, the applicant was not present at the time of alleged incident, so he had

played no role in causing death of the deceased and the applicant's involvement in the aforesaid crime on the basis of abetment is yet to be determined by the learned trial Court, therefore, case of the Applicant requires further enquiry as provided under section 497(2), Cr.P.C.

10. Apparently, Applicant is implicated on the basis of statement of co-accused which is not admissible in evidence under Article 38 of Qanun-e-Shahadat Order, 1984, hence, benefit of doubt can be extended to the Applicant at the bail stage.

11. It is well settled by now that where evidence with regard to the allegation of abatement or instigation is lacking the concession of bail can be extended in favour of accused. Besides, Applicant has pointed out mala fide on the part of Police and complainant; therefore, he is entitled to concession of Post arrest Bail in the aforesaid F.I.R.

12. The case law cited by the learned counsel for the complainant is not akin to the facts obtained in this Bail Application.

13. In view of above facts, circumstances and law the Applicant has made out a case of Post arrest Bail. Accordingly, the Applicant Wakeel Khan is granted Post arrest Bail in F.I.R No.364/2019, for offences under section 302, 34 read with Section 109 PPC registered at Police Station Site-A, Karachi, subject to furnishing solvent surety in the sum of Rs.300,000/- (Three Hundred Thousand only) and P.R bond in the like amount to the satisfaction of trial Court.

14. The above findings are tentative in nature which shall not prejudice the case of either party during the trial.

15. Before parting with this order, it may be observed that the trial Court shall ensure conclusion of trial preferably within a period of three months from the date of receipt of this order and such compliance report shall be furnished to this Court through the MIT-II accordingly.

16. By short order dated 26.12.2019, I have ordered release of Applicant named above on Post arrest Bail in the said F.I.R and these are the reasons thereof.

JUDGE