

## ORDER SHEET

### **IN THE HIGH COURT OF SINDH BENCH AT SUKKUR**

Criminal Bail Application No. S – 498 of 2012

For hearing.

Mr. Rasool Bux I. Siyal, advocate for the applicant.

Mr. Mohal Lal, the State Counsel for D.P.G.

Gul Muhammad, complainant present in person.

Date of hearing : 19.10.2012.

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**Nadeem Akhtar, J.-** This is an Application under Section 497 of the Code of Criminal Procedure, 1898, whereby the applicant has prayed that he may be admitted to bail pending trial in Sessions Case No.372/2011 before the IV<sup>th</sup> Additional Sessions Judge, Mirpur Mathelo, District Ghotki, in Crime No.79/2011, Police Station Mirpur Mathelo, District Ghotki, under Sections 302, 148 and 149 of the Pakistan Penal Code, 1860.

2. Briefly stated, the facts of the case are that an FIR was lodged on 01.04.2011 at 11:00 am by one Gul Muhammad S/O Pathan Pitfai (**complainant**) with the Police Station Mirpur Mathelo, District Ghotki, against five unknown persons. The complainant had alleged that two days before lodging of the FIR, that is on 30.03.2011, a cow belonging to his nephew Abdul Majid Pitfai was stolen from his house. In the evening, the complainant, along with his nephews ; namely, Rahib S/O Mahmood Pitfai, Abdul Majid S/O Billand Khan Pitfai, and Mohammad Siddique S/O Ramzan Pitfai, went to search for the stolen cow with the help of torches. After searching for the stolen cow, the complainant and his above named nephews were returning to the village on foot. At 02:00 am when they were at the thoroughfare near Village Sher Ali Kolachi, they saw in the light of their torches five persons armed with Kalashnikovs rushing towards them with two buffaloes. The complainant had stated in the FIR that the faces of all the said five persons were uncovered, and that he would be able to recognize them if they were seen by him again. It was alleged in the FIR that when the complainant's nephew Rahib asked the said five persons to identify themselves, one of them fired directly at him with the Kalashnikov with the

intention to murder him. It was also stated in the FIR that when the shot was fired, Rahib, the complainant and his other nephews fell on the ground and all of them started raising cries due to fear. On hearing the Kalashnikov burst and the cries, several people came running at the scene by raising *hakals*, due to which all the said five persons ran away from the scene. It was alleged by the complainant in the FIR that in the light of the torch, he saw Rahib bleeding with one injury that he had sustained on his left nipple which went through and through his body, due to which Rahib died on the spot.

3. It was stated in the FIR by the complainant that he arranged for the conveyance, and with the help of the witnesses, the dead body of Rahib was shifted by him to the Civil Hospital Ghotki. Thereafter, he obtained a letter from the police, got the postmortem conducted, and took away the body to the village, where he remained busy in the burial formalities. It was further stated in the FIR by the complainant that after completing the above formalities, he went to the Police Station on 01.04.2011 to lodge the FIR against unidentified accused for murdering his nephew Rahib aged 40/45 years, with common intention for unknown enmity. The FIR specifically stated that, according to the complainant, the unidentified accused were properly seen by him and the prosecution witnesses in the light of torches, and that they would be identified if seen again.

4. For 13 days after the occurrence of the incident, the unidentified accused mentioned in the FIR were neither identified by the complainant, nor were their names disclosed. All of a sudden on 14.04.2011, after 13 days of the occurrence of the incident, two witnesses Abdul Majid and Mohammad Siddque, who are the nephews of the complainant, appeared before the police for recording their statements. Their statements were recorded by the police on 14.04.2011 under Section 161 Cr.P.C., when the names of the applicant and four other persons were disclosed by them for the first time as the accused involved in the murder of Rahib. Out of the said other four accused, Abdul Wahid S/O Sher Muhammad Almani, and Imdad S/O Wahidan Mahar were arrested on 15.04.2011, whereas, the applicant was arrested on 21.04.2011. Imdad was granted bail.

The fourth accused Ameen was also arrested, but was subsequently released on bail. The fifth accused Sohrab is absconding.

5. The applicant filed Bail Application No.372/2011 before the Sessions Judge, Ghotki, which was dismissed vide order dated 19.08.2011. It was

held *inter alia* by the learned Sessions Judge that the witnesses had disclosed the name of the applicant in their statement under Section 161 Cr.P.C. by assigning specific role to him for causing injury to Rahib and for causing his death ; there was only one injury as per the postmortem report of Rahib, and only one empty was recovered by the police from the scene of crime ; the case of the applicant was distinguishable from the case of the co-accused Ameen, who had already been released on bail, therefore the rule of consistency was not applicable to the applicant's case ; there was sufficient iota of evidence to connect the applicant with the commission of the offence punishable with death or imprisonment of life, which falls within the ambit of the prohibitory clause of Section 497 Cr.P.C. ; and that the case of the applicant does not call for further enquiry. The aspects ; namely, the non-disclosure of the applicant's name in the FIR, nominating him for the first time in the statements recorded under Section 161 Cr.P.C. after 13 days of the incident, and not holding the identification parade, were not discussed by the learned Sessions Judge while refusing the bail to the applicant.

6. Mr. Rasool Bux I. Siyal, the learned counsel for the applicant, submitted that the applicant was not named in the FIR, and even till this date, his name does not appear in the FIR. He further submitted that, if the applicant was really involved in the crime, a second FIR could have been lodged against him, which was admittedly not done in this case. He also submitted that disclosing the name of the applicant for the first time in the statements allegedly recorded under Section 161 Cr.P.C. after 13 days of the incident, was an afterthought which clearly shows malafides on the part of the complainant and the alleged witnesses. He contended that the applicant has been falsely implicated in this case. The learned counsel further contended that Village Turk Ali Pitfai of the complainant and his nephews / the two alleged witnesses and Village Gullu Pitfai of the applicant, are adjoining villages. The residents of both these adjoining villages know each other very well, therefore, it is not possible that the applicant was not recognized either by the complainant or by his nephews at the time of the incident despite the fact that the faces of all the five persons were uncovered according to the complainant's own case. His further submissions were that there was an admitted delay of two days in the lodging of the FIR ; the postmortem was conducted without first lodging the FIR, which was a gross violation of Section 154 Cr.P.C. ; admittedly, no recovery was made from the applicant ; and that the alleged witnesses were not independent, but were admittedly the nephews of the complainant. The learned counsel specifically stressed that admittedly no identification parade was held, and the applicant

was arrested merely on the basis of the statements allegedly recorded under Section 161 Cr.P.C. after 13 days of the occurrence of the incident.

7. In support of his submissions, the learned counsel for the applicant cited and relied upon the following authorities of the Hon'ble Supreme Court, which are discussed below in brief :

**1984 SCMR 930** (Larger Bench)  
*Muhammad Iqbal V/S The State.*

In the above cited case, it was held by the learned larger Bench of the Hon'ble Supreme Court that the reliability of such witness is always questionable, whose statement has been recorded 15 or 20 days after the incident.

**1995 SCMR 127** (Full Bench)  
*Mehmood Ahmed and 3 others V/S The State and another.*

It was held *inter alia* by the learned Full Bench of the Hon'ble Supreme Court in the aforementioned case that the delay of two hours in lodging the FIR in the particular circumstances of the case had assumed great significance, as the same could be attributed to consultation, taking instructions and calculatedly preparing the report keeping the names of the accused open for roping in such persons whom ultimately the prosecution might wish to implicate. It was further held that belated examination of witnesses by the police may not be fatal to the prosecution, but where the delay is unexplained, accused have not been named in the FIR, and circumstances justify that the open FIR and the delay have purposely been maneuvered to name the accused later, such managed delay and gaps do adversely affect the prosecution.

**PLD 1981 Supreme Court 142**(Full Bench)  
*Lal Pasand V/S The State.*

In the above cited case, the appellant / accused was convicted by the High Court solely on his identification by a retired Police Officer believing him to be an honest witness and trained in recognizing strangers. The identification parade was held after seven days of the arrest of the accused. Moreover, no description of the assailant was given by the witness in his statement to the Police. The delay in holding the identification parade of the accused was depreciated by the Hon'ble Supreme Court. It was held that the delay had not been satisfactorily explained, and that the identification parade was not

conducted in accordance with the rule of mixing nine or ten strangers with one accused. Keeping in view the law laid down by the learned Full Bench of the Hon'ble Supreme Court, it may be noted that in the case in hand, no identification parade was held at all, let alone the holding thereof with some delay.

**1997 SCMR 412**

Muhammad Rafique V/S The State.

In the above case, the name of the accused was not mentioned in the FIR, and no identification test was held to identify him through eye witnesses. The petition for leave to appeal filed by the accused was converted into an appeal by the Hon'ble Supreme Court, and bail was granted to him.

**1976 SCMR 182**

Waris Muhammad V/S Haji Ahmad Yar and another.

The name of the culprit was not mentioned in the FIR lodged in the above case for murder. The informant remained associated with the Police in the investigation, and during the first 17 days, he suspected three other persons for the murder. Thereafter, he mentioned four accused as culprits, including the petitioner in the above cited case. The Hon'ble Supreme Court converted the petition for leave to appeal into an appeal, and bail was granted to the petitioner / appellant.

8. In addition to the authorities briefly discussed above, the learned counsel for the applicant also relied upon the case of Shahzado V/S The State, PLD 2002 Karachi 402, wherein it was held

*inter alia* by this Court that further statement of the complainant cannot be treated as the FIR, nor part of it, and that the object of such statement was to enable the complainant to clarify facts which required some explanation, but if complexion of the case was changed as regards to the identity of culprits, then the onus would be on the prosecution to cast away the same at the trial. It was further held that for the purpose of bail, the Court would be persuaded to draw reasonable inference that guilt of the person involved on the basis of further statement without rational explanation, would call for further inquiry.

9. The learned State Counsel opposed the application by submitting that the role assigned to the applicant is specific, and that the role has been assigned in view of the statements of eye witnesses. He submitted that because of the specific role assigned to the applicant and the nature of the

crime committed by him, he is not entitled to bail. He further submitted that the place of the incident is five kilometers away from the applicant's house, and that the applicant was arrested from Gullu Mor, which is only four kilometers away from his house. The complainant adopted the submissions made by the learned State Counsel, and both of them prayed for the dismissal of this application.

10. After hearing the learned counsel and perusing the record, I have observed as under :

- A. As per the FIR, admittedly there were five persons at the time and place of the incident, and the complainant has stated that all of them were armed with Kalashnikovs. This means that there were five Kalashnikovs. Admittedly there was only one fire that caused the injury on the deceased causing his death, and only one empty was recovered from the scene of the crime. Assuming that the applicant was one of them and he had a Kalashnikov, what made the complainant and the two witnesses so sure that out of five Kalashnikovs, it was the Kalashnikov of the applicant that fired and hit the deceased ?
- B. The complainant has also claimed that the faces of all the five persons were uncovered, and that he would be able to recognize them if they were seen by him again. The applicant was residing in the adjoining village, and the people of both the villages knew each other very well. In such circumstances, what prevented the complainant and the two witnesses, who were all present at the time and place of the incident and saw the uncovered faces of all the five persons, from recognizing the applicant for 13 days ?
- C. The other villagers, who came running immediately at the place of the incident according to the complainant, also did not recognize any of the five persons even though their faces were uncovered. None of them came forward to identify or name the applicant.
- D. Admittedly, the complainant did not identify the applicant, but he was named by his two nephews after 13 days of the incident without any identification parade. Both the said nephews were admittedly present at the time and place of the incident and they saw the uncovered faces of all the five persons. How did both the said nephews come to the conclusion all of a sudden and without any identification parade

that, out of five persons, it was the applicant who had fired at the deceased ?

- E. No description, such as height, built, colour, clothes, etc., of any of the five accused was given in the FIR.
- F. It is the complainant's own case that his nephew Rahib asked the five accused persons to identify themselves. This shows that all the five accused were unknown and unfamiliar to Rahib, and also to the complainant and his other nephews (the two witnesses) because they were admittedly accompanying Rahib.
- G. The complainant himself had stated at the time of lodging the FIR that the accused were "unidentified", and that he was lodging the FIR against "unidentified accused", which is clearly recorded in the FIR. This clearly shows that the complainant was totally unaware about the identity of the accused.
- H. Admittedly, there was no recovery at all, particularly of a Kalashnikov, from the applicant. The police have still not been able to trace the Kalashnikov from which that empty was fired that was recovered from the scene of the crime.
- I. In addition to the above, it is a matter of record that the name of the applicant is not mentioned in the FIR, the FIR was lodged with a delay of two days after the incident, the statements of the nephews of the complainant were recorded after 13 days of the incident, and that no identification parade of the applicant was held.

11. In view of my above observations and the law laid down by the Hon'ble Supreme Court, in my humble opinion this is a case which requires further inquiry. I do not wish to comment on the guilt or innocence of the applicant, as it would depend on the strength and quality of the evidence produced by the prosecution and the defense at the time of the trial. However, I am convinced that the applicant is entitled to be released on bail. In the present application, the applicant has undertaken to furnish solvent surety and to abide by the terms and conditions that may be imposed on him, in case bail is granted to him.

12. It is, therefore, ordered that the applicant be enlarged on bail subject to his furnishing a solvent surety in the sum of Rs.250,000.00 (Rupees two hundred and fifty thousand only) with P R Bond in the like amount, to the satisfaction of the learned trial court. It is hereby clarified that the

observations made and the findings contained herein shall not prejudice the case of any of the parties, and that the learned trial court shall proceed to decide the case strictly in accordance with law.

J U D G E