IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR &
MR. JUSTICE MUHAMMAD SALEEM JESSAR

CR. BAIL APPLICATION NO.211/2017

For applicant : Mr. Muhammad Ilyas Khan, advocate.

For Respondent: Mr. Muhammad Iqbal Awan, A.P.G.

For complainant: Mr. Faisal Siddiqui & Mr. Salahuddin Panhwar, advocates.

Date of hearing : 18.05.2017.

Date of order: : 18.05.2017.

O R D E R

SALAHUDDIN PANHWAR, J. Having been declined *post-arrest* bail plea by Anti-Terrorism Court No.VII, Karachi, the applicant/accused Salman Abro has applied for post arrest bail in FIR No.235/2014, under section 302, 324, 427, 34 PPC r/w section 7 ATA, 1997, P.S. Darakhshan, by filing present bail application under section 10(7) of the Juvenile Justice System Ordinance, 2000 (hereinafter referred to as 'the Ordinance, 2000').

2. Brief facts, as set out in the FIR, are that on 08.05.2014 complainant Zeeshan Mustafa was sitting at balcony of his bungalow, his brother-in-law Raheemuddin, mother Mst. Erum Naz and employee Riazat Ali alias Joji were gossiping. In the meantime at about 0200 hours a

black coloured Vigo vehicle bearing No.CU-2900 came and stopped in front of their bungalow, in the said vehicle there were six persons; out of which three persons were having Klashnikovs, who after firing at main gate entered into bungalow and caused gunshot injuries to his security guard Ali Ghulam Bugti and brother Suleman Mustafa Lashari; the complainant with his licensed pistol and injured security guard with licensed repeater made firing in retaliation, as result whereof gave gunshot injuries to accused Salman Abro and his gunman; after the incident he and his mother took his injured brother and security guard and brought them at South City Hospital, where his brother succumbed to the injuries whereas, his security guard had gunshot injuries at his leg. He brought the dead body of his brother to Jinnah Post Graduate Hospital for autopsy, later on he came to now that gunman of accused Salman Abro had died; the complainant averred that his deceased brother had told him that few days back hot words were exchanged with Salman Abro over the issue of wrong crossing the car.

3. On conclusion of investigation, challan was submitted before the A.T.C No.II, during proceedings the case of present accused Salman Abro was bifurcated under the provisions of the Ordinance 2000. The case was proceeded by learned Judge ATC-III vide charge framed against the accused on 19.02.2015 to which accused pleaded not guilty and claimed to be tried. The case of accused was declared to be inside jail trial and was transferred to the ATC No.VII on 12.01.2016.

4. Mr. Ilyas Khan learned counsel for applicant/accused argued that bail has been sought for accused on the ground falling under the Juvenile Justice System Ordinance, 2000 as applicant is juvenile offender, as such as per scheme of law by virtue of Gazette of Pakistan, Extraordinary Part II, dated 30.05.2012 vide SRO 572(1)2012 whereby powers of Juvenile Courts are conferred to Anti-Terrorism Court all over Pakistan in exercise of powers concerned section 4(1) of the Ordinance, 2000 as amended by Juvenile Justice System Amendment Ordinance 2012 to exercise such powers in their respective jurisdiction; he pointed out that applicant had been declared juvenile by ATC No.III Karachi therefore he is entitled to get benefit of such provisions of law; according to learned counsel, the unfortunate incident of subject case had taken place on 08.05.2014 wherein Suleman Lashari was killed alongwith PC Zaheer Ahmed Rind by the party of Suleman Lashari and his guard also received a fatal injury on the back side of his chest which got the exit wound of front chest side. Not only this, but applicant also received serious injuries on the back side of his body while he was fleeing from the house of complainant Zeeshan Lashari. Further contended that since 08.05.2014 applicant is in judicial custody and he is student of first year in CBM College Defence Karachi, having an excellent educational record; that there are no reasonable grounds to believe that the offender was involved in any offence being serious, heinous, gruesome, brutal and sensational in character or shocking to the public morality. Learned counsel relied upon 2009 PCrLJ 47, 2003 MLD 1591, 2007 YLR 2079, 2006 MLD 507, 2017 PCrLJ 65, 1998 MLD 1810, 2017 MLD 399, 2004 PCrLJ 326, PLD 1990 SC 934, 2012

PCrLJ 897, 2012 PCrLJ 142, 2013 PCrLJ182, 2012 YLR 590, 2002 MLD 1817, 2017 PCrLJ 373, PLD 2010 Karachi 384, 2006 SCMR 1417, 2005 MLD 1028, PLD 2012 Balochistan 122, PLD 2012 Lahore 433, 2007 PCrLJ 1011, 2011 PCrLJ 1022, NLR 2003 Criminal 536, NLR 2005 Criminal 487, 2002 MLD 1566, 2013 YLR 110, 2014 YLR 422, 2010 YLR 998, 2006 MLD 406, 2006 PCrLJ 542, 2006 PCrLJ 1648, 2012 SCMR 201, PLS 2006 Karachi 331, PLD 1982 SC 282, 2013 SCMR 1059, PLD 2014 SC 241, PLD 2004 SC 477 and PLD 2015 SC 41.

5. Mr. Faisal Siddiqui learned counsel for complainant has argued that ground for applicant/accused being juvenile was earlier available but same was not pressed; that applicant has intention to get bail without realizing the fact that case falls within the ambit of sections 6 and 7 of ATC 1997 and that is why not only present accused is facing trial but his companions being adult accused are also behind the bars facing trial; that applicant being son of a high ranking police officer while armed with deadly weapons alongwith police guards without uniform having no authority to accompany him, arrived in a Vigo at the house of complainant and caused murder of brother of complainant and also caused serious injuries to security guard, thus what is left to consider that the accused did not arrive at the spot with such *mensrea* and *actus-rea*. It is further argued that five witnesses have been examined, other witnesses are appearing in the trial Court since the day one but it was the applicant who with malafides and ill motives did not proceed with the matter on one or the other count, therefore, in view of such conduct applicant is not entitled even for bail under the Ordinance, 2000. Learned counsel

contended that bail application is not maintainable and merits dismissal out rightly.

6. In contra, learned APG has relied upon contentions of learned counsel for the complainant while adding that narration of FIR itself shows the manner and activation of occurrence and there appears nothing to consider that all it was done at the spur of the moment and even on slot of the accused leaving the bungalow having received fire shots cannot be tested as a negative effect to the case of prosecution, rather it all has established that there are reasonable grounds to believe that accused had actively participated in the offence causing brutal murder of Suleman Lashari.

7. At the very outset, we would find ourselves to address *plea* of learned counsel for applicant / accused with reference to presumption of innocence. In this regard we would add that presumption of *innocence* though continues with the accused but in a matter of *trial* only but it is of no help for an accused to seek bail whose case falls within *prohibitory clause* of Section 497 Cr.PC. To make things a *little* brighter, we would refer Section 497(2) of the Code which is:

> **"If it appears to such Officer or Court at any stage of the investigation, inquiry or trial, as the case may be that there are not reasonable grounds, for believing that the accused has committed a non-bailable offence; but that there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided."**

From above, it is quite clear that if the accused is alleged to have committed an *offence*, falling within meaning of *prohibitory* clause, it would be the accused to satisfy the *judicial* sense of the Court regarding non-existence of **reasonable grounds** for believing that he (accused) has committed the offence *but* there are *sufficient* grounds for further inquiry into his guilt. The provision of Section 497 (2) of the Code revolves round the **'existence of reasonable grounds'** or **'further inquiry'** and no bail to be granted to such an *accused* unless the spirit of the provision is satisfied which *too* through tentative assessment of *material*. We would *conclude* that *rejection* or *acceptance* of bail should *never* prejudice the presumption of innocence attached with *status* of accused nor should influence the Court while evaluating the evidence at the *end* of day.

8. With regard to contention of learned counsel for the applicant that applicant being juvenile offender is entitled for concession of bail, it may be noted that the Section 10 of the Ordinance, 2000 itself does not *ipso facto* entitle a declared juvenile for grant of bail but even a *declared* juvenile shall not be released on bail if his case, per opinion of the trial court, falls within exceptions provided by the Ordinance *itself* which are:

> "if there are reasonable grounds to believe that **such child** is involved in **an offence** which in its option is **serious, heinous, gruesome, brutal, sensational in character or shocking to public morality** or he is a previous convict of an offence punishable with death or imprisonment for life."

The applicant / accused has not denied **manner of happening of the incident** which, includes arrival of the applicant / accused alongwith

police personnel deployed at the house of his father, who is S.S.P, at house of the *victim* which *too* after arming themselves with *lethal weapons* and loss of *two* precious *lives* in result of *firing* at house of the complainant, undeniably situated in a residential area which, per prosecution, created sense of fear and insecurity in the mind of society, neighbours and so also the complainant party, therefore, the case is being tried before Anti-Terrorism Court. Since, trial is *undisputedly* continuing before Anti-Terrorism Court hence application of section 6/7 of the Act, if not challenged, is *unchallenged* or if declined, stamped to be one, involving **'terrorism'**. The term *'terrorism'*, per case of *Kashif Ali v. Judge, ATA Court No.II* (PLD 2016 SC 951), is to be determined as:

> **'12. ….**In order to determine whether an offence falls within the ambit of Section 6 of the Act, it would be essential to have a **glance over the allegations leveled in the F.IR, the material collected by the investigating agency and the surrounding circumstances, depicting the commission of offence. Whether a particular act is an act of terrorism or not, the motivation, object, design or purpose behind the said act has to be seen.** The term "design", which has given a wider scope to the jurisdiction of the Anti-terrorism Courts excludes the intent or motives of the accused. In other words, the motive and intent have lost their relevance in a case under Section 6(2) of the Act. What is essential to attract the mischief of this Section is the object, for which the act is designed.'

An *act* of terrorism, in our view, is *itself* sufficient to establish *exceptions* i.e offence to be **serious, heinous, gruesome, brutal, sensational in character** *least* 'shocking to public morality'. Even otherwise, the medical board had determined the age of accused in between 17/18 who *prima facie* acted in a manner which *undeniably* resulted in bringing the offence of *murder* as one of **terrorism *too.***

Further, it is not the case of accused that during his tenure in jail prosecution has failed to produce PWs thus bail has become his right on *statutory* ground but the record itself shows that material PWs are attending regularly on every date. In such eventuality the accused is not entitled for bail on the ground of delay in conclusion of trial. Thus, we are of the considered view that such *plea* of the applicant / accused also does not have sufficient weight.

9. Candidly, after bifurcation of the case, charge was framed on 19.02.2015; afterwards persecution examined four PWs out of 42 PWs, however the eye witnesses are attending the court on every date but due to one or other pretext the case is not being proceeded which *too* prima facie on part of the accused as *normally* regular attendance of the witness is *itself* indication of his willingness for his examination (evidence). It is *also* not the case of accused that PWs are not being produced by prosecution. At this *juncture,* we would admit that mere *involvement* is not necessarily sufficient to deprive one of his *liberty* therefore, if the accused succeeds in bringing his case within meaning of **'further inquiry'** then gravity or seriousness of offence would lose its value. (***Zaigham Ashraf v. State & Other*** (2016 SCMR 18). The perusal of the record *prima facie* shows that the eye witnesses of the case during course of identification parade identified all the accused with their specific role and described the manner of the occurrence; the accused has been connected with the allegation of murder of deceased Suleman Lashari and causing fatal injuries to Ali Ghulam; the offence had taken place in the populated area and there could be no chance of mistaken identity of assailants, therefore

nothing is on record to suggest that PWs had any motive, personal grudge, enmity or ill will to implicate the accused and his assailants falsely in this case. The FIR has been lodged promptly with the short delay of 8 hours which in the circumstances does occur being natural. The medical record has confirmed the cause of death of deceased by means of fire arm injuries, the submission and grounds in respect of factual aspect of the case as made by learned counsel for applicant needed deeper appreciation and detailed discussion which is not permissible at bail stage.

10. So far as previous bail application as referred by counsel for complainant is concerned, the record reveals that it was not pressed by counsel for applicant himself on the ground that he has filed fresh bail application and clause (d) of CMA No.17899 of 2016 filed in CP No.D-4920/2014 with regard to post arrest bail was got deleted. Reference may be made to the case of *Nazir Ahmed and another vs. the State and others* reported as PLD 2014 SC 241 whereby the Honourable Supreme Court not only detailed the *fresh ground* but also categorically held that withdrawal of bail plea shall preclude the applicant to repeat bail plea and that those *grounds,* available at time of *earlier* bail plea, shall be treated to have been *raised.*

11. The case law relied upon by learned counsel for applicant do not help him to the application of the case in hand having variant facts and circumstances hence distinguishable.

12. On the basis of the tentative assessment of material brought on record, particularly the identification parade by which four PWs namely Zeeshan Mustafa, Mst. Erum Naz, Rahimuddin and Riazat alias Joji identified the accused, with the specific role in the commission of instant crime being heinous offence of murder carrying capital punishment, created embargo under section 21-D of the ATA 1997 to grant the bail in such like offences, thus applicant/accused has not been able to make out his case for grant of bail on any count inclusive of Juvenile Justice System Ordinance, 2000. Consequently bail stands declined accordingly.

J U D G E

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