

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

**Cr. Misc. Application No. S- 22 of 2022**  
(Javed Ali Shaikh v. The State and others)

**Cr. Tr. Application No. S – 05 of 2022**  
(Javed Ali Shaikh v. Amjad Bajkani & another)

**Hearing of case**

1. For orders on Office objection at Flag 'A'
2. For hearing of main case

**Date of hearing: 23.05.2022**

**Date of Order: 23.05.2022**

Mr. Qurban Ali Malano, Advocate for the Applicant / Complainant in both matters

Mr. Zuber Ahmed Rajput, Advocate for Private Respondent(s) in both matters along with Amjad Hussain Respondent No.1 in  
CrI: Misc. Application No. S- 22/2022

Syed Sardar Ali Shah Rizvi, Additional PG for the State

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**ORDER**

***Muhammad Junaid Ghaffar, J:-*** Through Criminal Miscellaneous Application No. S-22 of 2022, the Applicant seeks cancellation of bail granted to Respondent No.1/accused by the Trial Court vide Order dated 10-12-2021 and through Criminal Transfer Application No. S- 05 of 2022, the Applicant seeks transfer of Sessions Case No.588 of 2020 (*Re- State v. Amir Hussain and others*) pending trial before 1<sup>st</sup> Additional Sessions Judge, Sukkur, to any other competent Court of law having jurisdiction. Both these Applications are being decided through this common order.

2. Learned Counsel for the Complainant / Applicant submits that Respondent No.1 is nominated in FIR No.145 of 2020 registered under Sections 302, 324, 427 and 34 PPC at Police Station Abad, District Sukkur and his first bail Application was dismissed by the Trial Court vide Order dated 04-01-2021. According to him, Respondent No.1 approached this Court and again the bail Application was dismissed vide Order dated 30-04-2021, which was then impugned before the Hon'ble Supreme Court in Criminal Petition No.89-K of 2021; however, the same was dismissed as not pressed on 30-08-2021, on the ground that some evidence has

been recorded by the trial Court. According to him in the second round the same trial Court judge has granted bail on the grounds, which were already available at the time of filing of the first bail Application and in fact were discarded by the trial Court, which order was then maintained by this Court, and therefore, the impugned Order whereby the post-arrest bail has been granted is against the settled principles of law and in support, he has relied upon the cases of *Manzoor Ali v. The State (1999 P Cr. L J 227)*; *Amir Altas Khan v. The State (2002 SCMR 709)*; *Mst. Qudrat Bibi v. Muhammad Iqbal (2003 SCMR 68)*; *Muhammad Ejaz v. The State (2021 SCMR 387)*; *Mst. Asia Qaseem v. Alamzeb (2021 SCMR 302)* and *Haji Shah Behram v. The State (2021 SCMR 1983)*. He lastly submits that not only this the trial Court is proceeding on day to day basis purportedly on the directions of this Court, passed in another Criminal Misc. Application filed by the accused; however, according to him the said order was unwarranted as the Applicants Transfer Application and Application for cancellation of bail were already pending before this Court, whereas, the Respondents' Counsel has been given indulgence on numerous occasions, inasmuch as no cross-examination is conducted on the same date and on the adjourned dates extensive and lengthy cross-examination has been permitted, therefore, according to him the case may also be transferred.

3. Learned Counsel for Respondent No.1/ accused has opposed both these Applications and submits that the learned Trial Court after examining three witnesses has come to the conclusion that on the basis of the available evidence the accused is entitled for the concession of bail, therefore, there is no illegality in the order of the trial Court in-question. He further submits that per settled law, even if a concession of bail has been extended, the same cannot be recalled at the whims and desire of the complainant, whereas, the trial has been expeditiously proceeding and is about to be concluded, therefore, neither the Criminal Miscellaneous Application merits any consideration nor the transfer, as both are liable to be dismissed. In support of his contention, he has relied upon the cases of *Muhammad Shakeel v. The State (PLD 2014 Supreme Court 458)*; *Muzafar Iqbal v. Muhammad Imran Aziz (2004 SCMR 231)*; *Muhammad Saeed Mehdi v. The State (2002 SCMR 282)*; *Nazir Ahmed v. The State (2008 CrL J 274)*; *The State v. Rashid Ahmad (1988 SCMR 1129)*; *Muhammad Nazir v. Anwar Ali Shah (2005 MLD 419)*; *Muhammad Azhar*

*v. Dilawar (2009 SCMR 1202); Muhammad Akram v. Zahid Iqbal (2008 SCMR 1715); Haji Mian Abdul Rafique v. Riaz-ud-Din (2008 SCMR 1206); Rehmatullah v. The State (2011 SCMR 1332); Aamer Shahzad v. Muhammad Asim (2006 SCMR 558) and Muhammad Hussain v. The State (1982 SCMR 227).*

4. Learned Additional PG has argued that the learned Trial Court was not justified in allowing the second bail application of Respondent No.1 / accused, as apparently the grounds on which bail has now been granted, were already available at the time of deciding the first bail Application, which was dismissed and maintained by the High Court; therefore, the impugned Order, whereby, bail has been granted is not in accordance with law; rather it is against the law settled by the Hon'ble Supreme Court; hence, is liable to be recalled. In support of his contention, he has relied upon the cases of *Muhammad Ejaz v. The State (2021 SCMR 387)*, *Syed Hamad Raza v. The State (2022 SCMR 640)* and *Muhammad Rizwan v. The State (2007 P.Cr. L J 78)*.

5. I have heard both the learned Counsel as well as learned Additional PG for the State and perused the record.

6. It appears that Respondent No.1 has been nominated in the above FIR registered under Sections 302, 324, 427 and 34 PPC, and was arrested, whereafter, he filed his first post-arrest bail Application and the trial Court vide Order dated 04-01-2021 was pleased to dismiss the said bail Application in the following terms:-

"I have heard learned Counsel for the parties and perused the material available on record.

***The applicant is named in the FIR with active role of firing upon PW Muhammad Sulleman Khoso. The injured has received three fire-arm injuries, on his person, at the hand of Applicant. The man sitting with PW Muhammad Sulleman (Aejaz Ali Shaikh) has been died while shifting to the hospital. Opening direct fires upon PW Muhammad Sulleman by the Applicant, speaks loudly of intention of the applicant. The lodgment of FIR with delay of two days has been explained as the complainant was busy in funeral ceremonies. No reason and ground has been given to involve the applicant falsely; and also in denial of payment of alleged amount, by deceased, to co-accused Amjad Ali on account of purchase of a bungalow through him.***

The case laws were carefully perused, where the accused have been released on bail. Such case laws are found much different to the present case. A case reported 2012 SCMR 1137, cited supra, the

accused was nominated in FIR but no specific injury to any person had been attributed to him and only generalized and collective allegation was leveled against the accused. A case reported 2016 Y L R 1639, cited supra, the father of the deceased had forgiven the accused and did not want to prosecute him. A case 2009 P.Cr.L.J 384 Lahore is distinguishable as there was a question as to whether accused would be convicted u/s 302 PPC or would be guilty u/s 319 PPC, which was a bailable offence.

In view of above, the application in hand merits no consideration, therefore, stands dismissed.”

7. Being aggrieved, Respondent No.1/accused preferred Criminal Bail Application No.S-32 of 2021 before this Court, which was also dismissed vide Order dated 30-04-2021 in the following terms;-

“3. I have heard the valued submissions of the learned advocate for applicant/accused, learned counsel for complainant and Additional Prosecutor General. I have also scanned the available record with their able assistance provided during the course of arguments. From whatever articulated or placed before me, I have observed as under;-

- a) ***The name of applicant/accused Amjad Ali is mentioned in the FIR with specific role of causing fire shot upon injured Muhammad Sulleman, who sustained fire-shot injuries.***
- b) That in the said incident one innocent person lost his life while other has sustained fire-shot injuries.
- c) That the delay in lodging of the FIR, for two days has been plausibly explained as the complainant, after postmortem, shifted dead body to their native village and after completing funeral rites, went to Police Station and lodged FIR.
- d) ***Having gone through the FIR and the allegations leveled against the applicant/accused Amjad, prima-facie, he is connected with the alleged occurrence.***
- e) ***That the presence and participation of the applicant/accused at the place of incident was not denied and allegedly he has participated in the commission of offence.***
- f) That no enmity has been alleged against the complainant to involve the applicant/accused falsely in the heinous offence of murder.
- g) ***That the eye witnesses of the incident have fully implicated the applicant/accused in commission of the offence in their 161 Cr.P.C statements.***
- h) That in criminal administration of justice, each case has its own peculiar circumstances and could not be equated with any other reported case.
- i) That the ocular evidence as well as medical evidence fully connect the present accused in the present crime as such no case for bail has been made-out at this stage.

- j) The motive to commit murder of brother of complainant was that co-accused Aamir Ali who is property dealer had taken amount of Rs.20 lacs on account purchase of bungalow, but the said amount was not returned by the accused party as the same was being demanded by the deceased.
- k) That the applicant/accused has been booked in a case which entails capital punishment and comes under prohibitory clause and no good ground for grant of bail has been agitated on behalf of applicant/accused, as such he is not entitled for grant of bail.
- l) The contention regarding innocence and false implication of applicant/accused as raised by learned counsel for applicant/accused, would be examined at the time of trial before trial Court after recording evidence of the witnesses.

4. In view of the above observation, I am confident that atleast at this stage, the applicant/accused Amjad son of Dr. Gul Hassan Bajkani is entitled for any concession, hence through short order dated 30.04.2021 the bail plea of applicant/accused was declined and these are reasons for the same.”

8. Thereafter the Respondent No.1/accused approached the Hon'ble Supreme Court by way of a Criminal Petition No.89-K of 2021, which was dismissed as not pressed vide Order dated 30-08-2021 in the following terms;-

**“Sajjad Ali Shah, J.- Learned AOR for the Petitioner submits that since three prosecution witnesses have been examined by the Trial Court, he has instructions not to press this Petition as the Petitioner would consider resorting to the appropriate proceedings. Dismissed as not pressed.”**

9. It appears that subsequently another bail Application was preferred by Respondent No.1/accused and apparently in the said bail Application there was no disclosure about the fact that Respondent No.1/accused had also approached the Hon'ble Supreme Court and had not pressed his bail Application. This objection has been raised by the Applicants Counsel, and it apparently appears to be correct, as the entire body of the second bail application is silent about such disclosure, and it is only some handwritten submission / disclosure on the first page of the bail application, which according to the Applicants Counsel was subsequently inserted. However, for the present purposes, I do not think that this controversy and as to what is the effect of such non-disclosure is relevant in any manner. Nonetheless, the trial Court, through impugned order dated 10-12-2021 has granted bail to Respondent No.1/accused in the following terms;-

“5. I have heard learned counsel for the parties and perused the material available on record.

6. ***It appears that as per prosecution version contained in FIR, the applicant has been attributed fire shots on non-vital part i.e. Arms and Right Calf of the body of injured PW- Muhammad Sulleman. Applicant had, from the very initial stage, taken the pleas of alibi which was thoroughly investigated by the Police, who had found him innocent and thus, referred to be released him, under Section 169 Cr.P.C.*** The applicant/accused could not be released since he was in judicial custody. The same was not approved by the learned Magistrate, leaving it to be decided by the trial Court; besides, placing the Petitioner in column No.2 of the challan is another circumstances which can be taken into consideration for release of accused on bail. Reliance in this respect is placed upon the case laws reported in 2009 P Cr L J [Peshawar] 370 (Muhammad Jabbar versus Shah Draz Khan and another). Moreover, it is settled law that bail cannot be withheld as punishment. Applicant/accused is in jail custody since more than a year and no more required for further investigation, hence, after tentative assessment of evidence on record, I find that the case of applicant/accused requires further enquiry, therefore, he is entitled for concession of bail. Application in hand is allowed, accordingly. The applicant/accused shall be released on bail subject to furnishing surety in the sum of Rs.100,000/- (One Lac), and PR bond in the like amount to the satisfaction of this Court. However, these observations will not prejudice the case of either party. The case laws placed by learned counsel for complainant are distinguishable to the facts and circumstances of present matter.”

10. Now when the aforesaid reasoning is perused, it appears that the grounds which have now prevailed upon the trial judge to grant bail to Respondent No.1/accused were already available at the time of rejection of first bail application and are a matter of record i.e. the plea of **alibi** as well as report under **Section 169 Cr.P.C** filed by the Police. In the first bail application at Para 5 it has been stated that “*That during course of investigation, high officials of the police also constitute the JIT, for fair and impartial investigation, in which the applicant/accused was declared as innocent and police recommended U/S 169 Cr.P.C in the Challan and submitted the same against the co-accused; but Ld. Magistrate disagree with the opinion of the police and ordered to join the applicant/accused in the above crime, in the above circumstances the case of applicant/accused fall within the ambit of Section 497(2) Cr.P.C.*”, whereas, at Para 7 it has been stated as “*That at the time of alleged incident, the applicant/accused was on duty and patrolling for theft electricity disconnection at various places of the Sukkur City; with the subordinate staff. (Plea of Alibi).*” Both these grounds were agitated in the first bail Application and had in fact been considered by the two Court(s) and were discarded. Even if not, by implication they stand discarded. In fact the learned Judge of this Court in his order of dismissal had observed at para (e) that ***That the***

***presence and participation of the applicant/accused at the place of incident was not denied and allegedly he has participated in the commission of offence.*** It is important to note that order of the trial Court, whereby, the bail was dismissed was not only maintained by this Court; but even there were further observations and reasoning for refusal of bail to Respondent No.1/accused. In that case, the learned trial Court had a duty to first overcome all the said grounds which were recorded in its first order dated 04-01-2021 and thereafter by this Court in its' order dated 30-04-2021. Nothing of that sort had happened and surprisingly without discussing or dilating upon any fresh cause of action or a fresh ground for maintaining and allowing second bail Application, the learned trial Court has granted bail to Respondent No.1/accused. There is a clear finding of this Court as to the presence of the accused at the place of incident, then as to how the plea of ***alibi*** can be entertained in the second bail application is beyond comprehension. As to report under section 169 Cr.P.C. it would suffice that this was already a ground in the earlier bail application and was discarded. Before the Hon'ble Supreme Court, it was stated that three witnesses have been examined by the trial Court, and therefore, Respondent No.1 does not wish to press his bail Application *"as the Petitioner would consider resorting to the appropriate proceedings"*. Perhaps by way of appropriate proceedings it was intended that a second bail application would be filed on fresh ground, i.e. the evidence of three witnesses who by that time had been examined. However, no such evidence of these three witnesses has been considered or even looked into and discussed by the Trial Court while allowing the second bail application of respondent No.1/accused which in fact was the only fresh ground available to him to seek and press upon his second bail Application. The observation of the Trial Court that the Applicant/accused is in jail custody since more than a year and no more required for further investigation and the case of the Applicant is of further enquiry do not appear to be a correct appreciation of facts and law, inasmuch as, these grounds were already available and as noted, the other two grounds were in fact already considered while dismissing the first bail Application. It is not clear from where any fresh ground has arisen in the facts and circumstances of this case and the trial Court has seriously fallen in error in allowing the second bail Application of Respondent No.1/accused. Per settled law, a second bail application can only be entertained on a fresh ground which did not exist at the time when first bail application was made and if such ground was available, and whether it was taken or not; or for

that matter was attended to or not; it is in no manner would be a fresh ground, rather it is to be assumed that all such grounds were raised and considered<sup>1</sup>. It is also settled law that grounds mentioned in the first bail application, whether or not discussed by the Court, were not fresh grounds for a second bail application<sup>2</sup>. It has also been held that dismissal of an application for bail after arrest attending to the merits of the case amounts to rejection of all the grounds available or in existence till the time of such dismissal, whether such grounds were actually taken or urged or not and whether such grounds were expressly dealt with in the order of dismissal or not<sup>3</sup>. In view of such position this Court is of the view that the trial court had no justification to allow the second bail application of the accused.

11. As to the argument that once bail is granted, recall requires most extraordinary measures is beside the mark as in an appropriate case, like one in hand, the Court would unhesitatingly strike down the error, manifestly reflecting upon the law<sup>4</sup>. Moreover, reference to the protection of freedom guaranteed under the Constitution is equally misplaced as the Constitution pledges freedom to the law abiding citizens; an offender, alleged to have committed some crime, is subject to a different legal regime; he is certainly entitled to due process of law and a fair and speedy trial, however, once taken in custody, his release is regulated by the provisions of the Code of Criminal Procedure, 1898<sup>5</sup>. Certainly it is for the trial Court to finally settle petitioner's alleged culpability and the offence made thereunder on the strength of evidence, nonetheless, available material in the given circumstances constitutes "*reasonable grounds*" within the contemplation of section 497 of the Code of Criminal Procedure 1898 so as to bring his case within the remit of prohibition provided thereunder and, thus, there was no occasion for the learned Additional Sessions Judge to release him on bail<sup>6</sup>. It should not be ignored that the concept of setting aside the unjustified, illegal, erroneous or perverse order to recall the concession of bail is altogether different than the concept of cancelling the bail on the ground that the accused has misused the concession or misconducted himself or some new facts requiring

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<sup>1</sup> The State v Muhammad Zubair (PLD 1986 SC 173)

<sup>2</sup> Muhammad Siddique v The State (2014 SCMR 304);

<sup>3</sup> Nazir Ahmed v The State (PLD 2014 SC 241)

<sup>4</sup> Hazrat Nabi Shah alias Hazrat Khan v The State (2020 SCMR 1672)

<sup>5</sup> Abid Hussain v Tassawar Hussain and another (2021 SCMR 518)

<sup>6</sup> Muhammad Waheed v The State (2020 SCMR 2066)



cancellation of bail have emerged<sup>7</sup>. A bail granting order can be cancelled if the same is perverse<sup>8</sup>.

12. Hence, in view of the above facts and circumstances of this case, it appears that the Applicant/complainant has made-out a case for entertaining his prayer for cancellation of bail and to exercise powers vested in this Court under Section 497(5) of the Criminal Procedure Code; hence, the order impugned herein is liable to be recalled and it is so ordered.

13. As to the Criminal Transfer Application, it may be observed that on this very ground that the Trial Court has misdirected itself in granting the second bail Application of accused, whereas, there is no fresh ground discussed in the impugned order, except that a new Counsel has been engaged, the matter warrants interference by this Court and case must be transferred to any other Court. Moreover, perusal of the diary sheet and examination of the witnesses further reflects that the learned trial Court at the request of Respondents' Counsel has granted numerous adjournments after examination-in-chief of the witnesses and has reserved the cross-examination and thereafter on adjourned dates, extensive and lengthy cross-examination has been allowed to the Respondents' Counsel. This conduct on the part of the Trial Court also reflects badly and warranting a transfer of the case from his Court to any other competent Court.

14. In view of hereinabove facts and circumstances of this case, both these Applications were allowed by means of a short order dated 23-05-2022 in the following terms and these are the reasons thereof;-

“Heard learned Counsel for the Applicant / Complainant, as well as for private Respondents and learned Additional PG. For reasons to be recorded later-on, the Criminal Miscellaneous Application No.S-22 of 2022 is hereby allowed and order of the trial Court dated 10-12-2021 passed by Additional Sessions Judge-I / M.C.T.C-I, Sukkur in Sessions Case No.588 of 2020 (*The State v. Amir Hussain and others*) arising out of Crime No.145 of 2020 registered at Police Station, Abad Sukkur under Sections 302, 324, 427 and 34 PPC, whereby the Respondent namely Amjad Hussain S/o Gul Hassan Bajkani was granted post-arrest bail stands recalled. The Respondent / accused Amjad Hussain Bajkani, who is present in Court, is taken into custody and remanded to Central Prison, Sukkur, with direction to produce him

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<sup>7</sup> Sidra Abbas v The State (2020 SCMR 2089)

<sup>8</sup> Samiullah v Laiq Zada (2020 SCMR 1115 & The State/ANF v Rafique Ahmed Channa (2010 SCMR 580)

before the concerned transferee trial Court on each and every date of hearing.

As a consequences thereof, the Criminal Transfer Application No.S- 05 of 2022 is also allowed and Sessions Case No.588 of 2020 (*The State v. Amir Hussain and others*) arising out of Crime No.145 of 2020 registered at Police Station, Abad Sukkur under Sections 302, 324, 427 and 34 PPC is transferred from the Court of Additional Sessions Judge-I / M.C.T.C-I, Sukkur to any other competent Court of Law to be nominated by the learned Sessions Judge, Sukkur.”

**Judge**

ARBROHI