

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No. 2768 of 2023

Date	Order with signature of Judge
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For orders on office objection.
For hearing of bail application

11.12.2023

Mr. Farrukh Sharif advocate for the applicant

Mr. Abdul Basit Afridi advocate for the complainant

Mr. Talib Ali Memon APG along with SIP Ghulam Mustafa of PS Manghopir

The applicant Dur Muhammad seeks his admission on post-arrest bail in F.I.R No.118/2023, registered under Sections 302/34 PPC at Police Station Manghopir, Karachi.

2. The accusation against the applicant, as per contents of the F.I.R, is that on 18.02.2023, he in connivance with his accomplices participated in the crime and co-accused Saeed fired upon the deceased Bahram cousin of the complainant, who succumbed to injuries and died, such incident was reported to the Manghopir Police station, Karachi, who registered the criminal case initially against unknown accused on 18.02.2023, and having seen no clue of the crime, the Investigating officer recommended the subject case under A Class report, however during further investigation, the investigating officer arrested the applicant on 5.6.2023 who allegedly confessed his guilt before the learned Judicial Magistrate under Section 164 Cr. P.C. and on his statement other accused were formally arrested though they were arrested along with the applicant and all were finally challaned in the subject crime. The applicant applied for post-arrest bail which was declined by the Trial Court vide order dated 22.11.2023 on the premise that he voluntarily confessed his guilt before the Judicial Magistrate; and, he facilitated co-accused Saeed by providing him crime weapon, who allegedly fired upon the deceased Bahram.

3. It is inter-alia contended on behalf of the applicant that he is innocent and has falsely been implicated in the present case due to enmity; that the story as narrated in the aforesaid crime seems to be concocted, managed, and engineered one; that there is inordinate delay of several hours in lodgment of FIR for which no plausible explanation has been furnished, which caused serious doubt about the genuineness of accusation against the applicant. Learned counsel emphasized that the alleged incident is un-witness; and that the prosecution story is clouded with mystery thus no fruitful result will come out if the applicant is sent behind bars for an indefinite period for the crime which he has not committed at

all; that nothing has been recovered from the possession of applicant, during the investigation; that the main accusation against the applicant is that he facilitated the co-accused to commit the murder of deceased based on his self-incriminating evidence which is prohibited under the law and Constitution; thereby he has been shown as vicariously liable for the offense committed by the co-accused as alleged. Learned counsel further argued in the instant case, that the applicant was a Juvenile being of the age of sixteen years or less at the relevant time as per his Birth Certificate issued by NADRA and concerned Union Council. Per learned counsel the applicant remained in the custody of the police for many days from the date of his arrest and was at the latter stage when he was severely tortured to confess his guilt and produce a crime weapon, then was produced before the learned Magistrate, however, the recording Magistrate did not provide him sufficient time for reflection to recompose; that being a Juvenile (minor), it was appropriate and desirable that he should have been provided counseling/consultation facility of a natural guardian or any close blood relative of mature age, having no clash of interest with him in the case in hand but no such care and caution was observed by the Magistrate. He next argued that the principle ingrained in Article 43 of the Qanun-e-Shahdat is applied at the bail stage based on the statement of the accused in the commission of the alleged offense without any other independent incriminating material corroborating the self-incriminating statement. Therefore, the trial court has to examine whether there is any other tangible incriminating material available on record that corroborates the statement of the accused, by connecting him with the commission of the alleged offenses. Learned counsel argued that the Supreme Court has, in several cases, held that the conviction of a co-accused cannot be recorded solely based on the confessional statement of one accused unless there is also some other independent evidence corroborating the confessional statement, as such this principle is fully attracted in this case. He emphasized that at the bail stage, the prima facie involvement of the accused cannot be determined merely based on a confessional statement without any other independent incriminating material corroborating.

4. The learned counsel for the complainant has submitted that the case against the applicant is based on his statement recorded under Section 164 Cr. P.C., the mashirnama of recovery of crime weapon from the accused has been effected, Medical report and statement of PWs confirm that the deceased received firearm injuries from the shotgun at the hands of the applicant and his accomplices involved in the subject FIR. Learned counsel for the complainant further submitted that sufficient incriminating material was/is collected by the police to connect the applicant with the

alleged crime and it seriously hampers the course of the investigation; if the applicant is released on bail as the maximum punishment for the offense under Section 302 PPC is life imprisonment or death, which comes in the prohibitory clause of Section 497(1) Cr. P.C. learned counsel refuted the claim of the applicant that he was/is Juvenile at the time of the alleged incident as such he is not entitled for bail as he has confessed his guilt before the learned Magistrate. He prayed for the dismissal of the bail application of the applicant.

5. Learned APG has supported the impugned order declining bail to the applicant and contended that the applicant is specifically named in the charge sheet with the allegation of facilitating the co-accused Saeed Ali who caused a firearm injury on the deceased with a lethal weapon and on his pointation crime weapons were recovered. He further submitted that he has confessed his guilt before the Magistrate which has significant value under the law. He prayed for the dismissal of the instant bail application.

6. I have heard learned counsel for the parties and have perused the material available on record with their assistance.

7. From perusal of the FIR, it appears that it has been lodged against the unknown accused persons who murdered deceased Behram, even; though there is no description of the accused persons mentioned in the FIR. however, the name of the applicant has been included in the second challan as the first report was submitted in A Class that too upon the statement of the applicant recorded under section 164 Cr.P.C., after a considerable period of his arrest as he was in police custody since 5.6.2023 and his statement was recorded on 14.6.2023, as such police pressure upon the applicant cannot be ruled out at the bail stage. It is trite law that for accepting a confession, two essential requirements must be fulfilled i.e. that the confession was made voluntarily, it was based on the true account of facts, leading to the crime, and the same was proved at the trial. The superior courts have also given strict guidelines for the Magistrate, recording confession, to be followed without any exception which need not be repeated herein, because a long line of authorities on this point is already in the field.

8. In the instant case, I have been informed the applicant Dur Muhammad was a minor being of the age of sixteen years or less at the relevant time; as per his Birth Certificate issued by NADRA (date of birth 20.05.2007). Besides, he remained in the custody of the police for many days, i.e. 9 days, if this is the position, the recording Magistrate ought to have provided him sufficient time for reflection to recompose. Being a Juvenile (minor) if any, it was appropriate and desirable that he should

have been provided counseling/consultation facility of the natural guardian or any close blood relative of mature age, having no clash of interest with him. On the aforesaid proposition, I am guided by the decision of the Supreme Court in the case of Muhammad Qasim vs. the State **2017 SCMR 986**.

9. Since the applicant claims to be a juvenile in terms of his Birth Certificate produced by the applicant as discussed supra, the Supreme Court in the case of Khawar Kayani Vs. The State (PLD 2022 SC 551) has interpreted Section 6(5) of the Juvenile Justice System Act, 2018. The question of whether the case of the applicant, being a child as disclosed by the learned counsel for the applicant, falls within the exception contained in section 83 P.P.C., for ease of reference, is hereby reproduced infra:-

“Act of a child above [ten] and under [fourteen] of immature understanding.- Nothing is an offence which is done by a child above [ten] years of age and under [fourteen], who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.”

10. Prima facie the trial court ought to have considered the case of the applicant in terms of the principles laid down by the Supreme Court in the cases of Khawar Kayani Vs. The State (PLD 2022 SC 551).

11. In principle bail does not mean acquittal of the accused but only change of custody from police to the sureties, who on furnishing bonds take responsibility to produce the accused whenever and wherever required to be produced. On the aforesaid proposition, I am fortified with the decision of the Supreme Court on the case of Haji Muhammad Nazir v. The State (2008 SCMR 807).

12. It is now well-settled that in a case where the accused is either a minor under the age of sixteen years, or woman, or a sick or infirm person, even in a non-bailable offense of prohibitory clause, in the same manner as bail is granted or refused in offenses of non-prohibitory clause of Section 497(1) Cr. P.C.

13. It is a settled principle of law that the benefit of the doubt can be even extended at the bail stage. Reliance is placed on Muhammad Ejaz v. The State (2022 SCMR 1271), Muhammad Arshad v. The State (2022 SCMR 1555), and Fahad Hussain v. The State (2023 SCMR 364).

14. I have further noticed that there is nothing on the record where the prosecution has advanced its case qua conspiracy in any manner except the bald allegation which is incorporated in the FIR without citing any witness of the said aspect of the case. The statement of the accused was recorded under Section 164 Cr. P.C. In all fairness is just a statement, hence, no deviation can be made against the established principle of law

that the statement of one accused cannot be used against the other in the absence of any attending material produced by the prosecution. As per the prosecution, the applicant has made a conspiracy to commit a crime and facilitated his maternal uncle to fire upon the deceased and only because of him the murder took place, if this is the stance, there are three ingredients to dub any person a conspirator i.e. (i) instigation, (ii) engagement with co-accused, and (iii) intentional aid qua the act or omission for completion of said abetment. All these three ingredients are prima facie missing from the record. Reliance is placed on Nouman Khan Vs. The State (2020 SCMR 666) & Muhammad Sarfraz Ansari Vs. The State (PLD 2021 SC 738). However, I do not want to give any finding in this regard because it can prejudice the case of either party, therefore at this stage only evidence against the applicant is his judicial confession, which was recorded on 14.06.2023 when the alleged incident took place on 17.02.2023 and applicant was arrested on 05.06.2023 after 9 days in police custody. Besides the recovered empties were not fired from one 12-bore shotgun as per the FSL examination report dated 04.07.2023 and the recovery of the crime weapon being a licensed weapon of co-accused has to be ascertained as to whether it was Rifle or Shotgun as disclosed in the challan and recovery memo and after committing an alleged crime by co-accused Saeed whether he handed over the weapon to applicant to hide or otherwise, these all factum require further inquiry in terms of Section 497(2) Cr. P.C. The grounds agitated by the learned counsel for the complainant needs deeper appreciation which is not permissible at the bail stage.

15. In view of the above facts and circumstances of the case, the applicant is entitled to post-arrest bail in the aforesaid crime subject to furnishing his solvent surety in the sum of Rs. 300,000/- (Rupees Three Lac) in the like amount to the satisfaction of the Trial Court. The trial Court is directed to examine the material witnesses within three months at least complainant must be examined. MIT II is directed to seek compliance within time.

16. All the observations made hereinabove are tentative and shall have no bearing on the final determination of guilt or innocence by the trial Court.

JUDGE

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