

ORDER SHEET
IN THE HIGH COURT OF SINDH BENCH AT SUKKUR
Cr. Bail Application No.S-65 of 2024

Applicants : Hussain Ali, Irfan Ali, Baqir Ali and
Mst. Rizwana, through
Mr. Nisar Ahmed Bhanbhro, Advocate

Complainant : Himmat Ali, through
Mr. Ali Akbar Shar, Advocate

The State : Through Mr. Imran Mobeen Khan,
Assistant Prosecutor General

Date of hearing: 08-03-2024

Date of Decision: 08-03-2024

O R D E R

Arbab Ali Hakro, J: Through this bail application under section 497 Cr. P.C., applicants Hussain Ali s/o Nazar Muhammad, Irfan Ali s/o Hatim Ali, Baqir Ali s/o Hidayat Ali and Mst. Rizwana w/o deceased Shahid Hussain, all by caste Khaskheli, seek admission to post-arrest bail in Crime No.245/2023, registered on 04.11.2023, at Police Station Mirwah, District Khairpur, u/s 302 and 120-B PPC. The applicants had previously applied for post-arrest bail in Bail Application No.3849/2023, but the same was dismissed by the learned Additional Sessions Judge, Mirwah, vide order dated 13.01.2024. After that, the applicants approached this Court.

2. Brief facts of the prosecution case are that on 04-11-2023 at 1530 hours, complainant Himmat Ali S/o Daim Ali Khaskheli lodged F.I.R bearing No.245/2023 at Police Station Mirwah, Khairpur, to the effect that they are five brothers out of whom, Shahid Hussain(the deceased) was the youngest. According to the complainant, he and his brother Shahid Hussain operate a Dome van service from Thari Mirwah to Karachi and reside together. It is further alleged that Hussain Ali is their

neighbour, but they did not come to each other. The brother, Shahid Hussain, multiple times informed the complainant that Hussain Ali used to visit their house in their absence. The complainant warned Hussain Ali, to which he was annoyed and used to say that he would kill his brother, Shahid Hussain. On 31-10-2023, after having a night meal and some conversation, the complainant, brother Shahid Hussain, Ajab Gul and nephew Sajid Hussain went to sleep in separate beds while Shahid Hussain was sleeping in a cottage near their house. The following morning, at about 04:40 a.m. on 01-11-2023, they woke up and saw that the dead body of Shahid Hussain was hanging from a cable wire. They raised cries, which attracted several neighbours. After the burial ceremony of the deceased, the complainant party was sitting to receive condolence, during which they came to know that each one, namely 1) Hussain Ali S/o Nazar Muhammad, 2) Irfan Ali S/o Hatim Ali, 3) Baqir Ali S/o Hidayat Ali, 4) Mst. Rizwana W/o Shahid Hussain D/o Inayat Ali, along with their two unknown companions, committed the murder of Shahid Hussain by strangulation and then hanged his body with a cable wire. Consequently, the complainant lodged instant F.I.R.

3. At the very outset, it has been argued by the learned counsel for the applicants that there is an ordinate delay of three days in lodgment of FIR, which has not been explained; hence, false implication of applicants after consultation and deliberation cannot be ruled out. Per learned counsel, this is an unseen incident, and the complainant has not disclosed the source of information from where he came to know that present applicants are involved in the commission of the offence. He also submitted that neither the dead body of the deceased was shown to the police nor any memo of inspection of the dead body was prepared as well as a postmortem of the dead body was also not got conducted. Besides this, initially, all the brothers of the complainant and the wife of Shahid Hussain had disclosed before the police that the deceased used to intoxication and had committed suicide. Lastly, he submitted that the applicants had been sent to judicial custody and are no longer required

for investigation, and all these circumstances bring the case into the ambit of further enquiry u/s 497 (2) Cr.P.C., hence the applicants are entitled to the concession of bail.

4. Conversely, learned counsel for the complainant and Assistant Prosecutor General appearing for the State vehemently opposed the bail application and submitted that there is no malafide on the part of the complainant to implicate the applicants in this case falsely, that the applicants are named in the FIR and the witnesses in their 161 Cr.P.C have supported the version of the complainant; that delay in registration of FIR has no ground for bail; therefore, applicants are not entitled for bail. They prayed that the bail application may be dismissed.

5. I have heard learned counsel for the applicants and learned Assistant Prosecutor General for the State and carefully examined the material on record.

6. Before dealing with the merits of the respective contentions, it would be appropriate to refer to the guidelines given by the Honorable Supreme Court while considering the application for grant of bail. The guidelines are that while deciding a Bail Application, the Court has to consider the facts of the case narrated in the FIR, statements recorded under Section 161 Cr.P.C, other incriminating material against accused, nature and gravity of charge and pleas raised by the accused. In this regard, I am fortified by the decision of the Honorable Supreme Court rendered in the case of Shahzad Ahmed Vs. The State [2010 SCMR 1221].

7. On a careful perusal of the tentative assessment of the record, it seems the alleged incident took place on 01.11.2023 at 04:30 a.m., while the F.I.R. was lodged by the complainant on 04.11.2023 after 03 days, and for that, no plausible explanation has been furnished by the prosecution. No doubt, delay in lodging an F.I.R. per se is no ground for grant of bail. However, where enmity between the parties is an admitted fact, such delay may give the right to the presumption of having the accused falsely involved in the case after deliberation and consultation.

Although the present applicants are directly charged in the F.I.R. by the complainant for committing Qatl-i-amd of his brother but, the occurrence was not witnessed by the complainant or anybody else. The complainant has narrated in the F.I.R. that after the burial ceremony of the deceased, they were sitting to receive condolence, during which they came to know that the present applicants/accused had committed the murder of the deceased, Shahid Hussain. However, the F.I.R. does not disclose the source from whom the complainant came to know about the involvement of the present accused in the commission of the offence. So far, no witness, having seen the accused while committing the alleged offence, has come forward before the Investigating Officer to depose regarding their involvement in the death of the deceased. Being an unseen occurrence, there is no direct evidence to prima facie connect the present accused with the commission of offence. It is also noted that on the very day of the incident, P.Ws/brothers of the deceased, namely Mashooque Ali, Bakht Ali and Muhammad Saleh got their statements recorded with the police in which they clearly stated that they had no suspicion against anyone regarding the death of Shahid Hussain and that Shahid Hussain had committed suicide. They also declined a postmortem examination of the deceased, and the deceased was buried without a postmortem examination. This by itself makes the case of the applicants one of further inquiry as contemplated under section 497(2) Cr.P.C.

8. Although P.Ws/brothers of the deceased, namely Muhammad Saleh and Bakht Ali, filed affidavits before the trial Court, resiling their previous statements recorded by the police. In this connection, it is settled principle of law that at the bail stage, evidence of witnesses recorded by police could not be kept out of consideration on the basis of an affidavit filed by the P.W. Hence, I am of the view that the evidentiary value of the affidavits would be considered/evaluated by the trial court at the time of trial, as a deeper appreciation of evidence is not permissible at the bail stage.

9. The record also shows that during the course of the investigation, the Investigating Officer of the case moved an application before the concerned Magistrate for exhumation and postmortem of the deceased to ascertain the cause of death. The dead body of the deceased was exhumed, and the postmortem was conducted. According to the opinion of the Special Medical Board, the cause of death is asphyxia by compression of the neck. Asphyxia, in the legal aspect, can be caused by several events, i.e. hanging, strangulation, suffocation, smothering, choking, electricity shock, etc. It is not the opinion of the Medical Board that the death has occurred on account of strangulation. Needless to say, the ligature marks in case of hanging would be different than those of strangulation. The distinction between suicidal death and homicidal death due to asphyxia has been brought out in Modi's "A Textbook of Medical Jurisprudence and Toxicology" Vol 26 "Chapter 20 Deaths from Asphyxia". No mark of violence or thumb or finger mark was observed on the neck of the deceased; therefore, at this stage, it prima facie appears that the medical evidence is not in accord with the complainant's version. The entire prosecution case requires deeper appreciation, and the genesis of the occurrence is shrouded in deep mystery, which can be threshed out in evidence till the present case requires further enquiry into the guilt of the applicants within the purview of Section 497(2) Cr.P.C. The investigation of the applicants is complete, and they are no more required for further investigation; therefore, their continued incarceration would not serve any beneficial purpose at this stage.

10. It is important to remember that bail should not be denied as a form of punishment. There is neither a legal nor an ethical obligation to keep the individuals in jail merely on the allegation that they have committed an offence punishable with death unless there are credible reasons to believe in their involvement. The eventual conviction and imprisonment of a guilty individual can rectify the error of mistakenly granting him bail. However, there is no adequate compensation that can be given to an innocent person for the

psychological, emotional and social damage caused by his unjustified incarceration at any stage of the case, even if he is ultimately acquitted. I fortify my view from the dictum laid down in the case titled *Zaigham Ashraf v. The State and Others (2016 SCMR 18)*, wherein it has been held as under:-

"To curtail the liberty of a person is a serious step in law, therefore, the Judges shall apply judicial mind with deep thought for reaching at a fair and proper conclusion albeit tentatively however, this exercise shall not to be carried out in vacuum or in a flimsy and casual manner as that will defeat the ends of justice because if the accused charged, is ultimately acquitted at the trial then no reparation or compensation can be awarded to him for the long incarceration, as the provisions of Criminal Procedure Code and the scheme of law on the subject do not provide for such arrangements to repair the loss, caused to an accused person, detaining him in Jail without just cause and reasonable ground".

11. Considering the above facts and circumstances of the case, the applicants have succeeded in making out the case for grant of bail on the ground of further enquiry as contemplated u/s 497 (2) Cr.P.C. Consequently, by short order dated 08.03.2024, the applicants were admitted to post-arrest bail subject to furnishing solvent surety in the sum of Rs.100,000/- (Rupees One Hundred Thousand) each and P.R bond in the like amount to the satisfaction of the trial court.

12. Needless to add, the observations made herein above are tentative only to decide this bail application, which shall not influence the trial court at the time of trial /decision of the subject case.

These are the reasons for the short order dated 08.03.2024.

JUDGE