

HIGH COURT OF SINDH, AT KARACHI

Cr. B.A. No.378 of 2014

ORDER

Applicant : Imtiaz Khan
Through M/s. Farooq H. Naek, Shazia Ahmed
Henjra, Nazeer Hussain Shar, Shraz Rajpur,
Asadullah Channa, Advocates.

Respondent : The State,
M/s. A. Q. Halepota, Mehmood A.Qureshi,
Moharam G. Baloch, Jamshed Iqbal,
Haqdad Khoso, advocates.

DATE OF HEARING : 07.05.2014

NAZAR AKBAR, J. The applicant Imtiaz Khan Khoso, after refusal of bail to him by the Court of Session Judge, Jamshoro at Kotri in crime No.12/2013, under Section 302, 324, 427, 147, 148, 149 & 504 PPC of P.S Coal Mines has approached this Court through this bail application for his release on bail.

Briefly stated on 20.11.2013 at about 5:00 p.m complainant Dildar Ali Khoso son of Laskari Khan Khoso reported at P.S Coal Mines that the applicant Imtiaz Khan against whom an FIR was registered by the wildlife persons was annoyed with Aziz Akbar who is friends with wildlife persons. The accused (Imtiaz Khan) used to publicly declare that he will quarrel with Akbar. He further reported that on 20.11.2013 alongwith others namely (1) Ali Akbar (2) Jawed (3) Abdullah (4) Khamiso (5) Muhammad Juman (6) Faiz Muhammad (7) Lashkaran all Khosos, he was having tea at the hotel of Kurar Lashari near Indus Coal Mines where at about 4:00 p.m Imtiaz Khan and 15 other persons came in a vigo vehicle and one van. The 15

companions of Imtiaz Khan / (applicant) used to come with him for hunting, therefore, he knew each of them. The accused started abusing Ali Akbar that he in inclusion with wildlife person had an FIR registered against Imtiaz Khan and others. Ali Akber asked him not to abuse but in the meantime Lal Bux and Ali Akber grabbed each other and Imtiaz Khoso made straight fire of Kalashankov upon Ali Akbar with intention to kill him. The fire shots hit Ali Akbar and even Lal Bux, companion of Imtiaz Khan, both of whom fell down on the ground and died on the spot. Then, other accused persons fired from their weapon upon us, so, Barkat with straight fire of Kalashankov killed Javed; Muhammad Hanif with straight fire of Kalashankov killed Abdullah and Fateh Muhammad fired the repeater and killed Muhammad Juman. Fire shots also hit our vehicles. In the meanwhile, on seeing the police of P.S Coal Mines all the accused persons leaving Vigo Vehicle, boarded in Van and fled away towards Karot. People gathered there set the vehicle of accused on fire in rage. Then, SHO Coal Mines also reached there, who, after handling necessary formalities sent the dead bodies for postmortem. I have appeared to report that the above accused Imtiaz Khan with hunting companions, in connivance with each other, have committed murder of Ali Akbar Khoso, Jawed Khoso and Abdullah Khoso and injured Muhammad Juman and Lal Bux, the companion of Imtiaz Khoso has also died from his firing.

The police registered the FIR at 1700 hours and on information from spies, within hardly one hour and 15 minutes at 1815 hours arrested all the 15 accused persons from near South of TV Booster Building.

I have heard learned counsel Mr. Farooq H. Naek, assisted by Mr. Nazir Hussain Shar, Advocate for the applicant and learned counsel Mr. A.Q. Halepota, assisted by Mr. Mehmood A. Qureshi and Moharam G. Baloch, Advocates for the legal heirs of deceased Ali Akbar Khoso. The counsel for the applicant on 18.4.2014, and the counsel for the aggrieved party on 29.4.2014, filed certain copies of police paper before advancing their arguments.

Learned counsel for the applicant has contended that there is a tribal enmity as both the complainant and accused belong to the Khosa tribe / and even in the FIR the enmity has been admitted by the complainant himself before assigning the role to the accused that he abused Ali Akbar and in the meanwhile, Lal Bakhsh and Ali Akbar grabbed each other and Imtiaz Khoso made a straight fire of Kalashnikov upon Ali Akbar with intention to kill / which fire shots hit Ali Akbar and Imtiaz's companion Lal Bux, both fell down on the ground and died on the spot. The narration of facts in the FIR is so vivid and specific that nobody under attack could have retained such minut detail to identify the accused, the weapon and the victim in the way it has been mentioned in the FIR. The complainant appears to have been unmoved by the indiscriminating firing of the 15 assailants on the complainant and his companions. He has further contended that the manner of arrest and recovery of the weapons foisted on the accused is highly dubious. All the 15 accused had been arrested by just seven police men on information from spies within one hour of the lodging of the FIR. Moreover all the accused were found sitting towards the South of TV Booster Building and none of them resisted the arrest or

attempted to run away. The claim of the police in the memo of arrest that they were concealing themselves is also unbelievable as they were arrested from an open place. He further contended that similarly the claim of police that on 23.11.2013 they recovered weapon/arms after voluntary confession of guilt by the accused on their pointation is highly doubtful. The recovery of weapon on 23.11.2013 has been shown in two different *mushirnamas*. The first was prepared at 1245 hours, in which amongst other accused Imtiaz Ahmed Khoso was declared to have confessed one Kalashnikov and three empty magazines. The second *mushirnama* of recovery was prepared at 1630 hours and it is verbatim true copy of the earlier *mushirnama* except that the weapons and accused are the remaining seven accused nominated in the FIR. All these seven accused of the second *mushirnama* have also made an identical confession and had also concealed their arms in the same abandoned water tank constructed with bricks and cement situated at some calling distance towards South from T.V. Booster. The learned counsel has raised the question that when it was all voluntary confession and the place of recovery of weapon was also one and the same then what prevented the police from recovering the same at 1245 hours in one go. Thus the story of arrest and recovery appears to be unnatural as nothing has been recovered from the accused, but it has been foisted on the accused.

Mr. Farooq H. Naek, learned counsel for applicant has further contended that the police had started the investigation even before the lodging of the FIR. The FIR was registered at 1700 hours whereas the *mushirnama* of place of occurrence and dead bodies was prepared at

1625 hours. The learned counsel for the applicant after having pointed out police connivance with the complainant party has further contended that the police had refused to register the FIR of murder of Lal Bux by the complainant Dildar and his accomplices. The second FIR of the same incident was registered on the order of the District & Sessions Judge / Ex-officio Justice of Peace on the application under section 22-A(6) Cr.P.C., in which true facts have been incorporated. Therefore, this is also a case of further inquiry not only on the grounds that the story of prosecution was doubtful but in addition to that, there are two FIRs of one incident and the complainant is also guilty of causing death to Lal Bux as per FIR No.28/2013. In support of his contentions learned counsel for the applicant has relied on the following case law: -

1. 2014 YLR 500 (*Meharban v. Ajab Noor*)
2. PLD 1972 SC 277 (*Amir v. State*)
3. PLD 1996 SC 241 (*Amanullah Shah v. State*)
4. PLD 1989 SC 585 (*Muhammad Ismail v. Muhammad Rafiq*)
5. 2010 P.Cr.L.J. 512 (*Muhammad Aamir v. State*)
6. 2004 P.Cr.L.J. 1264 (*Muhammad Idrees Kiani v. State*)
7. 2011 SCMR 606 (*Abdul Hameed v. Zahid Hussain*)
8. 2013 MLD 1645 (*Ghulam Hussain v. State*)
9. 2013 YLR 1963 (*Silk Ingrid Rassmann v. State*)
10. 2012 YLR 1110 (*Mumtaz Imtiaz v. State*)
11. PLD 1962 SC 495 (*Khalid Saigol v. State*)
12. PLD 1968 SC 349 (*Abdul Malik v. State*)

The learned counsel for the legal heirs of deceased Ali Akbar, Mr. A.Q. Halepota, while opposing this bail application has contended that mere existence of second FIR of the incident from the accused side cannot be a ground for admitting the accused on bail. He has challenged the veracity of the 2nd FIR registered on the orders of ex-officio Justice of Peace, Jamshoro, on several grounds including 08 days delay in lodging of

the said FIR. He has pointed out from the order passed on the application under Section 22-A Cr.P.C that the complainant had even nominated an advocate son of MPA Faquir Dad Khoso, who was at Karachi at the time of occurrence. However, the name of advocate was deleted by the applicant during the argument as mentioned in the order on the ground that the same was a typing error. He has also pointed out that in the second FIR the complainant instead of recording his statement has filed a written complaint for registration of second FIR and there are several mistakes / discrepancies which are sufficient to rule out the counter version as ground for further inquiry to exercise the discretion by this Court to grant the bail on the plea of cross version of the same incident. By comparing the version of the 2nd FIR with the 1st FIR, Mr. A. Q. Halepota, learned counsel, has emphasized that the applicant has been nominated in the FIR with a specific role and he was arrested within two hours of the incident. He has also relied on the Trial Court's order for refusal of bail to the applicant though five other co-accused were granted bail in the same order. The learned Trial Court in refusing bail to the applicant has relied on the case law reported in **2005 SCMR 1402** and learned counsel besides the said case law has also relied on the following cases.

1. 1983 SCMR 278 (*Imranuddin & another v. The State*)
2. 1992 SCMR 501 (*Nasir Muhammad Wassan v. The State*)
3. 2005 SCMR 1402 (*Arif Din v. Amil Khan*)
4. 2002 SCMR 1886 (*Parveen Akhtar v. State*)

In rebuttal to the other contentions of the learned counsel for the applicant that there is a photograph i.e narration of the facts by the complainant who was also under attack of indiscriminate firing of 15

persons killing 04 persons on the spot. The absence of an independent witness of mushirnama of occurrence despite the fact that several people were gathered at the spot who had set the vehicle of the accused party on fire as well as memo of arrest and recovery of weapon by the police, the learned counsel for the aggrieved party has only suggested that it will be for the learned Trial Court to examine the point of arrest and recoveries. This Court has to take only a tentative assessment of the record produced by the parties. Counsel for the victim has filed statement of the witnesses under Section 161 Cr. P.C postmortem reports of deceased Ali Akbar and Lal Bux and the forensic report of the weapons allegedly recovered from the accused party. However, he has not referred to the contents of any of the statement or the reports during the course of arguments.

Mr. Farooq H. Naek, learned counsel has however, contended that the statements of all the witnesses under Section 161 Cr.P.C are identical statements, which show that these are all tutored statements given by the members of Khoso tribe as each witness examined by the police is Khoso. He has also drawn my attention to the memo of recovery of the van which was recovered after 8 days of the occurrence of the incident and found in damaged conditions with several bullets holes on the body and glass from either side and back of the van.

I have examined the case law cited by the counsel at the bar. Learned counsel for the victim's family was kind enough as he has only referred to four cases, all of which are on one point, i.e the value of counter FIR for consideration by the Court at the stage of bail in post arrest bail.

Learned counsel for the complainant party has emphasized only on one point that since specific role has been assigned and applicant has been shown involve in causing death of two persons, the registration of the counter FIR in this case should not be considered as a case for “further enquiry” in term of section 497(2) Cr.P.C. In all the case law relied upon by the learned counsel for victim’s family, there is a definite consensus on the point of value to be attached to the counter version given by the accused in subsequent FIR. The existence of counter FIR alone should not be a ground for grant of bail. Indeed, there is no cavil to this proposition. However, superior courts are also of the considered and consistent opinion that merely filing of the counter version or counter challan may not justify allowing the bail to the accused persons in all the cases, but every case is to be decided in view of its peculiar circumstances keeping in view the facts involve in both the cases and the Court has to make a tentative assessment of the material placed before the Court, while exercising the discretion in favour or against the applicants.

I have heard both the learned counsel, and examined the documents filed by them as well as case law cited at the bar and I have observed as follows:-

- i. The incident begins at 1600 hours when accused party of 15 persons alighted from two vehicles and started abusing Ali Akbar and killed four persons on the spot before running away from the scene on seeing police followed by a mob which set Vigo on fire and thereafter preparation of a detailed memo of place of occurrence, four dead bodies and two vehicles viz, burnt vehicle of accused and damaged vehicles of complainant and all this consumed just 25 minutes as the mashirnama was prepared at 1625 hours.

- ii. The refusal of police to register the counter version of the applicant accused party, prima facie under the influence of the complainant of FIR No.12/2013 cannot be ruled out either. While I was examining the documents relied upon by the parties I have found that the complainant has given details of death of four persons by the accused party but he fell short of giving the particulars of the vehicle in which the complainant party has arrived at the place of occurrence.
- iii. An important fact which in my humble view gives credence to the counter version of the case is the mashirnama regarding place of occurrence and dead bodies and the post mortem report of Lal Bux. The police on thoroughly examination of the body of Lal Bux saw one hole like injury in the right side buttack blood oozed, and one hole like injuries in left side buttock blood oozed, but the injury shown in the post mortem report does not find mentioned of the two injuries which were seen by police in presence of the complainant Dildar Ali.
- iv. The post mortem report showing injury on the lower thorax appears to be close to the version in the second FIR No.28/2013 in which the complainant has attributed the specific role to the complainant of FIR No.12/2013 namely Dildar Ali made straight fire from TT pistol which hit the chest of guard of Lal Bux who fell down on the spot.
- v. The other obvious discrepancy in prosecution story is that according to the mashirnama of dead bodies of both the deceased Akbar Ali and Lal Bux was prepared at 1645 hours and both were sent to Liaquat University Hospital by police vide letter No.696 and 697 respectively but he dead body of Ali Akbar reached the hospital at 8.15 pm and the dead body of Lal Bux took almost (5) five hours and reached the same Liaquat Hospital at 11.45 pm.
- vi. At this stage prima facie, it is difficult to say that fatal injuries caused to Ali Akbar and Lal Bux were caused by one and the same weapon, at least the postmortem reports do not suggest the same.
- vii. There are other anomalies as well which I do not wish to discuss here and even the counsel for the victim has avoided to comment and suggested the same that should be examined by the trial have prima facie value to see a dent in the prosecution story. Therefore, I am not referring to the same as even tentative comment may prejudice the case of either side in the trial Court.
- viii. It is admitted position that both the parties are facing trial before the same Sessions Judge and the main accused in Crime No.28/2013 is absconding.

- ix. The accused is not required for further enquiry as he has already been remanded to jail custody, therefore merely on the ground that he is involved in heinous crime bail cannot be refused particularly when the accused has made out case of further enquiry into his guilt on several counts.

In view of the above facts and observation, I am of the view that the case of the applicant/accused requires further inquiry into his guilt, therefore, applicant/accused is admitted to bail subject to his furnishing two solvent sureties in the sum of Rs.5,00,000/- each and P.R bond in the like amount to the satisfaction of the learned Trial Court.

Needless, to mention here that the observations made hereinabove are tentative in nature and should not influence the trial Court while deciding the case of the applicant/accused.

Karachi
Dated:21.5.2014

JUDGE