

**IN THE HIGH COURT OF SINDH CIRCUIT COURT
LARKANA**

Criminal Bail Applications No.S-299 & 301 of 2022

Applicants : Muhammad Khan and Khair Muhammad
through Mr. Riaz Hussain A. Khoso,
Advocate.

The State : Through Mr. Aitbar Ali Bullo, Deputy
Prosecutor General Sindh.

Date of hearing : 12.09.2022

Date of decision : 19.09.2022

ORDER

KHADIM HUSSAIN TUNIO, J.-Through instant Criminal Bail Applications, applicants Muhammad Khan and Khair Muhammad seek their admission to post-arrest bail in Crime No. 100 of 2013, under Sections 302, 324, 337-H(ii), 114, 148 and 149 PPC registered at Police Station Madeji, Shikarpur. Earlier, the applicants approached the learned trial Court with the same plea, which had been declined vide orders dated 25.09.2021 and 05.10.2021.

2. It is alleged that following an exchange of harsh words between one Ganhwar Dahani and the complainant Sabhar Khan's son Ghulam Shabbir over land matters, on 08.12.2013 the complainant was available at his land along with his sons and other relatives was approached by the assailants at 08:30 a.m. who were identified by them as Ganhwar, Qaisar, Abdul Hameed, Ameer Bux, Muhammad Khan, Muhib, Khair Muhammad and Muhammad Bux armed with Kalashnikovs, Ghous Bux and Ghulam Mustafa having firearms and five unknown persons three of whom had Repeaters and two had T.T pistols approached the complainant party and co-accused Ganhwar asked the complainant's son Ghulam Shabbir for money which they out rightly refused and this resulted in another exchange of harsh words. Co-accused Muhammad Bux instigated the rest to take the lives of the complainant party and as such, co-accused Ganhwar and Qaisar

made direct fires from their Kalashnikovs at complainant's son Ramzan, co-accused Abdul Hameed and Muhib Ali shot at the complainant's other son Ghulam Shabbir with their Kalashnikovs, co-accused Ameer Bux fired at the complainant's nephew Jamsher with his Kalashnikov and applicant Khair Muhammad shot at the complainant's nephew Wazir Ali with his Kalashnikov. Seeing this, the complainant party raised cries which attracted the neighbours and caused the accused and applicants to run away while aerially firing. The complainant took all the injured to the hospital, but found his sons Ghulam Shabbir and Ramzan dead while his son and nephew had received critical injuries. He left them at the hospital under supervision of his relatives and then appeared at the police station and lodged the FIR.

3. Learned counsel for the applicants has contended that the applicants have been falsely implicated in the present case; that the FIR from the very face of it appears to be false, concocted and managed one; that both the prosecution witnesses are closely related to each other and interested; that the *malafide* on the part of the complainant party is clear; that the FIR is delayed by two hours; that applicant Muhammad Khan has not been assigned any active role while applicant Khair Muhammad has only injured PW Wazir Ali which injury is not on his vital parts of the body; that the role of causing injuries to the deceased is not assigned to the present applicants; that question of sharing of common intention and vicarious liability of both the applicants with principal accused would be determined at the time of trial; that there is no recovery of any incriminating article from the possession of applicants, which may connect them with commission of the alleged offence; that it is well settled law that absconsion of the accused would not come in the way of grant of bail, if otherwise, the case is made out for bail; that case has been challaned and applicants are behind bars and are no longer required by the police for the purpose of investigation, as such he prayed for the grant of bail to the applicants. In support of his contentions, he has cited the case law reported as *Abdul Rehman v. Javed and 2 others* (2002 SCMR 1415), *Sharbat & another vs. The State* (SBLR 2003 Sindh 848), *Mitho Pitafi v. The State* (2009 SCMR 299), *Muhammad Arif v. The State* (2009 MLD 19), *Sameen Jan (Naib Tehsildar) v. The State* (PLD 2011 SC 509),

Ashfaq v. The State (2013 YLR 1825), Muhammad Tanveer v. The State through Anees-ul-Afreen (2014 P.Cr.L.J. 1096), Muhammad Naveed v. The State (2014 P.Cr.L.J 1548), Niaz Ali Shah v. The State and another (2015 P.Cr.L.J. 766), Qurban Ali v. The State and others (2017 SCMR 279) and Muhammad Faisal v. The State (2020 SCMR 971).

4. Conversely, learned D.P.G. appearing for the State opposed grant of bail to the applicants on the grounds that they are nominated in the F.I.R with specific roles. He further contended that applicant Muhammad Khan has been assigned role of making aerial firing; thereby he fully facilitated the principal co-accused in the commission of offence, while applicant Khan Muhammad has been assigned active role of firing upon PW Wazir Ali. He further added that after commission of the offence, both the applicants went underground and remained fugitive from law for such a long period. He submitted that in these circumstances, the applicants do not deserve concession of bail.

5. I have given due consideration to the arguments advanced by the learned counsel for the parties and have perused the material available on record.

6. From the perusal of record, it is evident that the incident took place on 08.12.2013 and the FIR was lodged on the same day with only a delay of 2 hours, which makes the FIR a promptly lodged one. The case of the two applicants, Muhammad Khan and Khair Muhammad, is distinguishable as such will be discussed separately. It transpires from the record that the specific role of causing injuries to deceased Ghulam Shabbir and Ramzan has been assigned to co-accused Abdul Hameed, Muhib Ali, Ganhwar and Qaisar respectively while it further transpires that applicant Muhammad Khan is only shown to have been present at the place of incident armed with a Kalashnikov and only caused aerial firing at the time of escaping after the commission of offence. Besides that, no other active role has been assigned to him. As far as the question of sharing common intention with the principal accused is concerned with respect to applicant Muhammad Khan, such vicarious liability cannot be determined at this stage

and it will be determined at the time of trial after recording of evidence of the prosecution witnesses because the role assigned to applicant Muhammad Khan does not infer that he shared such an intention to commit murder or he too would have fired at the complainant party. Until such vicarious liability is determined, the case against applicant Muhammad Khan requires further inquiry. Investigation of the case has also long been completed and his custody is no longer needed.

7. As far as the case of applicant Khair Muhammad is concerned, he has been assigned role of firing at the injured PW Wazir Ali with his Kalashnikov. Applicant Khair Muhammad played an active role in the incident by firing at the injured Wazir Ali and causing him two injuries, one on his right arm and the other on his thigh. Both these injuries were also shown in the medical certificate issued by the MLO. Blood stained earth was also collected from the place of incident, which was sent to the chemical examiner and report regarding the same was also supportive of the prosecution version. Motive for the incident, *prima facie*, has also been furnished in that just a day earlier, there had been a heated argument, which led to this murderous assault on the complainant party of which applicant Khair Muhammad was a full-fledged participant of and as a result, two innocent souls lost their lives in a brutal manner. Medical evidence is in line with ocular account and the injured witnesses have fully implicated applicant Khair Muhammad in their statements u/s 161 Cr.P.C. The case was registered in the year 2013 while applicant Khair Muhammad was only arrested after almost 8 years. Most of the co-accused are still fugitive from the law and there is apprehension of abscondance of applicant Khair Muhammad because he had played an active role in the commission of the offence. Merely because no recovery of crime weapon was made by the investigation agency is also no ground for bail. The Hon'ble Apex Court in the case of *Haji Gul Rehman v. Imam-Ud-Din and another (2009 SCMR 1179)* has observed that:-

"This court has already held that a ground of further inquiry should be based on a rational conclusion arrived at with reference to the peculiar facts of the case and not mere hypothetical and whimsical statement

contrary to the material available on record. It was held that mere possibility of further inquiry which exists almost in every criminal case is no ground for taking the matter as one under sub-section (2) of section 497, Cr.P.C. In the case of Haji Akbar Khan (supra), this Court affirmed the view that where allegations contained in the FIR, duly corroborated by the record, constitute offences of serious nature, such facts disentitle the accused from the concession of bail"

(emphasis supplied)

8. As far as the contention that the injuries of PW Wazir Ali are on non-vital parts of the body is concerned, the same would require an in-depth examination of record, which will be beyond the mark of tentative assessment which is not permissible at bail stage. In a similar case reported as *Sheqab Muhammad v. The State and others (2020 SCMR 1486)*, the Hon'ble Apex Court has been pleased to observe that:-

"Arguments that ocular account stands contradicted by medical evidence and in the absence of an independent witness from the public, petitioner's general participation, resulting into an injury on a non-vital part of the body, particularly in the absence of repeated fire shot, squarely brings his case within the remit of further probe, are not only beside the mark but also cannot be attended without undertaking an in-depth analysis of the prosecution case, an exercise forbidden by law at bail stage. In a daylight affair, two persons sustained firearm injuries besides the one having endured violence through blunt means and as such requires no public support to drive home the charge; their statements supported by medical examinations of even date, cumulatively bring petitioner's case prima facie within the mischief of section 324 of the Pakistan Penal Code, 1860, hit by statutory prohibition, in view whereof, he cannot be released on bail in the absence of any consideration within the purview of subsection (2) of section 497 of the Code ibid. Similarly, murderous assault as defined in the section ibid draws no anatomical distinction between vital or non-vital parts of human body. Once the trigger is pressed and the victim is effectively targeted, "intention or knowledge" as contemplated by the section ibid is manifested; the course of a bullet is not controlled or steered by assailant's choice nor can he claim any premium for a poor marksmanship. Exercise of discretion by the High Court being well within the bounds of law calls for no interference. Petition fails. Leave declined.

(emphasis supplied)

9. For what has been discussed above, applicant Muhammad Khan has successfully made out his case for bail and is therefore granted post-arrest bail subject to his furnishing a solvent surety in the sum of Rs.500,000/- (Rupees Five Hundred Thousands only) and P.R bond in the like amount to the satisfaction of the trial Court. Resultantly, Criminal Bail Application No.S-299 of 2022 is allowed. As far as applicant Khair Muhammad is concerned, he has failed to make out a case for grant of bail and therefore Criminal Bail Application No.S-301 of 2022 is dismissed being meritless. Captioned Criminal Bail Applications are disposed of in the above terms.

10. Needless to state that the observations made hereinabove are tentative in nature and shall not influence the mind of the trial Court while deciding the case fully in accordance with law.

J U D G E