

ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr.Bail.Appl.No.S- 969 of 2015.

DATEORDER WITH SIGNATURE OF JUDGE

24.10.2016.

Mr. Ali Hassan Chandio, Advocate for applicant a/w applicant.

Mr. Nzazir Hussain Jarwar, Advocate for complainant.

Mr. Shahzado Saleem Nahiyoon, A.P.G. for the State.

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SALAHUDDIN PANHWAR, J: Through instant application, applicant seeks pre-arrest bail in Crime No.54/2015, registered at PS: Digri, under sections 302, 324, 114, 34 PPC.

2. Brief facts of the prosecution case are that on 01.05.2015 at 0430 hours complainant Muhammad Iqbal lodged report at Police Station Digri alleging therein that he has a Cabin of Cigarette at Doulat Mori Deh 162 near village Ghulam Nabi Junejo. There are also flour mill and grocery shops of his relatives. Arab son of Haji Khan Chandio is not on good terms with Abdul Raheem son of Manthar and Muhammad Hanif son of Muhammad Chandio. On 30.04.2015 at 8-15 p.m. he, Muhammad Arab, Mir Muhammad, Ameer Bux and others were present at the shop when accused Abdul Raheem Chandio and Muhammad Hanif Chandio, having pistols in their hands, came at their shop and asked Arab to vacate the shop otherwise it would not be better for him. They all gathered there and then accused persons escaped away while extending threats and making aerial firing. It is further alleged in the F.I.R. that he, Mir Muhammad, Ameer Bux and Arab after taking meal went to sleep; in the night at 12-30 a.m. they woke up on the screams of Arab, saw in the light

of bulb that Muhammad Hanif Chandio caught hold Arab with his arm and Abdul Raheem @ Chandio pointed his pistol on Arab and an unknown accused was available on motorcycle to whom he can identify on seeing, who instigated Abdul Raheem that not to spare and kill him on which he raised cries and before them Abdul Raheem @ Adloo fired two shots of pistol on Arab who fell down. They tried to apprehend the accused then accused Muhammad Hanif caused butt blow of pistol on the head of Mir Muhammad with intention to kill and then the accused persons escaped away on motorcycle while making aerial firing. They noticed that there were two firearm injuries on left side chest of Arab and due to profuse bleeding Arab died at the spot. Thereafter, they managed the conveyance and brought the dead body and injured to Taluka Hospital Digri where he left Ghulam son of Morio and Abdul Hussain son of Sain Bux Chandio with the dead body he came at police station and lodged such report.

3. Learned counsel for the applicant has argued that the name of applicant does not transpire in the F.I.R. and the witnesses of the incident had specifically claimed that they had seen the unknown accused and these witnesses during investigation did not disclose the name of unknown accused; that prior to submission of interim challan, the investigation officer had recorded the statements of eye witnesses and they did not name the unknown accused as the applicant Shafi Muhammad; that the applicant is residing in the same deh where the complainant party is residing and they are also caste fellows, they knew each other very well but they did not name the applicant till submission of interim challan; that the applicant has been introduced at later stage as

unknown accused and the involvement of the applicant is on the basis of statement of independent persons who were neither present at the place of incident nor had seen the alleged incident; that there was dispute between the applicant and brother of the deceased over settlement of accounts and due to that dispute the applicant has been involved in this case; that there is no direct evidence against the applicant except the statement of so-called independent witnesses; that the main accused namely Muhammad Hanif and Abdul Raheem are confined in jail; that the prosecution witnesses are interested and there is dispute between both parties over shop; that during investigation, the complainant has filed an application u/s 22-A-6-III Cr.P.C. for re-investigation but it was dismissed and after one month, two persons namely Abdul Hussain and Manzoor Ali implicated the applicant in this case; that the name of applicant has been placed in the final challan; that the applicant joined the trial of the case. Lastly, he prayed to confirm the interim pre-arrest bail of applicant. He relied on the case laws reported in **1999 P.Cr.L.J. 2013 (Karachi), PLD 1995 Supreme Court 241, 1997 MLD 196 (Lahore), 1997 MLD 1384 (Lahore), 1997 SCMR 1234), PLD 2002 Karachi 402, 2003 YLR 2305 (Lahore) and YLR 2541 (Lahore).**

4. Learned counsel for the complainant has argued that the complainant and his witnesses have stated in the F.I.R. that on seeing they can identify the accused; that the murder of the deceased Arab was committed by the co-accused at the instance of unknown person whose name has been disclosed by the independent witnesses namely Manzoor Ali and Abdul Hussain. Their version has been supported by the brother of the deceased also in their respective statement recorded during

investigation; that Abdul Hussain and Manzoor Ali are the independent witnesses/eye witnesses who have implicated the applicant in the murder of the deceased; that the above named P.Ws are relatives of the accused and they have no concern with the complainant; that both the independent witnesses appeared voluntarily and gave their statements to the I.O. of the case to whom the investigation of the case was transferred by the D.I.G. Mirpurkhas Range; that identification parade is essential in this case; that this is a case of capital punishment falls within the prohibitory clause. He prayed for dismissal of bail application.

5. Learned A.P.G. opposed the bail plea of applicant and adopted the arguments advanced by the learned counsel for the complainant. He added that the offence is heinous in nature, main accused are in jail custody and the applicant is fugitive from law for about six months; that the applicant has participated in the offence and at his instigation, main accused have committed the murder of the deceased.

6. I have carefully considered the above submissions of both the learned counsels and have gone through the papers in hand.

7. At the very outset, I would say that criterion for grant of pre-arrest bail is different from that of the post-arrest bail. For grant of pre-arrest bail the *initial* burden is upon the accused to prove *mala fide* or ulterior motives on part of the complainant or investigating agency because it is an *extra ordinary* relief , meant to protect innocent *only*. A reference in this regard can well be made to the case of Muhammad Sadiq and others v. State & another 2015 SCMR 1394 wherein it is held that:

“Since, there can be no denial to the well established principle of law that considerations for pre-arrest bail are totally different from that of post-arrest bail. Pre-arrest bail is an extraordinary relief, whereas the post-arrest bail is an ordinary relief. While seeking pre-arrest bail it is duty of accused to establish and prove *mala fide* on the part of the investigating Agency or the complainant. Bail before arrest is meant to protect innocent citizens who have been involved in heinous offences with *mala fide* and ulterior motives.’

No doubt, name of the applicant / accused does not appear in the FIR but mere non-appearance of name in the FIR is not sufficient to claim bail while for pre-arrest bail, as held by Apex Court, the pre-condition shall continue even in a case where name of the accused was not mentioned in the FIR.

The record reflects that alleged incident took place on 01.05.2015 at 0300 hours i.e *odd* hours of night and allegation against the applicant / accused is that he was riding on motorcycle (out of the house) and had instigated the co-accused persons to commit murder. Non-mentioning of the name of the person, standing in dark, is natural rather shows bonafide on part of prosecution. The witnesses namely Amir Bux son of Soomar and Mir Muhammad son of Arab Chandio have disclosed the role of unknown person including of the co-accused Abdul Raheem and Muhammad Hanif in their respective statements recorded u/s 161 Cr.P.C. by the I.O. of the case during investigation. The perusal of papers further indicates that the investigation of present case was transferred, on the complaint, by D.I.G. Mirpurkhas to SIP Kamal Khan Nohri. The subsequent I.O. of the case namely SIP Kamal Khan Nohri during

investigation also recorded the statement of brother of the deceased namely Ahmed and Malook both sons of Haji on 5.6.2015 under provision of section 161 Cr.P.C. P.W Ahmed and Malook both sons of Haji Chandio in their respective statements recorded u/s 161 Cr.P.C. on 5.6.2015 have pointed out that on 4.6.2015 Manzoor Ali son of Ismail Chandio and Abdul Hussain son of Sain Bux Chandio met them and told them that on 01.05.2015 at 1245 hours (night) they heard the firing and cries from Doulat Morr Stop and they rushed towards the aforesaid place on motorcycle and on light of motorcycle at Katcha Rasti Morr adjacent to Otak of Abdul Rehman Chandio they saw a motorcycle came. Shafi Muhammad son of Allahdino @ Allahdino was driving it and at his back side Abdul Raheem Chandio and Hanif Chandio were present who aimed the weapons upon them and threatened that if they disclosed the facts to any person then they will be killed and now on the voice of conscious they are disclosing these facts. The subsequent I.O. of the case had also recorded the statement of those independent witnesses namely Manzoor Ali and Abdul Hussain, both residents of Deh 162, Taluka Digri who have implicated the applicant in their respective statements recorded u/s 161 Cr.P.C. and on 05.06.2015 they also filed their affidavits. Needless to mention, that the version of the independent witnesses has been supported by the brothers of the deceased namely Ahmed and Malook. The name of applicant is also appearing in the final report as absconding accused. The witnesses examined by the subsequent I.O. of the case during investigation have fully implicated the applicant in this case to the extent that at the instigation of present accused the main

accused Abdul Raheem have fired upon the deceased Arab who had lost life in the result of alleged incident.

Sufficient material is available on record which connects the applicant with the commission of offence with which he has been charged and nothing available on record which appealed the prudent mind that the applicant has been falsely implicated in this case nor it plea of the applicant / accused appears sufficient to prove malafide on part of complainant party on count of mere dispute of settlement of account. The applicant / accused appears to have failed to establish any *malafide* on part of the complainant party and the investigation agency to substantiate that his involvement was / is for some *ulterior motives*. On failure therefore, the application for pre-arrest bail *normally* cannot be accepted. Case laws, relied by the counsel for the applicants, are not helpful to advance the case of the applicant / accused for grant of pre-arrest bail. Consequently the instant bail application was dismissed and the interim pre-arrest bail already granted to the applicants/accused by order dated 15.09.2015 was hereby recalled by short order dated 24.10.2016.

Above are the detailed reasons.

JUDGE

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