

ORDER SHEET
IN THE HIGH COURT OF SINDH BENCH AT SUKKUR
Cr. Bail Application No.S-293 of 2016
Cr. Bail Application No.S-389 of 2016

Date	Order with signature of Judge
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For hearing of bail application

Date of hearing: 04-06-2018; 22-06-2018 & 26-06-2018

Mr. Suhail Ahmed Khoso, Advocate for the Applicants;
Mr. Abdul Haque G. Odho, Advocate for complainant;
Mr. Sardar Ali Shah Rizvi, DPG

ORDER

ADNAN IQBAL CHAUDHRY J. – On 10-09-2016, the applicants-accused namely (i) Muhammad Ilyas, (ii) Ali Dino, (iii) Ali Murad @ Muhammad Murad, and (iv) Shoukat Ali were nominated in FIR/Crime No.288/2015 registered at P.S. ‘A’ Section, Khairpur, under Sections 302 (*qatl-i-amd*) and 34 of the P.P.C., the said offence having allegedly been committed on 04-05-2016 at 3:30 a.m., resulting in the death of Khadim Hussain (the Deceased). The Complainant, Abdul Rasheed, is the brother of the Deceased.

2. The accused Muhammad Ilyas was arrested at the outset, while the accused Ali Dino, Ali Murad and Shoukat Ali were arrested when their application for pre-arrest bail was dismissed by the trial court on 13-10-2015. Thereafter, the accused Ali Murad was granted interim pre-arrest bail by this Court in the subject Cr. Bail Application No.S-293/2016, but the accused Ali Dino and Shoukat Ali were arrested, and then along with Muhammad Ilyas they moved the trial court for post-arrest bail which was dismissed on 28-05-2016; hence

their Cr. Bail Application No.S-389/2016 before this Court for post-arrest bail.

3. The FIR of Crime No.288/2015 alleges that the dispute was with regards to a plot that had been purchased by the Complainant who was using it as a cattle pond; that the accused Muhammad Ilyas and Ali Dino had their eye on the said plot and had threatened not to spare the Complainant if he did not give them the said plot; on 04-09-2015 while the complainant party (5 in number – all related *inter se*) were sleeping in the said plot/cattle pond, one of them, the Deceased went out around 3:30 a.m. to urinate; that the complainant party heard the cries of the Deceased and rushed outside to see in the light of a bulb the accused (i) Muhammad Ilyas armed with a pistol, (ii) Ali Dino, (iii) Muhammad Murad (@ Ali Murad) armed with lathi and hatchet, and (iv) Shoukat Ali armed with a pistol, all giving blows to the Deceased with said lathi, hatchet and pistol butt before the said accused ran away; that the Deceased eventually succumbed to injuries at Civil Hospital Larkana.

4. On the other hand, the applicants-accused have presented a completely different version of the events. They allege that on 04-09-2016 at 3:00 a.m when they were sleeping in the courtyard of their house alongwith other family members, they were woken by a noise and saw in the light of a bulb the Deceased accompanied by two unidentified persons armed with lathis in their courtyard; that a fight ensued during which the Deceased was injured; during the fight, the daughter of Muhammad Ilyas who came to save her father also suffered serious injuries; that the two unidentified persons accompanying the Deceased managed to take away the Deceased and escaped on a motor cycle; that Muhammad Ilyas took his daughter for first aid to the hospital and thereafter at 16:00 hours on 04-09-2015 he lodged

FIR/Crime No.283/2015 under sections 382 and 511 PPC at P.S. 'A' Section, Khairpur nominating the Deceased and two unidentified persons.

5. The other relevant facts that emerged from the submission of the learned counsels are:

- (a) that the accused Ali Murad, Ali Dino and Muhammad Ilyas are brothers and the accused Shoukat Ali is their cousin;
- (b) that in both versions the Deceased is said to have been injured on 04-09-2015 but he is said to have died of the injuries on 10-9-2015;
- (c) that regards Crime No.283/2015 lodged by the accused Muhammad Ilyas, the Police report submitted under section 173 Cr.P.C recommended disposal of that case as Class 'B'. However, vide order dated 08-10-2015 the learned Magistrate ceased of the matter disposed off that case as Class 'C' and the reason cited by him for doing so was "*...in order to curtail any further litigation between the parties...*". At that point in time, the accused Muhammad Ilyas, who was the complainant of that Crime No.283/2015 had already been arrested in Crime No.288/2015, and the accused Ali Dino and Shoukat Ali appear to have been arrested soon thereafter. That appears to be the reason for them for not pursuing the investigation of, or challenging/addressing the disposal of Crime No.283/2015 as Class 'C'.

6. While the FIR of their version, i.e. Crime No.283/2015 was made by the accused Muhammad Ilyas the same day on 04-09-2015, the FIR of Crime No.288/2015 was made by the Complainant after 6 days on 10-09-2015. The explanation offered by the Complainant for the delay is that he was attending to the Deceased who was then injured and lying at

the hospital. But there is no explanation as to why the Complainant made no FIR for the injuries caused by the applicants-accused to the Deceased when he had gone to the Police on the day of the incident on 04-09-2015 for a letter of referral for the medical examination of the Deceased who was then alive but injured.

7. Learned counsel for the Complainant and the learned DPG had contended that the counter-version presented by the applicants-accused cannot be given any weight because their 'counter-case' (Crime No.283/2015) had been disposed off/cancelled by the Magistrate as Class 'C'. Firstly, the inability of the applicant-accused to challenge/address the disposal of Crime No.283/2015 as Class 'C' was in circumstances discussed in para 4(c) above. Secondly, it would not be correct to describe Crime No.283/2015 as a 'counter-case' when it was registered prior to Crime No.288/2015. In fact, it was Crime No.288/2015 that was the counter-case. Nonetheless, if 'counter-case' refers to the registration of the FIR/crime, then to my mind a 'counter-version' is not synonymous with a 'counter-case', and the fact that the counter version does not manifest itself in a counter-case does not eliminate the counter-version. Even if there is no counter-case, the investigating agency would be duty bound to record the counter-version under section 161 Cr.P.C. in the crime that is registered and to investigate the same. That much is now settled by a larger Bench of the Honourable Supreme Court of Pakistan in the case of *Sughran Bibi v. The State*, HRC No.10842-P/2018. Further, in my view, even where the counter-case of the applicants-accused (i.e. Crime No.283/2015) had been investigated and disposed off as Class 'C', that would certainly not deprive them of the right to lead evidence of the counter-version in their defence in the case registered against them. Therefore,

there is a counter-version in the field, one which cannot be ruled out as improbable that this stage.

8. Given the counter-version of the applicants-accused discussed in para 4 above, where the applicants-accused allegedly found the Deceased with accomplices armed with lathis in the middle of the night within the courtyard of their house where they and ladies of their family were asleep, the applicants-accused are essentially pleading the right of private defence and/or the defence of grave and sudden provocation which calls for a further inquiry.

9. In addition to what has been discussed in paras 6 to 8 above, for the pre-arrest bail of the accused Ali Murad, who was nominated as being armed also with a hatchet, it was also argued by his counsel that he had been declared innocent by the Police during investigation and as such his name had been placed in column 2 of the report submitted by the Police under section 173 Cr.P.C. *albeit* by order dated 26-10-2015 the learned Magistrate had joined him in the case.

10. Per learned DPG, a lathi was recovered from the accused Ali Dino and a pistol was recovered from the accused Shoukat Ali, but the FIR does not seem to allege that Ali Dino was armed with any weapon. However, so far there is nothing to show that the said recoveries were the weapons used in any version of the incident. Nonetheless, given the nature of the counter-version discussed above, these recoveries cannot be a ground to refuse bail.

11. Though investigation has concluded and challan has been submitted, trial has yet to commence. On the other hand, the accused Muhammad Ilyas, Ali Dino and Shoukat Ali are behind bars since September/October 2015. In the circumstances, their continued incarceration is of no use,

rather they would be prejudiced in preparing for their defence discussed above.

12. For what has been discussed in paras 6 to 9 and 11 above, the accused Ali Murad @ Muhammad Murad has made out a case of *malafides*, **Consequently, Cr. Bail Application No.S-293/2016 is allowed** and the interim bail granted to applicant-accused Ali Murad in Crime No.288/2015 registered at P.S. 'A' Section Khairpur is confirmed subject to furnishing solvent surety in the sum of Rs.300,000/- (Rupees Three Lacs only) with P.R. bond in like amount to the satisfaction of the Assistant Registrar of this Court.

13. For what has been discussed in paras 6 to 8 and 11 above, the case of Muhammad Ilyas, Ali Dino and Shoukat Ali requires a further inquiry into their guilt within the meaning of sub-section (2) of Section 497 Cr.PC. **Consequently, Cr. Bail Application No.S-389/2016 is allowed** and the applicants-accused Muhammad Ilyas, Ali Dino and Shoukat Ali are admitted to bail in Crime No.288/2015 registered at P.S. 'A' Section Khairpur subject to furnishing solvent surety in the sum of Rs.300,000/- (Rupees Three Lacs only) each, with P.R. bond in like amount to the satisfaction of the trial court.

14. Needless to state that the observations made herein above are tentative and are not to be used to prejudice or advance the case of any party at trial. Further, if the applicants-accused in any manner try to misuse this bail, it would be open for the trial Court to cancel their bail after issuing them the requisite notice.

JUDGE