IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No.1141 of 2023

Talha @ Jahangir applicant through:	M/s Muhammad Sadiq and Asif Ali Khoso, advocates
The State, through:	Mr. Talib Ali Memon, APG a/w SIO Arif Usman PS Pak Colony
Aman, complainant through:	Nemo
Date of hearing: **& order :**	**04.08.2023** ----------

O R D E R

Adnan-ul-Karim Memon, J. – Applicant Talha @ Jahangir seeks post-arrest bail in F.I.R No.286/2021, registered under Sections 302/34 PPC at PS Pak Colony, Karachi. His earlier bail plea has been declined by the trial Court vide order dated 2.5.2023 on the premise that during investigation sufficient material was collected by the prosecution to connect him with the alleged crime.

2. In a nutshell, the prosecution story as per FIR is that on 01.10.2021 at 1245 hours complainant was appraised of the fact by the neighbors that his brother Qadeer had received gunshot injuries at Katcha Chowk. Upon receiving such information, he reached the place of the incident and found his brother severely injured with bullet wounds on his chest at the front and backside. As per the complainant, he shifted his brother in Chipa Ambulance to the hospital but he succumbed to injuries and expired on the way to the hospital, such a report of the incident was lodged with Pak Colony Police Station on 01.10.2021.

3. Learned counsel for the applicant, contended that the applicant is innocent and has been falsely implicated in the present case with malafide intention and ulterior motives; that the complainant has lodged the FIR with delay of about 01 hour and 45 minutes; that the complainant is not eye-witness of the alleged incident and has nominated the applicant on hearsay evidence on the premise that *muhalla* people informed him about the incident and he

has not mentioned any eye-witness of the incident in his FIR; that no postmortem of the deceased has been conducted due to refusal of the legal heirs of the deceased, therefore, there is no medical evidence supporting the prosecution case which requires further inquiry; that the statements of the complainant and witnesses under section 161 Cr.P.C. contradict to the contents of FIR, though recorded at belated stage after due deliberation; that no incrementing material has been collected and/or recovered from the applicant nor the investigating officer has collected any concrete evidence against the applicant/accused to connect him with the alleged offence; that there is no possibility of concluding of trial in near future though the charge was framed on 08.5.2023; that the co-accused Dad Muhammad has already been admitted to bail by the trial Court, therefore, the applicant is also entitled to the same relief on the principle of rule of consistency; that the applicant is confined in jail since 2022. He prayed for allowing the instant bail application.

4. Complainant is called absent though several notices were issued to him to appear and assist this Court, however, he has chosen to remain absent without intimation, and in his absence, the learned APG has pleaded his case and opposed the grant of bail, on the ground that since the applicant/accused has been nominated in the F.I.R. with a specific role of causing firearm injuries to the deceased who succumbed to injuries and died and the crime is heinous one, hence the applicant is not entitled to bail. He next contended that the alleged offense took place on 01.10.2021 and was reported on the same day, and the allegations against the applicant are of direct firing upon the deceased. He next submitted that the eyewitnesses have implicated the applicant with the commission of an alleged offense of murder of the brother of the complainant namely Qadeer under Section 164 Cr.P.C. statements. He argued that police have recovered 2 empties from the place of the incident and the FSL report is positive; that the applicant has made an extra-judicial confession before the police to the effect that he committed the offense; that rule of consistency is not applicable in the instant case so far as the role of the applicant is concerned. He lastly prayed for the dismissal of the bail application.

5. I have heard the learned counsel for the applicant as well as learned A.P.G. and perused the record of the case.

6. The tentative assessment of the record reflects that the alleged incident took place on 01.10.2021 at Kancha Chowk, Jahanabad, Pak Colony, Karachi, and was reported on the same day. Prima-facie, the complainant is not an eye-witness of the alleged incident as per F.I.R; however, he was informed that such an incident had taken place on 01.10.2021 at Kancha Chowk, Jahanabad, Pak Colony, Karachi. The 164 Cr.P.C. statements of the sisters of the deceased were recorded on 08.6.2022 i.e. after the delay of around eight months. The alleged eyewitnesses recorded their statements under Section 161 Cr.P.C. on 03.10.2021 i.e. after two days of the incident with different narration of the facts as disclosed in the F.I.R. The crime empties were not collected by the police from the place of the incident, however, the same was handed over to police by Mst. Fazeela wife of Amir on 03.10.2021 after two days of the alleged incident. As per APG the complainant did not allow the doctor to conduct a postmortem and thereafter, he forcibly took the dead body and buried it without a postmortem as such cause of death is shrouded in mystery in such circumstances, and in the absence of the medical evidence, no tentative opinion about the connection of the applicant with the alleged crime could be formed at this stage until trial court records evidence of the parties. The accused was arrested on 19.5.2022 and it is yet to be ascertained as to whether the recovered weapon was used in the crime or otherwise and it is for the trial Court to ascertain the truth after recording the evidence of the parties.

7. The emphasis of the arguments of the learned counsel for the applicant is that the complainant in the instant case is not the eyewitness of the incident as such his evidence could hardly be relied upon at the bail stage. This factum needs a thorough examination of the record and the trial court is in a better position to thrash out the truth of the case. So far as for the statement of Mst Fazeela under Section 164, Cr.P.C. is concerned, the same factum cannot be accepted as gospel truth at the bail stage, as it requires scrutiny by the trial Court for the reason that statement under Section 164 Cr.P.C. is not a substantive piece of evidence. It can be used to cross-examine the person who made it, and the result may be to show that the evidence of the witness is false, but that does not establish that what he stated out of court under section 164 is true. 164 statements are not substantive evidence in the case and the limited purpose for which the same could be used is to negative the evidence of the witnesses by bringing out contradictions after confronting the witnesses with their previous statements and having those portions of the statements properly proved on the record. In such circumstances of the case, there doesn't need to

be many circumstances creating doubt, if a simple circumstance creates reasonable doubt in a prudent mind about the guilt of the accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right. *Tarique Bashir vs. The State* **(1995 SCMR 1345).**

8. There is a delay of 3 days in the recording of the statement of witnesses for which the prosecution has made no attempts to provide any explanation. Primarily, the late recording of statements of the prosecution witnesses under section 161 Cr.P.C. reduces its value to nil unless the delay is plausibly explained. On the aforesaid proposition, I am guided by the decision of the Supreme Court in the case of ***Abdul Khaliq vs. the State*** **(1996 SCMR 1553**). It is settled law that a belated statement has no value in the eyes of the law, as established by the case law reported as *Abid Ali alias Ali v. The State* (**2011 SCMR 161**). Except for the statement of witnesses under Section 164 Cr. P.C, after the belated stage, there is no evidence collected by the Investigating Agency despite the crime empties which the complainant produced to police after some days, making the case of the applicant that of further inquiry under section 497(2), Cr. P.C. for bail. Moreover, the evidentiary value of statements with the possibility of space to reconcile differences between the witnesses is an exercise that can be undertaken after the recording of evidence at trial only. Reliance in this respect is placed on the case of *Muhammad Jahangir Afzal v. The State and another* (**2020 SCMR 935**) & *Asfand Yar Khan v. The State* (**2020 SCMR 715**). Moreover, it is also a well-settled principle of law that in a case calling for further inquiry into the guilt of an accused person, bail is to be allowed to him as a matter of right and not by way of grace or concession. In this respect, reliance is placed on the case law reported as *Ikram-ul-Haq v. Raja Naveed Sabir and others* (**2012 SCMR 1273**). Whenever reasonable doubt arises about the participation of an accused person in the crime or about the truth or probability of the prosecution case and the evidence proposed to be produced in support of the charge, the accused should not be deprived of the benefit of bail and it would be better to keep him on bail than in the jail during the trial. Fortification is sought from the case of *Syed Amanullah Shah v. The State* (**PLD 1996 SC 241**). The Courts are equally required to make a tentative assessment with the pure judicial approach of all the materials available on record, whether it goes in favor of the prosecution or favor of the defense before making a decision. Bail cannot be declined and the applicant cannot be kept in custody for an indefinite period as premeditated punishment. In the case of *Haider Ali v. The*

State and others (**2021 SCMR 629**), it was observed by the Supreme Court, in a case of a somewhat similar nature, that:-

> *"2. After hearing learned counsel for the petitioner, counsel for the complainant, learned Addl. Prosecutor General Punjab and having gone through the record we observe that although the FIR was chalked out on a written application of the complainant Faisal Jameel but name of the petitioner is not mentioned in the said FIR rather it is mentioned that the unknown person who fired four shots at Javed Bashir can be identified by the complainant if brought before him. Subsequently, the supplementary statement was recorded by the complainant who categorically stated that he identified the petitioner then and there when he made fire shots upon Javed Bashir deceased. This divergent stance of the complainant makes the case of the petitioner of further inquiry falling under subsection (2) of section 497 of the Criminal Procedure Code (Cr.P.C.). Hence, this petition is converted into an appeal and the same is allowed. The petitioner is released on bail subject to his furnishing bail bond in the sum of Rs.2,00,000/- (Rupees two hundred thousand only) with two sureties in the like amount to the satisfaction of the trial Court."*

9. Prima facie, the prosecution at this stage lacks sufficient incriminating material to connect the applicant with the commission of the alleged offense, and the same definitely leaves room for further inquiry into the guilt of the applicant. On the aforesaid proposition, I am guided by the principles laid down by the Supreme Court in the cases of *Ehsan Ullah v. The State* (**2012 SCMR 1137**), *Muhammad Iran v. The State, and others* (**2014 SCMR 1347**), *Saif Ullah v. The State and others* (**2019 SCMR 1458**) and *Zulfiqar Vs The State* (**2020 SCMR 417**).

10. The applicant is behind bars since his arrest and the only charge has been framed as per the report of the APG and evidence of material witnesses yet to be recorded, therefore at this juncture concession of bail could not be withheld by way of premature punishment as the evidence is yet to be recorded. On the aforesaid proposition, reliance is placed upon the case of *Husnain Mustafa v. The State and another* (**2019 SCMR 1914**). Besides the co-accused Dad Muhammad has been granted bail by the trial Court vide order dated 10.9.2022. In such circumstances, the doctrine of parity or rule of consistency in a criminal case elucidates that if the case of the accused is analogous in all respects to that of the co-accused then the benefit or advantage extended to one accused should also be extended to the co-accused on the philosophy that the "like cases should be treated alike. As such the rule of consistency is also applicable in the present case. On the aforesaid proposition, I am guided by the principles laid down by the Supreme Court in the case of *Kazim Ali and others versus The State and others*, **2021 SCMR 2086**. In the said case, the Supreme Court dispelled such a view and held that where the role ascribed to a large number of accused was general, which cannot be distinguished from each other, and technical ground that

consideration for pre-arrest and post-arrest bail are on different footing would be only limited up to the arrest of the accused persons because soon after their arrest they would become entitled to the concession of post-arrest bail on the plea of consistency and as such the accused persons in such case were admitted to pre-arrest bail.

11. The grounds agitated by the learned APG cannot be assessed at the bail stage without recording the evidence in the matter as such the applicant has made out a case of post-arrest bail in the aforesaid crime at this stage.

12. In view of hereinabove, I am of the view that the case of the present applicant/accused appears to be of further inquiry. In the light of the above-mentioned discussion, this bail application is accepted and the applicant is admitted to post-arrest bail in the aforesaid crime, subject to furnishing surety in the sum of Rs.200,000/- (Rupees Two Lac) with P.R. bond in the like amount to the satisfaction of the trial Court.

13. It is clarified that if the applicant/accused misuses the concession of bail in any manner, the learned trial Court would be at liberty to proceed against the applicant/accused as per law.

14. Needless to mention that the observations made hereinabove are tentative and the trial Court shall not be prejudiced by any such observations and shall decide the case strictly on merits keeping in view the evidence available on record.

JUDGE