

ORDER SHEET

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Cr. B.A No. 10 of 2012.

Syed Amanullah Shah.....Applicant

Versus.

The State.....Respondent

Mr. J.K. Jarwar Advocate for the Applicant.

Mr. Zulfiqar Ali Jatoi, D.P.G. for the State

Date of Hearing: 11th May, 2012.

Muhammad Ali Mazhar,J:- The applicant has applied bail in Crime No.156/2010, lodged at Police Station, Ghotki, under Section 302, 147, 148, 149, PPC.

2. Briefly the facts of the case are that on 10.04.2010, the complainant Syed Ashique Ali Shah lodged the FIR, as under:

“It is complained that Mumtaz Ali was my real brother. Today early in the morning my brother Mumtaz Ali Shah came to house from the duty. There is dispute on land with Ali Shah on which they remained annoyed and were challenging. Today I, my brother Mumtaz Ali Shah, nephew Mujahid Shah and Arbelo were present at Dargah, Abdul Raheem Shah near house for funeral of brother Ahmed Ali Shah. The complainant further stated that Ali Hassan Shah, Ghulam Murtaza Shah with D.B. Guns, Abdul Rauf Shah with Gun, Ghulam Nabi Shah with Desi Pistol, Manzoor Shah empty handed came there, raised hakal that how Mumtaz Ali Shah quarreled on the matter of land and on saying this accused Ali Shah fired from his Gun upon Mumtaz Ali Shah with intention to commit murder which hit him on left muscle of his arm, accused Ghulam Murtaza Shah fired upon Mumtaz Ali Shah on his back and accused Abdul Rauf Shah fired from his Gun upon Mumtaz Ali Shah which hit him on side of stomach who fell down with cry. Thereafter all accused went away. Mumtaz Ali Shah sustained one fire on back from right side one on stomach from right side and one fire on muscle of left arm through and through”.

3. The learned counsel for the applicant argued that the applicant is an innocent person and has been falsely implicated in the crime in question due to tribal land enmity between complainant and applicant party. Learned counsel further argued that it is clear from the postmortem report that the size of injury No.1 is 1 c.m with 2 c.m exit in diameter, which is the injury of bullet but from the perusal of FIR the complainant stated that the applicant fired from his gun upon the deceased which hit him on back. The measurement of the injury is sufficient to hold that it was not caused by the gun but this injury was caused through pistol, KK or rifle. He further argued that the Doctor who conducted the postmortem did not send viscera to Chemical Laboratory which reveals that no postmortem was conducted. He further stated that according to postmortem the injuries were sustained by gun but not a single pellet was

recovered from the body of the deceased. It was further averred that the date of birth of applicant is 01.03.1996 as per Primary School Certificate and the incident took place on 10.04.2010, therefore at the time of alleged offence, the age of the present applicant was about 17 years, hence he is entitled to be released on bail. He further argued that the name of the applicant is Syed Amanullah but in the FIR the complainant has mentioned his name as Ghulam Murtaza Shah. He further argued that complainant is the uncle of the present applicant who was fully aware of the correct name but his wrong mentioning of name creates doubts that it is a case of mistaken identity.

4. The learned DPG opposed the bail application and argued on DB Gun was recovered from the place of incident along with 4 empty cartridges. He further argued that according to the report of Medical Board submitted in the trial court the age of application appears to be 18-19 years. He referred to Proviso attached to Section 10 of Juvenile Justice System Ordinance, 2000, which provides that where a child of the age of 15 years or above is arrested, the Court may refuse to grant bail if there are reasonable grounds to believe that such child is involved in an offence which in its opinion is serious, heinous, gruesome, brutal, sensational in character or shocking to public morality or he is previous convict of an offence punishable with death or imprisonment for life.

5. According to original school leaving certificate produced by learned counsel for the applicant during course of arguments, the date of birth of applicant is 1.3.1996 which shows that at the time of offence his age was less than 15 years. The school leaving certificate produced during course of arguments was issued by Govt. (N) D.A.V. High school Ghotki and another school leaving certificate issued by Govt. Boys Anwar Abad School also shows same date of birth i.e. 1.3.1996, so in both school leaving certificates issued by Primary and Secondary School date of birth is same. Medical certificate issued by medical board of Ghulam Mohammad Mahar hospital, Sukkur on 28.12.2011 also shows that according to opinion formed by the medical board, the age of applicant appeared to be 18/19 years. The applicant himself mentioned in the bail application that at the time of incident, his age was 17 years and on that bases, the counsel for the applicant relied upon the proviso of Section 497 Cr.P.C. in which it is provided that court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such offence be released on bail. Proviso makes it clear that for extending benefit of aforesaid proviso, court may only direct to release person on bail who is found under the age of 16 years which is not applicable in this case as the applicant himself admitted that at the time of incident, he was 17 years old. So far as Juvenile Justice system Ordinance, 2000, it is clearly provided that the child means a person who at the time of commission of offence has not attained age of 18 years but under Sub-section 5 of Section 10 of this Ordinance, it is clearly provided where a child under the age of 15 years is arrested for an offence punishable with imprisonment for life then he will be treated as if he was accused of commission of a bailable offence. However, under sub-section 7, it is provided that except where a juvenile court is of the opinion that delay in trial of accused has been occasioned by an act or omission of accused or any other person acting on his behalf, he may be released on bail if being accused of an offence punishable with death has been detained for such offence for continuous period exceeding one year and whose trial for such offence has not been concluded. Since the applicant is involved in offence under section 302 PPC, which is punishable with death or in alternate life

imprisonment under the mitigating circumstances, therefore, it is to be demonstrated that no delay has been caused by the applicant in the trial.

6. Though the learned counsel for the applicant made much emphasis that the applicant is juvenile but nothing has been placed on record to show status or stage of trial or the reason of delay in trial if any. Order of the trial court shows that the same applicant applied bail on the ground of minority of age vide his bail application dated 4.9.2010 which was dismissed as not pressed. Same applicant again moved bail application on 4.3.2011, which was also dismissed for non prosecution vide order dated 6.4.2011 and third bail application was filed in which again applicant prayed for grant of bail on the ground of his age, which was again dismissed by trial court vide order dated 29.11.2011. Now I would like to consider the bail application on merits. The learned counsel made much emphasis that name of applicant is Syed Amanullah Shah but in the FIR his name has been shown as Syed Ghulam Murtaza Shah. It was further argued that applicant is nephew of complainant. Giving a wrong name of the applicant in the FIR creates doubt and possibility of false involvement and or mistaken identity can not be ruled.

7. The allegations against the applicant is that he was carrying double barrel gun and he fired upon Mumtaz Ali on his back. According to postmortem report injury No.1 is in the size of 1 cm with exist wound of 2 cm in diameter, but in the FIR allegation against the applicant is that he fired from his double barrel gun. It is clearly transpiring from the postmortem report that no pellets were found in the body and size of lacerated wound does not show that the same appear to have been caused by double barrel gun. Learned DPG argued that four empty cartridges were recovered from the place of incident along with one double barrel gun but it is not mentioned from whose custody said gun was recovered. In the FIR, Abdul Rauf Shah stated to be armed with gun, Ghulam Murtaza with Desi Pistol, while Manzoor Shah empty handed came there and raised hakals but it is also an admitted fact these three accused were shown in column-2 and only applicant and his father Ali Hassan were sent for trial. The allegation against Abdul Rauf was that he fired upon Mumtaz Ali Shah which hit in his stomach but it is strange that despite assigning similar role to Abdul Rauf, his name was mentioned in Column 2 and he was let off by the police but the applicant whose role is identical to the role of co-accused Abdul Rauf was sent for trial. The postmortem report creates doubt that the injuries sustained by deceased were caused by bullets or gun shots which is not clear at this stage and due to wrong name of applicant in the FIR, possibility of mistaken identity and false implication cannot be ruled especially in the circumstances when enmity between the parties is admitted and also mentioned in the FIR.

8. The basic concept of bail is that no innocent's liberty is to be curtailed until and unless proved otherwise. The presumption in law is that every accused is innocent until his guilt is proved. If the court forms an opinion on the basis of tentative assessment of evidence that reasonable grounds are available to believe that accused has not committed offence with which he is being charged he would be allowed bail. Even in the case falling within prohibitory clause, an accused is entitled to concession of bail if his case comes within purview of further inquiry. It is well settled principle that while deciding bail application deeper appreciation of evidence is not required and it is also settled that even at the stage of bail benefit of doubt is extended in favour of applicant. Keeping in view the entire facts and circumstances of the case, I have reached to a conclusion that the case of present applicant requires further inquiry.

9. As a result of above discussion, this bail application is allowed. The applicant shall be released on bail subject to his furnishing solvent surety in the sum of Rs.300,000/- with PR bond in the like amount to the satisfaction of trial court. The above findings are tentative in nature and will not prejudice the case of either party. For last more than two years the matter is pending, therefore, the learned trial court is directed to conclude the trial and pass the judgment preferably within a period of four months.

Sukkur

Dated.1.6.2012

Judge,