

**IN THE PESHAWAR HIGH COURT,
BANNU BENCH
(Judicial Department)**

Cr. Misc: BA No.157-B of 2018.

**Rooh Niaz
Vs
The State etc.**

JUDGEMENT/ORDER.

Date of hearing _____ 07-06-2018 _____

Appellant-Petitioner: **By Pir Liaqat Ali Shah
& Farooq Khan
Sokari, Advocates.**

Respondent : **State By Shahid Hameed**

Qureshi, Addl: AG & Others By M. Alamgir

Khan Wazir, Advocete.

SHAKEEL AHMAD, J.- The petitioner Rooh Niaz

S/O Atlas, through the instant petition seeks post
arrest bail in crime report No.86 dated 15.03.2017
registered under sections 302/324/427/34 PPC of
Police Station Domel, Bannu.

2. The prosecution story as given in the crime
report, is that on 15.03.2017 at 1810 hours, the
complainant brought dead body of his brother
Muhammad Zahid Khan with the help of his co-

villagers to the Police Station, on a Datsun and reported the matter to the police that his brother was wanted to the police of Police Station Domel in Crime report No.211/2015, registered under sections 302/324/148/149 PPC. He had called his brother to hand over him to the police in the said case, tomorrow. He alongwith his brother came out of home and going to Chouk Musa Khel on foot. He had given cloth of his brother to tailor Zainullah for sewing; that at about 1700 hours when they reached at metalled road Waligai Chouk Musa Khel, he was going on foot on one side of the road while his brother on the other side of the road. In the meanwhile, a motor cycle emerged from their back side and stopped at a distance of few paces after through passing them. The drivers of the motor cycle namely Asmatullah S/O Gul Nawaz armed with Kalashnikov and accused/petitioner Rooh Niaz son of Atlas armed with repeater deboarded from the motor cycle,loaded their guns and with the intention to kill his

brother, fired at him, due to which he was hit and fell on the ground. After commission of offence, accused fled away from the spot on the said motor cycle. When he attended his brother he had already died. From the firing of accused, one minor namely Sumera Bibi, daughter of Raza Khan was also hit and sustained bullet injuries. The motive was alleged in the Crime report is previous blood feud enmity between the parties.

3. The petitioner was arrested on 04.04.2018, whereafter he applied for bail in the Court of the learned Additional Sessions Judge-V, Bannu, which was declined vide order dated 11.05.2018, hence this petition.

4. It has been contended by the learned counsel for the petitioner that except mere allegation in the Crime report there is nothing on record to connect the petitioner with the alleged crime; that petitioner is a taxi driver by profession, on the day

of occurrence he had taken the passengers to Peshawar and to this effect, the petitioners have submitted affidavits of passengers and also got recorded their statements in his favour; that plea of alibi taken by the petitioner was found favourable and the investigating officer has declared him innocent; that charring marks were found on the dead body of the deceased, which suggests that firing was made from a very close range, however, in the site plan distance between the points No. 1 to 3 and 1 to 4 is recorded as 7 feet, which cannot be caused from such a long distance, which is indicative of the fact that it is an un-witnessed crime; that the prosecution case requires further probe into the guilt of the petitioner, therefore, he deserves the concession of bail.

5. Conversely, the learned counsel appearing on behalf of the complainant and the learned A.A.G representing the State vehemently

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opposed the contention of the learned counsel for the petitioner and argued that the petitioner has specifically been named as one of the offender for committing murder of brother of the complainant Zahid Khan and causing bullet injury to the minor Sumera Bibi; that besides complainant, occurrence was also witnessed by Raza Khan , Rikshaw driver, father of injured (Sumera); that plea of alibi taken by the petitioner is concocted one and afterthought, therefore not worth consideration at this stage; that after commission of offence the petitioner remained at large for a noticeable period; that there is a short distance of 7 feet between the accused and the deceased, therefore charring marks can be caused from such a short distance; that the offence with which the petitioner is charged , falls within the prohibitory clause of Section 497 Cr.P.C, therefore he does not deserve the concession of bail.

A/Awan*

(S.B)

Mr. Justice Shakeel Ahmad.

6. I have heard arguments of learned counsel for the parties and perused the record with their valuable assistance.

7. The learned counsel for the petitioner in support of plea of alibi, made reference to affidavits dated 10-04-2018, sworn by Naeemullah and Akhar Ali. The affidavits in question have been perused wherein it was stated that service of petitioner had been hired by the deponents on 15.03.2017 at 7.00 a.m for the purpose of purchasing motor car from Peshawar and that he was present with them at Peshawar, whereafter, the statements of deponents were recorded by the I.O under section 161 Cr.P.C on 29.04.2018, and on the basis of affidavits and statements of the deponents, the petitioner was declared innocent by the Investigating officer.

8. No doubt plea of alibi like other defence plea taken at bail stage is essentially required to be examined by the Court within a

degree of care and caution. This belated swearing of affidavits in support of plea of alibi, prima facie creates an impression that it was after thought. However, I leave its evidentiary value to be decided by the learned trial Court after recording pro and contra evidence.

9. Filing of affidavits, in my view, would not make a case of further inquiry. This tendency was taken note of by the august Supreme Court of Pakistan in a case reported as *Mst. Bashiran Bibi., Vs..Nisar Ahmad Khan (PLD 1990 SC-83)* and bail granted on the basis of affidavits was cancelled. In this case at page-84, it was observed as under:-

Criminal procedure Code V of (1898).

S. 497(2)Further inquiry....mere

filing of affidavits by certain advocates

would not attract the impression

“further inquiry nor would it amount

to two versions....Evidentiary value of such evidence should be left to be determined by trial Court.”

In this respect reliance can also be placed on the case reported as *Muhammad SadiqVs....Muhammad Nisar (2003 P.Cr.L.J 209, Supreme Court at AJ &K)*, wherein it was held as under:-

Criminal procedure Code V of (1898).

Ss..497 & 498 --- Affidavit...Plea of alibiMere filing of affidavits for establishing the plea of alibi would not constitute a ground for bail either before the Investigating officer or to the Court....such plea has to be established before the trial Court.

In this behalf reference may also be made to the case reported as “*Abdul*

Haq..Vs..Ghazanfar Ali & 3 others

(PLD 1992 SC -AJ & K-53).

10. Coming to opinion of the I.O declaring the petitioner innocent on the basis of affidavits furnished by the passengers. It is now settled that opinion of the I.O is not binding upon the Courts and cannot be made any basis for granting bail. In this behalf reference may be made to the Case reported as ***Pervez Iqbal ..Vs..The State (2000 SCMR 1599).***

11. It is settled principle of law that at the bail granting stage the material available on record is to be sifted through in order to establish whether, on the face of the record, the accused person before the Court can be connected to the crime in question, hence no detail inquiry is to be conducted by the Court as held in ***“Gul Hussain’s case (2009-P.Cr.L.J-1491).*** In this case certain points have been agitated by the learned counsel for the

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petitioner, i.e presence of charring marks on the body of the deceased, despite the fact that distance between accused and deceased was 7 feet, which essentially touches the merits of the case. It is not denied that deeper appreciation or evaluation of material at the stage of bail is not permissible for the grant or refusal of bail and only tentative assessment is to be made, In this respect reliance is placed on the case reported as “*Mumtaz Vs..The State (2012 SCMR 556) and Abdullah Hayee & two others..The State (1996 SCMR 556) .*”

12. The crime in question having taken place on 15.03.2017, the petitioner was arrested on 04.04.2018, he remained absconder for more than a year and was declared as proclaimed offender. It is settled law that fugitive from law loses some of the normal rights granted by the procedural and substantive law and noticeable abscondence disentitles the absconder to the concession of bail,

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notwithstanding the merits of the case. In this behalf reliance can be placed on the case reported as ***“Muhamad Sadiq..Vs..Sadiq and others (PLD 1985 SC 182)***. In this case bail allowed by Peshawar High Court Abbott Abad Bench was cancelled by the august Supreme Court of Pakistan, wherein unexplained noticeable abscondence of six months of the accused was found, same view was expressed by their Lordship in the cases titled **“*Awal Gul ..Vs..Zawar Khan & others (PLD 1985 SC 402) & Ibrahim..Vs..Hayat Gul & others (1985 SCMR 382) and Raza Fazal-ur-Rehman..Vs..Muhammad Afzal & other (2010 SCMR 179)***.

In this behalf reference may also be made to the case reported as ***Raza Khan ..Vs.. The State through Advocate General Peshawar & another (2013 MLD 810)***.

13. In view of specific charge supported by the eye-witnesses, medical evidence and un-

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explained noticeable abscondence sufficiently provide reasonable grounds to believe that the petitioner is guilty of an offence charged with, which falls within the prohibitory Clause of Section 497 Cr.P.C.

14. It is pertinent to mention here that after completion of investigation challan has been submitted and trial is likely to commence soon. In such situation, it has all long been settled principle of law, set by august Supreme Court of Pakistan, when the trial is likely to commence or has begun, bail application should not be decided on merits and the matter be left to the trial Court, lest it may prejudice case of either side. In this respect, reliance can well be placed on the cases reported as *Muhammad Sadiq & other Vs.. The State (1980 SCMR 203), Muhammad Ismail.VS.. Muhammad Rafique & other (PLD 1989 SC 585), Mian Dad Vs. The State and another (1992 SCMR 1418),*

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Said Akbar and another Vs Gul Akhtar & another
(1992 SCMR 931) and Shahid Farooq Vs..The
State and others (2011 SCMR 1619).

15. For what has been discussed above, there is no merits in this petition, which is hereby dismissed.

It is clarified that any observations made in this order is tentative in nature, confined only to the extent of bail matter which would not influence the mind of the trial Court in any manner who shall decide the case by applying its own independent judicial mind after recording evidence.

Announced.
07.06.2018

J U D G E.

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