

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

**BA No.120-B of 2021
Muhammad Rafiq and others**

**Vs
The State & another**

JUDGEMENT

Date of hearing 01.04.2021

Petitioner by: **M/S Ahmad FARooq Khattak
and Zafar Jamal advocates.**

Respondents by: **Mr. Abid Anwar Khattak advocate.**

State by: **Mr. Shahid Hameed Qureshi Addl: A.G

SAHIBZADA ASADULLAH, J.--- The petitioners after having been booked in case F.I.R No. 789 dated 13.12.2020 under section 302/34 P.P.C, Police Station Yaqoob Khan Shaheed, District, Karak applied for post-arrest bail to the Court of learned Additional Sessions Judge, Takht-e-Nasrati, District Karak, which was declined vide Order dated 26.02.2021, hence, this petition.

2. Brief facts of the case are that the complainant while accompanying the dead-body of her deceased son, Talha Javed, reported the matter in the emergency room of Civil Hospital, Takht-e-Nasrati, District Karak, that she along with her son (deceased), and brother-in-law, were proceeding towards the house of her in-laws, when they

reached to the place of incident, the accused Muhammad Rafiq and Muhammad Khurshid sons of Jehan Shah, appeared duly armed and started firing at her son (the deceased), who got hit and fell to the ground, whereas she and her brother-in-law escaped unhurt; that the deceased was taken for treatment to Civil Hospital Takht-e-Nasrati, where after getting first aid the deceased then injured was referred to the D.H.Q Hospital, Karak, for further treatment, on reaching there the doctors declared the injured dead. On having been satisfied regarding the death of the deceased, they brought back the dead-body to the Hospital, where the matter was reported. Hence, the F.I.R (bid)

3. The learned counsel for the parties alongwith Addl: Advocate General were heard at length and with their valuable assistance the record was gone through.

4. While scanning the record it surfaced that the incident occurred at 11:20 hours, whereas the matter was reported at 13:40 hours, and the Police Station is situated at a distance of 3/4 kilometers from the spot. Though the deceased then injured was allegedly taken to the Civil Hospital, Takht-e-Nasrati and first aid was provided, but surprisingly the medico-legal report was not prepared and

the deceased then injured was allegedly referred to D.H.Q Hospital, Karak. It is pertinent to mention that the hospital, where the deceased then injured was initially taken, has its own reporting center, but the matter was not reported there. The complainant introduced one constable Sajid Iqbal, who allegedly asked the injured regarding the culprits and that the deceased then injured disclosed the petitioners as the culprits, but the said Sajid Iqbal when examined under section 161 Cr.P.C, did not mention the same. The record is silent regarding the initial examination of the deceased then injured and his capability to talk. These are the matters which are to be thrashed out by the trial Court after recording pro and contra evidence. This is yet to be established as to whether, in fact, the deceased was rushed in injured condition to the hospital and as to whether the complainant was present at the time when the incident occurred, as despite blood feud the complainant and the eye-witness escaped unhurt.

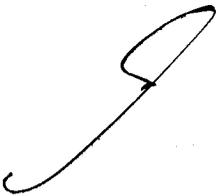
5. One of the accused/ petitioner submitted an application to the local police regarding his innocence, that on the day and time of incident he was present in Tehsil Courts, Takht-e-Nasrati, the application was marked to the concerned Investigating Officer who visited the Courts and

recoded statements of witnesses including advocates in respect of the presence of the petitioner in the Court premises at the time of incident. True that the genuineness of the plea of alibi cannot be thrashed out at bail stage and it is the domain of the trial Court to determine the same, but equally true that the Courts seized of bail matters can look into its veracity for limited purpose. As is held in case titled, "Zaigham Ashraf Vs the State and others' (2016 SCMR 18).

"7. In the case of Khalid Javed Gillan v. The State (PLD 1978 SC 256), broader principles were laid down with regard to accepting the plea of alibi of accused in that case, making tentative assessment of the materials brought on record and it was held as follows:-

"S. 497---Bail---Assessment of evidence---Court, in matters of bail, to go by its assessment of the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case---Prosecution though may prove a prosecution witness to be man of unimpeachable character for purpose of bail, however, hostile relationship between parties a circumstance not irrelevant to Court's assessment of material produced before it---Petitioner's

plea of alibi supported by affidavit of a disinterested person, a medical practitioner of high repute, not having any ostensible connection with petitioner---Bail absence of proof of Doctor's evidence being not fit to be relied upon, held, could not be properly refused---Impugned order being based on misreading of S.497, petitioner ordered to be released on bail."



6. There is no denial to the fact that the deceased received one firearm injury for which two real brothers are charged and it is yet to be determined by the trial Court that whose fire shot proved fatal, as the injury caused does not commensurate with the number of accused.

7. The question as to whether the benefit of doubt if arises out of the attending circumstances of the case, can be looked into, to favour the accused at bail stage, was answered in affirmative by the apex Court in case titled *"Muhammad Faisal Vs the State and another" (2020 SCMR 971)*.

"The accumulative effect of all these facts and circumstances create doubt regarding truthfulness of prosecution version. It is established principle of law that benefit of doubt can be extended at bail.

8. True that while seized of a bail matters tentative assessment is to be made and deeper appreciation is not warranted, but equally true that bail applications cannot be decided in vacuum and the Courts seized of bail matter should apply its judicial mind to the collected evidence brought before, so to avoid miscarriage of justice. This is what is held by the apex Court in its case titled **“Zaigham Ashraf Vs the State and others’ (2016 SCMR 18).**

“9. To curtail the liberty of a person is a serious step in law, therefore, the Judges shall apply judicial mind with deep thought for reaching at a fair and proper conclusion albeit tentatively however, this exercise shall not to be carried out in vacuum or in a flimsy and casual manner as that will defeat the ends of justice because if the accused charged, is ultimately acquitted at the trial then no reparation or compensation can be awarded to him for the long incarceration, as the provisions of Criminal Procedure Code and the scheme of law on the subject do not provide for such arrangements to repair the loss, caused to an accused person, detaining him in Jail without just cause and reasonable ground.”

The cumulative effect of what has been stated above, leaves no room to hold that the petitioners have been succeeded in

making out a case for bail, resultantly, this bail petition is allowed and the accused/ petitioners Muhammad Rafiq and Muhammad Khursheed are admitted to bail, subject to furnishing bail bonds amounting to Rs.2,00,000/-(two lac) each with two sureties each in the like amount to the satisfaction of Illaqa Judicial Magistrate/ MOD concerned.

9. Above are the detailed reasons of my short order of the even date.

Announced
01.04.2021
Yousaf Khan/C.O



JUDGE

(S.B)
Hon'ble Mr. Justice Sahibzada Asadullah



SCANNED

0 2 APR 2021


Khalid Khan