SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Mohammad Azam Khan, C.J.
Raja Saeed Akram Khan, J.

Criminal Appeal No.06 of 2016
(Filed on 21.01.2016)

1. Farzana Begum, widow of Basharat Hussain,
2. Mousa Begum wife of Tasadaq Hussain,
3. Muhammad Banaras s/o Nawab Khan, caste Sudhan r/o Andral Holar, Tehsil Sehnsa, District Kotli.
4. Muhammad Hafiz s/o Muhammad Sher, caste Sudhan r/o Andral Holar, Tehsil Sehnsa, District Kotli.

….APPELLANTS

VERSUS

1. Sohail Umer s/o Umer Hussain, caste Sudhan, r/o Qila Andral Holar, Tehsil Sehnsa, District Kotli.

….RESPONDENT

2. The State through Advocate-General Azad Jammu & Kashmir.

....PROFORMA-RESPONDENT

[On appeal from the judgement of the Shariat Court dated 30.12.2015 in Revision Petition No.172 of 2015]

FOR THE APPELLANTS:	Raja Inamullah Khan, Advocate.
FOR THE ACCUSED:	Raja Imtiaz Ahmed Khan, Advocate.
Date of hearing:	22.12.2016

JUDGMENT:

Raja Saeed Akram Khan, J.— The supra titled appeal has been addressed against the judgment of the Shariat Court dated 30th December, 2015, whereby, while accepting the revision petition filed by the accused-respondent, herein, he has been released on bail.

2. Necessary facts for disposal of the instant appeal are that the complainant,

Muhammad Hafeez, lodged a report at Police Chowki Holar, stating therein, that on 01.03.2015, at about 11:00 a.m., Basharat Hussain s/o Banaras was going towards the forest for grazing his cattle, when Umer Hussain and Sohail Umer, accused, having common intention while abusing attacked him. Umer Hussain, accused fired with 12-bore gun upon Basharat Hussain which hit him on his chest. He got seriously injured and fell down. On hearing hue and cry, Farzana Begum, the wife of Basharat Hussain, reached at the place of occurrence. Umer Hussain, accused also fired at Farzana Begum which hit her at her left arm. In the meantime, Sajjad Tassadaq s/o Muhammad Tassadaq also came at the spot. As soon as he reached, accused, Sohail Umer, who was also armed with 12-bore gun, fired upon Sajjad Tassadaq, which hit him on his chest, and he got seriously injured.

Basharat Hussain and Sajjad Tassadaq succumbed to the injuries on the spot. After the commission of offence, the accused fled away from the place of occurrence. On this report, a case in the offences under sections 302, 324, 341, 337-F (i), 504 and 34, APC and section 15(2) of the Azad Jammu & Kashmir Arms Ordinance, 2015, was registered against the accused. After registration of the case, the accused were apprehended by the police. Sohail Umar, accused filed a post arrest application for grant of bail before the Additional District Court of Criminal Jurisdiction Sehnsa on 11.09.2015. The learned trial Court, after necessary proceedings, rejected the application filed by the accused, Sohail Umar. Feeling dissatisfied, the accused, Sohail Umar filed a revision petition before the learned Shariat Court which has accepted

through the impugned order, hence, this appeal.

3. Raja Inamullah Khan, Advocate, the learned counsel for the complainant-appellants, argued that the learned Shariat Court committed a grave illegality while releasing the accused on bail. He added that the respondent is duly nominated in the promptly lodged FIR with a specific role. He submitted that the learned Shariat Court erred in law while not taking into consideration that the material collected by the prosecution during investigation fully implicates the accused in the commission of offence. He contended that the presence of the accused at the place of occurrence has not been denied. Moreover, the accused remained absconder for more than two months and a person fugitive from law is not entitled for any discretionary relief but this aspect of the case escaped the

notice of the Shariat Court. He added that the allegation levelled against the accused is that at the time of occurrence, he fired upon Sajjad Tassadaq with 12-bore gun which hit him on his chest and as a result of that injury, he died on the spot. The medical report fully corroborates the injury attributed to the accused. He added that according to the settled principle of law the Court is duty bound to make tentative assessment while dealing with the bail matter rather to go into the depth, but the learned Shariat Court has not attended this principle of law while passing the impugned judgment. He contended that it is a broad-day light occurrence and all the prosecution witnesses fully support the prosecution story including the injured witness. No enmity of the witnesses came on the record to falsely implicate the accused in the commission of offence. He further

contended that the learned Shariat Court failed to examine the record in its true perspective as it escaped the notice of the Court that the accused, herein, along with co-accused, Umar Hussain, participated in the occurrence with common intention and in the result of which two lives of innocent person have been lost. He added that the occurrence took place on 03.03.2015, whereas, the accused went to hospital for medical treatment on 06.03.2016, but no explanation in this regard has come on the record.

4. On the other hand, Raja Imtiaz Ahmed, Advocate, the learned counsel for the accused-respondent, strongly opposed the arguments advanced by the learned counsel for the complainant-appellants. He submitted that the learned Shariat Court exercised the discretionary powers in a legal manner and has not committed any illegality while

extending the concession of bail to the accused. He added that the accused has been enroped in a false case. He added that the accused came at the place of occurrence to rescue his mother but he was also beaten severely along with his mother. The recovery of 12-bore gun was not made on the pointation of the accused. He contended that injury sustained by the accused, i.e. the fracture in the finger shows that grappling was made during the occurrence. He further contended that according to the findings of the investigating officer, appointed on the choice of complainant party, the accused was empty handed at the time of occurrence. These findings have not been challenged by the prosecution at any forum. He strongly argued that once bail has been granted by a Court of competent jurisdiction, there must be some extraordinary circumstances to cancel the

same, whereas, no such circumstances are available in the case in hand. The *challan* has already been submitted in the Court of competent jurisdiction and the trial is in progress, the accused is no more required for further investigation, thus, at this stage sending the accused behind the bar would serve no useful purpose. He has relied upon the case reported as *Fazal-e-Rabi vs State and another* [2008 SCR 495]

5. Mr. Sadat Ali Kiani, Additional Advocate-General adopted the arguments advanced by the learned counsel for the complainant-appellants.

6. We have heard the arguments of the learned counsel for the parties and gone through the record made available along with the impugned judgment. The accused-respondent is implicated in the murder of one

Sajjad Tassadaq. The allegation levelled against him is that at the time of occurrence, he was armed with 12-bore gun and fired upon the deceased which hit him at his chest, in the result of which he succumbed to the injuries. The record shows that the investigation of the case was once completed, but on the request of the complainant party, the matter was reinvestigated by SSP Mirpur. During investigation both the investigating officers concurred that at the time of occurrence the accused was empty handed. In this way, this aspect of the case *prima facie* makes the case doubtful and it is settled principle of law that benefit of slightest doubt must be extended to the accused even at bail stage. Reference may be made to a case reported as *Zaheer Ahmed & another vs. Ibrar Hussain & 7 others* [2014 SCR 1667], wherein, it has been observed as under:-

"8. After examining the material available on record it appears that the occurrence was not pre-mediated and same has been occurred due to sudden provocation on the altercation took place between the deceased and one Muhammad ghaffar. Therefore, it can safely be held that it would be prejudice to record any findings regarding vicarious liability as it is job of the trial Court who ascertained and determined the fact of vicarious liability after evaluation of the evidence brought on record which stage has not come as yet. It is cardinal principle of law that while dealing with the bail matters, the Courts are bound to confine themselves to the tentative assessment of the material available brought on record rather to go into the deeper appreciation of the

> evidence, as the basic concept of the bail is, that no innocent person be kept behind bars until and unless prove guilty. Every accused is deemed to be innocent until his guilt is proved. Law cannot be stretched in favour of the prosecution, but the benefit of doubt must go to the accused even at bail stage. It is important to remember that bail cannot be withheld as a punishment……."

Similarly, in a case reported as *Kareem Dad vs. Zaheer & another* [2004 SCR 36], it has been observed by this Court as under:-

> "15. On the above premises of reasoning and the material placed before the Court by the prosecution, reasonable grounds do not exist to believe that the accused-respondent has been prima-facie guilty of commission of offence of abetment of murder. It is a settled law that the benefit of slightest doubt

> arising in the case goes in favour of the accused even at the stage of bail. Our aforesaid view is supported by a reported case titled *Babar Hussain vs. Muhammad Rashid Khan and others* [1999 SCR 507]"

In another case reported as *Muhammad Munir Awan & 3 others vs. Azad Jammu & Kashmir Ehtesab Bureau* [2005 SCR 109], it has been held as under:-

> "5. The Courts have time and again held that where after hearing the prosecution and defense version, it is not possible for the Court to hold that the version given by the accused in a case was not absolutely false, the benefit of doubt would go to him. In the same way when tow views are possible, the one benefiting the accused is to be preferred. In my view at this stage of the case when the stand of accused-appellant finds support from

> Government Notification dated 19.09.1998, he cannot be denied the benefit of bail merely on the basis of accusation which is yet to be proved……..”

7. The recovery of gun admittedly has not been made on the pointation of the accused. Although, the fate of such recovery shall have to be seen by the trial Court at the time of conclusion, however, this part makes the case of the accused one of further inquiry. So far as the argument of the learned counsel that the accused remained fugitive from law, therefore, he is not entitled to the concession of bail, is concerned, it may be observed here that mere abscondence does not disentitle the accused from the concession of bail, if he is otherwise entitled for the same. Moreover, it may be observed that no proceedings have been found initiated to declare the accused as absconder, thus, in absence of such material,

the accused cannot be declared as fugitive from law/absconder. The injury attributed to the accused leads us to agree with the reasoning assigned by the learned Shariat Court while accepting the revision petition. The accused remained in hospital due to injury caused to him and the medical report supports the stance taken by the accused. The accused was released on bail vide order dated 30.12.2015 and now almost one year has been elapsed, thus, at this stage, sending the accused behind the bars would not serve any useful purpose as investigation has already been completed and he is no more required for further investigation, the trial is in progress and statement of one witness has been recorded. In such state of affairs, this Court always reluctant to cancel the bail granted by the Court of competent jurisdiction. The appellants failed to substantiate the

extraordinary circumstances to recall the order passed by the Shariat Court. There is also no allegation of misuse of concession of bail and it is celebrated principle of law that once bail has been granted by a Court of competent jurisdiction there must be overwhelming circumstances to cancel the same. The learned Shariat Court assessed the material available on record tentatively and rightly came to the conclusion that the case of the accused comes within the purview of further inquiry. It may be observed here that if from the tentative assessment, it appears that the case of the accused is one of further inquiry falling within the ambit of Section 497 (2), Cr.P.C. then the grant of bail becomes the right of the accused. Reliance may be made on a case reported as *Zaigham Ashraf vs. State, etc.* [PLJ 2016 SC 14], wherein it has been held as under:-

"11. In the instant case, as discussed above, the plea of *alibi* of the accused has not been disbelieved by the Prosecution rather it was accepted after due verification from the Prison Authorities and Record, and it was for this reason that the present petitioner was subsequently charged for crimes u/s 109 and 120-B, PPC. Thus, in this way, his presence from the crime spot at the time of commission of the present crime stands excluded.

Keeping in view the two conflicting versions; one given by the complainant in the FIR and the other by the Investigating Agency based on documentary evidence with regard to the plea of *alibi,* the case of the present petitioner has become certainly one of further inquiry, falling within the ambit of sub-section (2) of

> Section 497, Cr.P.C., where grant of bail becomes the right of accused and it is not a grace or concession, to be given by the Court. In the absence of any exceptional ground or reason, denial of bail in such a case would amount to exercise a discretion in a manner, not warranted by law and principle of justice."

The result of above discussion is that finding no substance, this appeal stands dismissed.

Muzaffarabad JUDGE CHIEF JUSTICE
___01.2017