SUPREME COURT OF AZAD JAMMU & KASHMIR

[Shariat Revisional Jurisdiction]

PRESENT:
Ch. Muhammad Ibrahim Zia, CJ.
Raja Saeed Akram Khan, J.

Cri. Revision No.5 of 2018
(Instituted on 30.6.2018)

1. Waqas Khalid s/o Muhammad Khalid, caste Maldiyal, r/o Padar Muhammad Ali Khan, Tehsil Hari Gehl, District Bagh, presently in Judicial lockup, District Jail Bagh.

2. Muhammad Usman Khan s/o Mansha Khan, caste Maldiyal r/o Rawali, Tehsil Hari Gehl, District Bagh, presently in Judicial Lockup, District Jail Bagh.

.... PETITIONERS

v e r s u s

1. State through Advocate-General of Azad Jammu & Kashmir, Muzaffarabad.

2. Muhammad Sarfraz Rana s/o Sardar Ahmed Khan r/o Kafal Garh, Mang Bajri, Tehsil Hari Gel, District Bagh (complainant.)

3. Raja Asif /so Muhammad Nazir Khan, caste Narma, r/o Kafal Garh, Tehsil Hari Gehl, District Bagh.

..... RESPONDENTS

(On revision from the order of the Shariat Appellate Bench of the High Court, dated 5.6.2018 in Cri. Revision No.48 of 2018]

FOR THE PETITIONERS: Ch. Shuakat Aziz, advocate.

FOR THE STATE: Raja Ikhlaque Hussain Kiani, Additional Advocate-General.

FOR THE COMPLAINANT: Raja Ibrar Hussain, advocate.

Date of hearing: 31.10.2018

JUDGMENT:

Raja Saeed Akram Khan, J.—The titled revision petition has been preferred against the order passed by the learned Shariat Appellate Bench of the High Court dated 5.6.2018, whereby the Revision Petition filed by the petitioners, herein, has been dismissed.

2. The gist of the facts forming the background of the case in hand is that the petitioners were indicted in a case involving the offences falling under sections 302, 341, 147, 148, 149, 337 and 34, APC, registered at Police Station

Bagh on 8.5.2017. They were apprehended after registration of the case. They moved an application before the District Court of Criminal Jurisdiction Bagh on 27.12.2017, for release on bail, which was rejected vide order dated 20.1.2018. The order dated 20.1.2018 was assailed before the learned Shariat Appellate Bench of the High Court (to be referred as the High Court hereinafter), through a revision petition, which has culminated into the impugned judgment.

3. Ch. Shuakat Aziz, advocate, counsel for the accused-petitioners, submitted that the learned the High Court failed to exercise the discretion while dismissing the revision petition. He added that the learned High Court also failed to appreciate the material, made available on the record, while handing down the impugned judgment. He submitted that the case was thoroughly investigated thrice but nothing could be collected against the petitioners, however, they were implicated in the case on the statement of one Abdul Mannan alias Mohsin, who, later on, recoiled from his statement while

submitting his affidavit and also retracted from his statement recorded under section 164, Cr.P.C., which made the case of the petitioners, one of further inquiry and in such like circumstances, bail can be granted as a matter of right but this important legal proposition escaped the notice of the learned High Court. He submitted that the statement of the witness was obtained after making severe torture. He further submitted that the learned High Court fell in error of law while not taking into account that moving the High Court repeatedly on the part of the complainant party for seeking direction for reinvestigation, itself shows that the matter requires further probe, as the case fully comes within the purview of section 497(2), Cr.P.C. He also submitted that no specific role has been attributed to the petitioners except inflicting the injuries at the elbow of the deceased. In continuation of the arguments, the learned counsel submitted that even one Muhammad Jameel, who was attributed the main injury, was exonerated under section 169, Cr.P.C. and all the other accused, who were apprehended in

the case, have been discharged, which makes the case of the petitioners at par with them and the principle of consistency is fully applicable but the learned High Court has not examined the case from this angle. The learned counsel referred to the statements of the witnesses namely Ikhlaq alias Gora and Abdul Mannan alias Mohsin, recorded under section 161, Cr.P.C., while submitting that no one has specifically assigned any role to the petitioners. Petitioner No.2, Muhammad Usman Khan, was arrested in the case after two months of the occurrence. He added that the medical/postmortem report also does not support the version taken by the prosecution witnesses, as no definite cause of death has been given and according to the medical/postmortem report, the cause of death was the injury ascribed on the forehead of the deceased, which may have been caused due to falling down over hard surface, as the deceased was of 60 years of age. The learned counsel submitted that the petitioners are behind the bars for more than 1½ year and there is no possibility of commencement of

the trial in near future and it is settled law that nobody can be kept behind the bars for an indefinite period, which amounts to the punishment without trial. The learned counsel submitted that the whole story is doubtful and benefit of doubt can be extended to the accused even at bail stage. The learned counsel referred to and relied upon the cases reported as *Muhammad Ghalib vs. The State* [1993 SCR 122], *Mst. Jamila Bgum vs. Ghulam Hussain* [1994 SCR 104], *Zahid Paris & another vs. The State* [1995 SCR 104], *Muhammad Nasim Khan vs. The State* [1995 SCR 237], *Muhammad Yunus & another vs. Malik Muhamamd Nawaz & 5 others* [1997 SCR 125], *Muhammad Afzal vs. Zahid Mehmood & 3 others* [1997 SCR 372], *Sudheer Shah alias Kaka Shah vs. The State & another* [2016 SCR 1653] and *Rashid Hussain vs. The State & another* [2018 SCR 260].

4. On the other hand, Raja Ibrar Hussain, advocate, appearing on behalf of the complainant and Raja Ikhlaq Hussain Kiani, the learned Additional Advocate-General, appearing on behalf of the State,

submitted that both the courts below have rightly made the tentative assessment of the material collected by the prosecution. The learned counsel added that no *mala fide* or ill-will has come on the record to falsely implicate the petitioners in the case, as is evident from the contents of the FIR. They submitted that the accused-petitioners have been enroped on the basis of the material brought on the record during the investigation. The learned counsel further submitted that the accused-petitioners are influential persons, as one of their relatives is serving as the Superintendent of Police. The complainant could not get justice from the Police and was constrained to file the writ petition for seeking the order for reinvestigation in the case. It was further submitted that under the influence and pressure of the said Police Officer, the real culprits of the offence were not traced out earlier. On the apprehension of the complainant, the case was investigated thrice by the Joint Investigation Teams. The learned counsel submitted that the real story of the murder has not completely been unrevealed,

whereupon the complainant has filed a writ petition before the High Court seeking direction for reinvestigation, which is subjudice before the learned High Court. The learned counsel forcefully submitted that while dealing with the bail matters, only tentative assessment of the material brought on the record can be made instead of going into the depth of the case, which is not permissible under law. The learned counsel added that there is sufficient material to connect the accused-petitioners with the commission of offence, on the basis of which they can be held liable for the offence punishable with death or imprisonment of life. The learned counsel for the complainant referred to and relied upon the cases reported as *Haji Punhal vs. The State* [PLD 2002 Karachi 99], *Umar Hayat & another vs. The State* [2009 P. Cr.L.J. 1058] and *Rab Nawaz & 2 others vs. The State* [2015 P.Cr.L.J. 1531].

5. We have heard the learned counsel for the petitioners, the complainant and the learned Additional Advocate-General and gone through the impugned judgment along with the record made

available.

6. The petitioners were booked in a case on the allegation of the murder of one Muhammad Anwar Khan. Initially, they were not nominated in the FIR and at some subsequent stage, they were indicted as accused persons on the statement of Abdul Mannan alias Mohsin, Naziran Begum and Ikhlaque, the witnesses, whose statements were recorded under section 161, Cr.P.C. It spelt out from the record that one of the witnesses, upon whose statement, the prosecution heavily relies, after making the petitioners involved in the case, has recoiled from the statement while taking the stance that the statement was got recorded after severe torture by the police and in this regard he has also submitted an affidavit. In rebuttal, nothing has come on the record. The said witness also retracted from the statement recorded under section 164, Cr.P.C. Although the evidentiary value of the said document and the statement shall be seen during the trial but for the bail purpose, the same can be taken into account. Moreover, the complainant is still not fully

satisfied with the investigation and has approached the learned High Court for seeking direction for transfer of the investigation. The case has already been investigated thrice. In all the three rounds of investigation, no specific role has been assigned to the petitioners, rather the Investigation Office, in the incomplete challan, has recorded in the following terms:-

> "۔۔۔اس طرح مقدمہ ہذا کی اس وقت کی تفتیش سے ملزم وقاص خالد قوم ملدیال سکنہ ہاڑی گہل کے خلاف جرائم زیر دفعات 302/341، PC 34 کا ارتکاب ثابت وحاوی پایا گیا ہے۔ ملزم کا منظور شدہ ریمانڈ پولیس اختتام پذیر ہو رہا ہے جبکہ ملزمان دو کس بھی قابل گرفتاری ہیں۔ اس طرح مقدمہ میں مزید تفتیش کی جانی باقی ہے۔ مقدمہ ہذا میں گرفتار شدہ ملزم وقاص خالد ولد محمد خالد قوم ملدیال سکنہ ہاڑی گہل کا منظور شدہ ریمانڈ ختم ہونے پر بذریعہ نامکمل چالان پیش عدالت مجاز کر کے استدعا ہے کہ ملزم کا التوائ برائے حوالات جوڈیشل از 18.8.017 تا 2-7-017 پندرہ ایام منظور فرمایا جائے تاکہ مقدمہ ہذا کی تکمیل تفتیش ہو کر دیگر ملزمان کے خلاف مکمل چالان پیش عدالت مجاز کیا جا سکے۔"

Similarly, from the other record made available, the matter appears to be of further inquiry and in such circumstances, the accused-petitioners cannot be kept behind the bars for indefinite period.

7. The learned counsel for the petitioners has rightly argued that approaching the learned High Court for seeking direction for change of the investigation team, itself shows that the matter requires further probe. Moreover, after examining the postmortem report, it appears that no definite opinion regarding the cause of death has been given by the Medical Officer. It has been opined that the cause of death may be the injuries found on the body, which could be the result of hitting the hard surface, as the deceased fell down after being injured. The opinion is reproduced as under:-

> "In my opinion the cause of death is blunt trauma to temporo frontal (RT) of skull bleeding to repressed fracture ruptured of membranes and extradural hematoma and with massive bleeding from nose to mouth leading to cardio pulmonary arrest.
>
> Final report will be given/issued after chemical and Histopathological examination/reports of the specimen.
>
> (Blunt trauma could be due to assault/fall from cardiovascular event. Based on postmortem examination and forensic report, my final opinion is that the cause of death is head injury.)"

8. While taking into account the whole material in juxtaposition, it can safely be held that no direct evidence has been brought on the record, on the basis of which, the petitioners could be connected with the offence. The matter is one of further inquiry. Mere on the basis of recovery, it cannot be believed that the petitioners have committed the offence punishable with death or imprisonment for life. Moreover, the statements of the witnesses recorded under section 161, Cr.P.C., which made the basis for involvement of the petitioners, were recorded after considerable delay of more than two months and the same is the position regarding the recovery. The authenticity of the statements/recovery shall be judged at the time of recording evidence. The matter is still under investigation and trial could not commence due to the stay order issued by the learned High Court. In this scenario, after making tentative examination of the material discussed hereinabove, it can safely be held that the petitioners cannot be kept behind bars for indefinite period, who are already in jail for the

last one year and four months. There is no possibility of commencement of trial in near future. Keeping the accused-petitioners behind bars for indefinite period would amount to punishment without trial. We are in agreement with the argument of the counsel for the accused-petitioners that under law the benefit of slightest doubt must go to the accused, even at bail stage. In this regard, reliance can be placed on the case reported as *Farzana Begum & others vs. Sohail Umer & another* [2017 SCR 420], wherein, it has been observed by this Court, as under:-

> "…..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 defence 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....'"

In a case reported as *Abdul Khaliq vs. State and another* [2010 SCR 402] it was observed as under:—

> "…. It is celebrated principle of law that doubt, if any, which arises in the case, shall go in favour of accused

even at bail stage.”

9. The case law referred to by the counsel for the complainant is distinguishable to the facts of the case in hand, therefore, we do not intend to discuss the same.

In view of the above, the revision petition is accepted. The petitioners shall be released, if they are not required in any other case, subject to furnishing the bail bond in the sum of Rs.500,000/- (five lac rupees) each, consisting of two sureties each as well as personal bond in the like amount, to the satisfaction of the trial Court.

JUDGE **CHIEF JUSTICE**

Muzaffarabad