NAZIR AHMAD---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No. 4431-B of 2010, decided on 27th December, 2010.

NASIR SAEED SHEIKH, J.---The petitioner has been arrested in case F.I.R. No.287/2010 registered at Police Station, Khangarh, District Muzaffargarh, dated 15-6-2010. This case was originally registered under sections 324/353/186/34 P.P.C. and later on, on the death of Muhammad Ilyas injured in the occurrence on 18-6-2010 the case was converted to the offences under sections 302/324/353/ 186/34, P.P.C.

2. Briefly stating the facts of the case are that Imran Saeed, Head Constable lodged an F.I.R. that on 15-6-2010 at about 9-00 p.m. he along with constable Muhammad Ilyas riding on a motorcycle 125-Honda were patrolling the village Khangarh. When they reached near Nahar Bangla Link Road at Bridge Bhatt Waali, all of a sudden four persons who were waylaying then appeared and stopped the complainant by pointing their weapons. Although the complainant has given a description of those four persons but none of the persons is named in the F.I.R. The complainant further alleged that one of the accused who was armed with pistol made a fire which hit Muhammad Ilyas, Constable on the left down side of his shoulder. The other accused person who was armed with a rifle then fired at Muhammad Ilyas constable which hit him on his back. Muhammad Ilyas constable started bleeding profusely and fainted. The complainant then alleges that he got hold of the official weapon of Muhammad Ilyas constable and started firing in defence. In this process, the complainant was also injured by rifle fire shot on the back portion of his right foot. In the meantime Muhammad Sadiq, A.S.-I., Kaswar Abbas constable and Nazir constable arrived there and the accused fled away. One of the accused was also alleged to be armed with Sota. The injured Muhammad Ilyas was carried to the hospital where unfortunately he died on 18-6-2010.

3. For the first time, Imran Saeed, H.C. named the present petitioner in a supplementary statement got recorded on 20-6-2010 wherein he alleged that the present petitioner Nazir Ahmad, and one Ijaz are very notorious persons and may be that they have committed this crime. The present petitioner is alleged to have been arrested on 12-8-2010 by the police in connection with this case. On 27-8-2010 an identification parade was conducted under the supervision of a Judicial Magistrate wherein all the accused were identified by the complainant as well as by other witnesses to be the persons involved in the occurrence. It is in these circumstances that the petitioner was investigated and later on sent up to judicial lock up on 8-9-2010.

4. The petitioner moved for his post arrest bail before the learned District and Sessions Judge, Muzaffargarh, which was entrusted to a learned Additional Sessions Judge, who dismissed the same vide order dated 18-10-2010, hence this application.

5. It is contended by the learned counsel for the petitioner that it is an occurrence in which none of the accused is named in the F.I.R. For the first time Imran Saeed, HC/complainant nominated the accused as a suspect in his supplementary statement under section 161, Cr.P.C. on 20-6-2010. The petitioner was later on arrested on 12-8-2010 and the identification parade was conducted on 27-8-2010 in which also the learned counsel contends that the petitioner raised objection that he was previously shown to the witnesses and that he was also earlier photographed. It is next contended that no recovery of any incriminating piece of evidence has been effected from the petitioner and that the petitioner's case falls within the provisions of section 497(2), Cr.P.C. as there is a scope for further inquiry into his involvement in the case. The petitioner thus has prayed to be released on bail.

6. The learned Deputy Prosecutor-General Punjab, for the State has opposed the request for grant of bail of the petitioner by contending that although nobody is named in the F.I.R. but the purpose of registering an F.I.R. is to commence the proceedings of a criminal case. It is next contended that Sota has been recovered from the petitioner during the investigation and that he has also been identified as one of the culprits in the identification parade conducted under the supervision of a Magistrate. It is next contended that the challan of the case has already been submitted and the charge has been framed and the trial of the case has commenced.

7. I have considered the arguments of the learned counsel for the parties and have perused the record.

8. It is admitted fact in this case that nobody is named in the F.I.R. It is a matter of record that the complainant Imran Saeed nominated the petitioner in his supplementary statement for the first time on 20-6-2010 as a notorious person of the area likely to have committed the present occurrence. This supplementary statement of the complainant points out that the present petitioner was previously known to Imran Saeed and that is why he was nominated in the supplementary statement as notorious person of the area by the said complainant. The identification parade conducted by the learned Judicial Magistrate is not specific about the particular act having been committed by the petitioner during the occurrence in question. The F.I.R. narrates the occurrence in which one of the accused was only alleged to be armed with sota but there is no allegation that the said person armed with sota caused any injury to the deceased or in any other manner he is attributed any overt act in the occurrence. Although recovery of sota has been effected from the petitioner but it is not stated to be blood-stained. The submission of challan in a criminal case and the commencement of trial is one of the factors, which is considered by the Courts at the time of decision of application of the accused for his release or otherwise on bail. However, the honourable Supreme Court of Pakistan in a reported judgment Muhammad Sadiq v. Sadiq and others (PLD 1985 SC 182) laid down the following principle of law at page 188 which is reproduced:--

> "Normally, if reasonable grounds exist for believing that the accused has not committed a non-bailable offence he should not be tried at all for having committed any such offence. But if, however, sufficient grounds for further inquiry into his guilt exist there would then be some justification for putting him on trial for the offence for which he is charged but in such an eventuality the law entitles him to bail during the pendency of the trial, subject, of course, to cancel-lation of bail under section 497(5), Cr.P.C. on availability of the evidence or other sufficient cause."

In the same judgment an argument was raised that once a final report under section 173, Cr.P.C. has been submitted before the trial Court and the trial has commenced, the bail to an accused cannot be granted under section 497(2), Cr.P.C. After discussing the case law on the point the honourable Supreme Court of Pakistan held

that there is no such limitation on granting bail to such an accused person. The following portions of the judgment of the honourable Supreme Court of Pakistan at pages 189 and 190 are reproduced:--

> "Mr. Bashirullah Khan, learned Assistant Advocate - General,
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> N.-W.F.P. on the other hand, submitted that bail could not be granted under section 497(2) of the Cr.P.C. in a non-bailable offence when the final report under section 173 has already been submitted before the trial Court. In this connection, he relied upon Ch. Muhammad Khan v. Sanaullah and another PLD 1971 SC 324, wherein the learned Judges observed:--
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> "The remark by the learned Judge that 'the evidence on the Police record ex facie shows that the case of the petitioner requires further inquiry' was equally unwarranted. The final report under section 173, Cr.P.C. having been submitted in the Court of the Inquiry Magistrate and the statements of a number of witnesses recorded by him, section 497(2), Cr.P.C. was not attracted. There is no other provision in law under which a further inquiry could be made by the police."
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> The above decision was followed in Akbar Ali v. The State 1979 SCMR 132, wherein it was held that the final challan having already been submitted to the trial Court bail under subsection (2) of Section 497, Cr.P.C. could not be allowed.
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> The last mentioned judgment merely follows the dictum in the case of Ch. Muhammad Khan v. Sanaullah and another and this is so stated. We may, however, point out with the greatest respect that while taking the view, which has been expressed in these judgments, the learned Judges appear to have overlooked the words to the effect "<u>if it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be</u>...." (underlining is by us), occurring in subsection (2) of section 497. Hence, it is not possible, speaking with the utmost respect to adhere to the view taken in these judgments because in our humble opinion no such limitations to the exercise of powers of granting bail by the Court exist under subsection (2) of section 497, Cr.P.C."

9. The same principle was reiterated by the honourable Supreme Court of Pakistan in a latter judgment reported as Muhammad Ismail v. Muhammad Rafique and another (PLD1989 Supreme Court 585) wherein it was held that bail to an accused person involved in a murder case cannot be refused merely because there is a prevalent practice not to grant bail to accused of murder cases when the challan of the case has been submitted and the trial has commenced. The following two paragraphs of the reported judgment at page 588 are relevant and are reproduced below:--

> "It is apparent that when the court finds that the two essential condi-tions contained in section 497(2), Cr.P.C. are satisfied the accused shall become entitled as of right to bail. In the impugned order the learned Judge, it seems, without saying so in so many words, felt that the two conditions existed in this case- (a), that " there are not reasonable grounds for believing that the accused has committed (a) non-bailable offence"; (b), that there are sufficient grounds for further inquiry into his guilt." Accordingly the accused had become entitled to be released on bail.
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> The question then arises; whether, subsection (2) of section 497, Cr.P.C. would have operation notwithstanding the aforestated practice of this Court. Much discussion is not necessary in this behalf. When an accused person becomes entitled as of right to bail under subsection (2) of section 497, Cr.P.C., the same cannot be withheld on the ground of practice; because, the latter is relatable to exercise of discretion while the former is relatable to the exercise and grant of right."

10. The petitioner is not a previous convict so far, therefore, for the reasons recorded in paragraph 8 above, I am not persuaded to hold that there are reasonable grounds to believe that the petitioner is involved in the case when no overt act is attributed to him and there is a scope of further inquiry into his guilt.

11. In view of the above circumstances, the instant Criminal Miscellaneous is accepted and the petitioner is found to be entitled to be released on bail subject to furnishing bail bonds in the sum of Rs.2,00,000 with two sureties in the like amount to the satisfaction of the learned trial Court.

12. If the prosecution records some evidence during the trial, which involves the petitioner, prosecution shall be at liberty to move an application for the cancellation of the bail before the competent Court. This Criminal Miscellaneous stands disposed of.

N.H.Q./N-13/L Bail allowed.