HCJD/C-121

ORDER SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

CRL. MISC. NO.511-B/2014

AHMAD ALI

VERSUS

THE STATE, ETC

S.No. of order/ Proceeding	Date of hearing	Order with signature of Judge, and that of parties or counsel, where necessary.
	03-09-2014	Mr. M. Kowkab Iqbal Advocate, for petitioner in the instant petition. Mr. Liaq Khan Swati Advocate, for the petitioner in Crl. Misc. No.508-B/2014. Malik Wahid Anjum Advocate, for the complainant in both petitions. Malik Faisal Rafique, DAG. Mr. Shams SI, with record.

Through this consolidated order instant bail petition and Crl. Misc. No.508-B of 2014, are being decided as both arise out of the same FIR.

2. The petitioners Ahmed Ali S/o Ijaz Ali in Crl Misc. No.511-B of 2014, and Momin Khan S/o Abdul Khaliq in Crl. Misc. No.508-B of 2014, have sought post arrest bail in case, FIR No.244/2014, dated 23-03-2014, registered under sections 364, 109, 34 of Pakistan Penal Code, 1860 (hereinafter referred to as "PPC") at Police Station Margalla, Islamabad. Later sections 302 and 201 PPC were also added.

3. Brief facts as narrated in the FIR, are that the father of the deceased reported that Faizan Khan and Ahmed Ali along with some other unknown persons picked up his son from his house. When his son did not return he contacted him on his cell phone who informed him that he would return soon.

However, when he did not return the next morning he tried to contact him on his cell phone which was not responding and, therefore, the case was registered. The main accused and Ahmed Ali were arrested on 25-03-2014, and the body of the deceased was also recovered on the same date, and accordingly sections 302 & 201 of PPC were also added in the case.

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4. The learned counsel for the petitioner contends that; sections 364 and 302 of PPC are not attracted simultaneously, reliance is placed on *"Mushtaq and another vs The State",* 1972 P Cr L J 933; if it is to be assumed that the prosecution story is to be believed even then a case of bail is made out; the petitioner has no role in the murder; common intention is a subjective opinion and there must be compelling reasons for forming a tentative opinion; there was no motive on part of the petitioner for commission of the offence; no witness has given a statement against the petitioner, particularly describing his specific role; the prosecution case as per record is to the extent that the petitioner had travelled with the main accused Faizan Khan from Malaysia to Lahore; motive is to the extent of the main accused namely Faizan Khan; there have to be compelling reasons for a common intention, reliance is placed on *"Nisar Ahmed vs The State & Others",* 2014 SCMR 27; in so far as the petitioner is concerned his case falls within the category which will require further inquiry; the petitioner was not known to the deceased and there has to be a connection attributing motive to the petitioner, reliance is placed on 1996 SCMR 2215, *"Commissioner, Sindh Employees' Social Securities Institution and another vs Messrs E.M. Oil Mills & Industries Ltd., S.I.T.E., Karachi and 2 other",* 2002 SCMR 39, and *"Tasaver & another vs The State",* 2006 P Cr. L J 629; according to the report submitted under section 173 Cr.P.C, the role of the petitioner has been mentioned in general without ascribing a specific role; no overt act has been attributed to the petitioner, reliance is placed on *"Muhammad Khan and another vs The State",* 1999 P Cr. L

J 1934, *"Rasool Bakhsh vs The State",* 2003 P Cr. L J 119, and *"Nisar Ahmed and another vs The State",* 2005 P Cr. L J 652; the prosecution case rests on the statement made by the co-accused against the petitioner which for the purposes of bail has no bearing, reliance is placed on *"Doctor Khan alias Qadir vs The State",* 2010 YLR 306; the question of vicarious liability cannot be determined without recording of evidence, reliance is placed on *"Muhammad Asif Khan vs Ehtesab Bureau",* 2005 YLR 385, *"Muhammad Anwar Ali and others vs The State",* 2007 YLR 408, and *"Mst. Zareena vs The State",* PLJ 2013 Cr. C. 704; for the purposes of section 364, there has to be an independent witness, reliance is placed on 1965 P Cr. L J 569, and *"Muhammad Hassan vs The State",* 2004 P Cr. L J 649; the case of the petitioner is that of a further inquiry and as such the learned counsel urges the concession of bail to the petitioner.

5. Conversely, the learned counsel for the complainant has argued that; the main accused Faizan Khan and the present petitioner were both studying in Malaysia, they travelled to Pakistan, landed at Lahore and proceeded to Islamabad in a rented car; the father of the main accused had made arrangements for avenging the deceased for allegedly posting pictures of his daughter and Faizan Khan's sister on the website; the deceased was about 20 years old and the only son of a low ranking employee; deceased nor his father had any enmity with the petitioner and, therefore, there is no reason to doubt the story as narrated in the FIR; statement of the accused under section 161 Cr.P.C, and the statements of other accused confirms the prosecution story; the main accused Faizan Khan and his father Riffat Ullah Khan are influential people and Riffat Ullah Khan remains absconding; the crime scene is the Farm House, admittedly owned by Riffat Ullah Khan; the body of the deceased was recovered on 25-3-2014, on the information of the present petitioner; other recoveries such as blood stained shirt with bullet hole and the shoes of the deceased were also recovered on the information and pointation of the petitioner and the main accused; other articles such as pieces of

cell phone belonging to the deceased, his wallet and an iron rod with which the deceased was tortured were also recovered as pointed out by Faizan Khan; the recovery of Iron ladder to which the body of the deceased was tied and his ATM card were also recovered after having been pointed out by Faizan Khan and the petitioner; the murder weapon has also been recovered and cartridges fired from the murder weapon matched; the data of cell phones of the petitioner and the main accused confirms their connection; the recovery of burnt garments of the deceased were also affected as pointed out by the petitioner and the principal accused; the iron spade used for digging the ground to bury the body of deceased and the rope with which he was tied were also recovered as pointed out by the petitioner; the petitioner is directly nominated in the FIR; the Challan was submitted on 20-4-2014, and since then the trial is being delayed by the main accused by filing frivolous applications; for the purposes of considering the bail of the present petitioner the prosecution has collected sufficient evidence to connect the petitioner to the abduction and thereafter murder of the deceased; on these grounds it is forcefully urged that bail under such circumstances be refused.

6. The learned Standing Counsel adopted the arguments of the learned counsel for the complainant and in addition contended that the petitioner was promptly named in the FIR, and the father of the deceased had no reason or any enmity to have falsely named the petitioner; all named accused including the petitioner had came to the house of the father of the deceased to pick him and the deceased was last seen with the petitioner and other accused and after that he remained untraceable till his dead body was found; the evidence brought on record and the circumstances of this case do not entitle the petitioner to bail.

7. In rebuttal, the learned counsel for the petitioner contended that at bail stage statement under section 161 of Cr.P.C, cannot be considered and there is nothing on record which would give rise to reasonable grounds for believing that the petitioner had specific role in the murder.

8. After giving careful consideration, arguments of the learned counsels and perusal of the record with their able assistance the findings of this Court are as follows:

9. The petitioner is named in the FIR, and there is nothing on record to show that father of the deceased had any enmity or has any reason to falsely implicate the petitioner. The record, prima-facie, reveals that the petitioner and the main accused were living together in Malaysia, they travelled to Lahore, reached Islamabad in a rented car, father of the main accused had made arrangements so as to avenge the deceased for posting his daughters photographs on the web site, they picked up the deceased from the house of his father and took him to the Farm House owned by the absconding co accused. The deceased was tortured and thereafter murdered. The main accused and the petitioner had made their reservations to escape to Malaysia after committing the offence. Moreover, the recovery of the dead body of the deceased and several other articles were affected on the information and pointation of the petitioner. The prosecution has collected other material during the investigations which, prima facie, connects the petitioner, inter alia, to the offence under section 302 PPC. No doubt, deeper appreciation of material on record at the bail stage is deprecated but the material collected by the prosecution during investigations raises reasonable grounds for connecting the petitioner to the offence. Nothing has been placed on record to show that the case was outcome of an enmity. Tentatively, the prosecution has collected sufficient incriminating material against the petitioner to connect him to the offence of 302 PPC.

10. In the circumstances this Court is of the opinion that the petitioner is not entitled to bail and as such the petition is dismissed.

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11. The learned counsel for the petitioner contends that; the petitioner is a Chowkidar ("Watchman"), at the crime scene i.e. Farm House of the absconding accused namely Riffat Ullah Khan; according to the prosecution story the only role attributed to the petitioner is that of causing disappearance of evidence of the offence under section 302; as per the prosecution story, during the course of investigations, on 31-03-2014, the main accused Faizan Khan and the petitioner in Crl. Misc. No.511-B of 2014, stated that petitioner Momin Khan had assisted in causing disappearance of dead body of the deceased and washing the crime scene; the petitioner was arrested on 01-04-2014; his servant quarter was at a considerable distance from the main building where the murder took place and it is admitted that the petitioner was neither at the crime scene nor had any role in the murder; the only recovery affected from the present petitioner was an iron cot on which the dead body of the deceased is alleged to have been placed after the offence had taken place; there is no statement nor any shred of evidence collected by the prosecution connecting the petitioner to the offence of murder; the role attributed to the present petitioner and the material on record at best will attract the offence under section 201 of PPC, which falls in the non prohibitory clause of section 497 of Cr.P.C; the petitioner has no criminal record let alone a conviction; the investigations qua the petitioner have been finalized and he is no more required for the purpose; his further custody will not serve any beneficial purpose; he is not named in the FIR; even in the impugned order dated 21-7-2014, the learned Additional Sessions Judge-West, Islamabad, had observed that the only role attributed to the petitioner is of screening of the dead body of the deceased and destroying other evidence of the case; the iron cot/bed recovered on his pointation was found as not being blood stained and, therefore, to the extent of the present petitioner it is a case of further inquiry; the petitioner did not have any role in the abduction; places reliance on *"Muhammad Hanif vs The State and another",* 2010 P Cr L J 785, *"Subeh Sadiq alias Saabo alias Kalu vs The State*

and others", 2011 SCMR 1543, *"Shafique Hussain vs The State",* 2007 P Cr L J 60, *"Muhammad Khan vs The State",* 2010 P Cr L J 952; The report submitted under section 173 of Cr.P.C, further confirms that the role ascribed to the extent of Momin Khan is for causing disappearance of evidence.

12. On the other hand the learned counsel for the complainant states that the petitioner as a Watchman at the Farmhouse i.e. the crime scene was aware of the torture and the subsequent murder; the petitioner had assisted in digging of the grave and burial of the dead body, therefore, he opposes the bail.

13. The learned Standing Counsel adopts the arguments of the learned counsel for the complainant and as such opposes the bail. However, it is admitted that the role of the present petitioner ascribed to him in the Challan and during investigation is to the extent of causing disappearance of evidence of the offences

14. After giving careful consideration, arguments of the learned counsels and perusal of the record with their able assistance the findings of this Court are as follows:

15. The case of the petitioner in Crl. Misc. No.508-B of 2014, is distinguishable from that of Ahmed Ali in Crl. Misc. No.511-B of 2014. No doubt that as a Watchman, he remained present at the Farmhouse. The only role ascribed to him is that after the deceased was tortured and subsequently murdered, he had assisted in concealing the evidence. The petitioner was admittedly in the servant quarter of the Farm when the murder took place in the main building. He is alleged to have caused the disappearance of evidence of the offence under section 302 of PPC. Whether the petitioner had actually placed the body on the cot after his murder and assisted the main accused, calls for further probe. The offence attracted in his case is to the extent of section 201 of PPC, which falls under the non prohibitory clause of section 497 of Cr.P.C. The investigations qua

the petitioner are complete and his incarceration will not serve any useful purpose. The petitioner has no criminal record let alone being convicted. Nothing has been placed on record to show that there may be reasons to apprehend that he might abscond.

16. By now the law and principles for granting bail in such cases are well settled. It is important to note that in the case of *'Zafar Iqbal Versus Muhammad Anwar and others'* (2009 SCMR 1488), a larger Bench of the Honourable Supreme Court has elucidated the principles for considering the grant of bail, where offences fall within the non-prohibitory clause. In the light of the said principles it has been held that where offences fall within the non-prohibitory clause, the granting of bail has to be considered favourably as a rule, but may be declined in exceptional cases. Examples, though not exhaustive, of such extraordinary and exceptional cases have further been listed as follows:

i) Where there is likelihood of abscondance of the accused;
ii) Where there is apprehension of the accused tampering with the prosecution evidence;
iii) Where there is danger of the offence being repeated, if the accused is released on bail; and
iv) Where the accused is a previous convict.

17. The Hon'ble Supreme Court of Pakistan reaffirmed and reiterated the principles as laid down in the earlier judgments of Subhan Khan Versus the State (2002 SCMR 1797) and Tariq Bashir and five other vs The State (PLD 1995 SC 34). The said principles have been consistently followed. Reliance may also be placed on the case of Riaz Jafar Natiq Vs. Muhammad Nadeem Dar and others (2011 SCMR 1708).

18. In the light of the above this Court is of the opinion that the case of petitioner is distinguishable on the facts and circumstances more particularly

when the prosecution also admits that he had no role more than causing disappearance of evidence of the offence of Section 302 PPC.

19. This Court is, therefore, of the view that the petitioner is entitled to bail.

20. In the circumstances the petition Crl. Misc. No.508-B of 2014, is allowed and the petitioner is admitted to bail, subject to furnishing bail bonds in the sum of Rs.200,000/- (Rupees Two Hundred Thousand) with one surety in the like amount to the satisfaction of learned Trial Court.

21. Needless to mention that in both the above petitions the findings and observations of this Court are based on tentative assessment, which shall not affect trial of this case in any manner.

i. Crl. Misc. No.508-B of 2014 is allowed and petitioner Momin Khan s/o Abdul Khaliq is admitted to bail in the above terms.

ii. Crl Misc. No.511-B of 2014 is dismissed and, therefore, bail sought by the petitioner Ahmed Ali s/o Ijaz Ali is refused.

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on _____.

JUDGE

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