IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
Mr. Justice Iftikhar Muhammad Chaudhry, HCJ.
Mr. Justice Rahmat Hussain Jafferi
Mr. Justice Ghulam Rabbani

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Criminal Petition No.100-K of 2009

Muhammad Ramzan

...Petitioner

Versus

Rahib & others

...Respondents

For the petitioner:	Mr. Shakeel Ahmed, ASC Mr. Mazhar Ali B. Chohan, AOR
For the State:	Mr. Akhtar Rehana, Addl. P.G.Sindh
Respondent No.1:	N.R.
Date of hearing:	2.2.2010

ORDER

Let the Registrar obtain by fax progress report of trial in Session Case No.105/2008 (The State V. Zafar Iqbal and others) pending on the file of IInd Additional Sessions Judge, Khairpur. Adjourned to 4th February, 2010.

2. If the trial has not commenced, learned presiding officer may submit the reasons for the same as well.

Karachi, the
2nd February, 2010
Nisar/*

(47)

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

"

Present:
Mr. Justice Iftikhar Muhammad Chaudhry, CJ.
Mr. Justice Rahmat Hussain Jafferi.
Mr. Justice Ghulam Rabbani.

Criminal Petition No.100-K of 2009
On appeal from order dated 26.08.2009 of High Court of Sindh, Bench at Sukkur, passed in Criminal Bail Application No.586 of 2009.

MUHAMMAD RAMZAN **Appellant**

VERSUS

RAHIB & OTHERS **Respondents**

For the Appellant: Mr. Shakeel Ahmed, ASC.
Mr. Mazhar Ali B. Chohan, AOR

For the State: Mr. Zafar Ahmed Khan,
Addl. PG, Sindh.

Date of Hearing: 04.02.2010.

JUDGMENT

RAHMAT HUSSAIN JAFFERI, J-. The petitioner Muhammad Ramzan *(complainant)* filed the petition for cancellation of bail granted to the respondent Rahib *(hereinafter referred to as the respondent)* by the High Court on 26.08.2009 in the case registered under Sections 302, 324, 149 etc, PPC on 19.03.2009. The allegation against the respondent was that he armed with gun alongwith co-accused Mattal Mari armed with rifle caused injuries from their respective weapons to PW Muhammad Jaffar.

2. Having heard the learned counsel for the petitioner, Additional Prosecutor General, respondent and perusing the

record we find that prima facie medical certificate does not support the case in respect of allegations made against the respondent. The Medical Officer found two following injuries on the person of the injured Muhammad Jaffar:-

> *"1). Lacerated wound of perforated type of six 2cm x 3cm x musle deep at left upper arm (wound of entry).*
>
> *2). Lacerated wound of perforated type of size 2cm x musle deep at Right knee joint (wound of entry)"*

None of the above injuries appears to have been caused by gun, as the measurements of injuries show that they could not have been caused by pallets of cartridge used in the gun. They appear to have been caused by weapon loaded with bullet. However, this point can be properly examined at the trial, which can be adequately determined after the evidence of medical officer. In view of the above position of discrepancy and conflict between medical and oral evidence, common object and participation of the respondent is yet to be determined. At this stage the case of bail has been made out, which has rightly been granted by the High Court.

3. During the hearing, we inquired from the Advocate for the petitioner and Additional Prosecutor General about the stage of the case. They stated that the case was at initial stage because no evidence so far had been recorded. We were disturbed to know about the stage of the case because incident took place on 19.03.2009, after more than 10 months no evidence so far was recorded. Therefore, we called the report from the trial Court,

which was received on 2.2.2010. The trial Court has given the following reasons for delay of the case:-

> *"The trial is delayed due to the reason that one of the accused namely Kaleem Hussain remained absconder and the case property and reports were not received."*

4. The learned Additional Prosecutor General has stated that the record shows that the property has not been produced, at the time of submission of challan before the Magistrate as required under Section 170 of Code of Criminal Procedure *(hereinafter referred to as the Code)* and some of the accused are absconders, therefore, the trial Court consumed a considerable long period of time in declaring such accused as absconders, after completing the proceedings under Sections 87 & 88 of the Code and then the case was fixed for trial. He has further argued that one of the accused has been put in column No.2 with blue ink as no evidence was found against him, but the trial Court joined such accused in the case as such the delay occurred.

5. The learned counsel for the petitioner has stated that it is his right to get the case decided in a shortest possible time; and that the proceedings declaring the accused as absconders could have been completed within a period of one or two months, but the same have not been done as yet and his constitutional rights have, thus, been violated. He has requested that some orders may be passed to overcome the problems causing delay in disposal of case.

6. The respondent has also stated that the case has been unnecessary protracted and for the fault of co-accused he should

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not be deprived of his right of early trial and further that he has remained in jail for a period of five months for no fault on his part.

7. We have given anxious thought and consideration to the causes of delay, which are not only in this case but in large number of other cases noticed by us. In order to overcome the causes of delay we have examined various provisions of the Code on the subject.

8. Before we enter into discussion, it is essential to give brief background of sessions trial. Previously before the sessions trial started, there used to be an inquiry under repealed Chapter XVIII of the Code, which was commonly knows as committal proceedings under which the Magistrate held inquiry after receipt of challan and taking cognizance of the offence exclusively triable by the Court of Sessions. In the inquiry, which was conducted under warrant-cases trial, the Magistrate used to record evidence of prosecution witnesses, exhibit all the relevant documents, property and other articles, frame charge, record statements of the accused and examine defence witnesses. Under various provisions of the Code, he used to conduct all the proceedings such as declaring accused absconder, granting bail etc. After conclusion of such proceedings, the Magistrate used to evaluate the evidence to ascertain as to whether or not *prima facie* case was made out against the accused, if so, then he committed the accused to Court of Sessions for trial, if not then the accused was discharged.

9. The accused used to be committed to the Court of Session for trial with complete record in all respects with a view that trial should start immediately after receipt of the same by the Sessions Court. Without indulging in miscellaneous proceedings, the sessions trial used to be completed within 3 days after fixing the same for trial. Police used to be vigilant, as the concerned SHO used to bring all the witnesses, alongwith all the required papers and articles. The prosecution and defence counsel being always responsive used to be present giving preference to sessions trial than any other work except a trial of criminal case on the original side of the High Court. In short, the session trial never failed except for a very strong and exceptional reason.

10. It was found that inquiry under repealed Chapter XVIII of the Code took considerably long period of time for its completion, which was being criticized therefore, a move was initiated to abolish such inquiry to be replaced by a simple procedure.

11. In the year 1972, such move culminated, resulting the promulgation of Law Reforms Ordinance, 1972 *(hereinafter referred to as 'the Ordinance')* abolishing the inquiry under Chapter XVIII of the Code *(commonly known as committal proceedings)* by making simple procedure for sending the cases to the Court of Sessions without recording evidence through item No.82 of the Ordinance, which was made applicable from the date of Notifications issued by the Provinces, which they did vide Notification No. Judicial 1-

3(2) 75 dated 26.12.1975, published by Government of Punjab; Notification No. Legislative 4(8) 75, dated 23.12.1975, published by Government of Sindh; Notification S.O. Judicial Misc.(HD) dated 30.12.1975, published by Government of N.W.F.P.; and Notification No. Legislative 3(15) Law 75 dated 23.12.1975, published by Government of Balochistan. Various amendments were made to give effect to that simple procedure. While maintaining all general powers of the Magistrate under the Code, a bar was created, only, in recording the evidence in the shape of Section 190(3) of the Code, which used to be recorded in the inquiry *(committal proceedings)* before sending the case to the Court of Session, that too was also removed in the case of absconder accused by making appropriate amendment in section 512 of the Code by allowing such Magistrate to record the evidence in the absence of the accused after fulfilling the requirements mentioned thereunder. Instead of recording evidence, the accused was given right to cross-examine the witnesses at the time of recording their statements under Section 164 of the Code as provided under Section 365-J of the Code.

12. It appears that Ordinance was misconstrued and misinterpreted with the result that without completing the miscellaneous proceedings so as to complete the case in all respect before sending the case to the Court of Sessions to start with the trial in the sessions Courts, the Magistrates sent up all the cases, in incomplete form to the court of sessions, with the result that the

sessions Courts commenced with such proceedings, which were to be completed by the Magistrate. When large number of cases were received at one and same time, the sessions Court felt difficulties to cope up with the work load resulting delay in disposal of cases. Virtually, the Courts of sessions have been burdened to perform the functions of the Court of Magistrate, as a consequence the cases which used to be normally completed within three days are taking very long time and are disposed of after several years. Had the Ordinance been implemented at initial stage in its true spirit, by adopting simple procedure, and allowing the Magistrates to complete all other miscellaneous proceedings as per their powers except recording the evidence the mess now created in the Sessions Court would have been avoided.

13. Nevertheless, this Court, in the case of "*Mehar Khan v. Yaqub Khan* **(1981 SCMR 267)**" examined the question and authoritatively held that Magistrate is not a post office but he has to apply his mind to ascertain as to whether the case is fit for trial before Court of session. It will be advantageous to reproduce paras 9 & 10 at page 272 of the judgment in order to avoid detail discussion that reads as under:-

> *"9. A reading of subsection (3) of section 190, Cr. P. C., in the light of above-noted facts would, however, show that-*
>
> > *(i) before he can 'send' a case for trial to the Court of Session, a Magistrate must, first, have taken cognizance of a case, under any tone of the three clauses to subsection (1) of section 190, Cr. P. C, In other words, he must either have received a private complaint under clause (a), or a Police report under section 173, Cr. P. C., as envisaged in clause (b), or he*

should be acting on any information received by him, as mentioned in clause (c). It is, therefore, evident that he cannot act under subsection (3) without having received a private complaint or a Police report (i.e. a challan either complete or incomplete) or some information from any other source, and 73

(ii) that although now a Magistrate is not required to hold an inquiry under Chapter XVIII, but that does not mean that he is to act merely as a post office and automatically 'send' the case for trial to a Court of Session simply because a section relating to an offence exclusive triable by a Court of Session has been mentioned by the Police or the complainant (as the case may be) in the challan or the private complaint. He is, in fact, required on having taken cognizance of such a matter to enquire into the case and to apply his mind to whatever material is placed before him, by the Police or the complainant, if in order to determine whether the allegations made in the Police report, private complaint or information received by him, make out a prima facie case triable exclusively by a Court of Session.

10. In the changed circumstances, after the commitment prose have been dispensed with by the Law Reforms Ordinance, this inquiring that the relevant material and application of mind thereto by a Magistrate, to determine the nature of offence i.e. to determine as to whether or not the case is one triable, exclusively by the Court of Session, would now constitute an `inquiry' within the meaning of the word as defined in clause (k) of section 4, Cr. P. C. and used in S. 344(1), Cr. P. C."

Thus, this Court clarified the position of law that though inquiry as contemplated under repealed Chapter XVIII of the Code was dispensed with the application of mind by the Magistrate would be essential without recording of evidence. No other amendment was made under the Ordinance curtailing the powers of the Magistrate which he used to exercise in those proceedings as such all the general powers of the Magistrate are intact.

14. Keeping in view the above legal position, we have perused the record of this case very carefully which shows that problem started from the initial stage of submission of challan and onwards. In the present case, the learned Magistrate acted in a mechanical manner in accepting the challan and sending the case to the Court of Sessions for trial. In these circumstances, it has become essential to examine the powers of Magistrate and Sessions Court in the light of various provisions of the Code to give an authoritative decision so that a uniform procedure is adopted in the Courts of the country with a basic view to have expeditious disposal of the cases as visualized under the Ordinance and to overcome the causes of delay in disposal of the cases.

15. The scheme of the Code is that the police after completing the investigation have to form opinion as to whether or not there is sufficient evidence and reasonable ground or suspension to justify the forwarding of the accused to a Magistrate. If the opinion is in the negative, the police officer is required to release the accused if in custody on executing bond, with or without surety as such officer may direct, to appear if and when so required, before the Magistrate in order to take cognizance of the offence, on a police report and to try the accused or send him for trial as provided under Section 169 of the Code, which reads as under:-

> *"169. Release of accused when evidence deficient. If, upon an investigation under this Chapter, it appears to the officer incharge of the police-station, or to the Police-officer making the investigation that there is not*

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sufficient evidence or reasonable ground or suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police-report and to try the accused or send him for trial."

If the opinion is positive, the police officer is required to forward the accused in custody to the Magistrate empowered to take cognizance of the offence upon a police report for trial of the accused or to send him for trial to the Court of Sessions if the offence is bailable and the accused is able to give surety, the police officer is required to take surety from him for his appearance before the Magistrate on a day fixed and for his appearance from day to day before such Magistrate. At the same time, the police officer is also required to send to the Magistrate any weapon or other articles which may be necessary to be produced before him alongwith the bonds of the complainant and witnesses for their appearance before the Magistrate as required under Section 170 of the Code, that reads as under:-

*"**170. Case to be sent to Magistrate when evidence is sufficient.** (1) If, upon an investigation under this Chapter, it appears to the officer incharge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police-report and to try the accused or send him for trial or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.*

(2) When the officer incharge of police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce

before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

(3) If the Court of District Magistrate or Sub-divisional Magistrate is mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may refer the cases for inquiry or trial, provided reasonable notice of such reference is given to such complainant or persons.

(4) .....

(5) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report."

In both cases, when the accused is released under Section 169 or is forwarded to the Magistrate, the police officer is required to submit the report, *which is commonly known as challan,* in the form provided under Section 173 of the Code. Reference is invited to "*Habib v. State* **(1983 SCMR 370)**".

16. Thus under the provisions of Section 170 of the Code, the police officer is required to produce the property and other articles as are necessary before the Magistrate. Admittedly, the police did not produce the property before the Magistrate nor the Magistrate directed the police to produce the property. In these circumstances, the process of delay started from the very first stage. Had the police taken proper steps to produce the property before the Magistrate the delay would have not been caused. Equally when the police

had not produced the property at the relevant time, had the Magistrate been vigilant enough to ask for the property, the delay in production of the property could have been avoided. Thus in the instant case, police officer and Magistrate, both are responsible for causing the delay in disposal of the case. We have taken a serious view on the omission and conduct of the police officer and Magistrate in respect of non production of the property at the time of submission of challan. The concerned police officer and Magistrate should be dealt with departmentally by the PPO/IGP Sindh and High Court respectively.

17. Now, we will examine the question of absconders and accused released and placed in column No.2 of the challan. The accused who is released with direction to appear before the Magistrate, if and when required by him as provided under Section 169 of the Code, it may be stated that in such a case the Magistrate is empowered to discharge the bond executed before the police only or pass any order, as he thinks fit as provided under Section 173 (3) of the Code which is as under:

> *"(3) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit."*

18. It is important to note that the above provision is mandatory, therefore, the Magistrate is required to pass appropriate order. For exercising the above powers, the Magistrate should not act mechanically, as he has to form an opinion as to

whether it is a fit case where bond should be discharged or pass any other order including joining him as an accused. For that, he is required to examine the file so as to form his opinion. Such order of the Magistrate is not a judicial order but is an administrative one. If the Magistrate discharges the bond executed before the police of the released accused then it will not preclude the Session court to join such accused in the case as that will be a judicial act which is taken after taking cognizance by Session Judge as required under Section 193 of the Code. However, the police cannot re-investigate the case against such accused without getting the order of discharge of bond passed by the Magistrate recalled.

19. As regards the accused who are shown absconders in the challan, it is to be noted that the Magistrate is competent to issue process including warrant of arrest to procure his attendance as provided under Section 204 of the Code because he has powers to take cognizance in the matter. Further the evidence against accused, who is absconder can be recorded after declaring him absconder as provided under Section 512 of the Code, that reads as under:-

> *"512. Record of evidence in absence of accused. (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him the Court competent to try or send for trial, to the Court of Session or High Court such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, of trial for the offence with which he is charged, if the dependant is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay,*

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> *expense or inconvenience which, under the circumstances of the case, would be unreasonable.*
> *(2) Record of evidence when offender unknown. If it appears that an offence punishable with death or imprisonment for life has been committed by some person unknown, the High Court may direct that any Magistrate of the first class shall hold an inquiry and examine any witness who can give evidence concerning the offence. Any deposition so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of Pakistan.[Ibid]"*

20. The phrase "or send for trial to the Court of sessions or High Court" appearing in Section 512 of the Code clearly demonstrates that the Magistrate who is empowered to send the case to the Court of sessions has also power to record the evidence in the absence of accused after declaring him absconder which can be done as required under Sections 87 & 88 of the Code after issuance of warrants of arrest as provided under Section 204 of the Code. Thus such Magistrate has power to initiate proceedings under Sections 87 & 88 of the Code in a case triable by the Court of Sessions.

21. We are conscious of the fact that by virtue of Section 190 (2) of the Code, the Magistrate is required to send the case to the Court of Sessions without recording evidence, which was enacted after repealing Chapter XVIII of the Code to make the inquiry process simple, but this provision is general in nature applicable to all the accused persons. However, section 512 of the Code is a special provision applicable to particular class of accused i.e. absconders. Therefore, as per settled law the special provision will prevail upon general provision of the same enactment. Thus

section 512 of the Code is an exception to the general provisions of Section 190(2) and Section 353 of the Code.

22. It is not out of place to mention here that originally such power was not given to the Magistrate, when committal proceedings were being conducted. However, this power was given to the Magistrates after abolishment of committal proceedings by the Ordinance. The above phrase was added by the Ordinance with a view that the sessions Court should not be burdened with these type of proceedings because the main function of the Sessions Court is session trial. If the session Court is involved in these type of proceedings, its major portion of time would be consumed in conducting these proceedings, which is being consumed now a days and further the status of the Sessions court would be reduced to that of Court of Magistrate. If the proceedings under Sections 87 & 88 of the Code are completed at the level of the Magistrate before the case is sent up to the Court of sessions then the Session Court will be in a position to start the trial expeditiously and the time consumed in such proceedings by it can be saved.

23. In order to comply with the above provisions of law, it is directed that if all the accused are shown absconders in the challan then the case be sent up to the Court of Session after completing the proceedings as provided under Section 512 of the Code. After receipt of case, the Session Court may pass order for keeping the case on dormant file or pass any appropriate order as it

deems fit. If some of the accused are absconders and some are present, then before sending the case to the Court of session the Magistrate should simply complete the proceedings under Sections 87 & 88 of the Code within the shortest possible time but not later than two months after taking cognizance. The Magistrate should ensure that when a case is sent up to the Court of sessions it should be complete in all respect enabling the court of Sessions to start the trial immediately.

24. In this connection the Magistrate should provide all the copies of required documents to the accused, to obtain information from the accused as to whether he would engage an advocate himself otherwise an Advocate could be provided to him on state expenses, produce the property, statements of PWs under Section 164 of the Code, confession, memo of identification test etc. The case should be sent up alongwith a detailed order showing the application of mind as to whether the case is exclusively triable by the Court of session keeping in view the facts, circumstances of the case and material made available by the police, mentioning all the proceedings including the above mentioned points so as to facilitate the Sessions Court to fix the case for trial. After receipt of the case by the Court of sessions, a thorough scrutiny be made to see as to whether anything is lacking or missing which may affect the start of trial then such shortcoming should be removed and fulfilled including engaging an Advocate on state expenses if the accused so demand before the Magistrate. After fixing the case for

trial, the Sessions Court should issue process for appearance of the witnesses keeping in view the bonds executed by them before the Magistrate in compliance with the provision of Section 173(5) of the Code well in advance preferably not less than one month to the concerned SHO who shall be responsible to produce all the witnesses before the Court on the date fixed for trial. If the SHO fails to produce the witnesses before the Court, serious action should be taken against him by initiating departmental proceedings by the competent authority of police on the report of session Court including prosecution under Section 174, PPC. Notice should also be given to the prosecution, the accused and his Advocate one month in advance so that the prosecution and defence could prepare their case and make necessary arrangements with regard to their other professional duties so as to make them available before the Court for trial. No adjournment should be granted on any flimsy or artificial ground except on a very strong and cogent cause by assigning valid and legal reason. The Session Court should try the case on day to day basis till its completion. Non compliance would entail very serious consequences. Defence Advocate and Prosecutor shall give preference to the session trial except in a case of criminal trial fixed before the High Court on its original side. No obstruction shall be made in the session trial which can be visualized as an obstructing in the administration of justice. In appropriate cases the Sessions Judges may report the matter to the Bar Council for taking appropriate action against such

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Advocate. In short, all stakeholders shall ensure that Sessions trial should not fail.

25. As regards the pending cases in which the accused are shown absconders, the court should separate the case of accused person, who is in attendance either on bail or in custody from the accused person who is absconder so that an early trial should be started fulfilling the constitutional rights of the accused and complainant for expeditious disposal of the case. After separating the case of accused person, who is absconder the process should be issued in that case to get it ripe for trial.

26. It is important to note that under Section 233 of the Code every charge of a distinct offence which any person is accused should be tried separately except in the cases mentioned in sections 234, 235, 236 & 239 of the Code. Section 239 deals with joint trial of several accused persons together. A perusal of Section 233 and 239 of the Code reveals that under such provisions a discretion lies with the Court to try the offences of the kind indicated therein jointly in the circumstances mentioned therein, but there is nothing in them to indicate that the Court is bound to try such offences or persons together in every case. Similar view was expressed in the case of "*Noor Ahmed v. State* **(PLD 1964 SC 120)**".

27. Further vide Notification GRHD No.223411/40, dated 5.7.1941, it is provided that where more than one accused is

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involved the commencement of proceedings should not be held up until all the wanted persons are apprehended, but the case should be proceeded with as soon as the principal accused is/are secured. ..... such reference is available at page 165 of Federal Capital and Sindh Courts Criminal Circulars 1997 Edition.

28. Thus there is no bar in separating the case of the absconder from the case of accused who is present before the Court. All the Courts are directed to adopt such method and immediately proceed with the cases in which some of the accused are present before the Court after bifurcating and separating the case of absconder and required process be issued against absconder in those cases.

29. Another factor, which causes delay, is late submission of challan before the Court in violation of provisions of Section 173 of the Code. A detailed discussion has been made on the above subject by a Bench of this Court headed by one of us, the Hon'ble Chief Justice, in the case of "*Mumtaz Ahmed v. State* **(PLD 2002 Supreme Court 590)**", therefore, no further discussion is required. In the above authority it has finally been observed that the police officials are exposing themselves to take appropriate action in not submitting the challan within the required period of Section 173 of the Code. At the same time, Magistrates were asked to take steps to compel the police officers to submit the challan within time. Session Judges were directed to supervise such process in exercise their revisional powers.

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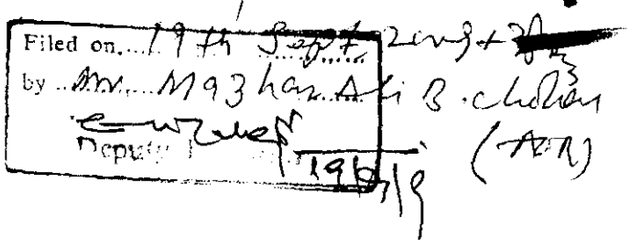
30. In order to implement the provisions of Section 173 of the Code and the rule laid down by this Court in the case of "*Mumtaz Ahmed v. State* **(PLD 2002 Supreme Court 590)**", it is made clear that if the police officer does not submit the challan within the required period then such officer *prima facie* is disobeying the discretion of law contained in Section 173 of the Code thereby falling within the ambit of offence punishable under Section 166, PPC which is a scheduled offence of Pakistan Criminal Law (Amendment) Act, 1958. As such if the Magistrate finds that any police officer has violated the provisions of Section 173 of the Code then he should either himself on behalf of the Court or through any officer of the court file complaint before the Special Court created under the above enactment for prosecution of such police officer. The said Court should give preference to the case and the same be decided in accordance with evidence and law within a shortest possible time. Such Court shall furnish fortnightly report to the High Court about the progress of the case. If the Magistrate performs his functions in accordance with law and under the supervision of the Sessions Judge, then this problem can be solved adequately.

31. Above are few steps in the direction of early disposal and to discourage the delay in the disposal of case.

32. In the instant petition, no case has been made out for cancellation of bail, therefore, the petition is dismissed. Leave refused.

33. A copy of the order be sent to Registrars of all High Courts for circulating amongst all the Judges and Magistrates for implementation and strict compliance. The Sessions Judges of the Districts are directed to supply a copy of the order to the District Bar Associations of their Districts for information and strict compliance. A copy of the order be sent to PPO/IGPs of all the Provinces for strict compliance and Federal Capital. The PPO/IGPs should issue special instructions to all SHOs and concerned officers to produce all the witnesses before the Court of Sessions for trial, failing which strict action as permissible under the law should be taken with information to the concerned Sessions Judge and High Court.

KARACHI, THE
4th February, 2010.
*M.Zubair/**
Approved For Reporting



IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Cr. Petition for leave to Appeal
No. 1000 -K of 2009

Muhammad Ramzan,
S/o Muhammad Abdullah Jut,
Muslim , Adult, R/o Village
Muhammad Ramzan ,Union Council
Kot Laloo , Taluka Faiz Gunj ,
Dist. Khairpur. Sindh
.....Petitioner.

Versus.

1. Rahib s/o Bukhshan ,
R/o Village Muhammad Ibrahim ,
Union Council Kot Laloo , Taluka Faiz Gunj ,
Dist. Khairpur. Sindh

2. The State
Through Prosecutor General, Sindh,
Sindh Secretariat No.6,
Shahra-e-Kamal Attaturk,
Karachi **.....Respondents.**

PETITION UNDER ARTICLE 185 OF THE CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN 1973, AGAINST ORDER DATED 26-08-2009 IN CR.BAIL APPLICATION NO. 586/2009, PASSED BY THE LEARNED SINGLE JUDGE OF THE HON'BLE HIGH COURT OF SINDH AT SUKKAR.

That the Petitioner above-named being aggrieved from the impugned order dated 26-08-2009, passed by the learned single judge of the Honorable High Court of Sindh at Sukkar, in Criminal bail application No. 586/2009, which bail application filed by the Respondent, has been allowed, begs to prefer the present Petition for leave to Appeal, wherein the following points of law of public interest arise:-

(Certified true copy of the impugned order dated 26-08-2009 and certified copy of bail application are attached herewith and marked as Annexure "A & A/1" respectively.)

P O I N T S O F L A W

I. Whether the Respondent has obtained the bail by mis-representation /concealment of the facts of F.I.R. ?

II. Whether the Respondent has deliberately, and with malafide intention wrongly translated the FIR, specially in respect of the role assigned to the accused Shabbir, in order to misguide the Honorable Court for obtaining the bail ?

III. Whether as per FIR, the Accused Shabbir was equipped with fire ?

IV. Whether the injured Muhammad Jaffar sustained injuries from the direct fires of accused Rahib equipped with Gun, and accused Mattal who was equipped with rifle ?

V. Whether the Medical Report of the injured Muhammad Jaffar has any nexus with the role attributed to accused Shabbir in FIR ?

VI. Whether the order dated 26-08-09, passed by the learned Single Judge is patently illegal, erroneous, factually incorrect and has resulted miscarriage of justice ?

VII. Whether the learned Single Judge has misread the Medical Report of injured Muhammad Jaffar ?

VIII. Whether the learned single judge can grant the bail on the bases of presumption and can go to the deeper appreciation of evidence at bail stage without recording the evidence ?

IX. Whether the reasons/observations of the learned single judge is in accordance with the law ?

X. Whether the bail granted to the Respondent by the leaned single judge vide order dated 26-08-2009 is illegal and is liable to be cancelled under the law ?

FACTS OF THE CASE

AS PER F.I.R, BRIEF FACTS OF THE CASE ARE AS UNDER :-

" I myself looking after my land. I have 4 sons, elder son is Tajlb Hussain aged about 33/34 years 2. Altaf Hussain 3. Khalid Hussain 4. Khadim Hussain are residing in my house. At Water Course No. 14-R new Kot Laloo Minor there is my 17 acres agricultural land and also have other 20 acres land on lease from which some of land is cultivated by one Allah Rakhio son of Sharbat Bugti aged about 25/26 years on harap basis. Today in the morning from same water course from 6:30 A.M. to 8 Pahar (24 Hours) continue

there was our turn of water share. Today in the morning I and son Talib Hussain Jatt, Hari Allah Rakhio Bugti, son Khalid Hussain Jatt, brother Mohammad Abad Jatt, relative Mohammad Jaffar son of Ali Mohammad Jatt, and Khadim Hussain son of Irshad Ali altogether went for looking after water rotation at Water Course No. 14, where at about 0720 hours we saw and identified that accused namely Kaleem Hussain son of Nazir Ahmed Jatt with K.K 2.Zaffar son of Nazir Ahmed Jatt with Rifle 3. Nazir Ahmed son of Mohammad Ibrahim Jatt with gun 4. Mithal son of unknown Mari with Rifle 5. Rahib son of unknown Mari with gun 6. Bashir Ahmed son of Mohammad Ibrahim Jatt with gun 7. Shabir Ahmed son of Mohammad Ibrahim Jatt were standing there who closed our minor of water and as soon we arrived there they gave Hakal and said that: **"Why have you come here".** We have closed your water so you all go back otherwise we will kill you. We replied them that our crop has become dry and we would open our share water towards our water course. On such saying co-accused Shabir Ahmed Jatt instigated all accused persons and said that make fire from arms and kill Talib Hussain's people. On his instigation accused Kaleem Hussain Jatt made straight K.K fire upon son of Talib Hussain who raised cries and fell down and accused Zaffar Jatt made straight Rifle fire upon Allah Rakhio Bugti , who also raised cries and fell down and accused Nazir Ahmad Jatt made gun shot fire upon my brother Mohammad Abad and accused Mattal Mari made straight Rifle fire upon Mohammad Jaffer Jatt and accused Rahib Mari made straight gun fire upon Mohammad Jaffar Jatt and accused Bashir Jatt also made straight firing. On fire shot reports and cries other neighbourers came running giving Hakals and seeing them coming the Accused persons while raising slogans made aerial firing went towards Northern side. Thereafter, we saw that my son Talib Hussian Jatt received fire shot on his head, blood

as oozing and had died and Allah Rakhio Bugti also received fire ıot on his head, blood was oozing and had died, my brother lohammad Abad Jatt received fire shot on his left shoulder and :ft buttock, blood was oozing and Mohammad Jaffar received fire ıot on left side below the arm hole and on left leg near he knee, lood was oozing and thereafter with the help of villagers we rought the dead bodies and injured persons. Now I have appeared ıd complain that the above named accused persons duly armed 'ith common intention due to above dispute with their arms made ring and caused death of my son Talib Hussain Jatt and Allah akhio Bugti and caused serious injures to brother and for making arassment they also make firing with weapons.

GROUNDS

1. The Respondent deliberately and with malafidely intention, wrongly translated the FIR and also concealed the material facts,(i.e the role assigned to the accused Bashir Ahmed has been changed with the role assigned to the Shabbir Ahmed) from the Honorable High Court. It is pertinent to mention that as per FIR the accused Bashir Ahmed was equipped with the Fire Arm who is still in judicial custody, but not accused Shabbir.

2. That as per FIR, the role assigned to the accused Shabbir, he was empty handed, therefore, his name was placed in column 2 of the Challan by the police, whereupon the petitioner (i.e complainant in F.I.R.) has made an application

Under Section 193 Cr. P.C in the Court of II Addl. District & Session Judge at Khairpur, Sindh, which application was allowed vide order dated 03-04-2009, by the learned II Addl. Sessions Judge at Khairpur, judge with direction to the accused Shabbir Ahmed Jut to face the trial, who was present in person in the court at the relevant time, and he was also directed to furnish the solvent surety in the sum of Rs. 2,00,000/- and P.R Bond in like amount, which order dated 03-04-2009 , passed by the learned 2nd Addl. Sessions Judge Khairpur, was challenged by the petitioner in Honorable High Court of Sindh at Sukkar, in Cr. Misc. Application No.142/2009, which Cr. Misc. Application was came up for hearing and order on 10-08-2009, (prior to the date of impugned order in the above noted petition) before the same learned judge (i.e his Lord Ship, Mr. Justice Khilji Arif Hussain) who was pleased to observe the role assigned to the accused Shabbir as under:-

" ..... from perusal of record it appears that it was alleged by the complainant that respondent No.2 was present at place of incident but carrying no weapon in his hand, only alleged him that of LALKARA.....", and after having taken into consideration the role assigned to accused Shabir, being empty handed, the learned single judge was pleased to dismiss the

Cr. Misc. Application No. 142/09, filed by the petitioner and maintained the bail granting order dated 03-04-2009 to accused Shabir by the learned 2nd Addl. Session Judge, Khairpur. However after 2 week, the accused Rahib succeeded to obtain the bail by misrepresentation/ concealment of facts in respect of the role assigned to accused Shabir in FIR.

3. That it is very clearly mentioned in FIR that accused Rahib was equipped with Gun and accused Mattal who was equipped with rifle and they directly fired on Muhammad Jaffar, who sustained the injuries as mentioned/ described in the Medical Report of Muhammad Jaffar, submitted by M.L.O. vide/ bearing 103 dated 13-04-08.

4. That as per FIR Shabbir was empty handed, therefore, the question of firing by accused shabbir does not arise, however the injured Muhammad Jaffar sustained the injuries as mentioned / described in the Medical Report of injured Muhammad Jaffar, which in fact was cause by the direct fires of accused Rahib, equipped with gun and accused Mattal, equipped with rifle.

5. That it is evident that there is no nexus / relevancy between the Medical Report of injured

Muhammad Jaffar, and as per F.I.R., the role assigned to accused Shabbir. The learned Single Judge, while deciding the bail applcaiton of accused Rahib has wrongly relied upon the bail granted to the accused shabbir.

6. It is well settled principle that the deeper appreciation is not allowed at the stage of bail, while deciding bail application of respondent, the learned single judge has ignored the very settled principle of law and failed to appreciate that who caused the injuries to injured Muhammad Jaffar is a part of evidence, which would be decided after recording the evidence.

7. That the learned single judge failed to appreciate Medical Report of injured Muhammad Jaffar and wrongly / erroneously observed that " ***the opinion of about nature of injuries have not been giving by the concerned Medico-Legal Officer more than one year, make the case of applicant for further inquiry and sufficient to grant the bail,"*** where as the Medico-Legal Officer had submitted the final Certificate of the injured Muhammad Jaffar vide/ bearing No. 103, dated 13-4-2008, to the prosecution, wherein the number and nature of injuries has clearly been mentioned / described, injury No.1 as GHAYR-JAIFAH, MUTALAHIMAH, injury No.2 as GHAYR-JAIFAH, HASHIMAH, both the injuries are caused

by the fire Arms. It is, therefore, respectfully submitted that the learned single judge, while deciding the bail application has completely misread the Medical Certificate of injured Muhammad Jaffar.

8. In view of above mentioned facts, **the bail granted to the respondent No.1, by the learned single judge is patently illegal, erroneous, factually incorrect and has resulted and miscarriage of justice and is liable to be cancelled under the law and also in the interest of justice.**
(Reliance is placed on 2007 SCMR- 482(a))

PRAYER

It is, therefore, respectfully prayed that this Honorable Court may be pleased to grant the leave to appeal to the petitioner and would further to please to set-aside impugned order dated 26-8-2009, passed by the learned single judge of the Honorable High Court of Sindh at Sukkar, in Criminal bail application No. 586/2009.

Any other relief, which this Honorable Court may deem suitable in the circumstance of the case and in the interest of justice.

Drawn by :

(Shakeel Ahmed)
Advocate Supreme Court
for the petitioner

Filed by :

(Mazhar Ali B. Chohan)
Advocate On Record
for the petitioner