

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Cr.Misc.BA No.1634-P/2020

1. Zewar Khan son of Maleet Ullah; and
2. Waleed son of Zewar Khan,
r/o Rashakai Banda Sro Kalay District Charsadda.

Petitioner (s)

VERSUS

The State etc

Respondent (s)

For Petitioner :-	<u>Mr. Shabbir Hussain Gigyani, Advocate..</u>
For State :-	<u>Mr. Muhammad Riaz, AAG.</u>
For respondent No.1.	<u>Nemo (served but absent).</u>
Date of hearing:	<u>27.07.2020</u>

ORDER

ROOH-UL-AMIN KHAN, J:- Petitioners seek post arrest bail in case FIR No.68 dated 26.02.2020, registered under sections 324/148/149 PPC, at Police Station Sro Kalay, Charsadda.

2. According to FIR/report of complainant Amir on 26.02.2020, he along with his uncle Wakil ur Rehman, was present on a thoroughfare near the house of Wakil ur Rehman when at 1810 hours, the petitioners along with co-accused Nisar, Aziz, Usman Ali and Wisal, duly armed with firearms came there and opened fire at them, as a result, his uncle sustained injury while he luckily remained unscathed. Motive behind the occurrence is that prior to the

For Amir

occurrence, son of accused Nisar was forbidden by the injured from using a thoroughfare, hence, this case.

3. Despite service complainant is not in attendance. Being bail application cannot be kept pending for an indefinite period for the sole reason to procure the attendance of complainant, who otherwise, has been duly served. In this view of the matter, after hearing learned counsel for the petitioner and worthy AAG, this petition is being decided on the available record.

4. Before advertng to the bail plea of the petitioners, I deem it appropriate to decide first Cr.Misc.No.87-P/2020, filed by learned counsel for the petitioners for deciding the controversy as to whether in cases of an attempt to commit qatl-i-Amd (324 PPC), it would be legally justified at bail stage to sent the case(s) to the prosecution for insertion of sections of law governing the hurt caused to injured of the case(s)?.

5. Learned counsel for the petitioners argued that by sending case(s) registered under section 324 PPC, to the prosecution for insertion of sections of law pertaining to hurt always results into filing of fresh bail application(s) by the accused person(s) right from the court of learned Judicial Magistrate till this court which not only increase the agonies of the parties but also multiply the pendency, putting extra burden on the racks of the courts. He contended that section 324 PPC by itself is exclusive in

Justice Saini

nature which not only provides punishments for attempt to commit Qatl-i-amd, but in addition, also provides punishment for the hurt caused, therefore, insertion of sections of law in the FIR for the hurt caused at bail stage, is not the requirement of law, because such exercise is the sole discretion of the trial Court, which after recording evidence of the medical officer determines the proper section for the hurt caused. He added that it is also the job of the learned trial Court to alter the charge at any stage of the proceedings, whereas, any such direction of this court at bail stage shall tie the hands of the trial Courts in framing of charge at the trial stage.

6. I am in agreement with the submissions of learned counsel for the petitioner for the reasons that section 324 PPC provides two types of punishments, one for the offence of an attempt to commit qatl-i-Amd and another for the hurt caused, in addition to the punishment of the offence of attempt to commit qatl-i-Amd. What the court(s) is/are required at bail stage to do is the determination of *prima facie* connectivity or otherwise of an accused seeking bail in light of the tentative assessment of the material on record coupled with the story of the prosecution in the FIR. Even if any section of law has been omitted by the prosecution, the court may take the same into consideration from the material on record. The courts are not bound to deal with the cases in light of the sections

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of law leveled by the prosecution; rather what offence(s) can be made out from the material on record shall be taken into consideration. On legal premises, insertion of section of law in a case is the sole prerogative of the Investigating Agency at the investigation stage; secondly, by the prosecution Branch, and lastly, the trial Court at the time of framing of charge on the basis of the material available on file against an accused. Under section 227 Cr.P.C., the court may alter or add to any charge at any time before judgment is pronounced. Even otherwise, without alteration of charge, the trial Court has ample powers under sections 237 and 238 Cr.P.C. to award punishment under a penal section, irrespective of the fact that charge under the said section had not been framed, particularly, in the circumstances when charge had been framed in a section providing major punishment, whereas the accused is being awarded minor punishment.

7. In this view of the matter, sending of case to the prosecution at bail stage for insertion of sections of law by this court would amount to interference in investigation which exercise has been disliked and deprecated by the Hon'ble Supreme Court in plethora of judgments, some of which may be referred i.e. Wali Muhamamd alias Walia vs Haq Nawaz and 03 others (1971 SCMR 717), Shahnaz Begum Vs the Hon'ble Judges of the High Court of Sindh and Baluchistan and another" (PLD

Asad Sami

1971 Supreme Court 677), Brig.(Rtd) Imtiaz Ahmad vs Government of Pakistan through Secretary, Interior Division Islamabad and 02 others (1994 SCMR 2142), Mazhar Naeem Qureshi vs the State (1999 SCMR 828) and Pordil Khan vs the State through Advocate General Khyber Pakhtunkhwa and 11 others (2016 MLD 314).

8. In view of the above, I am firm in my view to hold that sending of case file to the prosecution by this Court while dealing with bail matter of accused, is not legally justified. Such exercise is nothing but to increase the agonies of the litigants and burdened the courts with extra labour.

9. Coming to merits of the case for the purpose of bail of the petitioner, as per medico legal report, the injured has sustained a solitary firearm entry wound with corresponding exit on his chest for which by attributing a general role of indiscriminate firing, seven accused including the petitioners are charged. The injury sustained by the injured has not been specifically attributed to anyone of the petitioners. Fire shot of which of the seven accused proved effective and sharing of common intention of the remaining accused with the accused of effective fire shot is yet to be determined during trial after recording evidence by the learned trial Court. Similarly, escape of the complainant from indiscriminate firing of seven accused,

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who at the time of occurrence was in close proximity of the injured, is yet another begging question which makes the case of the petitioners arguable for the purpose of bail, hence, they are entitled to the concession of bail.

10. Accordingly, this petition is allowed. Accused/petitioners are admitted to bail provided each one of them furnishes bail bonds to the tune of rupees two lacs with two local, reliable and resourceful sureties each in the like amount to the satisfaction of learned Illaqa Judicial Magistrate/MOD concerned.

Announced:

27.07.2020

M. Straj Afridi PS

Rooh ul Amin
JUDGE

SB of Hon'ble Mr. Justice Rooh ul Amin Khan.