JUDGEMENT SHEET

IN THE PESHAWAR HIGH COURT,
D.I.KHAN BENCH
(*Judicial Department***)**

Cr.MBA.No.337-D/2017

Rahmatullah….Versus…The State

JUDGEMENT

Date of hearing: **10.11.2017.**

Appellant-petitioner by M/S Saifur Rehman Khan, Muhammad Abid and Farooq Akhtar Khan Advocates.

Respondent by Mr. Adnan Ali Khan A.A.G

SHAKEEL AHMAD, J.- Through this single order I am proceeding to decide the instant Cr.MBA.No.337-D/2017, filed by the petitioner Rahmatullah and the connected Cr.MBA.No.338-D/2017, filed by the petitioner Rafiullah as both have sprung out of one and the same case crime report No.13 dated 26.4.2017 registered under Sections 324/353/148/149 PPC read with Sections 3/4/5 of the Explosive Substances Act/ 7 of Anti-Terrorism Act, 1997 and 15 of Arms Act at Police Station C.T.D, D.I.Khan.

2. Prosecution case, as set forth in the crime report, is that on 26.4.2017 at 1130 hours, complainant Salimullah Khan, SHO Police Station Gomal University, D.I.Khan alongwith Sajawal Khan ASHO and other police officials including QRF and

staff of Police Lines, carried out search and strategic operation in the area, and after performing their duty, they were coming back towards the police station via Jhauk Ladho to Kat Shahani. Wilayat Khan DFC, Constable Javed Iqbal, Constable Mazhar and Constable Muhammad Ramzan were aheard of them on two motorcycles, while the remaining police *nafri* was coming behind them in official vehicle, when they reached on metaled road Kat Shahani near graveyard, at1130 hours, they saw six unknown terrorists, who were present on the road side and had parked their motorcycles there. On seeing the police coming near towards them, they started indiscriminate firing, as a result of which Wilayat Khan DFC and Constable Javed Iqbal received firearm injuries. Resultantly, the police party also opened fires in self defence, which continued for quite some time. The terrorists also threw hand grenades on the police party. Out of six terrorists, four fled away by taking advantage of nearby bushes and shrubs while the remaining two continued their firing by taking refugee near the tube-well belonging to one Salim. On their demand, army personnel, QRF and CTD staff with APC attracted to the spot alongwith other vehicles, ultimately, both the terrorists blew themselves. One 9 MM pistol with fitted magazine and 05 live cartridges with one live hand grenade was recovered from one of the terrorists while one 9 MM pistol with fitted magazine and 14 live rounds were recovered from the second one. The three

motorcycles parked on the spot were also taken into possession by the police party, hence, the instant FIR was registered.

3. Both the accused/petitioners were arrested in case FIR No.461 dated 22.10.2016 under Section 15 Arms Act of Police Station Gomal University, D.I.Khan and were formally arrested in the instant case on the same day.

4. The learned counsel for the petitioners urged with vehemence that sufficient incriminating material connecting the petitioners with commission of alleged offence is lacking, which aspect of the matter has been ignored by the learned lower Court, which resulted in serious miscarriage of justice as no prima facie case is made out against the petitioners. It is next contended that the case falls within the ambit as contained in Section 497(2) Cr.P.C, being a case of further inquiry; the relief prayed for on behalf of petitioners could not have been declined because the petitioners have been implicated through supplementary statement of Allah Wasaya got recorded on 21.6.2017, under Section 164 Cr.P.C, wherein it was stated that Matiullah and Kashif Jamal alias Khalid (both were killed in police encounter), Umer Farooq and Rehmatullah were fast friends.

5. The learned A.A.G, representing the State, seriously controverted the view point as advanced at bar by the learned counsel for petitioners with the submission that sufficient material

connecting the petitioners with the alleged offence is available, which has rightly been scrutinized tentatively and the impugned order, being free from any ambiguity, does not call for interference. In order to substantiate the said contentions, he read out the supplementary statement of Allah Wasaya. He also contended that the matter does not fall within the ambit of further inquiry, in view of sufficient incriminating material, which has come on record. He also referred the provision as enumerated in Section 21-D(4) of the Anti-Terrorism Act, 1997, with the submission that facility of bail cannot be extended in favour of the petitioners in view of restriction placed by the Anti Terrorism Act 1997 itself.

6. I have carefully examined the respective contentions as agitated on behalf of the petitioners and for the State in the light of the relevant provisions of the law and record of the case. Let me mention here at the outset that sufficient incriminating material is lacking prima facie connecting the petitioner with the commission of the alleged offences. There is no denial to the facts that the alleged offences are heinous in nature, but the question is as to whether sufficient incriminating material connecting the petitioner with the alleged offences is available or not.

7. It may be kept in view that presumption of innocence of accused is always paramount irrespective of the heinousness of

alleged offences. The learned A.A.G could not point out any incriminating material on the basis whereof it could be opined that prima facie case is made out against the petitioners except the statement of Allah Wasaya wherein he stated that the petitioners and accused Kashif Jamal alias Khalid and Matiullah were fast friends of his son namely Umer Farooq and the petitioner Rehmatullah and that there was a general rumor that his son and other companions were involved in the terrorist activities while his son and relative Muhammad Javed had left the motorcycle on the spot. The mobile data, which too does not disclose that the petitioners had contact with the terrorists at the time of occurrence.

8. The learned A.A.G was asked time and again to show as to whether mobile data, collected by the police, reveals that the accused were in contact with the terrorists at the time of commission of offence, but he remained answerless. The learned A.A.G was also asked, if any other incriminating material was available against the petitioners or otherwise, but no satisfactory answer could be given. As a result of tentative and careful examination of the above collected material, I am inclined to hold that no prima facie case is made out against the petitioners.

9. Adverting to the main contention of the learned A.A.G that the case does not fall within the ambit of the Section

497 (2) Cr.P.C, which being without substance cannot be taken into consideration. It is well settled law by now that *"where there is no prima facie case against the petitioner and evidence on record is vague and sketchy and the Court considers it necessary that further inquiry may be held in the matter, it may enlarge the petitioner on bail."* Reliance can be placed on the case of "***Muhammad Sadique Vs State"*** **(PLD 1985 SC 182)**. It is worth mentioning that where prosecution versions leaves much to be inquired into, the bail can be granted by invoking the provisions as enumerated in Section 497(2) Cr.P.C, and concept of further inquiry can be pressed into service. In this respect reference can be made to the case of ***"Falak Shah Vs The state"*** **(1979 SCMR 103).** Reliance can also be placed on the case of ***"Najeeb Gul Vs Khalid Khan "*** **(1989 SCMR 899).** I have no hesitation in my mind while holding that the case of petitioners falls within the ambit of further inquiry as at the moment sufficient incriminating material is lacking connecting the petitioners with the commission of alleged offence. Moreso, it is not known that how alleged offence was abetted or facilitated by the petitioners.

10. I have also adverted to the provision contained in Section 21-D(4) of the Anti-Terrorism Act 1997, which is reproduced herein-below for reference.

> *"S.21-D(4). In exercising its powers in relation to a person seeking bail under*

> *this Act, the Court shall have regard to such of the following considerations (as well as to any others which it considers relevant)-*
> *(a) the nature and seriousness of the offence with which the person is charged;*
> *(b) the character, antecedents, associations and community ties of the person;*
> *(c) the time which the person has already spent in custody and the time which he is likely to spend in custody if he is not admitted to bail; and*
> *(d) the strength of the evidence of his having committed the offence."*

11. A careful analysis of the above reproduced section would reveal that it is free from any ambiguity and accordingly the learned A.A.G was asked as to how it can be made applicable to the petitioners, but no answer could be given except that petitioners were responsible for abetment and instigation, but no evidence could be pointed to substantiate the said allegation. It has been noticed with great concern that the case against the accused was registered on 26.4.2017, but challan has not yet been submitted against them.

12. In the light of what has been discussed above, I am inclined to accept these petitions. Resultantly, both the petitions in hand are allowed and the petitioners Rahmatullah and Rafiullah are directed to be released on bail subject to their furnishing bail bonds in the sum of Rs.5,00,000/- (Rupees five lacs) each, with two sureties each in the like amount to the satisfaction of

Illaqa/Duty Judicial Magistrate. The sureties must be local, reliable and men of means.

13. Above are the detailed reasons of my short order of even date.

Announced.
Dt:10.11.2017

(SHAKEEL AHMAD)
J U D G E

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