

JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT JUDICIAL DEPARTMENT.

Writ Petition.....No.....1173-P.....of.....2015

J U D G M E N T

Date of hearing: 17th December, 2015

Petitioner(s): (Zakir Ali) by Mr. Arshad Khan Mohmand,
Advocate.

Respondent(s): (State) by Mr. Qaiser Ali Shah, Additional
Advocate General and

(Federation) by Mr. Manzoor Khan Khalil,
Deputy Attorney General.

MAZHAR ALAM KHAN MIANKHEL, CJ.-

By this single judgment, we propose to decide Writ Petitions No.1173-P, 1071-P, 2500-P, 1169-P, 1174-P & 2237-P of 2015, wherein, the petitioners namely, Zakir Ali, Salim, Noorul Amin (present on ad-interim pre-arrest bail), Waqif Ali, Khairul Akbar (petitioners in W.Ps No.1173-P, 1071-P, 2500-P, 1169-P, 1174-P of 2015 respectively), have sought their release on bail in a case registered against them and others under Sections 324 / 353 / 427 / 148 / 149, PPC / Section 3 / 4 of the Explosive Substances Act, 1908 read with Section 7 of the Anti-Terrorism Act, 1997 and Section 16 of the Protection of Pakistan Act, 2014, vide FIR No.01, dated 16.09.2014 in Police Station CTD, Mardan while Attaur

Rehman (petitioner in W.P.No.2237-P/2015) has sought his release on bail in a case registered against him and others under Sections 324 / 353 / 148 / 149, PPC / Section 15 of the Arms Act, 2013 / Section 4 / 5 of the Explosive Substances Act, 1908 read with Section 7 of the Anti-Terrorism Act, 1997 and Section 15 of the Protection of Pakistan Ordinance, vide FIR No.09, dated 21.01.2015 in Police Station CTD, Mardan.

2. The learned counsel appearing on behalf of the petitioners vehemently argued that the alleged occurrence took place at midnight / odd hours, having no independent eyewitness; that neither the petitioners have directly been charged in the FIR nor were arrested on the spot rather later on were falsely implicated in the instant cases only on a Source report dated 21.09.2014; that petitioners namely, Khairul Akbar and Waqif Ali and co-accused Saddam were arrested after thirteen days of the alleged occurrence and after twenty-seven days of the same, the identification parade had been conducted; that petitioners namely, Zakir Ali and Salim, who were arrested later on, were not even identified in the identification parade; that such like identifications, which were conducted much after the arrest of the accused, as per settled view of the apex Court, have no legal sanctity, as such, cannot be relied upon / believed; that in the alleged Source report, petitioners namely, Zakir Ali, Noorul Amin and Salim

were not nominated, whereas, the petitioners namely, Waqif Ali and Kahirul Akbar were, though, nominated therein and, on whose pointation, the alleged addition has been made in the site plan but, interestingly, even in that, their names were not mentioned anywhere; that nothing incriminating has been recovered from any of the petitioners; that they have not made any confessional statement despite being remained in custody; that petitioners namely, Waqif Ali and Khairul Akbar are below the age of eighteen years and, as per Juvenile Justice System Ordinance, 2000, they are otherwise entitled to be released on bail; that no specific role has been attributed to any of the petitioners; that except one, all the petitioners are behind the bars since long, yet the commencement of their trial let alone its conclusion is not in sight, that too, when despite lapse of sufficient long time, even the Federal Government has failed to constitute the Courts to try them, notwithstanding, the challan has since been completed; that they are neither hardened, desperate or dangerous criminals nor previous convicts in such like criminal cases nor there is anything in black and white that they belong to any banned organization or threatened the security of Pakistan, as such, provisions of Protection of Pakistan Act, 2014 are not applicable to the instant cases; that under Section 5 of the Protection of Pakistan Act, 2014, a Joint Investigation Team was supposed to conduct investigation but, in the instant

matters, no Joint Investigation Team was constituted rather the entire investigation has been conducted by a Sub-Inspector, who, under this Act, was not competent, as such, the entire superstructure based on the strength of such like void and illegal investigation, would automatically, crumble down like house of cards; that the alleged occurrence vide FIR No.01 had been committed much prior to twenty-first amendment of the Constitution of Islamic Republic of Pakistan, 1973 and no retrospective effect has been given in this regard; that the case of the petitioners does not fall under Section 2(1) (iii) of the Army Act, 1952; that the co-accused namely, Naveed Hussain, Maqsood and Farooq having identical role have already been released on bail vide judgments dated 05.03.2015 and 10.06.2015 respectively, hence, they are otherwise, entitled to be released on bail on the principle of consistency, notwithstanding, merits of the case. The learned counsel for petitioner namely, Noorul Amin further submitted that since he has been involved in the case on the strength of statement of co-accused, who has also been granted bail by this Court, his ad-interim pre-arrest bail, in the present scenario, is required to be confirmed. All the learned counsel for the petitioners in support of their arguments placed reliance on the cases of **Muhammad Afzal alias Abdullah & others vs. State (2009 SCMR 436); Bacha Zeb vs. State (2010 SCMR 1189); Shafqat Mehmood vs. State (2011 SCMR 537);**

Sabir Ali alias Fauji vs. State (2011 SCMR 563); Nazir Ahmad vs. Muhammad Iqbal (2011 SCMR 527).

3. So far as the maintainability of the instant writ petitions is concerned, the learned counsel for the petitioners by arguing the case in this regard submitted that under Article 245(3) of the Constitution of Islamic Republic of Pakistan, 1973, though, High Court cannot exercise its jurisdiction under Article 199 of the Constitution, where the Armed Forces of Pakistan, for the time being, acting in aid of civil power but the area, where, the alleged occurrence has taken place or the petitioners arrested, was settled one and the Armed Forces were not called for or deputed under Article 245 of the Constitution, therefore, this Court has the ample power to adjudicate upon such like matters under Article 199 of the Constitution and even can grant bail to the petitioners in the light of dicta, rendered by the apex Court in Asfand Yar Wali's case, that too, when except filing petition under Article 199 of the Contrition, no other remedy in the shape of Sections 374, 426, 435, 439, 439A, 491, 496, 497, 498 and 561A of the Cr.PC is available to the petitioners as envisaged under Section 18 of the Protection of Pakistan Act, 2014, hence, these writ petitions are maintainable and can well be heard and decided by the Division Bench of this Court. Placed reliance on the cases of **District Bar Association,**

Rawalpindi vs. Federation of Pakistan (PLD 2015 SC 401)
Citations (ww) and (ccc) and Khan Asfandyar Wali &
others vs. Federation of Pakistan and others (PLD 2001 SC
607).

4. As against that the learned Additional Advocate General appearing on behalf of the State by opposing the grant of bail to the petitioners submitted that concession of bail cannot be granted on basis of hypothetical and presumptive arguments as the petitioners, after due satisfaction and identification test, have been nominated in the instant cases; that petitioners Waqif Ali, Kahirul Akbar and co-accused Saddam are also involved in another case vide FIR No.12 dated 30.09.2014 of similar nature; that petitioner Attaur Rehman has directly been charged in the FIR, who after the occurrence decamped from the spot and all the petitioners are interlinked and in league with each other and till date, they have failed to allege any mala fide on the part of the police for their false involvement in the instant cases and since, they are involved in heinous offences / crimes, they do not deserve the concession of bail, at least, at this stage.

5. The learned Deputy Attorney General appearing on behalf of the Federation, in support of the arguments of the learned Additional Advocate General, submitted that as per amendment made in Section 2 of the Army Act on 19.11.2015,

the arrest and detention, much prior to the twenty-first amendment, has been given protection with retrospective effect and the Protection of Pakistan Act, 2014 has been inserted in the First Schedule through twenty-first amendment, the crime committed there-under being Scheduled offence, as such, Article 8(1)(2) of the Constitution of Islamic Republic of Pakistan would not be applicable to the case of the petitioners. On query qua submission of complete challan before the Court of competent jurisdiction, the learned DAG submitted that the Federal Government under Section 12 of the Protection of Pakistan Act, 2014 has appointed Prosecutor General but so far as functioning of Trial Courts for those matters is concerned, those have not yet been constituted and made functional. In the end, he has requested for the dismissal of the instant writ petitions.

6. Arguments of both the parties were heard carefully and record of the case was perused.

7. First of all, we would like to tackle the question of maintainability of the instant writ petitions. As per Section 18 of the Protection of Pakistan Act, 2014, provisions of Sections 374, 426, 435, 439, 439A, 491, 496, 497, 498 and 561A of the Cr.PC are not applicable to the Act, *ibid.*, but, at the same time, we see that there is no legal bar to seek bail through a petition, filed under Article 199 of the Constitution

of the Islamic Republic of Pakistan, 1973 and, that's why, the Hon'ble Supreme Court of Pakistan while facing with similar situation in NAB case in **Khan Asfandiyar Wali & others vs. Federation of Pakistan and others (Supra)** held in the following manner:-

(r) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.9(b)---Constitution of Pakistan (1973), Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution before Supreme Court---Vires of National Accountability Bureau Ordinance, 1999---Provision of S.9(b) of the Ordinance purports to deny to all Courts, including the High Courts, the jurisdiction under Ss:426, 491, 497, 498 & 561-A, Cr.P.C. or any other law for the time being in force, to grant bail to any person accused of an offence under the Ordinance---Validity---Superior Courts have the power to grant bail under Art.199 of the Constitution, independent of any statutory source of jurisdiction such as S.497, Cr.P.C.--Section 9(b), National Accountability Bureau Ordinance, 1999, to that extent is ultra vires the Constitution and the same is to be suitably amended accordingly.

The superior Courts under Article 199 of the Constitution "remain available to their full extent....notwithstanding anything contained in any legislative instrument enacted by the

Chief Executive": Whereas, section 9(b) of the National Accountability Bureau Ordinance, 1999 purports to deny to all Courts, including the High Courts, the jurisdiction under sections 426, 491, 497, 498 and 561A or any other provision of the Code of Criminal Procedure or any other law for the time being in force, to grant bail to any person accused of an offence under the National Accountability Bureau Ordinance. The superior Courts have the power to grant bail under Article 199 of the Constitution, independent of any statutory source of jurisdiction such as section 497 of the Criminal Procedure Code. Section 9(b) of the Ordinance to that extent is ultra vires the Constitution. Accordingly, the same be amended suitably.

So, in view of the above referred citation and by taking guideline there-from, we can safely say that these writ petitions being petitions for bail in substance are maintainable as the petitioners have no other remedy to seek bail under the Criminal Procedure Code.

8. The record of the case would reveal that the petitioners alongwith others were arrested in the cases on the allegations that they have attacked at the police post and at the police party, for which, they were booked in two different FIRs vide No.01, dated 16.09.2014 and No.09, dated

21.01.2015, mentioned above. The co-accused namely, Naveed Hussain, involved in FIR No.01, dated 16.09.2014, though first applied to the Anti-Terrorism Court concerned for his release on bail but due to lack of jurisdiction, he approached this Court through Writ Petition No.94-P/2015, which was allowed and he was granted bail by this Court vide judgment dated 05.03.2015. Likewise, the other co-accused namely, Maqsood and Farooq, involved in FIR No.09, dated 21.01.2015 also filed Writ Petition No.765-P/2015, who were also released on bail by this Court vide judgment dated 10.06.2015. Similarly, petitioner namely, Noorul Amin also applied for ad-interim pre-arrest bail, which was accordingly granted to him by this Court vide order dated 10.07.2015 and today, his case is fixed for confirmation.

9. The record would further reveal that though in FIR No.01, dated 16.09.2014, the petitioners herein, were not directly charged / nominated but, later on, on a source report, they were implicated in the instant case. On 13.10.2014, the learned Judicial Magistrate, Mardan, had conducted the identification parade, through which, petitioners namely, Khairul Akbar and Waqif Ali besides co-accused Saddam were correctly identified by the witness. So, it is not a universal rule that, an accused, who has committed the crime but is not charged in the promptly lodged report or not arrested on the

spot cannot be implicated later on, despite having sufficient material against him and since, in the instant case, the petitioners of FIR No.01 have been implicated on account of source report, based on some solid incriminating evidence against them, would not be in a position to take shelter under the umbrella of technicalities as they have not directly been charged in the FIR. So far as, the petitioner of FIR No.09 is concerned, he has directly been charged for committing the crime and decamping thereafter from the spot.

10. Now comes the questions that the co-accused of the petitioners, named above, were granted bail by this Court, whether the present petitioners are also entitled to be released on bail on the principle of consistency and whether the FIR No.01 dated 16.09.2014, lodged for the offence / occurrence, committed much prior to twenty-first amendment, has been given any retrospective effect. Yes, the occurrence took place prior to twenty-first amendment and till filing of the petitions of the co-accused as well as the instant ones, no protection was given to the actions with regard to the arrest of an accused prior to commencing of Pakistan Army (Amendment) Act, 2015 but, in the month of November, 2015, on 19.11.2015, certain more amendments have been made in the Pakistan Army Act, 1952. It would be worthwhile to reproduce herein

below the relevant portion of the said amendments, which read as under:-

2. Amendment of section 2, Act XXXIX of 1952.-In the Pakistan Army Act, 1952 (XXXIX of 1952).-

(a) in section 2, in sub-section (I), in clause (d), in sub-clause (iv), in the second proviso, for the full stop at the end a colon shall be substituted and after the second proviso amended as aforesaid the following new proviso shall be added, namely:--

"Provided further that notwithstanding anything contained in this Act or any other law for the time being in force, any person arrested, detained or held in custody by the armed forces, civil armed forces or law enforcement agencies and kept under arrest, custody or detention before the coming into force of the Pakistan Army (Amendment) Act, 2015 (Act II of 2015) shall be deemed to have been arrested or detained pursuant to the provisions of this Act as amended by the Pakistan Army (Amendment) Act, 2015 (Act II of 2015) if the offence in respect of which such arrest or detention was made also

*constitutes an offence referred to in
sub-clause(iii) or sub-clause (iv):*

The above quoted amendment would reveal that a proper protection has been given to the actions, which were done prior to twenty-first amendment and the co-accused have been granted bail before that amendment, so, in the present scenario, neither the principle of consistency would be attractive to the case of the present petitioners nor they can claim that no retrospective effect was given to the FIR No.01, lodged before twenty-first amendment.

11. Besides the above legal impediments, the other material, available on the record, goes against the present petitioners, that too, when they were unable to establish any mala fide or grudge on the part of the police qua their false involvement in the instant cases and the offences, for which they are charged with, being Scheduled offences, as such, Article 8(1)(2) of the Constitution of Islamic Republic of Pakistan would not be applicable to their case and they being, prima facie, connected with the crime, attracting prohibitory clause, do not deserve the concession of bail, at-least, at this stage. Though the learned counsel for the petitioners tried their level best to make out a case for concession of bail through their elaborate arguments but, in our opinion, they could not succeed in their efforts. Even otherwise, none of the

contentions raised by the learned counsel for the petitioners can be appreciated without deeper appreciation of evidence, which, we, while hearing petitions under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, in substance bail petitions, cannot be considered. The judgments, so referred to by the learned counsel for the petitioners, in the present scenario, would not be helpful to the petitioners. The arguments of the learned counsel for the petitioners qua deficiencies in the investigation of the cases cannot be considered, at-least, at this stage of the case.

12. For the reasons discussed above, these petitions being without substance are dismissed while the order dated 10.07.2015 of this Court qua granting ad-interim pre-arrest bail to petitioner Noorul Amin, is hereby recalled.

13. Before parting with the judgment, we have observed with great concern that, after the registration of both the FIRs bearing No.01 and 09, the Special Court has not been made functional and even a senior District and Sessions Judge has been posted by this Court for the purpose on the request of the Federal Government. We, in the circumstances of the case, would like to advice the Federal Government through its Secretaries Defence and Law to take necessary measures / arrangements to make the Special Court functional, so that the petitioners as well as the other co-accused of such like

offences could be tried and prosecuted without wasting any further time. We expect that the needful shall be done by the Government as early as possible but not later than two months, after the receipt of this judgment, failing which, the petitioners would be at liberty to seek their appropriate relief provided under the law. Copies of this judgment be sent to the Federal Government through its Secretaries, mentioned above, for information and strict compliance.

Announced.

17. 12. 2015

CHIEF JUSTICE

J U D G E

(Fayaz)