

JUDGMENT SHEET

**PESHAWAR HIGH COURT, MINGORA
BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)**

B.A. No. 87-M/2020

ORDER

Date of hearing: **13.03.2020**

**Petitioners: - (Rooh-ul-Amin & another) by
Muhammad Raziq, Advocate.**

**Respondents: - (The State & another) by Mr.
Sohail Sultan, Asstt: Advocate General and Mr.
Hazrat Rehman, Advocate.**

WIQAR AHMAD, J.- This order is directed to dispose of bail application of the petitioners namely Rooh-ul-Amin and Muhammad Zahid, who have been arrested and are behind bars in case F.I.R No. 219 dated 09.11.20 19 registered under sections 302, 324, 337 F (iii), 34 PPC at Police Station Timergara District Dir Lower.

2. FIR in the case in hand was registered on the basis of 'Murasila' sent by Shahid Khan, IHC of police station Timergara Dir Lower. Report of the occurrence was lodged by one Gohar Ayub in the emergency ward of DHQ hospital Timergara, wherein he stated that they had joint ancestral property (شوارہ اراضی) situated at village Kotko Shah. The accused namely Rooh-ul-Amin, Zahid sons of Abdur Rehman (petitioners) and Zahir Shah son of Shah Rawan (co-accused) had cultivated seeds of wheat in their

property after ploughing it with a tractor, a day before. Brothers of the complainant namely Shah Khalid, Ayub Nawaz and his nephew namely Usama were altercating with the accused-party over their acts of ploughing their land at the time of occurrence. The altercation turned into a scuffle and then the petitioners commanded their co-accused Zahir Shah, who was having a Kalashnikov, to kill the complainant-party, whereupon he started firing on them, causing numerous injuries to Shah Khalid resulting into his death, and causing firearm injuries to his brother Ayub Nawaz as well as his nephew Usama, while the complainant escaped un-hurt. The occurrence was stated to have been witnessed by Alla-ud-Din and Rasool Muhammad. Land dispute was disclosed to be a motive behind the occurrence and all three accused were charged for commission of the offence in furtherance of their common intention.

3. Learned counsel for petitioners stated during the course of his arguments that the accused/petitioners have been assigned the role of raising a proverbial *lalkara* and as such case against the accused/petitioners was that of further inquiry. The learned counsel in this respect placed reliance upon the judgments reported as 2012 SCMR 265 and 2011 MLD 210.

4. Learned counsel for complainant submitted in rebuttal that role of accused/petitioners was very crucial in giving aid and support to the main accused and

had they been not present on the spot, then the principal accused namely Zahir Shah could not have committed the offence with such an ease. The learned counsel also added that *challan* has been put in Court and trial has commenced, which fact also requires dismissal of the instant application. The learned counsel relied upon the judgments reported as 1980 P Cr. LJ 21, 1987 MLD 3174 and 2001 P Cr. LJ 295. The learned Astt: A.G appearing on behalf of the State adopted arguments of learned counsel for complainant.

5. I have heard arguments of learned counsel for the parties, learned Astt: A.G for the State and perused the record.

6. Perusal of record reveals that the accused/petitioners have been attributed no overt act in the commission of the offence except making a verbal command to the main accused namely Zahir Shah for opening firing on the complainant-party. The weapon of offence i.e. rifle of 7.62 mm bore, normally known as Kalashnikov has also been recovered on pointation of the principal accused. FSL report reveals that all empties recovered from the spot have been fired from the Kalashnikov recovered at the instance of main accused. Question of their joining common intention with the principal accused or abetting the commission of the main offence, shall best be determined by the learned trial Court after recording of evidence, but case of the accused/petitioners is found to be that of further probe, at

the moment. The Hon'ble Apex Court in the case of "Talib Jan v/s The State and another" reported as "2012 SCMR 265" had extended bail to the accused in similar role. Relevant part of the judgment is reproduced hereunder for ready reference;

"5. Two person are charged in the F.I.R. Petitioner is charged for commanding his son while the latter, who has gone into hiding, has been charged for firing effective shot at the deceased. Whether the role assigned to the petitioner is a result of exaggeration which, more often than not, is resorted to in this part of the country to rope in even elder of the family so that he may not be at large to pursue the litigation; whether stay of the petitioner in the village despite being named in the F.I.R could be held to be more consistent with his innocence rather than guilt when his son charged for the effective shot has gone into hiding after the occurrence and whether the role of commanding attributed to a person who himself is armed with a Kalashnikov could be held to be ornamental or at par with abetment, as is contended by the learned counsel for the State, are the questions calling for further inquiry and thus tilt the scales of justice in favour of bail rather than jail."

Further reliance in this respect may be placed on the judgments in the case of Wazir Muhammad v/s The State reported as 1978 SCMR 448, the case of Sher Khan v/s The State reported as 1980 SCMR 448, the case of Muhammad Haroon v/s The State reported as

1994 SCMR 2161 and the case of Mumtaz Hussain v/s The State reported as 1996 SCMR 1125.

7. *Challah* has no doubt been put in court and the case is under trial. In such a case, superior Courts have normally been exercising some restraint in granting bail, because of the reason that findings in such cases may affect the outcome of trial. But it does not mean that bail should invariably be refused even if case of an accused/petitioner is found to be that of further inquiry. The reasons recorded for allowing of the instant application are not of such a nature which will affect outcome of the trial in any manner. A five members Bench of the Hon'ble Apex Court, in the case of "Muhammad Ismail v/s Muhammad Rafique and another" reported as PLD 1989 Supreme Court 585 has held in this respect;

"The first point is not much in context. It is well-known practice of the superior Courts of Pakistan that when a murder case is fixed for hearing ordinarily, the bail applications are not decided on merits and the matter is often left to the discretion of the trial Judge."

Further ahead in the said judgment the matter was concluded in the following words;

"It is apparent that when the Court finds that the two essential conditions contained in section 497(2) Cr.P.C. are satisfied the accused shall become entitled as of right to bail. In the impugned order the learned Judge, it seems,

without saying so in so many words, felt that the two conditions existed in this case- (a), that "there are not reasonable grounds for believing that the accused has committed (a) non-bailable offence";(b), that there are sufficient grounds for further inquiry into his guilt." Accordingly the accused had become entitled to be released on bail.

The question then arises; whether, subsection (2) of section 497 Cr.P.C. would have operation notwithstanding the aforesaid practice of this Court. Much discussion is not necessary in this behalf. When an accused person becomes entitled as of right to bail under subsection (2) of Section 497 Cr.P.C. the same cannot be withheld on the ground of practice; because, the latter is relatable to exercise of discretion while the former is relatable to the exercise and grant of right."

Further reliance in support of the said principle can be placed on the judgments reported as "2013 SCMR 49, 2014 SCMR 49 and 2012 YLR 896.

8. In light of what has been discussed above, case against the accused/petitioners is found to be that of further inquiry and they are therefore admitted to bail. These are the reasons for my short order of even date, which read as follows;

"For reasons to be recorded later, this application for bail is allowed and accused/petitioners Rooh-ul-Amin and Muhammad Zahid involved in case FIR No. 219 dated 09.11.2019 registered under sections 302, 324, 337 F (iii), 34 PPC at Police Station Timergara District Dir Lower are directed to be released on bail provided each on of them furnishes bail bonds in the sum of Rs. 400,000/-

(four hundred thousand) with two sureties each in the like amount to the satisfaction of learned trial Court, who shall ensure that the sureties are local, reliable and men of means."

ANNOUNCED

Dt: 13.03.2020

JUDGE

Office
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