

IN THE PESHAWAR HIGH COURT,
BANNU BENCH.

(Judicial Department)

B.A No. 275-B of 2015

JUDGMENT

Date of hearing _____ 20.11.2015 _____.

Appellant-Petitioner: **By Sultan Mehmood**
Khan, Advocate.

Respondent : **State by Qudrat Ullah**
Khan Gandapur, AAG.

IKRAMULLAH KHAN, J.--- Zahir Shah, the accused/ petitioner involved in case F.I.R No. 178 dated 27.09.2015, under section 56/186 PPC, 15 AA, 5 Khyber Pakhtunkhwa Explosive Substances Act, 3/4 P.O of Police Station Marian, Bannu, was refused bail by the learned Additional Sessions Judge,-I, Bannu, vide order dated 14.10.2015. He has moved this further application through counsel for his release on bail.

2. Brief facts of the case, as per FIR, are that there were complaints against Zahir Shah that he is involved in the business of selling (*desi*) local-made wine. After obtaining search warrant, the complainant Muhammad Bashir Khan SHO, alongwith Police *Nafri* and lady constables, under the leadership of Syed Khan DSP Range, raided at the house of accused-petitioner, as a result of which the local police recovered, a Kalashnikov with fit magazine, containing 20 live rounds of 7.62 bore, a spare magazine containing 15 live rounds of 7.62 bore, a 30 bore pistol with fit magazine containing 5 rounds of 30 bore, a bandolier containing three hand grenades and eight plastic drums containing total 240 liter vine. Accused-petitioner was arrested, *murasila* was drafted, which culminated into above mentioned FIR.

3. Learned counsel for petitioner contended that the charges leveled against the

accused-petitioner are vague, not specific in so far as the section 5 of Explosive Act, is concerned, while rest of the offences for which the petitioner has charged does not carry punishment of death, life or above 10 years; that the case against the accused-petitioner is that of further inquiry, as the alleged recovery of explosive substance, had not effected therefrom the personal possession of the petitioner; that the petitioner has been sent to judicial custody and no more required for further investigation into the case.

4. On the other hand, learned AAG on behalf of the State, contended that, the accused-petitioner has committed a schedule offence, which is exclusively triable by the Anti-terrorism Court (ATC) but the petitioner had not approached, the competent court, therefore, this petition is not competent.

5. I have heard learned counsel for the parties and have also gone through the record, in view of the argument, rendered by learned counsel.

6. Prior to discuss, tentatively, the merits of the case for the purpose of bail, it would be not out of context to resolve the objection of learned AAG, whereas on the same ground bail petition of petitioner, has been dismissed by the learned Additional Sessions Judge, below.

7. The learned Additional Sessions Judge, has held that, the offence for which the petitioner has charged in the F.I.R by the local police, is exclusively triable by the Anti-terrorism Court (ATC) therefore, the concession of bail was declined to the petitioner.

8. It is admitted fact, conceivable therefrom the available record, that petitioner has been charged under section 15 AA and 5 Explosive

(It is not known whether the section of law applied against the petitioner would be construed as “section 5 of the Explosive Substances Act, or Explosive Act) However, keeping in view the explosive allegedly recovered therefrom the petitioner are hand grenades, which falls within the ambit of 5 of the Explosive Substances Act, the offence of unlawful possession of explosive as defined thereunder Antiterrorism Act, 1997 (ATA) falls within the clause “ee” of section 6(2) of the ATA, which is punishable under section 7(ff) of ATA, wherein the punishment provided shall not be less than 14 years, but may extend to imprisonment for life. However, petitioner has not been charged, under section 7 (ff) of the ATA.

9. In so far, the question of jurisdiction of the ordinary court is concerned, the learned Additional Sessions Judge has not properly

construed the provision of section 21 (G) of the ATA, which read as:

21-G. Trial of offences. All offences under this Act, shall be tried exclusively by the Anti-Terrorism Court established under this Act.

So the offences, mentioned in the schedule of ATA, shall also be exclusively tried by the ATC, but mere having any unlawful explosive is not included in the 3rd schedule item 4, which read as:

THE THIRD SCHEDULE.

4. Without prejudice to the generality of the above paragraphs, the anti-terrorism Court to the exclusion of any other Court shall try the offences relating to the following, namely:--

(i)

(ii) Use of fire-arms or explosives by any device, including bomb blast in a mosque, imambargah, church, temple or any other place of worship, whether or

not any hurt or damage is caused thereby; or

(iii) firing or use of explosives by any device, including bomb blast in the Court premises.

So, the offence, as alleged in the FIR, allegedly committed by the petitioner does not occupy any place, within the purview of schedule 3rd item 4 thereof.

10. Section 15 (e) of the Khyber Pakhtunkhwa Arms Act, 2013, could be read as:

“has in his possession or under his control any arms or ammunition in contravention of the provision of section 9;

Shall be punishable with imprisonment for a term which may extend to seven years or with fine, which may extend to two lacs, or with both.”

11. Subsection (i) (a) (iv) of section 3 of Arms Act, 2013, include grenade within the definition of ammunition, which read as:

“Ammunition” includes---

(i)

(ii)

(iii)

(iv) All types of grenades, bombs, rockets, mines and fuels for flame throwers;

12. While Section 5 of the Khyber Pakhtunkhwa

Explosive Substances Act, 2013 read as:

5. Punishment for making or possessing explosives under suspicious circumstances.--- Any person who makes or knowingly has in possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be punishable with imprisonment for a term which may extend to fourteen years.

13. But this court could not bypass the provision of section 71 of the PPC, which read as:

“71. Limit of punishment of offence made up of several offences.

Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

14. The explosive grenade is not directly recovered therefrom the exclusive possession of the petitioner nor on its pointation, while keeping in view the provision of section 71 of the PPC, there is likelihood that, petitioner even if found guilty, would be extended, the benefit of section 71 of the PPC, which, makes the case against the petitioner that of further inquiry, as no other offence allegedly committed by the petitioner falls within the prohibition clause of section 497 Cr.PC. The search of joint residential house of the accused-petitioner, wherefrom the explosive substance, ammunition etc were allegedly recovered, not carried out in presence of private witnesses. I did not find any expert report in regard to the grenade, although other arms, allegedly recovered, were sent to the FSL and the FSL report is placed on record. Mere, recovery of any alleged explosive substance, without expert opinion would not withhold the concession of bail to

an accused. Reliance may be placed on **“Ihsanullah
Vs. the State” (PLD 1995 Peshawar 106).**

15. For the aforesaid reasons, this bail petition is accepted and the petitioner be released on bail, provided he furnishes bail bonds in the sum of Rs.200000/- (two lac) with two sureties each in the like amount to the satisfaction of Illqa/ Judicial Magistrate concerned.

Announced
20.11.2015
Azam/P.S

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