

Judgment Sheet
**IN THE PESHAWAR HIGH COURT, ABBOTTABAD
BENCH
JUDICIAL DEPARTMENT**

Cr.Misc. (BA) No. 245-A/2020

JUDGMENT

Date of hearing.....**01.04.2020**.....

Petitioner (Aon Ali) By Mr. Maqbool Hussain, Advocate.

Respondents. (State) By Raja Muhammad Zubair, AAG and
(Complainant) By Mr. Khurshid Azhar, Advocate.

SHAKEEL AHMAD, J.- This petition has been moved on behalf of Aon Ali for admitting him to bail till the final conclusion of trial in Crime No. 100 dated 09.02.2020 registered under Sections 377 / 511 / 34 PC read with Section 53 of the Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010 at Police Station Khanpur District Haripur.

2. The allegation, as set forth in the crime report, against the petitioner is that he took the complainant to his house and facilitated his co-accused namely, Sumair to commit sodomy upon him. Vide order dated 16.03.2020, he was declined post arrest bail by the learned Additional Sessions Judge-II, Haripur, hence, this petition.

3. I have heard the arguments of learned counsel for the parties at length and

gone through the record with their valuable assistance.

4. No doubt, the petitioner has not been charged for committing sodomy upon the minor victim, but, it cannot be said that he neither aided or facilitated his co-accused Sumair in committing unnatural offence. As per crime report, petitioner is alleged to have taken away the victim in his house in a scheming / pre-planned manner on the pretext to impart knowledge of computer to him, because if the victim had least doubt that he was going to be physically abused, he would not have accompanied the petitioner. The victim was taken by the petitioner to his house, where he was put in defenceless condition by him and facilitated his co-accused to commit the crime and on hue and cry raised by the victim, he also put Rs.50/- in his pocket and asked him to leave the premises and not to disclose the crime to anyone else. The petitioner appears to have acted in preconcert or shared common intention with his co-accused, who committed sodomy upon the victim and can be saddled by constructive or vicarious liability as

provided in Section 34 PPC. In this behalf reliance can be placed on the well known *Hadith* of the Holly Prophet Mohammad (P.B.U.H) which is reproduced as under: -

متعدد صحابہ کرام سے مروی ہے کہ سرکار دو عالم صلی اللہ علیہ وسلم کے سامنے ایک مقدمہ پیش ہوا جس میں ایک شخص نے دوسرے کو پکڑ لیا اور دوسرے شخص نے اسکو قتل کر ڈالا اسکے بارے میں آنحضرت صلی اللہ علیہ وسلم نے فیصلہ فرمایا کہ "یقتل القاتل ویحسب السنک" (کنز العمال ص 82 ج 15 حدیث نمبر 40194 بحوالہ دار قطنی) یہاں مقتول کے پکڑنے والے کو قاتل کے برابر موت کی سزا نہیں دی گئی بلکہ قید کی تعزیری سزا کا مستحق قرار دیا گیا اور حضرت علی رضی اللہ عنہ نے اسکے مطابق ایک شخص کو عمر قید کی سزا دی اور اسے مرتے دم تک قید میں رکھا (ملاحظہ ہو کنز العمال ص 82 حدیث نمبر 40195)

5. In the famous case of **"Muhammad Riaz Vs. Federal Government"** reported in **PLD 1980 FSC 01** the Hon'ble Judges of the Federal Shariat Court quoted two references of Ahadith, which are reproduced from page-10 of the said judgment hereunder: -

"It has been held by the Peshawar Bench that an offence of murder can be condoned by pardon, or on payment of 'Diyat', otherwise the convict was to face the penalty of death. The same principle will be attracted in the cases of abettors under Sections 109 & 114 of PPC. In support thereof, reliance is placed on two

Ahadith as to be found on Page 740, Vol.II of Mishkat-Al-Masabih, as translated in English by James Robson:

“Ibne Umar reported the Prophet Mohammad (P.B.U.H) as saying, if a man seizes a man and another kills him, the man, who killed him, is to be killed and the one, who seized him, is to be imprisoned. Daraqutni transmitted it.

Said-b-Al-Musayyib told that Umar bin Al-Khattab killed five or seven people for one man, whom they had killed treacherously, Umar saying ‘If the people of San’a’ had conspired against him, I would have killed them all’. Malik transmitted it, and Bukhari transmitted something similar on the authority of Ibne Umar.”

6. In this behalf, I am also fortified by the judgment reported as **“Mulo Ahmed Vs. The State” (2011 MLD 1171)** wherein it was observed as under: -

“The principle of vicarious liability can be looked into even at bail stage if from the F.I.R., the accused appears to have acted in pre-concert or shared the community of intention with his co-accused who caused

fatal injury to deceased and can be saddled by constructive or vicarious liability by invoking section 34, P.P.C. The Court on the basis of material placed, such as F.I.R. and statements recorded by the police even at bail stage consider the question whether the case of constructive liability is made out or not. Paramount consideration is whether the accused was a member of an unlawful assembly or whether the offence has been committed in furtherance of the common object. In the case in hand, though the allegation against the present applicant is of making aerial firing along with co-accused and has not caused any fire arm injury to the deceased but his undeniable presence on the place of incident duly armed with weapon shows his motive of preplanned concert in furtherance of common object with principal accused. It is not a case of sudden provocation rendering the matter one of further inquiry. It is clear from the contents of F.I.R. that accused persons including the applicant duly armed with

weapons were waiting the complainant party on the road and they raised Hakal and stopped the complainant party and committed the murder of complainant's father. The judgments cited by learned counsel for the applicant are distinguishable as in these cases, question of considering the vicarious liability at bail stage and sharing the common object was not an issue. While judgments relied upon by learned counsel for the complainant are applicable so far as related to sharing the common intention to commit the murder. It is also important to note that no explanation whatsoever is rendered to justify the presence of the accused at the place of occurrence which leads to a tentative view that the applicant shared common intention to commit the murder of deceased. Nothing is available on record to show that complainant party had any motive or reason to falsely implicate the accused in the case. Case is at preliminary stage and evidence of none of prosecution witnesses has

been recorded. Court at bail stage, could not undertake deeper appreciation of the evidence of prosecution.”

7. The upshot of above discussion leads me to the conclusion that on the face of record, there are reasonable grounds to believe that the petitioner has shared common intention with co-accused and facilitated him to commit the crime of sodomy. Resultantly, this petition for bail of the petitioner fails and is dismissed

Announced:
01.04.2020.

J U D G E

/*Saif*/