

ORDER SHEET
**IN THE HIGH COURT OF SINDH,
 CIRCUIT COURT, HYDERABAD.**

Cr. Bail Appln. No.S-519 of 2019
 [Ali Sher & another versus The State].

DATE	ORDER WITH SIGNATURE OF JUDGE
	For orders on office objection. For hearing of main case.

Date of hearing :26.07.2019.

M/s. Muhammad Farooq and Nisar Ahmed Durrani, Advocates for the Applicants.

Mr. Taj Muhammad Keerio, Advocate for the complainant.

Mr. Shahid Ahmed Shaikh, DPG and Ms. Sana Memon, APG for the State.

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Adnan Iqbal Chaudhry J.:- Vide short order dated 26-07-2019 bail after arrest was granted to the Applicants. The reasons for the same follow.

1. The Applicants were booked along with their brother Shahzad Ali and one Saleem in Crime No.91 of 2018 at PS Khipro, District Sanghar, under sections 302, 324, 337-A(i), F(i) and 34 PPC for the murder of Hakim Ali and for the hurt to Abdullah and others.

2. The incident as per the FIR is that on 16-06-2018, the complainant, his sons Abdullah and Hakim, along with other villagers of the Village Haji Muhammad Chanhion, went to a nearby ground to watch a cricket match; there came the accused party namely Shahzad Ali, Jamsher Ali (Applicant No.2), Ali Sher (Applicant No.1) and Saleem who were residents of Village Babo Samicho; that Hakim Ali confronted the accused party and said that we have already asked you not to play in this ground as our residence is situated nearby; upon that, at 17:00 hours, the accused party flared up; that Shahzad Ali with a hatchet, Jamsher and Ali Sher with cricket bats, and Saleem with a lathi came to fight; that Shahzad Ali hit Hakim Ali on the head with the hatchet; Jamsher Ali and Ali Sher (the Applicants) gave blows to Abdullah with cricket bats on the right and left side of his body; that when Aslam, Miandad and the complainant tried to stop the accused, Saleem and others also gave blows to them causing hurt to the right index finger of Miandad and to the body of Aslam and thereafter the accused party returned to their homes; that the complainant took the injured for first-aid to the Taluka Hospital and then to LHUMS Hospital at Hyderabad but Hakim Ali succumbed to his injuries and passed away.

3. To support the grant of bail, learned counsel for the Applicants submitted *inter alia* that the role assigned to the Applicants in the FIR is one of the causing injury to Abdullah; that per the final medico-legal certificate relating to Abdullah, injury No.2 is classified under section 337-A(i) PPC as *shujjah-i-khafifah* which is bailable; that though injury No.1 is classified under section 337-A(iv) PPC as *shujjah-i-munaqqilah*, the circumstances of the case attract sub-section (2) of section 337-N PPC and thus the Applicants can at best be liable for *arsh*; that the incident as narrated in the FIR is false and is contradicted by the statements of the injured under section 161 Cr.P.C which in any case were recorded after four days; that apart from the injured, there is no statement of any independent witness; that as regards the allegation of common intention to murder Hakim Ali, the narration in the FIR itself shows that there could not have been any such common intention.

4. Learned counsel for the complainant submitted that the Applicants have been assigned specific role in the FIR not only of injuring Abdullah and others, but also acting with common intention to murder Hakim Ali; that there is no reason to disbelieve the statements of the injured and the complainant; and that the common intention to murder Hakim Ali is apparent from the incident.

5. The learned DPG too opposed the bail. He submitted that it was not a case of further inquiry and that the charge is a serious one. He however accepted that 'common intention' is to be gathered from the circumstances of the case.

6. The specific role assigned to the applicants in the FIR is one of causing hurt to Abdullah. Per the final medico-legal certificate relating to Abdullah, the injuries suffered by him were classified as follows:-

"Injury No.1 treated as 337-A (iv) Shujjah-i-Munaqqilah.

Injury No.2 treated as 337-A(i) Shujjah-i-Khafifah."

"X-Ray Skull AP & Lateral View:- Displaced fracture of left frontal bone is seen in these X-Rays."

7. Of the injuries suffered by Abdullah, injury No.2, viz. *shujjah-i-khafifah*, is a bailable offence. As regards injury No.1, viz. *shujjah-i-munaqqilah*, that is punishable under section 337-A(iv) PPC by *arsh* and "may" also be punished with imprisonment of either description for a term which may extend to ten years as *tazir*. In other words, for the offence of *shujjah-i-munaqqilah* the mandatory punishment is *arsh* while punishment by imprisonment is additional/discretionary. Though, *shujjah-i-munaqqilah* is a non-bailable

offence, but that is subject to sub-section (2) of section 337-N PPC which is a *non-obstante* clause and which provides as follows:

“s. 337-N (2). Notwithstanding anything contained in this Chapter in all cases of hurt, the Court may, having regard to the kind of hurt caused by him in addition to payment of *arsh*, award *tazir* to an offender who is a previous convict, habitual or hardened, desperate or dangerous criminal or the offence has been committed by him in the name or on the pretext of the honour:

Provided that the *tazir* shall not be less than one third of the maximum imprisonment provided for the hurt caused if the offender is a previous convict, habitual, hardened, desperate or dangerous criminal or if the offence has been committed by him in the name or on the pretext of honour.”

8. By virtue of sub-section (2) of section 337-N PPC, in all cases of hurt under Chapter XVI PPC, the additional punishment of *tazir* over and above *arsh* is awarded only in those cases where the offender is a previous convict, or a habitual, hardened, desperate or dangerous criminal, or where the offence has been committed by him in the name or on the pretext of the honour. Such effect of sub-section (2) of section 337-N PPC is also discussed in the cases of *Haji Maa Din v. The State* (1998 SCMR 1528) and *Abdul Wahab v. The State* (2019 SCMR 516). Counsel for the Applicants had submitted that the Applicants were not previous convicts or habitual/hardened criminals; that no other criminal case is pending against them; and that the Applicant No.2 is also a student. Such statement was not controverted by the Complainant's counsel nor by the learned DPG. Therefore, it appears that for the offence under section 337-A(iv) PPC, the Applicants would at best be liable for *arsh*, not imprisonment. Consequently, the case against them for the said offence does not fall under the prohibitory clause of section 497 Cr.P.C. and the grant of bail would be the rule.

9. Of the injuries suffered by Aslam, the non-bailable injury is classified as *ghayr-jaifah hashimah* which is punishable under section 337-F(v) PPC by *daman* and “may” also be punished with imprisonment of either description for a term which may extend to five years as *tazir*. Though such injury is not specifically attributed in the FIR to the Applicants, assuming that they are eventually found liable for the same, if they are not previous convicts etc., then again by virtue of sub-section (2) of section 337-N PPC, the punishment for that would not be imprisonment.

10. As regards the murder of Hakim Ali, the injury caused to him is not attributed to the Applicants, rather it is alleged that they shared a common

intention with the co-accused Shahzad Ali to commit the murder. But the incident is said to have happened in a play ground where both sides had come to play cricket. The Applicants are said to have held cricket bats and not any deadly weapon. The incident, per the FIR, appears to have taken place in the heat of the moment. It is not said that there was a prior enmity between the parties. Therefore, the material thus far does not suggest that the Applicants had come to the play ground sharing a common intention to commit the murder of Hakim Ali.

11. Needless to state that the above observations are only a tentative assessment of the matter. Ultimately, whether in view of the role assigned to them, the Applicants can be held to be vicariously liable (by way of common intention) for the murder of Hakim Ali; whether in view of sub-section (2) to section 337-N PPC the Applicants can be awarded a sentence of imprisonment over and above *arsh* for allegedly causing injuries to Abdullah when the record so far does not show that they are previous convicts, or habitual, hardened, desperate or dangerous criminals; these are all questions requiring further inquiry bringing the case within the ambit of section 497(2) Cr.P.C. For that, reliance is placed on the case of *Mazhar Hussain v. The State* (2012 SCMR 887). Further, since investigation against the Applicants has been completed and their physical custody is not required for investigation, there is no purpose to keep them behind bars; hence bail is granted, but with the observation that if the Applicants abuse the bail, the trial court will be competent to cancel the same after due process.

J U D G E

Hyderabad
Dated: 31-07-2019