SUPREME COURT OF AZAD JAMMU & KASHMIR

[Shariat Appellate Jurisdiction]

PRESENT:
Raja Saeed Akram Khan, ACJ.
Ghulam Mustafa Mughal, J.

1. Cri. Appeal No.34 of 2019
(Filed on 25.6.2019)

Sohail Hussain s/o Ghulam Hussain, r/o Nagdar Chanbani, Tehsil Athmuqam, District Neelum, presently detained in Judicial Lock-up District Neelum.

..... APPELLANT

v e r s u s

1. State through Advocate-General for Azad Jammu & Kashmir, Muzaffarabad.
2. Station House Officer (S.H.O.), Police Station Lawat, District Neelum.
3. Bashir Hussain s/o Faqeerullah r/o Nagdar Chanbani, Tehsil Athmuqam, District Neelum.

…… RESPONDENTS

(On appeal from the order of the Shariat Appellate Bench of the High Court, dated 15.6.2019, in Cri. Revision Petition No.136 of 2019)

FOR THE APPELLANT: Raja Aftab Ahmed Khan, Advocate.

FOR THE STATE: Raja Ayaz Ahmed, Assistant Advocate-General.

FOR THE COMPLAINANT: Mr. Mushtaq Ahmed Janjua, Advocate.

2. Cri. Appeal No.38 of 2019
(Filed on 3.9.2019)

Bashir Hussain s/o Faqeerullah r/o Nagdar Chanbani, Tehsil Athmuqam, District Neelum.

..... APPELLANT

v e r s u s

1. Azhar s/o Muhammad Bashir Inqilabi r/o Nagdar Chanbani, Tehsil Athmuqam, District Neelum.
2. State through Advocate-General Azad Jammu & Kashmir, Muzaffarabad.
3. Station House Officer (SHO), Police Station Lawat, District Neelum.

…… RESPONDENTS

(On appeal from the order of the Shariat Appellate Bench of the High Court, dated 15.6.2019, in Cri. Revision Petition No.136 of 2019)

FOR THE APPELLANT: Mr. Mushtaq Ahmed Janjua, advocate.

FOR THE STATE: Raja Ayaz Ahmed, Assistant Advocate-General.

FOR RESPONDENT NO.1: Raja Aftab Ahmed Khan, advocate.

Date of hearing: 14.11.2019

JUDGMENT:

Raja Saeed Akram Khan, J.—Both the supra-titled appeals are offshoot of the one and the same FIR, arising out of the single judgment of the Shariat Appellate Bench of the High Court (to be referred hereinafter as the High Court), therefore, these have been heard together and are being disposed of through this single proposed judgment. Through the impugned judgment of the High Court dated 16.5.2019, while partly accepting Cri. Revision Petition No.136/2019, bail has been granted to Azhar, accused-respondent, herein, whereas to the extent of Sohail Hussain, accused-appellant, herein, the bail has been declined.

2. The facts forming the background of the matter in hand are that on a written report made by the complainant, Bashir Hussain, a case in the offences under sections 147, 148, 149, 337 and 324, APC, read with section 20 of the Offence Against Property (Enforcement of Hudood) Ordinance, 1979, (to be referred hereinafter as the EHA) was registered at Police Station Lawat, Neelum, against Sohail Hussain, Azhar and the co-accused, on 30.3.2019. After registration of the FIR, the accused nominated in the

FIR moved the bail application before the Additional Tehsil Criminal Court Athmuqam on 5.4.2019 for release on bail, which was rejected to the extent of the accused-appellant Sohail Ahmed and accused-respondent Azhar, vide order dated 11.4.2019. The matter was brought before the District Criminal Court Neelum on 13.4.2019. The learned District Criminal Court Neelum, vide order dated 17.4.2019, also refused to extend the concession of bail to both the accused. Again feeling aggrieved, both the accused filed a revision petition before the High Court, which was decided through the impugned judgment dated 15.6.2019, in the manners indicated in the preceding paragraph.

3. While arguing the appeal tilted *Sohail Hussain vs. The State & others,* Raja Aftab Ahmed, advocate, counsel for the accused-appellant, submitted that the order passed by the High Court to the extent of the accused-appellant is against law and the facts of the case, as the learned High Court failed to exercise its discretion in a legal manner while refusing to enlarge the accused-appellant on bail. He submitted that the learned High Court fell in error of law while not

taking into account the principles laid down by the superior Courts regarding the bail matters. He forcefully argued that at the time of the decision of bail application, tentative assessment of the record; i.e. allegations leveled in the FIR, the medico-legal report and the statements recorded under section 161, Cr. P.C. is permissible, but the same has not been taken into account by the courts below while refusing to extend the concession of bail to the accused-appellant. The learned counsel added that not a single piece of evidence has been discussed by the High Court as there is gross contradiction in the statements of the prosecution witnesses, which does not support the allegations leveled in the FIR, hence the case falls within the scope of further inquiry and the whole case has become doubtful, therefore, the benefit of doubt must be extended to the accused even at bail stage but this principle has not been followed by the High Court, while delivering the impugned judgment. He forcefully argued that the learned High Court committed grave illegality while not adhering to the principle of consistency, as the case of the accused-appellant was at much better footing as compared to Azhar, accused-

respondent, to whom the concession of bail was extended. He further added that according to the prosecution story, the accused-appellant Sohail Hussain snatched the pistol and bullets from the victim. Had the accused got the intention to kill Muhammad Shafique, he would have used the pistol for the purpose. He lastly submitted that the learned Courts below also fell in error of law while not taking into consideration that section 324, APC, is not attracted in the case. He requested for release of the accused-appellant on bail.

4. On the other hand, Mr. Mushtaq Ahmed Janjua, advocate, counsel for the complainant, while controverting the arguments of the counsel for the accused-appellant, submitted that the order passed by the High Court to the extent of the accused-appellant, Sohail Hussain, is in accordance with law, which is not open for interference by this Court. He added that only a bird-eye view can be made while evaluating the material available against the accused at the bail stage, as deeper appreciation is not warranted under law and this principle has fully been followed by the High Court to the extent of the accused-appellant while delivering the impugned judgment. The learned counsel

submitted that the accused appellant was duly nominated in the FIR with a specific role that he hit on the head of the victim, Muhammad Shafique, with a blow of hatchet and injured him seriously. He added that the medical report fully corroborates the allegation leveled in the FIR. He added that the accused-appellant is attributed a vital role towards the commission of offence, who was armed with a sharp-edged weapon and used the same in the result of which the victim received injury on his head, which is the vital part of the body, as is evident from the medical report and the statement recorded under section 161, Cr.P.C. In continuation of his arguments, the learned counsel submitted that the accused-appellant was found guilty of the offence by the prosecution and challan has been presented in the trial Court. The trial is in progress and the statement of one witness has been recorded. According to the learned counsel, at this stage, the release of the accused on bail is not warranted by law.

5. While arguing the cross appeal titled *Bashir Hussain vs. Azhar and others,* Mr. Mushtaq Ahmed Janjua, advocate, counsel for the complainant-appellant, Bashir Hussain, submitted that the bail

granting order passed by the learned High Court is fanciful and perverse, as the learned High Court has failed to exercise its discretion in a legal manner, while extending the concession of bail to the accused respondent, Azhar. He added that cogent evidence was brought against the accused but the learned High Court without taking into account the principle laid down by the superior Courts, to be dealt with the bail matters, has dived deep into the matter, whereas the deeper appreciation of evidence in bail matters is not warranted under law. He further added that the FIR was promptly lodged and the accused was nominated with a specific role, whose participation in the occurrence is fully proved. He added that the challan has been presented in the Court and the trial is in progress, but this fact has also been overlooked by the High Court while extending the concession of bail to the accused-respondent. The learned counsel further added that during investigation all the accused were found guilty but the learned High Court fell in error of law, while bringing the case of the accused-respondent within the purview of further inquiry. The learned counsel referred to and relied upon the case reported

as *Shakil Ahmed & others vs. Kahnzada & others* [2019 SCR 43].

6. In reply, Raja Aftab Ahmed Khan, advocate, counsel for the accused-respondent, defended the judgment of the High Court to the extent of Azhar, accused-respondent, while submitting that the principles for granting and cancellation of bail are altogether different and once bail has been granted by the Court of competent jurisdiction, the same cannot be recalled in routine. The learned counsel submitted that right conclusion has been drawn by the learned High Court while making bird eye-view of the material collected by the prosecution, which makes the case one of further inquiry. The learned counsel lastly argued that no specific role has been attributed to the accused-respondent towards the commission of offence. The learned counsel also submitted that the learned High Court has granted bail while exercising the discretion in a legal manner. No case is made out for cancellation of the bail. He requested for dismissal of appeal. The learned counsel referred to and relied upon the case reported as *Sajid vs. Wazir Hussain & another* [2005 SCR 302].

7. Raja Ayaz Ahmed, the learned Assistant Advocate-General, supported the arguments advanced by the counsel for the complainant and requested for cancellation of bail extended to the accused-respondent, Azhar, and dismissal of appeal filed by Sohail Hussain, accused-appellant.

8. We have heard the learned advocates for the parties, the learned Assistant Advocate-General and gone through the record of the case along with the other material made available.

9. The accused-appellant, Sohail Hussain, and accused-respondent, Azhar, were booked in a case falling in the offences under sections 147, 148, 149, 337 and 324, APC, read with section 20 of EHA, for inflicting the blow of hatchet on the head of, Muhammad Shafique, the brother of complainant-appellant, herein. During the course of investigation, the accused were found guilty for inflicting hatchet blow to the victim, which caused him serious injury. After taking into account the medical report, it appears that the head injury caused by the sharp-edged weapon has been ascribed as *shujjah-i-maudiah* and the other injury on the body of victim has been ascribed as *gher*

jaifa munaqqila, which is further corroborated by the statement of witnesses. In the FIR, it has clearly been alleged that the accused, Sohail Hussain, armed with the sharp-edge weapon; i.e. hatchet, inflicted the blow on the vital part (head) of the victim, whereas the other accused have been attributed the role to inflict the blows with stick on the body of the victim. It may be observed that the punishment of injury *shujjah-i-maudiah* is severe as compared to the injury *gher jaifa munaqqila.* Thus, the argument of the learned counsel for the accused-appellant that the case of the accused-appellant is at much better footing as compared to the other accused, who were released on bail, is falsified from the record; i.e. the FIR and the medical report.

10. The argument of the counsel for the accused-appellant, Sohail Hussain, that section 324, APC, is not attracted in the case and the same has wrongly been incorporated in the FIR, just to deprive the accused-appellant of the concession of bail, cannot be considered at this stage, as challan has been presented and trial is in progress. Although mere commencement of trial does not debar an accused person from release on bail, if a case is otherwise made out, however, the

case of accused-appellant, Sohail Hussain, does not come within such purview. From the material collected by the prosecution, he is found guilty of the offence by the prosecution agency and it is settled principle of law that while dealing with the bail matters, the Court can only take into account the allegation leveled in the FIR, the medico-legal report and the statements recorded under section 161, Cr.P.C. etc. After making the cursory examination of the material, we are of the view that the same connects the accused-appellant with the commission of offence. The detailed discussion on merits of the case is otherwise not proper at the time of dealing with the bail matters. We are not inclined to grant bail to the accused-appellant, Sohail Hussain, rather to direct the trial Court to conclude the trial expeditiously, preferably within a period of four months from the receipt of this order and in case of non-conclusion of the trial, the appellant shall be at liberty to repeat his bail application before the trial Court.

11. So far the case to the extent of cancellation of bail granted by the learned High Court to the accused-respondent, Azhar, is concerned; it may be observed here that the main argument of the counsel

for the complainant is that the accused-respondent has been nominated in the FIR with a specific role and the order passed by the High Court granting bail to him is arbitrary, perverse and fanciful. It may be observed that the learned High Court has allowed the concession of bail to the accused while taking into consideration the relevant facts and making tentative assessment of the record collected by the investigating agency. In the FIR, the accused, Azhar, has not been ascribed the specific role and only collective role has been ascribed to all the other accused, except Sohail Hussain, that when the victim fell on the ground, they inflicted the blows with sticks. It has not been stated that which of the accused has inflicted such blow on the body of the victim.

12. It is a celebrated principle of law that when the bail is granted to an accused by the Court of competent jurisdiction, very strong reasons are required to recall the same. The grounds for cancellation of bail are altogether different as compared to those for grant of bail. The discretionary powers based on cogent grounds, exercised by the Court of competent Jurisdiction while granting bail are normally

not interfered with by this Court. The same principle has been reiterated by this Court in the case reported as *Zaffar Mehmood vs. Muzaffar and another* [2014 SCR 544], wherein, it has been observed as under:-

> "It may be stated that at the bail stage only the tentative assessment of the record i.e. FIR, statements of the witnesses recorded under section 161, Cr.P.C., the medico legal report and of course defence plea, if any, raised by the accused have to be considered. Deeper appreciation of evidence is not permissible at the stage of bail. This Court normally does not interfere with the discretion exercised by the Shariat Court unless the discretion is found capricious, against the settled norms governing the bail matter and against the record. The question of cancellation of bail does not stand on the same pedestal as the rules governing the grant of bail are different than the one applicable for cancellation of bail. Once the bail is granted by a Court of competent jurisdiction very strong reasons are required for its cancellation…."

Similarly, in the case reported as *WAPDA and another vs. Shahid Mehmood and 2 others* [2014 SCR 579], it has been observed as under:-

> "… The matter of cancellation of bail has to be considered by the Courts altogether from a different angle as compared to that of grant of bail. The rules governing the grant of bail stand at a different footing as compared to cancellation of bail. Normally this Court

> refrains from cancelling the bail where the trial Court and the High Court has exercised discretion in a judicious manner. Of course, this Court has jurisdiction to cancel the bail if it is found that the order passed by the Courts below is capricious, against the record or against the settled rules governing the bail matters."

13. There is nothing on the record that after getting the concession of bail, the accused-respondent has ever misused the same or tried to influence the trial proceedings. In this scenario, sending him behind the bars would not serve any useful purpose. Even otherwise, no overwhelming circumstances are available to recall the bail granting order passed by the Court of competent jurisdiction, as in the cases, where the Court of competent jurisdiction, while exercising its discretion has released the accused on bail, some very strong and exceptional grounds are required to recall the concession of bail. In the instant case, no such arbitrariness, capriciousness, illegality or irregularity has been pointed out, therefore, we are of the view that the discretion exercised by the High Court for release of accused on bail is perfectly legal, in accordance with law and the rules governing the bail

matters, thus no interference under law is warranted by this Court.

14. The result of the above discussion is that finding no force in these appeals, the same hereby are dismissed.

Before parting with the case, we would like to observe here that the observations made in this order are tentative in nature and the trial Court is under obligation to decide the case on its own merits, without being influenced by the findings recorded by this Court in this order.

ACTING CHIEF JUSTICE **JUDGE**

Muzaffarabad