

**JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, BANNU BENCH.
(Judicial Department)**

Cr.M No.36-B/2018 in Cr.A No.101-B/2018.

Sher Jan
Vs
Mehrab Khan/State

JUDGMENT

Date of hearing: **04.09.2018.**

Appellant-Petitioner: **By Muhammad Rasheed Khan Dirma
Khel,& Ashraf Khan Marwat, Advocate.**

Respondent(s) : **State By Shahid Hameed Qureshi, Addl: AG
& Others by Salah-u-Din Marwat, Advocate.**

SHAKEEL AHMAD, J.--- This is an application under section 426 Cr.P.C for the suspension of sentence of Sher Jan, the appellant who has been convicted and sentenced by the learned trial Court as under:-

Imprisonment for life under section 302/34(b)

PPC for raising Lalkara/for issuing command

to his son Bait Ullah to commit murder of

Naseer Muhammad (now dead) with a

compensation of Rs.20,00,000/-(Twenty Lakhs)

under section 544- A Cr.P.C to be paid to the

legal heirs of the deceased. In default thereof

to further undergo six months S.I. Benefit of

section 382-B Cr.P.C was extended to the petitioner/appellant.

2. The facts necessary for the disposal of this petition are that on 03.5.2014 at 16.40 hours complainant Mehrab Khan reported the matter to Pasham Khan ASI, to the effect that he went to the shop of one Saif ur Rehman situated in his village to purchase house-hold articles, whereas his sons namely Naseer Muhammad and Nisar Ahmad were also present there. He after purchasing house hold articles was returning from the shop. His son Naseer Muhammad was some paces ahead, while he along with other son Naseer Ahmad were behind him. At 1600 hours accused Sher Jan and co-accused Baitullah (juvenile co-accused facing trial) appeared on motorcycle. Accused Sher Jan was driving the motorbike while co-accused Baitullah duly armed with Kalashnikov was sitting behind him. As soon as the accused crossed the complainant party, accused Sher Jan ordered his son Baitullah to kill Naseer Muhammad. Upon which accused Bait Ullah started firing at his son Naseer Muhammad, as a result of which he was hit and fell down. The accused after commission of the offence fled away from the

spot. When the complainant and his son Nisar Ahmad attended Naseer Muhammad, he was taking his last breath. Motive as alleged in the crime report is that the co-accused Bait Ullah had committed decoity in the house of the complainant on the basis of which he and his group was charged.

3. It has been argued by the learned counsel for the petitioner that the only allegation against the petitioner is that he raised Lalkara at the time of occurrence; that the petitioner remained present before the Court during the whole trial; that the petitioner has been convicted under section 302(b) PPC read with section 34 PPC whereas there is no such evidence, which could attract the provision of section 34 PPC qua the petitioner and this fact even otherwise shall finally be determined at the time of hearing the main appeal, which is not at sight in the near future.

4. As against that the learned counsel appearing on behalf of the complainant contended that the petitioner has specifically been charged for raising Lalkara/issuing command to his son to kill Naseer Muhammad, besides, facilitating the crime, therefore, section 34 PPC is fully attracted under the

attending circumstances of the case; that the petitioner has been convicted after a full dressed trial, therefore, he is not entitled for suspension of sentence.

5. The learned AAG representing the State supported the contention of the learned counsel for the complainant and added that conviction of the petitioner does not fall within the ambit of section 426(1-A) Cr.P.C, therefore, his prayer for suspension of sentence is not tenable in the eye of law.

6. We have given our anxious consideration to the contentions raised by the learned counsel for the parties and have gone through the record with their eminent assistance.

7. Undoubtedly, there is no bar to the tentative assessment of evidence on the basis of which finding of guilt is given, for the purpose to consider the application of suspension of sentence under section 426(1) Cr.P.C. In this respect we are fortified by the full Court judgment of Lahore High Court reported as “**Altaf Hussain Shah Vs. The State**”(1986 **P.Cr.L.J. 2202**), wherein it was observed that:-

“the power and discretion of the appellate Court to grant bail is not fettered or restricted by reference either to the conviction or sentence passed against an appellant but this discretion must be exercised in a proper manner.”

In this context reliance can also be placed on the cases reported as **“Allah Yar and another Vs. The State”(1996 P.Cr.L.J. 211) and “Mumtaz Ali and another Vs. The State” (2012 YLR 2204).**

8. It is now settled that appellate Court has got implied power to grant relief which is ancillary or incidental to appeal during pendency of appeal. This power of appellate Court under section 426(1) Cr.P.C is in fact limited and court during pending disposal of appeal, suspend the sentence of accused in appropriate cases in its discretion for good and sufficient reasons, unlike section 426(1-A) Cr.P.C , wherein it is not a discretion of the Court but the grant of bail is mandatory and for its refusal reasons must be stated, reflecting that grant of bail is a rule while refusal thereof an exception in the case falling within the ambit of sub-section (1-A) of section 426 Cr.P.C. The two provisions, one is under sub-section (1) and the other is under sub-section (1-A) of section 426 Cr.P.C are unlike and in contrast to each other and in the former it is the discretion of the Court and in case of suspension of sentence the reasons will have to be recorded

while in the latter it has been made mandatory that the sentence shall be suspended with a further provision that in case of refusal, reasons will have to be recorded.

9. We have noticed that the only allegation against the petitioner is that he raised Lalkara/issued command to his son to commit murder of Nasser Muhammad and facilitated the crime. Genuineness or otherwise of allegation against the petitioner would be adjudged at the time of final adjudication of main appeal, thus he has made out a case for suspension of sentence. In this behalf reference may be made to the cases report as **“Muhammad Ashfaq Vs. The State” (2005 YLR 2314)**, **“Noor Muhammad Vs The State and another” (2013 YLR 235)**, **Muhammad Ali Vs The State” (2007 YLR 2986)**, **“Mst. Nasreen Bibi Vs The State” (PLD 2007 Lahore 531)**, **“Muhammad Yaseen Vs. The State”(2007 MLD 1066)** and **“Mumtaz Hussain Vs The State” (2006 YLR 2385)**.

10. In view of the above, we accept this petition and suspend the sentence of the petitioner. He is directed to be released on bail subject to his furnishing bail bonds in the sum of Rs. 3,00,000/-(Rupees three Lakhs) with two sureties each in

the like amount to the satisfaction of learned trial Court/ASJ-III, Lakki Marwat. The petitioner shall appear before the Court in person on each and every date of hearing of his main appeal.

Announced.
04.9.2018

JUDGE.

JUDGE.