**ORDER-SHEET**
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**
**JUDICIAL DEPARTMENT**

**Criminal Misc. No. 753-B of 2022**

**Ayaz Javed & another**
Versus
**The State, etc**.

| S. No. of order/ proceedings | Date of order/ Proceedings | Order with signature of Judge and that of parties or counsel where necessary. |
|---|---|---|
| | 22.06.2022 | Petitioners on ad-interim pre arrest bail with Mr. Basharat Hussain Raja, Advocate.<br>Mr. Zeeshan Babar, State counsel,<br>M. Mansoor, Inspector/IO and M. Malik ASI with record. |

Through the instant Criminal Misc., petitioners-accused (*Ayaz Javed & Javed Akhtar)* pray for pre-arrest bail in FIR No. 92, dated 24.04.2022, Under Section 324, 186, 353 & 34-PPC read with Section 13, 20 of the Arms Ordinance, 1965, registered at Police Station Nelore, Islamabad.

2- According to the allegations set-forth in the FIR, on 24.04.2022, at about 12:10 p.m. within the area of village Charah, territorial limits of PS Nelore, Islamabad, when the complainant namely Muhammad Malik ASI along with police officials in order to conduct combing operation, entered in a street, three unknown persons made straight firing at them while standing on the roof of a house; that they encircled the said house and succeeded to apprehend one Asjad Javed, co-accused, with .30 bore pistol containing five live bullets while rest of the two managed to escape and that said Asjad Javed disclosed the names of other two assailants as Ayaz and Javed (*petitioners).*

3- Learned counsel for the petitioners argued that the story narrated in the FIR is concocted and false; that offence under section 324 PPC is not attracted while rest of the offences are bailable; that there is no private witness of the alleged occurrence therefore, petitioners are entitled to the concession of pre-arrest

bail. Learned counsel relied upon case law reported as 2011 MLD 1049, 2008 P Cr L J 1453 and 1998 P Cr L J 22.

4. On the other hand, learned State Counsel repelled the above submissions. It is asserted that petitioners were named in the FIR on the basis of statement of co-accused who, soon after his apprehension, named his companions, who are his father and brother respectively; that petitioners retain criminal record; that sufficient incriminating material in the shape of statements of police officials who were part of the police party, recovery of empties from the spot and recovery of weapon from co accused, is available on record while alleged offence of section 324 PPC falls within the ambit of prohibitory clause of section 497 Cr P C, therefore, in absence of any malafide on the part of police, petition is liable to be dismissed.

5. Heard, record examined.

6. Perusal of record reveals that it is a case of ineffective firing at the police party. According to the prosecution version, the police party under the commission of Malik ASI when entered the street at about 12:10 pm, three assailants standing on the roof of a house started straight firing.

7. The occurrence allegedly took place in the broad daylight but no witness from the public hailing from that particular area had been cited as a witnesses which, in the attending circumstances of the case, cannot be overlooked at this stage where only tentative assessment of the material collected by the prosecution is permissible, for the reason that the alleged occurrence did not happen between the private persons rather there is an allegation of launching an attack upon the police party.

8. Furthermore, nobody from the police party had sustained any bullet injury in result of alleged reckless firing made by the assailants. It appears that the allegation is with regard to making

ineffective firing, therefore, allegation to the extent of offence under section 324 PPC calls for further inquiry.

9. The rest of the offences are bailable wherein bail is to be granted as a right. In-addition, mere registration of criminal case without conviction cannot be made basis to hold an accused disentitled to the concession of bail when the case, as observed above, otherwise calls for further inquiry.

10. It is by now well settled that if there is non-availability of incriminating material against an accused, his implication by the complainant or the persistence of the police to arrest him, would be construed as the circumstances, which by themselves indicate malafide on the part of the complainant or the police and in that eventuality, an accused need not to lead any evidence to substantiate the malice or malafide on part of the complainant or the police. Reliance is placed upon case of ***Shahzada Qaiser Arfat alias Qaiser v. The State and another"*** **(PLD 2021 Supreme Court 708).**

11. It has also been held by the Hon'ble Apex Court in the case of ***Shahzada Qaiser Arfat supra*** that:-

> *"the power of the High Courts and the Courts of Sessions to grant pre-arrest bail, first and foremost, must be examined in the constitutional context of* ***liberty, dignity, due process and fair trial****. Pre-arrest bail is in the nature of a check on the police power to arrest a person.* ***The non-availability of incriminating material against the accused or non-existence of a sufficient ground including a valid purpose for making arrest of the accused person in a case by the investigating officer would as a corollary be a ground for admitting the accused to pre-arrest bail****, and vice versa. Reluctance of the courts in admitting the accused persons to pre-arrest bail by treating such a relief as an extraordinary one without examining* ***whether there is sufficient incriminating material available on record to connect the accused with the commission of the alleged offence and for what purpose his arrest and detention is required during investigation or trial of the***

> ***case, and their insistence only on showing mala fide on part of the complainant or the Police for granting pre-arrest bail does not appear to be correct****, especially after recognition of the right to fair trial as a fundamental right under Article 10A of Constitution of Pakistan, 1973. Protection against arbitrary arrest and detention is part of the right to liberty and fair trial. This Court has, in many cases, granted pre-arrest bail to accused persons after finding that there are no reasonable grounds for believing their involvement in the commission of the alleged offences and has not required independent proof of mala fide on part of the Police or the complainant before granting such relief. Despite non-availability of the incriminating material against the accused, his implication by the complainant and the insistence of the Police to arrest him are the circumstances which by themselves indicate the mala fide on the part of the complainant and the Police, and the accused need not lead any other evidence to prove mala fide on their part."*
> *(Emphasis added)*

12. Having examined the case, on tentative assessment of the material placed on record, it is concluded that petitioners have succeeded to make out a case for exercise of extra-ordinary discretion of pre-arrest bail. Consequently, instant criminal miscellaneous is allowed. Ad-interim pre-arrest bail already granted to the petitioners vide order dated 10.06.2022 is confirmed subject to their furnishing fresh bail bonds in the sum of Rs.50,000/- each with one surety each in the like amount to the satisfaction of the learned Trial Court.

13. The observations made hereinabove are tentative in nature and shall not prejudice the case of either party during the trial.

**(ARBAB MUHAMMAD TAHIR)**
**JUDGE**

**//Kamran//**