ORDER SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

JUDICIAL DEPARTMENT

Crl. Misc. No. 977 of 2022

Ashfaq Ahmed **VERSUS** **The State, etc.**

Serial No. of order of proceedings	Date of order of proceedings	Order with signatures of judge, and that of parties of counsel, where necessary.
	12.08.2022	Mr. Zia Hussain Raja, Advocate for petitioner. Mr. Nafees Khan, Advocate for respondent. Mian Zain Qureshi, State Counsel with Muhammad Siddique, S.I.

Through the instant Crl. Misc., petitioner (*Ashfaq Ahmed*) prays for pre-arrest bail in FIR No. 507, dated 06.03.2022, under Sections 337-H (ii), 506(ii) & 34 PPC registered at Police Station Koral, Islamabad.

2- The subject FIR stood registered on the application of respondent No. 2 namely Muhammad Younas (complainant) who alleged therein that his ancestral land is contained in Khasra No. 289 and 290, Khewat No. 21; that on **28.02.2022** Dildar son of Sajwal, Zubair son of Dildar and Ashfaq son of Talib (petitioner) attempted to occupy his land illegally upon which he along with Naeem, Ashfaq and Javed admonish them and also warned them not to raise any constructions, planation or use any machinery but despite that at about 12:30 pm, **petitioner Ashfaq brought a Kalashnikov from his house** and in presence of Dildar, Zubair, Ashfaq, directed the driver of the machine to take aside and that **he will slash their heads and will kill them;** that at about 7:45 pm the assailants started firing in front of his house but he could not recognize them due to darkness and that he has firm doubt that Dildar, Zubair, **Ashfaq petitioner made firing or got the same done through anyone else**.

3. According to the allegations, the role assigned to the petitioner is attempting to take illegal possession of the land owned by

the complainant; emerging at the crime scene with Kalashnikov; extended life threats while to the extent of making firing, the complainant expressed his suspicion as he could not identify the assailants due to darkness.

4. Learned counsel argued that the very registration of the instant FIR is tainted with malafide; that the offence under section 506 (ii) PPC in the attending circumstances is not attracted; that case of the petitioner calls for further inquiry; that the alleged offence does not fall with the ambit of prohibitory clause of section 497 Cr.P.C, wherein grant of bail is rule and refusal is an exception; that petitioner retains no criminal record, therefore entitled to the concession of pre-arrest bail. Leaned counsel relied on ***2011 MLD 1032, 2022 PCr.LJ Note 7, 2014 PCr.LJ 1464 , PLJ 2019 CR.C (note) 34.***

5. On the other hand, learned counsel for the complainant argued that petitioner is specifically nominated in the FIR with the allegation of an attempt to take illegal possession of the land owned by the complainant and resorting firing with *Kalashnikov* besides extending life threats; that recovery of crime weapon is yet to be effected while police investigation did not lend support to the stance of the petitioner, therefore, petitioner is not entitled to the concession of pre arrest bail. Learned counsel relied upon ***2020 SCMR 249, 2020 SCMR 313 and 2012 PCr.LJ 1035.***

6. Heard, record perused.

7. Perusal of record reveals that the alleged occurrence took place on **28.02.2022** but the complainant reported the matter to the concerned police station on **06.03.2022 i.e. with the delay of 05 days** without advancing any explanation with regard to such inordinate delay.

8. It is also noted that there are allegations of making firing in front of the house of the complainant but the police record is silent as to whether any empty was recovered from the crime scene.

9. Furthermore, the allegation of making firing is not directly attributed to the petitioner rather the complainant has expressed his doubt therefore, in the attending circumstances when there is inordinate delay in reporting the matter to the police and no empties were recovered from the spot, the case of the petitioner warrants further inquiry where possibility of false implication cannot be ruled out, a pre-requisite for extending extra ordinary relief of pre-arrest bail.

10. The offence under section 337-H (ii) PPC is bailable while offence under section 506 (ii) PPC does not fall within the ambit of prohibitory clause of section 497 Cr.P.C, wherein grant of bail is a rule and refusal is an exception. Reliance is placed upon case of ***"Muhammad Ramzan alias Jan v. The State and others*** **(2020 SCMR 717)**.

11. The Hon'ble apex Court in the case of ***Shahzada Qaiser Arfat alias Qaiser v. The State and another"*** **(PLD 2021 Supreme Court 708)** has graciously held 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."*

12. The ratio set in the case of ***Shahzada Qaiser Arfat supra*** guides to holds 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.

13. In view of above tentative assessment, petitioner has succeeded to make out a case for exercise of extra ordinary concession of pre-arrest bail. Consequently, instant criminal miscellaneous is **allowed**. Ad-interim pre-arrest bail already granted to the petitioner vide order dated 02.08.2022 is confirmed subject to

furnishing fresh bail bonds in the sum of Rs.50,000/- with one surety in the like amount to the satisfaction of the learned Trial Court.

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

(ARBAB MUHAMMAD TAHIR)
JUDGE

//Kamran//*