ALI MUHAMMAD

Versus

THE STATE

P L D 2009 Lahore 312

ASIF SAEED KHAN KHOSA, J.---An overwhelming number of cases coming up before this Court are run of the mill but there are others which are groundbreaking. The case of Ali Muhammad petitioner offers a rare opportunity to break new ground and, therefore, we have decided to grab the opportunity so as to explore new avenues for delay reduction and innovative management of the colossal overload of cases before the subordinate courts.

2. Through this petition Ali Muhammad petitioner has sought post-arrest bail in case F.I.R. No. 253 registered at Police Station Gogera, District Okara on 22-6-2008 in respect of offences under sections 337-A(i)/337-A(iii)/337-F(i)/34, P.P.C. It is alleged by the prosecution that at about 09-00 a.m. on 16-6-2008 the petitioner and his son namely Maqbool Ahmad had caused injuries to the petitioner's second wife namely Mst. Azran Bibi complainant with sotas in village Dholly Khichi. Earlier on applications submitted by the petitioner seeking the same relief had been dismissed by the learned Magistrate First Class, Okara and the learned Additional Sessions Judge, Okara on 26-11-2008 and 6-12- 2008 respectively.

3. We have heard the learned counsel for the petitioner, the learned counsel for the complainant, the learned Deputy Prosecutor-General appearing for the State, the learned Deputy Attorney-General for Pakistan and the learned Additional Advocate-General, Punjab and have gone through the relevant record with their assistance.

4. The learned counsel for the petitioner .has argued that the petitioner is not a previous convict, habitual or hardened, desperate or dangerous criminal and the alleged offence had not been committed by him in the name or on the pretext of honour and, thus, by virtue of the provisions of subsection (2) of section 337-N, P.P.C. even in case of his ultimate conviction the petitioner would not be awarded any sentence of imprisonment by the learned trial court as Ta'zir in addition to the punishment of payment of Arsh or Daman to the victim. According to the learned counsel for the petitioner in all such cases no sentence of imprisonment may be awarded to the offender and he may be burdened only with payment of monetary compensation to the victim by way of Arsh or Daman. He has maintained that the petitioner is ready to deposit the requisite amount of Arsh or Daman with the learned trial court in order to secure the relevant amount of money in case of his ultimate conviction and sentence, if any, and, therefore, without adverting to the merits of his case the petitioner may be released on bail on this score

alone. As against that the learned counsel for the complainant has maintained that the petitioner is a desperate person who had beaten up his wife, i.e. the complainant with the help of his son and on account of such desperate nature of his character he is, in case of his conviction, likely to be handed down a sentence of imprisonment as Ta'zir besides the sentence of payment of Arsh and Daman and, thus, the offer made by the petitioner regarding deposit of the requisite amount of Arsh or Daman may not have any bearing upon his prayer for bail. The learned Deputy Prosecutor-General appearing for the State and the learned Additional Advocate-General, Punjab have taken the same position and have gone on to maintain that admission of an accused person to bail in this manner may encourage violence in the society. The learned Deputy Attorney-General for Pakistan has, however, supported the stand of the petitioner and has maintained that the case in hand is one of domestic violence only which ipso facto does not portray the petitioner as a "habitual or hardened, desperate or 'dangerous criminal" within the purview of the provisions of subsection (2) of section 337-N, P.P.C. attracting a sentence of imprisonment as Ta'zir in addition to the punishment of payment of Arsh or Daman. He has submitted that the proposed manner of disposition of matters of bail in such cases is likely to obviate premature punishment of accused persons, reduce the load of under-trial prisoners in jails and encourage conciliation and compromise between the affected parties.

5. After hearing the learned counsel for the petitioner, the learned counsel for the complainant, the learned Deputy Prosecutor-General appearing for the State, the learned Deputy Attorney-General for Pakistan and the learned Additional Advocate-General, Punjab and after going through the relevant record with their assistance it has been appreciated by us that' the pivotal statutory provisions needing interpretation in this case are those of subsection (2) of section 337-N, P.P.C. which read as follows:--

> "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 Ta'zir 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 honour;
>
> Provided that the Ta'zir 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."

The words "or the offence has been committed by him in the name or on the pretext of honour" and the proviso reproduced above were not a part of the original subsection (2) of section 337-N, P.P.C. and the same had been introduced on 11-1-2005 through the Criminal Law (Amendment) Act, 2004 (Act I of 2005). There are conflicting opinions in

the field regarding the true scope of the provisions of subsection (2) .of section 337-N, PPC. The view expressed by Mian Muhammad Ajmal, J. of the Peshawar High Court (as his lordship then was) in the cases of Ikramullah v. Samiullah alias Shanai (1998 MLD 1184) and Aurangzeb v. The State and another (1999 PCr.LJ 230) and the view taken by Khawaja Muhammad Sharif, J. of this Court in the case of Muhammad Saeed v. The State (2006 YLR 1591) were identical and the same view was followed by Muhammad Jehangir Arshad, J. of this Court in the case of Muhammad Yaqoob and 4 others v. The State (2007 MLD 1067) but Muhammad Khalid Alvi, J. of this Court had disagreed with that view in the case of Bakhshu v. The State (Criminal Miscellaneous No. 1625-B of 2008 decided at the Multan Bench of this Court on 26-9-2008). The views expressed by the Hon'ble Supreme Court of Pakistan on the subject in the case of Haji Maa Din and another v. The State (1998 SCMR 1528) were somewhat similar to the views expressed by Mian Muhammad Ajmal, J., Khawaja Muhammad Sharif, J. and Muhammad Jehangir Arshad, J.

6. It had been observed by Mian Muhammad Ajmal, J. in the case of Ikramullah v. Samiullah alias Shanai (1998 MLD 1184) as follows:--

> "9. The bare reading of the above-stated sections i.e. 324, 337-F(ii) and 337-N(2) of the Act would show that the provisions thereof do not supplement each other rather they are at variance from each other. The punishment provided under section 324 of the Act is imprisonment with fine under `Tazir' and word `shall' has been used making it mandatory in nature, whereas the punishments provided for the offences of the hurt are the payment of Arsh or daman as the case may be, which are mandatory and the award of imprisonment of various terms without any fine has been left to the discretion of the Court. The provisions of subsection (2) of Section 337-N of the Act overrides section 324 and all other sections providing punishment for offences of hurt contained in the chapter. Sub-section (2) of section 337-N begins with non-obstante clause as "Notwithstanding anything contained in this Chapter in all cases of hurt, the Court may", give it an overriding effect over all other sections providing punishment for hurt. Under this sub-section the offender beside payment of Arsh may be awarded punishment of `tazir' who is previous convict, habitual or hardened desperate or dangerous criminal. There is nothing on the record to suggest that the petitioner is either a previous convict, habitual or hardened, desperate or dangerous criminal, therefore, in view of the above legal position, the petitioner who is no more required for further investigation is entitled to bail."

Later on in the case of Aurangzeb v. The State and another (1999 P.CrLJ 230) Mian Muhammad Ajmal, J. had again remarked as follows: -

> "7. Subsection (2) of section 337-N of the Act provides that notwithstanding anything contained in this chapter, in all cases of hurt, the Court may having regard to the kind of hurt, in addition to payment of Arsh, award `Ta'zir' to an

offender who is a previous convict, habitual or hardened desperate or dangerous criminal.

8. The bare reading of the above stated sections i.e. 324, 337-F(ii) and 337-N(2) of the Act would show that the provisions thereof do not supplement each other rather they are at variance from each other. The punishment provided under section 324 of the Act is imprisonment with the fine under Tazir' and word `shall' has been used making it mandatory in nature, whereas the punishment provided for the offences of the hurt are the payment of Arsh or daman as the case may be, which are mandatory and the award of imprisonment of various terms without any fine has been left to the discretion of the Court. The provisions of subsection (2) of section 337-N of the Act overrides section 324 and all other sections providing punishment for offences of hurt contained in the chapter. Subsection (2) of section 337-N begins with non-obstante clause as `Notwithstanding anything contained in this Chapter in all cases of hurt, the Court may", give it as overriding effect over all other sections providing punishment for hurt. Under this subsection the offender beside payment of Arsh may be awarded punishment of `Tazir' who is previous convict, habitual or hardened desperate or dangerous criminal. There is nothing on the record to suggest that the petitioner is either a previous convict, habitual or hardened, desperate or dangerous criminal, therefore, in view of the above legal position, the petitioner who is no more required for further investigation is entitled to bail."

Khawaja Muhammad Sharif, J. had commented in the case of Muhammad Saeed v. The State (2006 YLR 1591) that:

"Learned counsel for the petitioner submits that in the offence under section 337- A(iii), P.P.C. the sentence is Arsh which is 10% of Diyat. He further submits that Part II of section 337-N, P.P.C., the conviction and sentence for imprisonment can only be awarded when it is proved that he is desperate and hardened criminal; ??????????

2. ??????????

Learned Additional A.-G. concedes the submissions/contention of learned counsel for the petitioner that conviction and sentence of imprisonment under section 337- N(ii), P.P.C. cannot be awarded unless it is proved that accused was hardened and desperate criminal.

4. I have heard learned counsel for the parties. After having heard learned counsel for the parties I am of the opinion that in view of above statement of learned Addl. A.-G case of petitioner is of further inquiry. Petitioner shall be released on bail subject to his furnishing bail bonds ??..."

Muhammad Jehangir Arshad, J. had observed in the case of Muhammad Yaqoob and 4 others v. The State (2007 MLD 1067) that:

> "8. Since, at present there is neither any allegation nor any evidence on the record to hold that petitioner(s) are either previous convict, habitual or hardened desperate or dangerous criminals or the offence has been committed by them in the name or on the pretext of honour, therefore, I have no option but to agree with the view taken by his lordship Mr. Justice Mian Muhammad Ajmal, in "Aurangzeb v. The State and another" (1999 PCr.LJ 230) that provisions of section 337-N(2), P.P.C. are not only mandatory but have overriding effect over all other sections providing punishment for hurt and in terms of subsection (2) of said section, the offender besides payment of Arsh may be awarded punishment of Ta'zir only when it is proved that he is a previous convict, habitual or hardened desperate or dangerous criminal, and in the absence of any evidence against the present petitioners to this effect 'I am persuaded to accept both these bail applications."

As against that in the case of Bakhshu v. The State (Criminal Miscellaneous No. 1625-B of 2008 decided at the Multan Bench of this Court on 26-9-2008) Muhammad Khalid Alvi, J. had articulated as follows:

> "8. Apart from Section 337-I the rest of the hurt cases mentioned in Chapter XVI relating to hurts provide punishment of either "Diyat", "Arsh" and "Daman" but as "Ta'zir" certain sentences of imprisonment are also provided in the respective kinds of hurts. The non-obstante clause of sub section (2) of section 337-N (notwithstanding anything contained in this chapter, in all cases of hurt,) brings out the cases of categories of criminals mentioned in this subsection out of the ordinary criminals and are to be dealt with in accordance with this provision. Meaning thereby that all other types of criminals have been left out by this nonobstante clause to be dealt according to the respective hurt case. By adding proviso through Criminal Law Amendment Act 2004 (I of 2005) to sub section (2) and repeating the categories in the proviso as well by providing minimum sentence from the already provided sentence for respective hurt, it makes the case further clear that this clause is specifically designed only for the categories mentioned in this clause and not for any other ordinary criminal.
>
> 9. If for the sake of argument contention of the learned counsel for the petitioner is accepted to be true interpretation, the result would be that no offender causing any type of hurt can be sentenced to imprisonment unless he falls within the category of subsection (2) of section 337-N, P.P.C. For example, if a man out of rage for the first time chops of hands and legs of a. person he can only be sentenced under section 334, P.P.C. and if "Qisas" is not executable then he is only liable to pay "Arsh" and no punishment as provided in Section 334, P.P.C. of 10 years can be imposed upon him because he is neither a previous convict nor habitual, hardened, desperate or dangerous criminal. This interpretation in my view cannot be accepted.

10. Looking from another angle it is to be observed that in second schedule of Cr.P.C. particularly, in hurt cases in Column No. 5 some cases are bailable and some are non-bailable keeping in view the gravity of hurt and sentence provided. Had the intention of the legislature been that sentence is only Arsh and Daman in hurt cases then in the schedule it was not required to differently treat different types of hurts as bailable or non-bailable. It is thus obvious that along with Arsh sentence of imprisonment for various hurts to various lengths is provided but the discretion is left with the court to award punishment of imprisonment commensurate with the gravity of offence to various terms within the prescribed limit.

11. Having all respect to the judgments cited by the learned counsel for the petitioner it is to be observed that proviso to subsection (2) of Section 337-N, P.P.C. was added through Criminal Law Amendment Act, 2004 (I of 2005) dated 10-1- 2005. Judgment reported as 1999 PCr.LJ 230 was delivered before the introduction of the Proviso while judgment reported as 2007 MLD 1067 has merely followed the earlier judgment without considering the effect of Proviso, which was not brought into the notice of his lordship."

7. The research conducted by us shows that the Hon'ble Supreme Court of Pakistan had also commented upon the provisions of subsection (2) of section 337-N, P.P.C. in the case of Haji Maa Din and another v. The State (1998 SCMR 1528). In that case the Hon'ble Supreme Court had framed a question as to "Whether and when a person accused of an offence punishable with Qisas or in the alternative Arsh (Diyat) can also be punished with imprisonment?" It was held by the Hon'ble Supreme Court in that connection as follows:-

"8. The second question need not be gone into in this case as this being a bail matter, it is sufficient to refer to section 337-N(2) of P.P.C. which provides, amongst others, the cases/circumstances in which punishment of imprisonment is to be awarded as Ta'zir. The factors to be seen for awarding Ta'zir punishment are???...

??????????? 9. ????.??

10. As regards Haji Maa Din, petitioner No. 1, the case is that injury was caused in scuffle. He is not alleged to be habitual or hardened, desperate or dangerous criminal or a previous convict. He has undertaken to face the trial and to be available to receive the prescribed punishment in Qisas if the case is proved against him and if the same is waived to pay the requisite amount of Arsh ??.."

11. In view of the above circumstances ???..it would be in fitness of things that they should be released on bail. This petition is, therefore, converted into appeal and allowed. Both the petitioners are allowed bail ???.."

It appears that this pronouncement by the Hon'ble Supreme Court already available in the field has so far remained unnoticed by the High Courts and unfortunately Muhammad Khalid Alvi, J. was not made aware of the views of the Hon'ble Supreme Court on the subject.

8. We have respectfully and carefully examined the divergent views reproduced above and have minutely considered the provisions of subsection (2) of section 337-N, P.P.C. Mian Muhammad Ajmal, J., Khawaja Muhammad Sharif, J. and Muhammad Jehangir Arshad, J. were of the view that the provisions of subsection (2) of section 337-N, P.P.C. are not only mandatory in nature but they also have an overriding effect over all the other provisions providing for punishment for hurt and that in all cases of hurt the offender, besides the punishment of payment of Arsh or Daman, may be awarded the punishment of imprisonment as Ta'zir only when it is proved that he is a previous convict, habitual or hardened, desperate or dangerous criminal. Muhammad Khalid Alvi, J. was, however, of the view that after the subsequent introduction of the proviso to subsection (2) of section 337-N, P.P.C. serious cases of hurt involving cruelty or brutality, etc. could still be visited with a punishment of imprisonment as Ta'zir in addition to the punishment of payment of Arsh or Daman and that some offences pertaining to causing of hurt were still nonbailable, and, thus, an accused person involved therein could be arrested, which meant that bail could be refused in such cases.

9. After a careful consideration of the matter we have found that the non-obstante clause contained in subsection (2) of section 337-N, P.P.C. has indeed given the provisions of the said subsection an overriding effect and sway over all the other provisions dealing with hurt contained in Chapter XVI of the Pakistan Penal Code, 1860. We have also found that the provisions of subsection (2) of section 337-N, P.P.C., as they stand today, contemplate that in all cases of hurt the normal punishment to be awarded to an offender is payment of Arsh or Daman and the optional additional punishment of imprisonment provided for the relevant offence can be awarded to an offender only where the offender "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 honour". It is also quite clear to us that the subsequent addition of the proviso to subsection (2) of section 337-N, P.P.C. had done nothing more than stipulating that if the offender "is a previous convict, habitual, hardened, desperate or dangerous criminal or the offence has been committed by him in the name or on the pretext of honour" then the sentence of imprisonment to be awarded to him as Ta'zir shall not be less than one-third of the maximum period of imprisonment provided for the hurt caused. According to our understanding the said proviso only fixes the minimum sentence of imprisonment to be awarded to an offender who "is a previous convict, habitual, hardened, desperate or dangerous criminal or the offence has been committed by him in the name or on the pretext of honour". Respectfully observing, we have found nothing in the said proviso

which may detract from the overriding effect of the main subsection or create any exception for cases of cruelty or brutality, etc., as found by Muhammad Khalid Alvi, J. The cases of cruelty or brutality, etc. already stood catered for in subsection (2) of section 337-N, P.P.C. and the proviso only fixes the minimum sentence of imprisonment in such cases.

10. We may also add with great deference that the consideration weighing with Muhammad Khalid Alvi, J. regarding some offences pertaining to causing of hurt being non-bailable has been found by us to be extraneous to the issue because even in a case involving a bailable offence an accused person can be arrested during the investigation but he is entitled to be admitted to bail as of right. Bailable nature of an offence does not mean that the accused person involved in such offence cannot be arrested in connection with investigation of such a case. As a matter of fact the provisions of section 496, Cr.P.C. reading as:--

> "When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer-in?charge of a police station, or appears or is brought before a Court, and is prepared at any time while in custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail: ???.." (Italics have been supplied for emphasis)

expressly contemplate arrest or detention of accused persons even in cases involving bailable offences and then go on to provide for their release on bail in such cases as of right. It goes without saying that arrest of an accused person involved in a case of hurt may be necessitated by the requirements of a proper investigation but such arrest cannot be equated with punishment so as to conclude or infer that upon his ultimate conviction such accused person can also be visited with a sentence of imprisonment at the end of the day. These observations made by us find ample support from the contents of paragraph No. 7 of the judgment rendered by the Hon'ble Supreme Court of Pakistan in the case of Haji Maa Din (supra) according to which arrest or detention of an accused person during an investigation has no relevance to the issue whether the accused person could or could not be imprisoned after recording of his conviction. Offences carrying punishments of Hadd, Qisas or Diyat do not contemplate imprisonment of the convict and a question was framed by the Hon'ble Supreme Court in that case as to "Whether a person accused of an offence punishable with Qisas or in the alternative Arsh (Diyat) can be detained in prison awaiting decision of his case?". It was held by the Hon'ble Supreme Court after a discussion on the issue that "It follows, therefore, that an accused person can be detained in jail pending investigation or decision provided the dictates of justice and public good so demand; hence refusal or grant of bail will be regulated by the Court in accordance with the well-settled principles." The question of arrest during an investigation, thus, could not be bracketed with the question of imprisonment after conviction and by tagging the two together, we

observe so with great regard, Muhammad Khalid. Alvi, J. had given weight to a consideration which was not relevant.

11. In view of what has been discussed above we have entertained no manner of doubt that in all cases of hurt provided for in Chapter XVI of the Pakistan Penal Code, 1860 the normal punishment to be awarded to an offender is payment of Arsh or Daman and the optional additional punishment of imprisonment as Ta'zir provided for the relevant offence can be awarded to an offender only where the offender "is a previous c convict, habitual or hardened, desperate or dangerous criminal or the offence has been committed by him in the name or on the pretext of honour" and in the case of such an offender the sentence of imprisonment as Ta'zir is not to be less than one-third of the maximum 256 imprisonment provided for the hurt caused. This, to us, is the only interpretation of the provisions of subsection (2) of section 337-N, P.P.C. as they stand today and if the legislature intends otherwise then it may suitably and appropriately amend the relevant provisions.

12. As a sequel to the discussion made above we are persuaded to hold that cases of hurt attracting only punishments of Arsh or Daman are ordinarily to be treated differently in the matter of post-arrest bail than cases of hurt attracting the optional additional sentence of imprisonment as Ta'zir where the accused person "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 honour" within the purview of subsection (2) of section 337- N, P.P.C. In order to determine as to whether an accused person falls in those categories or not for the purposes of imposition of the optional additional sentence of imprisonment as Ta'zir guidance may be sought from the observations made by the Hon'ble Supreme Court in the case of Haji Maa Din (supra). It was observed by the Hon'ble Supreme Court in that context that:????????

> "8. ???.it is, to refer to section 337-N(2) of P.P.C. which provides, amongst others, the cases/circumstances in which punishment of imprisonment is to be awarded as Ta'zir. The factors to be seen for awarding Ta'zir punishment are the facts and circumstances of the case, the nature of the injury/hurt caused, the weapon used and the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience, or adversely affecting harmony among different sections of the people."

In a case attracting the above mentioned factors a court may have an option to award an additional sentence of imprisonment against a convict besides the punishment regarding payment of Arsh or Daman and the minimum sentence of imprisonment to be awarded in such a case would be governed by the proviso to subsection (2) of section 337-N, P.P.C. In such a case of a possible optional additional sentence of imprisonment bail may legitimately be refused to an accused person keeping in view the circumstances of the case. The hypothetical example given by Muhammad Khalid Alvi, J. of an accused person chopping off the hands and legs of his victim in a rage would probably fall in this category of cases attracting the optional additional sentence of

imprisonment and, thus, such a case is to be treated differently from the case of an accused person who is not a previous convict, habitual or hardened, desperate or dangerous criminal or where the offence has not been committed by him in the name or on the pretext of honour.

13. In the case in hand the petitioner happens to be the husband of the complainant and there was no premeditation on the part of the petitioner. According to the F.I.R. itself the situation had degenerated into violence at the spur of the moment upon arrival of the petitioner's son (the complainant's step son) at the matrimonial home of the petitioner and the complainant where they were present together quite peacefully immediately prior to the occurrence. The petitioner had allegedly picked up a sota from the spot and he and his son had then collectively given only three injuries to the complainant. The case was, thus, a run of the mill case of domestic violence based upon estranged matrimonial relations. The petitioner has no credentials or antecedents of being a previous convict, habitual or hardened, desperate or dangerous criminal and admittedly the offence in this case had not been committed by him in the name or on the pretext of honour and, thus, keeping in view the provisions of subsection (2), of section 337-N, P.P.C., even in case of his ultimate conviction the petitioner is not likely to be awarded any sentence of imprisonment as Ta'zir and the only sentence likely to be awarded against him would be payment of Arsh or Daman to the victim. As observed earlier, the petitioner is ready to deposit the requisite amount of Arsh or Daman with the learned trial court in order to secure his ultimate sentence, if any. In these circumstances keeping the petitioner behind the bars at this stage would amount to nothing but', in the words of Shakespeare, "insisting upon a pound of flesh".

14. After addressing arguments in the matter of bail the learned counsel for the petitioner has further argued that in the trial of all such cases the concept of plea-bargaining should be introduced and recognized and if the only punishment to be awarded to an accused person upon his conviction would be payment of the requisite amount of Arsh or Daman to the victim and if at the time of framing of the charge the accused person agrees to pay the requisite amount to the victim then ordinarily he should be convicted and sentenced accordingly straightaway without holding a full trial. As against that the learned 'counsel for the complainant, the learned Deputy Prosecutor-General appearing for the State and the learned Additional Advocate-General, Punjab have maintained in unison that adoption of such a course would encourage violence in the society and prosperous persons would be emboldened in resorting to violent behaviour. The learned Deputy AttorneyGeneral for Pakistan has, however, supported the suggestion made by the learned counsel for the petitioner and has maintained that the proposed manner of disposition of trial of hurt cases is likely to ensure expeditious delivery of justice inasmuch as through this process the victim shall receive the requisite compensation promptly, the accused person shall be handed down his lawful punishment without unnecessary loss of time and the trial court shall be saved of the time and effort likely to be consumed in the trial which is to end in that result in any case. These submissions of the learned counsel for the parties and of the learned

law officers compel us to consider the concept of plea-bargaining in criminal cases and to explore the scope of this concept in the criminal jurisprudence in vogue in our country.

15. We are conscious of the fact that the petition in hand pertains only to a matter of bail and such larger issues may travel beyond its scope but the order dated 9-2-2009 passed by one of us (Asif Saeed Khan Khosa, J.) shows and constitution of the present Full Bench by the Hon'ble Chief Justice on the basis of that order demonstrates that apart from deciding the matter of bail the larger issue of plea-bargaining in cases of hurt has also, been referred to this Full Bench for rendering an authoritative pronouncement on the same. It was in this context that the parties to this case as well as the learned AttorneyGeneral for Pakistan and the learned Advocate-General, Punjab had been issued notices of this petition.

16. The concept of plea-bargaining in criminal cases is generally explained as pre-trial negotiations that take place between an accused person and the prosecution, during which the accused person agrees to plead guilty to the charge in exchange for certain concessions to be extended by the prosecution. Academics classify plea-bargaining in three categories, i.e. charge bargain, sentence bargain and fact bargain. In charge bargain the accused person is given an option to plead guilty to a lesser charge or only to some of the charges framed against him. In sentence bargain the accused person pleads guilty to the charge framed against him but there is a bargain on the quantum of sentence. Fact bargain, which is not very common, is concerned with admission of a relevant fact by the accused person in exchange for a concession by the prosecution. The driving factors behind all classes of plea-bargaining are saving time of the court, cutting down the expenses involved in the trial and expeditious delivery of justice. A critical advantage of adoption of such a process is that the accused person feels satisfied with what he gets and this generally precludes the possibility of filing of an appeal.

17. Plea-bargaining was frequently resorted to in the criminal justice delivery system of the United States of America in the late 1960s. Prior to that its use was sporadic and ad hoc. As plea-bargaining was utilized more often for the disposition of a case it led to criticism of the procedures adopted but, after initial hiccups, it became an integral part of the system so much so that the position today, it is commonly believed, is that if pleabargaining is taken out of the American criminal justice delivery system the system itself may collapse.

18. During the 1970s plea-bargaining was the subject of some important judgments handed down by the United States Supreme Court. The result of those judgments was general acceptance and widespread incorporation of plea-bargaining in the American criminal justice system. Among those judgments are Robert M. Brady v. United States [(1970) 397 US 742] and Rudolph Santobello v. New York [(1971) 404 US 257]. In Brady the Supreme Court upheld the constitutional validity of plea-bargaining as a process of disposition of a case.

19. In Santobello Chief Justice Burger laid the foundation for a broad-spectrum acceptance of plea-bargaining in the following words:--

> "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely 'called "plea-bargaining", is an essential component of the administration of justice. Properly administered, it is to be encouraged."

A little later in his opinion the Chief Justice, while elaborating some advantages of plea bargaining, observed:--

> "Disposition of charges after plea discussion is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much, of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pre-trial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned."

20. Another judgment that is of some importance was Stanley Blackledge v. Gary Darrell Allison [(1977) 431 US 63]. In that case the Supreme Court strongly advocated plea bargaining and remarked:

> "Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."

21. In some other judgments the United States Supreme Court has described plea bargaining as a mutuality of advantages to the accused and the prosecutor, each having his own reasons for avoiding a trial.

22. The success of plea-bargaining in America over the last thirty years can be attributed to the positive support given to it by the Supreme Court and more importantly to the leadership of Chief Justice Warren Burger. Were it not for his wholehearted commitment plea-bargaining might have taken a long time to gain approval in the American criminal justice delivery system.

23. Plea-bargaining is now very commonplace in America, it is also practised in Canada and Australia and to a far lesser extent in England. It has also recently been introduced in India.

24. In so far as the criminal justice delivery system in India is concerned the situation was not particularly satisfactory, especially in the District Courts. It was, therefore, felt that unless steps were taken to tackle the pendency of criminal cases in the District

Courts the situation might spin out of control. It was appreciated that in the District Courts the bulk of cases related to offences triable by Magistrates and that was where any reform ought to be encouraged and would indeed be necessary. As a consequence of that realization the Indian Parliament enacted Chapter XXI-A in the Indian Code of Criminal Procedure which was brought into force some time in July of 2006. In the Statement of Objects and Reasons accompanying the Bill the concept of plea-bargaining was described as an alternative method to deal with the huge -arrears of criminal cases. It was noted that the Law Commission of India in its 154th Report had recommended introduction of pleabargaining and the Committee on Criminal Justice System Reforms (popularly known as Justice Malimath Committee) had also endorsed the recommendations of the Law Commission of India. The broad idea of plea-bargaining was explained as pre-trial negotiations that take place between the accused person and the prosecution, during which the accused person agrees to plead guilty in exchange for certain concessions by the prosecutor. The Criminal Law (Amendment) Bill presented in the Indian Parliament in the year 2005 mentioned that plea-bargaining would reduce the time-frame of criminal trials. The basic reason for introducing the concept of plea-bargaining in India, therefore, was to tackle the looming arrears by speeding up the disposition of cases and thereby to bring down the over all pendency of criminal cases.

25. In Pakistan plea-bargaining already stands formally introduced in our criminal justice system through section 25 of the National Accountability Ordinance, 1999 and it is increasingly being resorted to and availed of in accountability cases. Under the said law plea-bargain based upon voluntary return of assets or gains acquired or made by a person in the course or as a consequence of any offence under the said Ordinance was introduced and the necessary mechanism for the same was provided. The incentives provided in the said law for a plea-bargain are that if plea-bargain is accepted by the Chairman, National Accountability Bureau at the pre-investigation stage then no investigation is undertaken against the person concerned and he stands discharged from the liability and if pleabargain is accepted after initiation of investigation or commencement of trial or during pendency of appeal then the liability of the concerned person does not entail any trial or further proceedings of the trial or appeal. Acceptance of a plea-bargain does not lead to any imprisonment or imposition of fine, etc. but it only carries some disqualifications for the person concerned.

26. Under the Islamic system of dispensation of criminal justice in vogue in our country many offences, including some serious offences like murder and hurt, are compoundable. Compoundability of such offences inherently carries some seeds of resorting to pleabargaining in respect thereof. Apart from that many offences, particularly those of causing hurt, have monetary compensation to the victim as the main sentence and imprisonment has been provided for such offences as an additional, but optional, sentence. Availability of an option about additionally sentencing an

accused person to a term of imprisonment or not carries a big scope for introducing plea-bargaining in such cans without any legislative intervention at all. A detail of such offences and the sentences provided for the same by the Pakistan Penal Code, 1860 is as follows:--

Section 334: Punishment for Itlaf-i-udw:

Qisas, or

(if Qisas is not executable) Arsh + optional additional sentence of imprisonment up to 10 years as Ta'zir.

Section 336: Punishment for Itlaf-i-salahiyyat-i-udw:

Qisas, or

(if Qisas is not executable) Arsh + optional additional sentence or imprisonment up to 10 years as Ta'zir.

Section 337-A(i) Punishment for Shajjah-i-khafifah:

Daman + optional additional sentence of imprisonment up to 2 years as Ta'zir.

Section 337-A(ii): Punishment for Shajjah-i-mudihah:

Qisas, or

(if Qisas is not executable) Arsh equal to 5 per cent of Diyat + optional additional sentence of imprisonment up to 5 years as Ta'zir.

Section 337-A(iii): Punishment for Shajjah-i-hashimah:

Arsh equal to 10 per cent of Diyat + optional additional sentence of imprisonment up to 10 years as Ta'zir.

Section 337-A(iv): Punishment for Shajjah-i-munaqqillah:

Arsh equal to 15 per cent of Diyat + optional additional sentence of imprisonment up to 10 years as Ta'zir.

Section 337-A(v):Punishment for Shajjah-i-ammah:

Arsh equal to one third of Diyat + optional additional sentence of imprisonment up to 14 years as Ta'zir.

Section 337-A(vi): Punishment for Shajjah-i-damighah:

Arsh equal to one half of Diyat + optional additional sentence of imprisonment up to 14 years as Ta'zir.

Section 337-D: Punishment for Jaifah:

Arsh equal to one third of Diyat + optional additional sentence of imprisonment up to 10 years as Ta'zir.

Section 337-F(i): Punishment for Damiyah:

Daman + optional additional sentence of imprisonment up to 1 year as Ta'zir.

Section 337-F(ii): Punishment for Badiah:

Daman + optional additional sentence of imprisonment up to 3 years as Ta'zir.

Section 337-F(iii): Punishment for Mutalahimah:

Daman + optional additional sentence of imprisonment up to 3 years as Ta'zir.

Section 337-F(iv): Punishment for Mudihah:

Daman + optional additional sentence of imprisonment up to 5 years as Ta'zir.

Section 337-F(v): Punishment for Hashimah:

Daman + optional additional sentence of imprisonment up to 5 years as Ta'zir.

Section 337-F(vi): Punishment for Munaqqillah:

Daman + optional additional sentence of imprisonment up to 7 years as Ta'zir.

Section 337-G: Punishment for causing hurt by rash or negligent driving:

Arsh/Daman + optional additional sentence of imprisonment up to 5 years as Ta'zir.

Section 337-H: Punishment for causing hurt by rash or negligent act driving:

Arsh/Daman + optional additional sentence of imprisonment up to 3 years as Ta'zir.

Section 337-J: Punishment for causing hurt by means of a poison:

Arsh/Daman + optional additional sentence of imprisonment up to 10 years as Ta'zir.

Section 337-K: Punishment for causing hurt to extort confession or to compel restoration of property:

Arsh/Daman + optional additional sentence of imprisonment up to 10 years as Ta'zir.

Section 337-L(1): Punishment for causing other hurt:

Daman + optional additional sentence of imprisonment up to 7 Years as Ta'zir.

Section 337-L(2): Punishment for causing other hurt not covered by section 337-L(1):

Daman and/or imprisonment up to 2 years.

27. There is already an indication available in the Pakistan Penal Code itself as to when the option may be exercised regarding awarding punishment of imprisonment as Ta'zir in addition to the punishment requiring payment of Arsh or Daman to the victim. As already discussed above, by virtue of the provisions of subsection (2) of section 337-N, P.P.C. in all those cases of hurt where the offender is not a previous convict, habitual or hardened, desperate or dangerous criminal or where the offence has not been committed by him in the name or on the pretext of honour the court may not award any punishment of imprisonment as Ta'zir to the offender in addition to the punishment of payment of Arsh or Daman to the victim. In other words, in all such cases no sentence of imprisonment may be awarded to the offender and he may be burdened only with payment of monetary compensation to the victim by way of Arsh or Daman.

28. It is also relevant to mention here that under Section 337-I of the Pakistan Penal Code the only punishment provided for causing hurt by mistake (khata) is .payment of Arsh/Daman and the said offence does not carry any optional additional sentence of imprisonment as Ta'zir.

29. Availability of a room for plea-bargaining in all the above mentioned cases is quite obvious and such an opportunity should ordinarily be grabbed by the court upon its own initiative as it does not involve any legislative intervention.

30. There is, however, a problem in this respect which needs to be addressed. It may be argued that by virtue of the provisions of section 304, P.P.C. read with Article 17 of the Qanun-e-Shahadat Order, 1984 a confession made before the court in cases of hurt may lead to a sentence of Qisas and, thus, a .plea of guilty by an accused person may be treated as a confession and may entail punishment of Qisas. Qisas has been defined by section 299(k) of the Pakistan Penal Code, 1860 as "punishment by causing similar hurt at same part of the body of the convict as he has caused to the victim or by causing his death if he has committed qatl-i-amd in exercise of the right of the victim or a wali". It is obvious that an accused person willing to pay Arsh or Daman to the victim would like to avoid the sentence of Qisas and, therefore, for any meaningful introduction of plea-bargaining in cases of hurt such a consequence is to be avoided and a way is to be found whereby without pleading guilty to the charge an accused person may avoid full trial as well as the sentence of Qisas and may obtain an early conclusion of his prosecution through the court handing down a punishment of payment of monetary compensation to the victim by way of Arsh or Daman. A simple and convenient solution to this problem is offered by the North American experience of introduction of the plea of nolo contendere (pronounced as nohloh kuhn-ten-duh-ree) which, literally speaking, means that the accused person does not contest the charge but he also does not accept any responsibility for the outcome. That plea authorizes a court to sentence an accused person as if he is guilty even though the accused person does not admit the guilt. Nolo contendere is a legal term that comes from the Latin for "I do not wish to contend." It is also referred to as a plea of "No Contest." Derived from English Common

Law, several Common Law jurisdictions, including the United States, also adopted the nolo contendere concept. In criminal trials, and also in some other common law matters, it is a plea whereby the accused person or the defendant neither admits nor disputes a charge, serving as an alternative to pleading guilty or not guilty. A no contest plea, while not technically a guilty plea, has the same immediate effect as a guilty plea, and is often offered as a part of a plea-bargain. In an essay on the origin of the nolo contendere plea Anthony J. Fejfar argues that the nolo contendere plea has biblical origins. Fejfar maintains that it entered English Common Law "based upon English Eccliastical Law which is modeled after the encounter of Jesus with Pilate during Holy Week". In the encounter Jesus neither agreed nor denied guilt to the charge of calling himself the messiah, effectively pleading "no contest".

31. Introduction of the plea of nolo contendere in our criminal jurisprudence does not appear to be offensive to the relevant statutory provisions existing in our country. Dealing with trials before a Magistrate section 242, Cr.P.C. provides as follows:--

> "When the accused appears or is brought before the Magistrate, a formal charge shall be framed relating to the offence of which he is accused and he shall be asked whether he admits that he has committed the offence with which he is charged." (underlining has been supplied for emphasis)

Section 243, Cr.P.C. goes on to provide that???

> "If the accused admits that he has committed the offence with which he is charged his admission shall be recorded as nearly as possible in the words used by him; and if he shows no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly." (Underlining has been supplied for emphasis)

Similarly, dealing with trials before a High Court or a Court of Session section 265-E, Cr.P.C. provides as under:

> "(1) The charge shall be read and explained to the accused, and he shall be asked whether he is guilty or has any defence to make.
>
> (2) If the accused pleads guilty the Court shall record the plea, and may in its discretion convict him thereon." (Underlining has been supplied for emphasis)

While taking the plea of nolo contendere an accused person neither admits that he has committed the offence with which he is charged nor he pleads guilty and, thus, taking of such a plea may not amount to confession for the purposes of Qisas in terms of section 304, P.P.C. read with Article 17 of the Qanun-e-Shahadat Order, 1984 and may also not attract the consequences contemplated by section 243, Cr.P.C. or sub-section (2) of section 265-E, Cr.P.C. It can, therefore, be concluded with some degree of confidence that the plea of nolo contendere may not be incompatible with the pre-existing statutory law in our country. We are, thus, persuaded to hold that offering no contest for the purpose of m avoiding a full trial may be recognized as different from admission of guilt

and in all cases of hurt if the only punishment to be awarded to an accused person upon his conviction would be payment of the requisite amount of Arsh or Daman to the victim and if the accused person agrees to pay the requisite amount to the victim without pleading guilty to the charge and at the same time without contesting the charge so as to avoid a trial then ordinarily he should be convicted and sentenced accordingly straightaway without holding a full trial.

32. The manner of disposition of trial of hurt cases proposed above is likely to fulfil the obligation of the State under clause (d) of Article 37 of the Constitution of the Islamic Republic of Pakistan, 1973 regarding ensuring inexpensive and expeditious delivery of justice inasmuch as through this process the victim shall receive the requisite compensation promptly, the accused person shall be handed down his lawful punishment without unnecessary loss of time and the trial court shall be saved of the time and effort likely to be consumed in the trial which is to end in that result in any case. It may be added in this context that the ever-growing volume of criminal cases before our courts is already stretching the capacity of our courts to its limits and the capability of our Judges to its edge and the issue, therefore, abegs ingenuity and necessitates innovative approaches to deal with the problem. It is proverbial that those shy of innovation and experimentation are condemned to the dustbin of history.

33. We, therefore, hold and direct as follows:

(i) At the time of hearing of an application for post-arrest bail in a case of hurt where the accused person is not a previous convict, habitual or hardened, desperate or dangerous criminal or where the offence has not been committed by him in the name or on the pretext of honour if the accused person offers to deposit the requisite amount of Arsh or Daman with the trial court in order to secure the relevant amount of money due as punishment in case of his ultimate conviction, if any, and if the period of his 'physical remand is over and the statutory period of investigation has expired then ordinarily he should be admitted to bail subject to making of the requisite deposit and furnishing of bail bond. Such a bargain shall, however, not be available to an accused person for his post-arrest bail if he is a previous convict or in the tentative assessment of the court he is a habitual or hardened, desperate or dangerous criminal or where the offence has been committed by him in the name or on the pretext of honour.

?

(ii) At the time of framing of the charge in all cases of hurt where the accused person is not a previous convict, habitual or hardened, desperate or dangerous criminal or where the offence has not been committed by him in the name or on the pretext of honour the trial court should ask the accused person whether or not he is ready to plead nolo contendere (No Contest) if the only punishment to be awarded to him would be payment of the requisite amount of Arsh or Daman to the victim. If the accused person agrees to take that plea on that basis then

> ordinarily he should be convicted and sentenced accordingly straightaway without holding a full trial. Such a bargain shall, however, not be available to an accused person if he is a previous convict or in the assessment of the court he is a habitual or hardened, desperate or dangerous criminal or where the offence has been committed by him in the name or on the pretext of honour.

34. As a consequence of the discussion made above the petitioner, who has no credentials or antecedents of being a previous convict, habitual or hardened, desperate or dangerous criminal and admittedly the offence alleged in this case has not been committed by him in the name or on the pretext of honour, is admitted to bail subject to deposit of the requisite amount of Arsh and the appropriate amount of Daman (to be determined tentatively by the learned trial court) with the learned trial court and furnishing of bail bond in the sum of Rs.50,000 (Rupees fifty thousand only) with one surety in the like amount to the satisfaction of the learned trial court.

35. The Office of this Court is directed to send a copy of this order to all the Sessions Judges, Additional Sessions Judges and Judicial Magistrates in the Province of the Punjab for their information and guidance.

Order accordingly