JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT, BANNU BENCH

(Judicial Department)

Cr.MBA.No.475-B/2017.

Mir Hakeem Khan and another

Versus

Gulap Khan and two others

JUDGMENT

Date of hearing: 15.02.2018.

Appellant-petitioner __By Pir Liaqat Ali Shah Advocate.

Respondent : State by Shahid Hameed Qureshi, Addl: AG.

Other By Farooq Khan Sokari Advocate._____

SHAKEEL AHMAD, J.- Through this single judgment I intend to decide the instant Cr.MBA.No.475-B/2017 and Cr.MBA.No.24-B/2018, as both the petitions have not only sprung out of one and the same FIR, but common question of law and facts are also involved therein.

2. Petitioners Mir Hakeem son of Muzaffar Khan, Hazratullah son of Mir Hakeem Khan and Mir Ghafoor son of Muzaffar, who are detained in crime No.116 dated 23.9.2009 registered under Sections 302/ 324/427/34 PPC at Police Station Mirian, applied for post arrest bail in the Court of the learned Additional Sessions Judge-IV, Bannu, mainly on the ground of statutory

delay, but their prayer was declined by the learned Additional Sessions Judge-IV, Bannu vide separate orders dated 14.11.2017 and as per his opinion their case is not covered under 3rd proviso of sub-section (1) of Section 497 Cr.PC.

3. The allegations as set forth in the crime report are that on 23.9.2009 at 1035 a.m. complainant Gulap Khan, brought the dead body of his brother Irfanullah to Police Station Mirian, Bannu and made a report that on the eventful day, he, his brother Irfanullah and Tahir Khan were proceeding towards Bannu City in a motorcar bearing registration No.53/GAC, which was being driven by Zaheerullah, when they reached near the home of one Muhammad Khan, accused Mir Ghafoor Khan, Mir Hakeem Khan sons of Muzaffar Khan, Mir Moliyaz son Mir Ghafoor Khan and Hazratullah son of Mir Hakeem Khan duly armed with Kalashnikovs were already present there. On seeing the complainant party, the accused started firing at them, as a result of which, brother of the complainant Irfanullah, Tahir Khan and Zaheerullah, driver of the vehicle, were hit. Irfanullah succumbed to his injuries in the motorcar, while injured Tahir and Zaheer were shifted to hospital. Later on Zaheerullah also embraced death. Motive as alleged in

the FIR is previous blood feud enmity between the parties. Resultantly, the accused were booked in the FIR.

4. It is, inter alia, argued by the learned counsel for the petitioners that accused Hazratullah and Mir Hakeem were arrested on 28.10.2009, whereafter, they were put to trial and finally, convicted and sentenced to imprisonment for life on two counts vide judgment dated 20.4.2011, passed by the learned Additional Sessions Judge-III, Bannu; that accused Mir Ghafoor was arrested on 11.11.2014, he was also convicted and sentenced to life imprisonment vide judgment dated 11.5.2016 by the learned Additional Sessions Judge-III, Bannu whereagainst, they filed appeal; that vide judgment dated 09.10.2017, the Honourable High Court accepted the appeal filed by the petitioners and set aside the impugned judgments of the learned trial Courts and remanded back the case for denovo trial; that on 15.4.2012, the miscreants launched attacked on Central Jail Bannu, broke it, forcibly took away all the prisoners including Hazratullah, Mir Hakeem and Moliyaz, they were kept in private captivity, Moliyaz was murdered on 26.12.2015; that again accused Mir Hakeem and Hazratullah were arrested on 06.8.2015 and 25.12.2015, respectively, and since then they are in continuous detention; that accused

Mir Hakeem has spent three years, nine months and 03 days, while Hazratullah spent four years, four months and 14 days in jail, and Mir Ghafoor is in continuous detention since last more than three years; that delay in concluding the trial is not attributed to the petitioners; that petitioners are neither hardened nor desperate nor previously convicted, therefore, they are entitled to be released on bail under 3rd proviso of sub-section (1) of Section 497 Cr.PC.

5. As against that, learned counsel for the complainant and the learned A.A.G. representing the State jointly argued that period spent in jail after conviction cannot be counted while deciding the petition under 3rd proviso of sub-section (1) of Section 497 Cr.PC and if this period is deducted from total period of detention in jail, it comes to less than two years; that delay in concluding the trial is not attributed to the prosecution; that the accused are hardened, desperate and dangerous criminals, therefore, they are not entitled for bail.

6. I have given my anxious consideration to the arguments of the learned counsel for the parties and scanned the record with their able assistance.

7. The question emerging for consideration is as to whether the period spent in the Jail after conviction of the petitioners would be countable while deciding the pettion under proviso 3rd of sub-section (1) of Section 497 Cr.PC or not. In order to answer this question, it appears necessary to make cursory survey of the provisions of Section 426 and 497 Cr.PC.

8. Section 426 Cr.PC empowers the appellate Court to suspend sentence in pending appeal and release the convict on bail. Condition under Section 426(1) Cr.PC is analogous to the one contained in Section 497(1) Cr.PC, in both the cases the sentence or detention is to be suspended and convict or the detenue is to be released on bail with only difference that in the former case the person is a convict who has already been found guilty while in the latter case he has been charged only to face trial and is still to be proved guilty. In the absence of any guideline, it would be appropriate to follow the one provided under Section 497 Cr.PC, on the principle that where a statute lays down certain principles for doing same acts they may be taken as a guideline for doing something of the same nature which is in the discretion of the Court.

9. In order to decide the question of entitlement of the petitioners to be released on bail on account of statutory delay, it would be appropriate to trace out its legislative history. 3rd proviso was added in Section 497 Cr.PC through Ordinance No.LXXI of 1979, which reads as under:-

> *"Provided further that the Court shall, except where it is of opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf, direct that any person shall be released on bail.*
> *(a) Who, being accused of an offence not punishable with death, has been detained for such offence for a continuous period exceeding one year and whose trial for such offence has not concluded; or*
> *(b) Who, being accused of an offence punishable with death, has been detained for such offence for a continuous period exceeding two years and whose trial for such offence has not concluded."*

Then again in the year 1983, change was brought in Section 497 Cr.PC through Ordinance

No.XXXII of 1983, and 4th proviso was added, which is reproduced herein below:-

> *"Provided further that the provisions of the third proviso to this sub-section shall not apply to a previously convicted offender or to a person who, in the opinion of the Court, is a hardened, desperate or dangerous criminal."*

10. Before 1979, no enabling provision was in existence in Criminal Procedure Code, whereby a person could be released on bail on account of delay in conclusion of trial. Even then, prior to the insertion of 3rd proviso, the delay was already considered as a ground for the grant of bail. However, at that time the Courts were of the view that the delay must be inordinate or scandalous in nature. In this respect reference may be made to the judgment of the Honourable Lahore High Court reported as ***"Ghulam Jillani Vs. SHO Gulberg"*** **(PLD 1975 Lahore 210),** wherein it was observed that:-

> *"Similarly, on the question of bail after arrest, after some amount of uncertainty, the law is now well settled that inordinate delay is a good ground for bail even in those cases which otherwise fall within the prohibition contained in sub-section (1) of Section*

497, Cr.PC. Thus, the ground of delay can be taken as another relevant analogy for the present discussion. It has been held that inordinate delay amounting to abuse of process of law furnishes good ground for bail."

The august Supreme Court of Pakistan in Ahrar Muhammad's case **PLD 1974 Supreme Court 224,** held as under:-

"It is true that the view of the Supreme Court has consistently been that mere delay by itself is not a sufficient ground for the granting of bail; but, at the same time it cannot be said that inordinate or unjustified delay in the prosecution of a case amounting to an abuse of process of law can never be taken into account as relevant ground for the granting of bail. If the delay is so inordinate or so scandalous or so shocking as to amount clearly to an abuse of the process of law there can be no reason either in principle of law as to why it cannot be treated as a sufficient ground for the granting of bail. If such delay can be sufficient for quashing a criminal proceeding then it can also be an equally good ground for the granting of bail."

It was noted with great concern that in the past, the provision of 3rd proviso of Section 497 Cr.PC was misused. The Honourable Supreme Court of Pakistan in Sh. Liaquat Hussain's case **PLD 1999 SC 504,** observed that:-

> *"45. Before concluding the above discussion it will not be out of context to point out that the third proviso to Section 497 the Criminal Procedure Code is also substantially contributing towards the delay in the disposal of criminal cases as it entitles an accused person accused of an offence not punishable with death to obtain bail on the expiry of one year from the date of his arrest, and in case of an offence punishable with death on the expiry of two years period from the date of his arrest. Some of the accused persons by their design ensure that the trials of their cases are delayed, so that they may come out of jails on the expiry of the above statutory period. In my humble view, the above provision has been misused and the same needs to be deleted. I may also observe that even before the incorporation of the above proviso, it was open to a Court to grant bail in a fit case on the ground of inordinate delay in the trial of a case,*

but no accused person was entitled to claim bail as a matter of right on the expiry of certain period."

Consequently, the 3rd and 4th proviso were omitted from Section 497 Cr.PC through Ordinance LIV of 2001. However, again 3rd and 4th proviso of sub-section (1) of Section 497 Cr.PC has been inserted by Act VIII of 2011 w.e.f. 18.4.2011, which reads as under:-

"*Provided further that the Court shall, except where it is of the opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf, direct that any person shall be released on bail.*

(a) Who, being accused of any offence not punishable with death, has been detained for such offence for a continuous period exceeding one year or in case of a woman exceeding six months and whose trial for such offence has not concluded; or

(b) Who, being accused of an offence punishable with death, has been detained for such offence for a continuous period exceeding two years and in case of a woman exceeding one year and whose trial for such offence has not concluded.

> *Provided, further that the provisions of the foregoing proviso shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life."*

11. The gist of the aforementioned discussion is that right of the accused to be enlarged on bail under the 3rd proviso to Section 497(1) Cr.PC is a statutory right which could not be denied under the discretionary power of the Court to grant bail. However, bail under the 3rd proviso to Section 497 Cr.PC could be refused to an accused only on the ground that the delay in the conclusion of trial had been occasioned on account of any act or omission of the accused or any other person acting on his behalf. Bail under 3rd proviso to Section 497 (1) Cr.PC could also be refused to an accused by the Court, if case of the accused fell under the 4th proviso to Section 497(1) Cr.PC, but in all other case the Court must grant bail.

12. It is now settled that an early trial is an inherent right of every accused, and inordinate delay in imparting justice was likely to cause erosion of public confidence on one hand, and on the other, it was bound to create sense of helplessness, despair and feelings of frustration apart from adding to the woes of the public. In this respect reliance can well be placed on the case ***"Wazir Ali Vs. The State"*** **(PLD 2005 K 201),** wherein it was held as under:-

> *"I have given due consideration to the arguments of the learned counsel for the applicant and learned State counsel. I have also gone through the material placed on record and the case-law cited at the bar. Indeed, a direction to the trial Court to conclude the trial within specified time if not complied with, cannot be deemed to be fresh ground as held in the case of Muhammad Nawaz v. The State 2003 MLD 79, nevertheless, the delay in conclusion of a trial when it appears to be shocking and scandalous or when it appears that complainant and his witnesses have played a part in delaying the conclusion of the trial by remaining absent despite having been served in order to see that accused should remain incarcerated for as*

much time as possible can be taken into consideration for grant of bail. The complainant and the P.Ws who are related inter se and two of the witnesses are real brothers of the complainant, have failed to appear despite issuance and service of P.Ws. against them, this fact speaks for itself. Indeed, Provisos (iii) and (iv) to section 497, Cr.P.C. stand duly omitted during the pendency of this case but even before introducing the said provisos (iii) and (iv) to section 497(1), Cr.P.C. bail was being granted in cases of delay in conclusion of the trial which appeared to be scandalous and shocking. Hardship is also being considered as ground for bail in appropriate cases by the superior Courts of the country."

Reliance is also placed on the case of ***"Sher Ali alias Sheri Vs. The State"*** **(1998 SCMR 190),** wherein it was held that:-

"---S. 497(1), third & fourth provisos--- Bail on the ground of statutory delay--- Right of accused for bail under the third proviso to S. 497(1), Cr.P.C. cannot be defeated on any other ground except the delay mentioned in the relevant clause and the grounds provided in the fourth proviso thereof."

13. I am also fortified by unreported judgment of the apex Court in Criminal Petition No.1232 of 2016 titled, ***"Adnan Prince Vs. The State through P.G., Punjab and another"*** decided on 01.02.2017, wherein it was held that if a case on statutory delay in the conclusion of trial is made out then, ordinarily bail should not be refused on hyper technical ground. It was also held that *"The Primary object behind this view is that in case any accused person under detention is acquitted at the end of the trial then, in no manner the wrong, caused to him due to long incarceration in prison pending trial, he cannot be compensated in any manner while on the other hand, in case, if he is convicted then, he has to be rearrested and put behind the bars to undergo his sentence and in that case no prejudice would be caused to the prosecution/complainant."*

Reference in this behalf may be made from the judgment of this Court reported as ***"Shahzad Khan Vs. The State"*** **(2018 P Cr.LJ 104),** wherein it was observed as under:-

> *"S.497---Bail statutory delay---Scope---Bail could not be refused on hyper technical grounds if case on statutory delay in conclusion of trial was made out."*

In this respect reference may also be made from the judgment reported as ***"Behram VS. The State"*** **(2003 P Cr.LJ 73),** wherein it was held that "*fair and expeditious trial is fundamental right of the accused person which cannot be denied to him*."

14. In my view it is a fit case for grant of bail, as the accused are to face the agonies of protracted trial, once again, after remand of their case, they cannot be kept in jail for indefinite period, therefore, I hold that the whole period spent in Jail is countable while deciding the bail petition on statutory delay. It is immaterial whether those period spent as convict or under trial prisoner.

15. For what has been discussed above, I am of the view that since the petitioners are in continuous detention and have spent more than three years in Jail, therefore, they are entitled to the grant of bail as a matter of right and not as a matter of grace, accordingly, the Cr.MBA. No.475-B/2017 and connected Cr.MBA.No.24-B/2018 are accepted and the accused are directed to be released on bail subject to furnishing bail bonds in the sum of Rs.3,00,000/- (Rupees three lac) each, with two sureties each, in the like amount to the satisfaction of Illaqa/Duty Judicial Magistrate.

16. Above are the reasons of my short order of even date.

Announced.
Dt:15.02.2018.

JUDGE

*Imran/** *(S.B) Mr. Justice Shakeel Ahmad, J*