

**JUDGEMENT SHEET
IN THE PESHAWAR HIGH COURT,
BANNU BENCH**

(Judicial Department)

Cr.Misc:BCA No.172-B of 2016.

**The State through Advocate General K.P.K
Peshawar**

Versus

Zahoor-ur-Rahman

JUDGEMENT

Date of hearing: **27.01.2017**

Petitioner: (State) by Mr. Shahid Hameed
Qureshi, Addl: A.G.

Respondent: **Zahoor-ur-Rahman** by Mr.
Hamayun Khan Wazir, Advocate.

ISHTIAQ IBRAHIM, J.- The State through Advocate
General Khyber Pakhtunkhwa, Peshawar has filed the present
petition for cancellation of bail granted to the respondent/
accused namely, Zahoor-ur-Rahman alias Zahoor by learned
Additional Sessions Judge-II, Lakki Marwat vide order dated
16.9.2016 in case F.I.R 236 dated 31.3.2016 registered under

Sections 324/148/149 PPC at Police Station Lakki, District Lakki Marwat.

2. The case of prosecution as narrated in the FIR is that on 31.3.2016 at 2015 hours, complainant Moalim Khan was present in his *baithak* when the accused Shaista Khan, Zahoor (respondent), Wali and Zakria duly armed with Kalashnikovs came there and caught hold of him and forcibly started ousting the complainant from the *baithak* but on his hue and cry, his brother Feroz Khan came out of the house and in the meanwhile the accused started firing due to which the complainant and his brother Feroz Khan got hit and sustained injuries, hence, the respondent/accused alongwith others were booked in the *ibid* F.I.R.

3. Learned Addl: A.G. for the State contended that the respondent/accused was directly charged alongwith his co-accused for causing firearm injuries to the complainant and PW Feroz Khan. The crime empties have been recovered from the places of accused and in this respect Firearms Expert Report fully supports the prosecution case. The MLCs and the FSL report regarding bloodstained articles also support the case of

prosecution. The learned Court below released the respondent/accused on bail on erroneous and petty grounds and if the bail granting order dated 16.9.2016 is remained intact in the field, it will highly damage the prosecution case during course of trial.

4. On the other hand, learned counsel for the respondent/accused contended that once the bail is granted to an accused by a Court of competent jurisdiction it is normally not interfered with, unless the bail granting order is found patently illegal, erroneous, or the concession of bail was misused or tamper the evidence, to obstruct the course of fair investigation, resulting into miscarriage of justice; he further argued that there is nothing on record, whatsoever, which would show that the respondent/accused after his release on bail has misused or abused the concession; that there is no likelihood of tampering with the prosecution or absconction of the respondent/accused.

5. I have heard learned counsel for the parties and have gone through the record.

6. The grounds prevailed before the learned Additional Sessions Judge-II, Lakki Marwat for granting of bail

to respondent/accused and rendered in the impugned order are that it is a case of further inquiry. The relevant portion of the impugned order is as follows:-

"Having heard the detail arguments of learned counsels for both the parties and after going through the record of the case file, undeniably, general role of firing has been attributed to all the four accused on the person of complainant and his brother co injured. As per contents of site plan, the role of firing on the person of injured-complainant has been restricted to the extent of accused/petitioner as well as his co accused namely Shaista Khan. On the application of co accused Shaista Khan, the I.O of the case after thorough probe has declared him innocent for his non availability at the scene of occurrence at the relevant time. This situation leads to the formation of a counter version which is yet to be ascertained at the stage of trial that which of the version rings true so as to establish the independent liability of each of the party. Consequently without commenting upon the further merits of the case, on this score alone, the case of the present accuse/petitioner also becomes one of further inquiry"

7. Declaration of innocence by police otherwise is not relevant factor alone, and that too, of co-accused, which would hardly have any bearing on the case of other co-accused and against whom the Court has to see a prima facie case. In view of this Court plea of alibi of an accused would not entitle the co-accused for grant of bail as a matter of right. Reliance is placed on case titled, **'Muhammad Azam Vs. The State'** (1990 SCMR 1319).

8. The record reveals that subsection (2) of section 497, Cr.P.C. has not been properly appreciated by the learned Judge. It is settled law that the expression "further inquiry" is not to be taken lightly nor is to be entertained unnecessarily. Reference is made to **PLD 1990 SC 83**. In the case of **'Arbab Ali v. Khamiso and others'** (1985 SCMR 195), it was observed by apex Court *"There are certain other features also in this case which have not been attended in the High Court before giving a verdict that it was a case of "further inquiry". It needs to be clarified that bail can be allowed in a case otherwise allegedly falling under the prohibition contained in subsection (1) of section 497 under subsection (2) of section 497, Cr.P.C.,*

when there are sufficient grounds for further inquiry into the guilt of the accused but only on the condition when the Police Officer or the Court at any stage of investigation, inquiry or trial, as the case may be, comes to a definite conclusion that there are no reasonable grounds for believing that the accused had committed a non-bailable offence. Without this finding bail cannot be allowed under subsection (2) on mere ground that there are sufficient grounds for further inquiry. This aspect of the relevant law has also not been brought to the notice of the learned Judge of the High Court."

9. The most pivotal question which arises at this juncture is whether this Court would be justified to cancel the bail granted to the respondent/accused by Court of competent jurisdiction under section 497(5), Cr.P.C.? Cancellation of bail is a hard order, because it interferes with the liberty of an individual, hence, it must not be resorted to lightly. Rejection of bail when bail is applied for is one thing and cancellation of bail when granted is another, because cancellation of bail interferes with the liberty already secured by the accused either on the exercise of discretion by the Court, or by thrust of law.

Hence, power to take back in custody, an accused who has been enlarged on bail is to be exercised with care and circumstances.

That does not mean that power though extraordinary in character must not be exercised even if the ends of justice so demand, and in this case, it is being exercised in favour of the petitioner.

10. In this case, the respondent/accused along with other co-accused had come to the *baithak* of the complainant while duly armed with Kalashnikovs and started firing due to which the complainant and PW Feroz Khan got hit and sustained injuries. The complainant had promptly lodged F.I.R. wherein a total of four persons have been charged by name for commission of offence. The empties have been recovered from the spot and to that effect the report of Firearms Expert fully supports the case of prosecution. Both the parties are well known to each other so question of mistaken identity does not arise. Therefore, the respondent/accused is *prima facie* connected with the commission of offence and the impugned order dated 16.9.2016 is patently illegal, factually incorrect and perverse which has resulted in miscarriage of justice.

11. Consequently this petition is accepted and the impugned order impugned dated 16.9.2016, passed by learned Additional Sessions Judge-II, Lakki Marwat is set aside and bail granted to the respondent/accused is hereby cancelled. He is present in Court and be taken into custody forthwith and be sent to judicial lock-up.

12. Above are detailed reasons of my short order of the even date.

Announced.
Dt:27.01.2017

J U D G E