

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Cr.Misc.BA No.134-P/2021

Syed Maqbool Shah son of Hassan Shah,
r/o Badaber District, Peshawar.

Petitioner (s)

VERSUS

The State etc

Respondent (s)

For Petitioner (s) :-	<u>Mr. Akbar Zaman Khattak, Advocate.</u>
For State :-	<u>Mr. Amir Nawaz Durrani, Advocate.</u>
For complainant :-	<u>Nemo</u>
Date of hearing:	<u>25.01.2021</u>

ORDER

ROOH-UL-AMIN KHAN, J:-Petitioner Syed Maqbool Shah, whose plea for post arrest bail on merit has been turned down by this court vide order dated 19.07.2019, passed in Cr.Misc.BA No.1514-P/2019, through this application, seeks his release on bail in case FIR No.763 dated 27.08.2012, registered under sections 302/324/148/149 PPC at Police Station Badhber, Peshawar, on the ground of non-conclusion of his trial within a period of three months as stipulated by this court vide order dated 17.07.2020, operative part of which is reproduced below for the sake of convenience and ready reference:-

“After hearing arguments at some length, learned counsel for the petitioner states that he would not press this bail petition at the moment,

if direction is given to the learned Trial Court to conclude the trial within three months. The learned Standing counsel on behalf of the State and learned counsel for complainant have no objection in conclusion of trial within such stipulated period. This is therefore, directed that the learned trial Court shall conclude the trial within three months, positively. If the trial is not concluded within the given time, the accused/petitioner may apply afresh for his release on bail. Furthermore, if the delay in conclusion of trial is caused on the part of the accused/petitioner, then such extra time shall be given to the learned trial Court for the conclusion of trial.

With the above observations, this bail petition is disposed of accordingly. ”

2. Despite service, no body turned up on behalf of the complainant. Being bail application cannot be kept pending for an indefinite period for the sole reason to procure attendance of the complainant, who otherwise, has been duly served. In this view of the matter, after hearing learned counsel for the petitioner and learned State counsel this application is being decided on the available record.

3. It appears from record that occurrence of this case has been reported vide FIR No.763 dated 27.08.2012, whereas after a considerable abscondence the petitioner was arrested on 09.03.2019, followed by submission of supplementary challan and framing of charge against him on 17.10.2019. During trial of the petitioner, co-accused Musa Khan was arrested and fresh charge was framed on

17.10.2020, consequently, on his denial to the charge, the prosecution evidence was invited by the learned trial court for 31.10.2020. Since, 31.10.2020 till date not a single PW has been examined by the prosecution. As stated above, the petitioner has been arrested on 09.03.2019 and he along with co-accused is charged for murder of Noor-ul-Islam deceased under section 302 PPC, which entails capital punishment i.e. death or imprisonment for life. Proviso third to section 497 Cr.P.C. provides that:-

“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 been concluded.”

(emphasis supplied).

4. In view of clause (b) of third Proviso to section 497 Cr.P.C., the statutory period for the offence with which the petitioner is charged is two years, which is to be completed on 09.03.2021, therefore, the instant application is premature. Contention of learned counsel for the petitioner that non-conclusion of trial within a period of

three months as stipulated by this Court, would be a sufficient ground to entitle the petitioner for bail, is misconceived, because such directions are alien to section 497 Cr.P.C., which is the mother provision governing the grant or refusal of bail to accused charged under various offences. In this view of the matter, this petition being premature is hereby dismissed.

5. Before parting with the judgment, I deem it appropriate to mention here that this court has taken serious notice in so many cases about the irresponsible attitude of the prosecution witnesses, who are deliberately not appearing before the learned trial Courts and lack of interest of the Public Prosecutors who are entrusted with the task of pursuing/prosecuting cases on behalf of the State/Prosecution. Before pointing towards the duties and responsibilities of the Public Prosecutors, I would like to refer to section 173 Cr.P.C., which provides that every investigation shall be completed without unnecessary delay and as soon as it is completed, the Officer Incharge of the Police Station shall through the **Public Prosecutor** forward to a Magistrate empowered to take cognizance of the offence on a police report, a report, in the form prescribed by the Provincial Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case and stating whether the accused

(if arrested) has been forwarded in custody or has been released on his bond, and if so, whether with or without sureties. Under 1st proviso to section 173 Cr.P.C., where investigation is not completed within a period of fourteen days from the date of recording of the first information report under section 154 Cr.P.C., the officer incharge of the Police Station **shall** within three days of the expiration of such period, forward to the Magistrate through the **Public Prosecutor**, an interim report in the form prescribed by the Provincial Government, stating therein the result of the investigation made until then and the court shall commence the trial on the basis of such interim report, unless, for reasons to be recorded, the court decides that the trial should not so commence. Similarly, section 175(5) Cr.P.C., provides that where the Officer incharge of a Police Station forwards a report under sub-section (1) he **shall** along with the report **produce the witnesses** in the case, except the public servants, and the Magistrate shall bind such witnesses for appearance before him or some other Court on the date fixed for trial.

6. In the instant case, despite directions of this Court and hectic efforts of the learned trial Court in the shape of issuance of summons, notices and warrants, attendance of the PWs could not be procured almost within a span of 18 months, what to speak of compliance of the provisions of section 173 Cr.P.C. in true spirit. The non serious conduct

of public prosecutor in the matter of producing and examining prosecution witnesses is a major factor in swift conclusion of criminal trial. The Prosecutor plays a pivotal role in the administration of criminal justice. Normally, the role of the public prosecutor commences on the completion of investigation by investigation agency and presenting the case to district public prosecutor and putting the challan in the Court. Foremost objective of the Public Prosecutor is to ensure a fair trial of the accused by assisting trial courts in the disposal of cases with an aim to deliver a prompt, efficient and speedy service to the litigants for achieving the ends of justice, ensuring judiciousness and speedy legal remedies. Apart from conducting cases before the trial court the Public Prosecutors are also vested with the powers to evaluate the evidence in each case and make their recommendations for filing revision petitions or appeals against impugned orders and judgments in the High Court. The Public Prosecutor has the power to withdraw prosecution if reasonable ground exists under section 494 of the Cr.P.C. Consent will be given by the Public Prosecutor only if public justice in the larger sense is promoted rather than subverted by such withdrawal. It is undeniable fact that due to many reasons including the incompetence of the Investigating Officers the deadline of 14 days for the submission of the Challan (final report) u/s 173 Cr.P.C. is missed as a matter of routine, which

definitely is the main source of causing undue delay in processing of the case, but thereafter the idling of Public Prosecutor(s) attached with trial Court(s) gave another support to delay the conclusion of trial. Though, a proper Prosecution Department has been established by the Government under the Home department, headed by the Director General with Regional Director as his fleet member for supervision purpose but there is no endeavor or check from that end to make prosecution reliable and credible. I have noted with great concern that in almost all the criminal cases, the prosecution witnesses, despite repeated non-bailable warrants, avoids appearance in the courts for recording their testimony. The Public Prosecutors never like to adhere to their duties in swift disposal of criminal cases which not only amount to waste the precious time of the courts, but also multiply the cost of litigations on public exchequer. It is the fundamental duty of the Prosecution to ensure that justice is delivered and in pursuance of this, they should lay before the court all relevant evidence and assure production of all the prosecution witnesses in support of the above said evidence.

7. During arguments the Director General, Regional Prosecutor and Public Prosecutor, present in court were confronted as whether a single instance is available to show that any legal or disciplinary action has been

proposed by any Public Prosecutor to the high ups against any official witness in any criminal case who was deliberately not appearing before the Court or by the Director General Prosecution Khyber Pakhtunkhwa against the delinquent Public Prosecutors, their reply was in the negative. Dispensation of justice and enforcement of rights are the two chief objectives, a civilized community is supposed to accomplish. Timely disposal of dispute and redressal of grievance are two sure signs of effective administration of justice. The criminal justice system requires that a person accused of a crime is brought to justice as speedily as possible, so if he is found guilty, he is punished and if he is found to be innocent, he is discharged or acquitted. The maxim that justice delayed is justice denied comes true when a criminal trial remains pending indefinitely for no reason whatsoever.

8. Coming to the powers, functions and responsibilities of the Public Prosecutors, I would refer to section 492 Cr.P.C., under which the Provincial Government appoint the Public Prosecutors who are law Officers to conduct criminal proceedings on behalf of the State. A Prosecutor is a legal representative of the prosecution, responsible for presenting the case in a criminal trial against accused. The main role of the Public Prosecutor is to serve the ends of justice in the best interest of the public. A Public Prosecutor is an officer of the court

and his primary duty is to assist the court in arriving at the truth by putting forth all the relevant material on behalf of the prosecution. While discharging his duties, the Public Prosecutor must act in a manner that is fair to the court, to the investigating agencies as well as to the accused.

Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005, (**“the Act of 2005”**), was promulgated on 29th January, 2005, to reorganize and establish a “Prosecution Institution” for achieving speedy justice and matters ancillary or incidental thereto, Chapter-II whereof pertains to establishment of Prosecution Institution and Chapter-III enunciates a workable mechanism to improve investigation system as a whole as well as investigation of individual cases at district level. Section 4 of the Act of 2005, enumerates the powers and functions of the Public Prosecutors, according to which a District Public Prosecutor or Public Prosecutor, as the case may be, shall be in-charge of the Prosecution in the District concerned and in discharge of his lawful duties with respect to a case the prosecution whereof is lawfully assigned to him, shall perform the functions enumerated in the Act in relation to conducting prosecution of offences before courts of competent jurisdiction, i.e. to safeguard the interest of the public in prosecution of cases before the courts of competent jurisdiction, to submit challan before competent court of trial or to withhold the same for want

of proper evidence and return it to the Investigation Officer with written direction to resubmit the report after removal of the deficiencies so identified by him; in respect of compoundable offences, other than those which are punishable with death or life imprisonment, the Director General Prosecution, and in respect of compoundable offences punishable with imprisonment for seven years or less, the District Public Prosecutor, is vested with powers to withhold prosecution if reasonable grounds exist to believe that the offence is compoundable; provided that if the offence is not compounded within a period of one month, a report shall be lodged in the court of competent jurisdiction for prosecution and trial; or apply, for reasons to be recorded in writing, to the court of competent jurisdiction for the discharge of the case, if its institution has been found to be *malafide*, wrongful or weak from evidentiary point of view. In respect of any case instituted by a Public Prosecutor before a competent court, any private person representing the complainant shall act under the directions of the Public Prosecutor

9. Similarly, sections 5 and 6 of the Act of 2005, speak about the conduct of prosecution in criminal offences and liaison of the Director General Prosecution with the Advocate General. The investigation Officer shall send the case together with the evidence to the concerned Public Prosecutor, whereas the prosecution shall not take

effect against persons other than those charged as accused, on the basis of available evidence, by the Public Prosecutor. The Public Prosecutor shall have the right of audience before any court in respect of any case assigned to him and a Public Prosecutor may within his jurisdiction, issue general guidelines to police officers regarding state of their investigation and other matters necessary for the fulfillment of the purpose of effective prosecution. Likewise, a District Public Prosecutor may ask the Head of Investigation in a District to take disciplinary action against investigation Officer, where sufficient reasons exist to believe that Investigation Officer has colluded or has not exercised due diligence or honesty in conducting investigation or misrepresented the facts of the case or prepared the report inefficiently; and the Director General Prosecution or the District Public Prosecutor may when he deems necessary in cases where police officers fail to follow any suggestions or instructions of Public Prosecutor under this Act, call for disciplinary action against the Investigation Officer through the competent authority. According to section 6 of the Act (ibid), the Director General Prosecution shall keep liaison with the Advocate General to ascertain the progress of criminal appeals and revisions and other legal proceedings pending before the Supreme Court, Federal Shariat Court and High Court or any other court established under the law. The

Director General Prosecution shall provide Prosecutors to all the criminal courts in the Province. Section 7 of the Act of 2005, further enumerates the additional powers of District Public Prosecutor/Public Prosecutor that a Public Prosecutor, in discharge of his lawful duties and in respect of a case lawfully assigned to him, may also exercise the following powers, in addition to the powers conferred by section 4 of this Act, namely:-

- (a) Upon expiry of time period mentioned in the Code for submission of final report or after submission of final report, if necessary for proper and thorough investigation of an offence, a Public Prosecutor may request the court to issue warrants for search, seizure or inspection of evidence for compliance by the Investigation Officer;
- (b) A Public Prosecutor may call for record or any other document from any law Enforcement Agency upon expiry of time period mentioned in the Code for submission of final report;
- (c) A District Public Prosecutor in case of offences carrying seven years or less imprisonment and the Director General Prosecution for all other offences may

withdraw prosecution subject to prior approval of Court:

Provided that prosecution of an offence falling under the Anti-Terrorism Act, 1997 (XXVII of 1997), shall not be withdrawn without prior permission in writing of the Secretary to Government, Home and Tribal Affairs Department; and

(d) The Public Prosecutor on completion of investigation shall scrutinize the case file and refer the shortcomings or faults in investigation to the Head of Investigation for removing or improving the same, which shall be complied with by the Head of Investigation within seven days, and on fulfillment thereof, it shall be sent to the Public Prosecutor putting it in the court”.

10. Apart from above, under the Khyber Pakhtunkhwa Prosecution Service Constitution Function and Powers Rules, 2012, the Public Prosecutor shall prosecute, watch or direct the prosecution of the cases in the courts of the District. In this connection it shall be realized that his duty embraces not only to prosecute the prosecution case but ensuring the observance of conditions and instruction imposed by the law. The Prosecutor must be impartial, fair

and truthful, not only as a public executive but also because the prosecutor belongs to the honorable profession of law, the ethics of which demand these qualities. The Public Prosecution is to supervise and distribute the work of Prosecuting Officers subordinate to him and the police personnel attached to his office or to the courts; and see that the results of cases in courts are promptly communicated to the police concerned according to the Act and especially to bring it into the notice of the superintendent investigation, together with an abstract or copy of the judgment if necessary, orders of acquittal or discharge or other orders of courts, which either reflect in any way on the conduct of the police or indicate that the theory on which the case was prosecuted has broken down.

11. The Additional Registrar (Judicial) of this Court shall send copy of this order to the Director General Prosecution, who shall onward circulate the same amongst the Public Prosecutors under his supervisions in the Province for guidance, reminding their official powers, functions and responsibilities as well as strict compliance.

Announced:
25.01.2021.
M.Siraj Afridi PS

SENIOR PUISNE JUDGE

SB of Mr. Justice Rooh ul Amin Khan Hon'ble Senior Puisne Judge

