JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,

PESHAWAR

(Judicial Department)

Cr.Misc.BA No.1366-P/2015

Date of hearing: _____

Petitioner (s) : _____

Respondent (s) : _____

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.-

Being unsuccessful before the two Courts below to get the concession of bail, petitioners (1) Sher Zaman and (2) Imtiaz, through this further petition, seek bail from this Court in case FIR No.3 dated 02.01.2015, registered under sections 302/324/34 P.P.C., in Police Station Faqir Abad, wherein they alongwith Hafiz ud Din and Haroon (absconding co-accused), are charged for committing the Qatl-e-Amd of Ali Asghar deceased with firearms, attempting at the life of complainant Ali Hassan Khan by firing at him

ineffectively and causing injury on the person of PW Inayat ur Rehman by inflicting Butt blows on his head, on a motive of children brawl. In addition to the complainant the incident is stated to have been witnessed by his brother Ali Johar and injured Inayat ur Rehman.

2. Arguments heard and record perused.

3. It appears from the First Information report that petitioners have not been nominated therein directly, rather one Hafiz ud Din absconding co-accused has been named in the very initial report i.e. Murasila, but later on, digits 5/6 persons have been inserted above his name on two occasions. On 08.01.2015, complainant while recording his statement u/s 164 Cr.P.C., nominated the petitioners and other co-accused to be the said 5/6 persons. If insertion/ addition of digits 5/6 persons in the first part of the murasila is considered to be a clerical mistake, then repetition of same

exercise in subsequent part of murasila above the name of co-accused Hafiz ud Din, is beyond my comprehension which smells mala fide on the part of the complainant to throw a net wider on the entire family. Again in the initial report all the accused i.e. absconding accused Hafiz ud Din and 5/6 persons, have been nominated for firing, but PW Ali Johar in his statement recorded under section 164 Cr.P.C. only attributed the role of fatal shot to absconding co-accused Hafiz ud Din (Fazal Amin). Similarly, injured PW Inayat ur Rehman has charged nobody for his injuries as according to him there was a brawl inter-se the deceased and absconding co-accused Hafiz ud Din over children and that in the process of separation he sustained injuries and became unconscious. He has not disclosed about presence of the petitioners on the spot at the time of incident. Besides, as per autopsy report, the deceased has

sustained a solitary firearm entry wound with exit for which more than 6 persons have been charged, however, on the face of record, the case of the petitioners is on different footing from that of absconding co-accused Hafiz ud Din, who has been directly nominated for the occurrence. On tentative assessment all these circumstances require further probe into the guilt of the petitioners, hence, they are entitled to concession of bail. It is settled law that bail may not be withheld as a punishment as a mistaken relief of bail can be repaired by convicting the accused, if proved guilty, but no proper reparation can be offered for unjustified incarceration, albeit, his acquittal in the long run. As regard abscondance of the petitioners, it has been held by the august Apex Court in case titled, **"Qamar alias Mitho Vs The State and others" (PLD 2012 Supreme Court 222)** that right of bail could not be refused to accused

merely on account of his alleged abscondance which is a factor relevant only to propriety. The relevant part of the judgment is reproduced below for ready reference:-

> **"It has vehemently been argued by the learned Additional Prosecutor-General, Punjab appearing for the State that the petitioner had remained a Proclaimed Offender for a period of about four years and, thus, he is not entitled to any indulgence in the matter of bail. We have, however, not felt persuaded to agree with the learned Additional Prosecutor-General in this regard. It has already been held by this Court in the cases of Ibrahim v. Hayat Gul and othes (1985 SCMR 382) and Muhammad Sadiq V Sadiq and others PLD 1985 SC 182) that in a case calling for further**

inquiry into the guilt of an accused person bail is not to be allowed to him as of right and such right cannot be refused to him merely on account of his alleged abscondance which is a factor relevant only to propriety".

Same view has been reiterated by the Hon'ble Supreme Court in case titled, **"Ikram ul Haq Vs Raja Naveed Sabir and others" (2012 SCMR 1273)** in the following words:-

"It has vehemently been argued by learned counsel for the petitioner that respondent No.1 had remained a fugitive from law and had been declared a Proclaimed Offender, and ths, he was not entitled to be extended the concession of bail. We have, however, remained unable to subscribe to this submission of the learned counsel for the petitioner

because the law is by now settled that in a case calling for further inquiry into the guilt of an accused person bail is to be allowed to him as a matter of right and not by way of grace or concession. Bail is sometime refused to an accused person on account of his absconsion but such refusal of bail proceeds primarily upon a question of propriety. It goes without saying that whenever a question of propriety is confronted with a question of right the latter must prevail".

For the reasons discussed above and taking guidance from the dictum of the Hon'ble Supreme Court, I am inclined to exercise the discretion of bail in favour of the petitioners. Resultantly, this petition is allowed. Accused/petitioners are admitted to bail,

provided each one of them furnishes bail bonds in the sum of Rs.3,00,000/- with two sureties each in the like amount to the satisfaction of learned Illaqa Judicial Magistrate/MOD, concerned. The sureties must be local, reliable and men of means.

Announced
24.08.2015

J U D G E

*M.Siraj Afridi P.S. D