

**IN THE PESHAWAR HIGH COURT,
PESHAWAR.**

(Judicial Department)

Cr. Misc (BA) No. 1413-P/2017.

Date of hearing:..... **26.7.2017**

Petitioner (Jalal Shah) by Mr. Astaghfirullah, Advocate.


The respondent-State by Mian Arshad Jan, AAG, and Syed Azmat Ali, Advocate, for complainant.

ISHTIAQ IBRAHIM, J.- On his failure to obtain bail from the court below, Jalal Shah, the petitioner, who is accused in case FIR No. 198 dated 10.7.2010 Under sections 302/324/34 PPC/512 Cr.P.C of Police Station, Nizam Pur, has come to this Court for his release on bail on statutory delay.

2. The precise allegations against the petitioner is that he alongwith his co-accused Didar Shah (since dead) on 10.7.2010 at about 10.00 hours at Khawar Mohallah Kandarkhel near the house of Sabir Shah, situated in village Amiro Kalay, in furtherance of their common intention, committed the murder of Nadeem Akbar and causing injury to Noyat Akbar by firing at them besides ineffective firing at Niaz Akbar, complainant.

3. Learned counsel for the petitioner submitted that the petitioner was arrested in the case on 20.4.2015 and since

then he is in continuous custody but his trial has not yet been concluded due to constant absence of the prosecution witnesses as they are intentionally avoiding to attend the Court for recording their evidence with a view to prolong the period of confinement of the petitioner as under trial prisoner. He next submitted that delay has not been occasioned on the part of petitioner or any person 'acting on his behalf'. He further submitted that since the petitioner is behind the bars for the last more than two years, therefore, he is entitled to be released on bail on statutory ground.



4. Learned AAG appearing on behalf of the State and counsel for the complainant opposed the grant of bail by submitting that the application of the petitioner is pre-mature as his continuous confinement in the case for two years is not complete. They next submitted that the 3rd Proviso of Section 497(1) Cr.P.C is not strictly attracted to the present case because the petitioner is hardened, desperate and dangerous criminal as he has not only committed the brutal murder of innocent person in the present case but he is also involved in two other criminal cases registered against him under section 353/186/324 and 302 PPC by firing at the complainant as well as police party at the time of his arrest in the present case, therefore, he, at this stage, is not entitled to the concession of bail on statutory ground.

5. I have considered the submissions of learned counsel for the petitioner, learned AAG representing the State and gone through the record of the case with their valuable assistance.

6. Undisputedly, speedy and fair trial is the fundamental right of every accused person. The policy of criminal law is to bring accused person to justice as speedily as possible so that if he is found guilty he may be punished and if he is found innocent he may be acquitted and discharged. Before the insertion of Article 10-A in the Constitution, all the rights regarding expeditious and fair trial were already available in the Constitution and Criminal Procedure Code etc. The guiding principle for the grant of bail on the ground of inordinate delay was laid down by Hon'able the apex Court in the case of Riasat Ali v. Ghulam Muhammad and the State (PLD 1968 SC 353), wherein it has been held that:-

“Delay in prosecution of accused amounts to abuse of process of law and is a valid ground for bailing out accused, however, delay in prosecution of each case as a ground for bail is to be weighed and judged, in each case on its merits.”

7. The third proviso to section 497 (1) of the Cr.P.C was, later on, introduced through **Ordinance No. LXXI of 1979**, which reads as under:-

"Section 497.—(1) When.....

Provided.....

Provided.....

Provided further that the Court shall, except where it is of the opinion of the court 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.

The bare reading of above referred provisos would make it clear that it is a statutory right, which is earned by an accused person for his post arrest bail where he has been detained continuously exceeding two years for an offence punishable with death or imprisonment for life and whose

trial for such an offence has not concluded, provided he, in the opinion of the court, is not a hardened, desperate and dangerous criminal or is an accused of an act of terrorism punishable with death or imprisonment for life or previously convicted person for an offence punishable with death. The word "shall" means that where statutory period is complete, the delay is not on the part of the accused and where his case does not fall under any of the categories of the fourth proviso, then the Court is left with no choice but to release him on bail. Time and again, it has been held by the apex Court that if a case on statutory delay in the conclusion of trial is made out then, as a rule, bail should not be refused. The object behind this view is that any accused person is acquitted at the end of the trial then there is no compensation for the wrong caused to him due to his long confinement in prison while, on the other hand, in case if he is convicted then he has to be rearrested and put behind the bars to serve out his sentence and in that case no prejudice would be caused to the prosecution/complainant.

8. From the perusal of available record, it is evident that petitioner was arrested in the present case on 20.4.2015 and his statutory period has been completed on 20.4.2017, but his trial has not been concluded so far, therefore, under the law he is entitled to the concession of

bail. The perusal of all the order sheets of the trial Court reveals that majority of the adjournments have been made due to the absence of PWs and even the Presiding Officer of the Court has not taken any coercive measure either against process server/DFC concerned or the PWs, who deliberately avoiding their attendance before the court for recording their statements and there is nothing on the record which could reflect that the delay occasioned in the trial is either on the part of the accused-petitioner or any person 'acting on his behalf'.

9. The arguments of learned counsel for the complainant that the application for the grant of bail on statutory ground is pre-mature as charge in the case has been framed on 26.10.2015 is misconceived because the time of detention of accused person, who seeks bail on statutory ground, is to be reckoned from the date of his arrest and not from the commencement of trial. The submission of learned AAG and counsel for the complainant that two other criminal cases, i.e., FIR No. 66 and 33, have been registered against the accused, where in the former he has been charged for firing at the complainant party while in the latter for firing at the police party at the time of his arrest, therefore, his case is hit by the fourth proviso of Section 497 Cr.P.C, has also no force because the three words, 'hardened', 'desperate' or

dangerous' have different connotation and in the present case the petitioner is charged for the killing and causing injury to his opponent on the dispute over women folk and in my humble understanding killing of a person over women folk dispute by firing at him is not an act of desperate, hardened or dangerous criminal. Rel: Moundar and others v. The State (PLD 1990 SC 934). Even otherwise, the effect of the aforesaid criminal cases registered against the petitioner is not relevant for disposing of the instant petition. Reliance is placed on the case "Qurban Ali vs. The State (2017 SCMR 279)". As far as abscondance of the petitioner in the present case is concerned, the same pertains to merits of the case and it does not come under the exceptional provisions of the fourth proviso.

10. In view of the above legal and factual position, the petitioner is entitled to the concession of bail as of right on the basis of delay in the conclusion of his trial. Accordingly, this petition is allowed and these are the detailed reasons of short order of even date, which is as follows:-

"For the reasons to be recorded later on, the petition for the grant of bail is allowed and, accordingly, the petitioner, Jalal Shah, involved in case FIR No. 198 dated 10.7.2010 Under sections

302/324/34 PPC/512 Cr.P.C of Police Station,
Nizam Pure, is admitted to bail on furnishing bail
bonds amounting to Rs. 5,00,000/- with two
sureties each in the like amount to the satisfaction
of learned trial court, who shall ensure that the
sureties are local, reliable and men of means."


JUDGE

M. Zafral

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