

**JUDGMENT SHEET**  
**IN THE PESHAWAR HIGH COURT,**  
**BANNU BENCH.**

*(Judicial Department)*

**BA No.101-B of 2017**

**Habibullah**  
**Vs**  
**The State etc.**

**JUDGMENT**

Date of hearing \_\_\_\_\_ 25.05.2017 \_\_\_\_\_.

Appellant-Petitioner : **By Mr. Farooq Khan Sokari, M. Yaqoob Khan Marwat & M. Rasheed Khan Dirma Khel Advocate.**

Respondent : **By Pir Liaqat Ali Shah, Salah-ud-Din Marwat & Inam Ullah Khan Kakki Advocate.**  
**State by SHahid Hameed Qureshi, Addl: AG.**

**ISHTIAQ IBRAHIM, J.---** Through this common judgment/ order, I would like to dispose of this ***BA No.101-B/2017, BA No.105-B/2017 and BA No. 122-B/2017,*** arising out of three different FIRs, as in all the three cases bail is sought mainly on the ground of acquittal of co-accused.

- **Cr. Misc:/B.A No. 101-B/2017.**

The petitioner **Habibullah** seeks his release on bail in case F.I.R No. 148 dated 13/05/1998 under sections 302/324/34 P.P.C, registered at Police Station Mandan. The allegation against the accused/ petitioner is that on 13.05.1998 at 10.30 hours, he alongwith acquitted co-accused Mohammad Naeem, Mushk-e-Alam and Dilasa Khan armed with Kalashnikovs, started firing at the complainant party, as a result of which Abdul Majeed, Aleem Khan hit and died at the spot, while Asghar Ali and Two unknown passengers alongwith driver of the motorcar sustained injuries.

- **Cr. Misc: /B.A No. 105-B/2017.**

The petitioner **Abbas Khan** seeks his release on bail in case F.I.R No. 247 dated 18.09.2012 under sections 302/324/404/34 P.P.C, registered at Police Station Dadi Wala, Lakki Marwat. The allegation against the accused/ petitioner is that he alongwith absconding co-accused Nazar Gul and acquitted co-accused Umer Gul armed with Kalashnikovs started firing at complainant party, as a result of which Naeem Khan got hit and died at

the spot, while complainant Akhter Zaman and Sherdallah escaped unhurt. The accused also take away double barrel riffle and a 30 bore pistol of deceased.

- Cr. Misc:/B.A No. 122-B/2017.

The petitioner **Hameed Khan** seeks his release on bail in case F.I.R No. 56 dated 27.05.2004 under sections 302/324/34 P.P.C, registered at Police Station Haved Bannu. The allegation against the accused/ petitioner is that he alongwith acquitted co-accused Naseeb Khan, Nekam Khan and Mehboob Khan armed with Kalashnikovs started firing at the complainant party, as a result of which Khumar Ali was hit and died at the spot, while complainant Raziullah Khan and Murad Ali Khan escaped unhurt.

**2.** Learned counsel representing the petitioners argued that co-accused in their respective cases have been acquitted after full dressed trial; that when once the evidence of co-accused has been disbelieved, then the same evidence with respect to other accused having same role also cannot be believed, therefore, as there is no chance of conviction of accused/ petitioners in subsequent trial, their

case falls within the ambit of further inquiry. Keeping the accused/petitioners behind the bars would serve no fruitful purpose. If on merits, the case of accused/ petitioners is one of further inquiry their liberty cannot be curtailed on the sole ground of abscondence. Learned counsel for accused/ petitioners relied on cases cited in **2016 SCMR 762; 2017 P Cr.LJ 10; 2016 YLR 244 and 2016 P Cr.LJ 1523.**

**3.** Learned A.A.G appearing for state assisted by learned counsel for complainants, with respect to their cases, argued that accused/ petitioners are directly charged for committing qatl-e-amd and attempted to commit qatl-e-Amd. There is no chance of misidentification or false implication, as the occurrence took place in all the cases in broad day light and the matters were reported promptly; that mere acquittal of co-accused in earlier trial is no ground for releasing the accused/ petitioners arrested subsequently, as each and every case is to be decided at its own merits, neither the evidence recorded during the trial of co-accused can be considered in case of co-accused arrested subsequently at his bail stage nor during his trial; that

absconsion of accused/ petitioners for a sufficient long time also a step connecting them with the commission of offence. Learned counsel for complainant relied upon the cases cited in *1985 SCMR 382; 2016 MLD 818 and 2014 PCr.LJ 636*.

**4.** Arguments heard and record gone through with the valuable assistance of learned counsel for the parties.

**5.** Record reveals that in all the cases accused/ petitioners are charged directly by name in the first information report by giving them specific role of firing at the deceased and others. After commission of offence all the accused/ petitioners went into hiding, while trials against their co-accused have been completed and ultimately they were acquitted. Now the accused/ petitioners seek their release on bail on the sole ground of acquittal of their co-accused.

**6.** True that in all cases co-accused have been acquitted at an earlier trial held before different courts, but whether acquittal of co-accused would entitle the

accused/petitioners for concession of bail, who were arrested subsequently sitting on the fence, while watching the proceedings of their co-accused, who were arrested or surrendered earlier and faced the trial as an under trial prisoners. Answer is in negative, as evidence recorded in absence of accused/ petitioners in the case of their acquitted co-accused cannot be taken into consideration, neither at bail stage nor during trial. Fate of the case of the accused/ petitioners would be decided on the evidence recorded in their presence and believing or disbelieving of evidence is the exclusive domain of trial court, where it will form its own opinion after recording of evidence in presence of the accused/ petitioners. It is not necessary that the trial court will come to same conclusion which was arrived at the trial of co-accused. In this respect case of **“Sardar Vs State” (PLD 1979 Peshawar 16)** can favorably be reproduced as below:-

***“Accused/ petitioner remaining outlaw after occurrence for about eight years and his trial to be held independently of previous trial resulting in acquittal of his co-accused. Contention that other***

*accused in case having been acquitted and evidence being same in both cases, petitioner exonerated from charge of murder. Held. Not correct. Acceptance of contention amounts to examining of witnesses in petitioner's case as a matter of mere formality or there being no need to examine such witnesses for reason of such evidence having already been taken into consideration in previous case and such course not permissible in law. Bail application rejected."*

7. Learned counsel for petitioners relied on the judgment of this court rendered *in BA No.211-B/2015* and *BA No.36-B/2017* by submitting that bail was granted to the petitioners on the ground that their co-accused were already acquitted in earlier trial. I think learned counsel for petitioners have misconceived the situation, as the bail to the petitioners in those cases was not granted on the sole ground of acquittal of co-accused, rather it was taken as supportive ground apart from other reasonable grounds. This case is at different footing to that of case relied upon by learned counsel for accused/ petitioners, therefore, is distinguished.

8. Learned counsel for accused/ petitioners pressed strong reliance on the judgment of august Supreme Court cited in titled **“Chairman NAB through PGA NAB Islamabad Vs Muhammad Khalid” (2016 SCMR 676),**

wherein it is observed that:

***“The mere fact that co-accused of the respondent have been acquitted may not be sufficient ground for granting him bail but it has created dent at present to the extent which has made the case of the respondent of further inquiry.”***

In the above cited judgment, the case before august apex court was cancellation of bail, which has totally different criterion then grant of bail. The cited case transpires that co-accused, main beneficiary of the offence and other co-accused, who transferred the misappropriated money into account of accused have been acquitted, while role of accused/petitioner in that case was milder than the acquitted co-accused, as misappropriated money was transferred into a loan account belonging to the accused. Moreover, the cited case was with respect to misappropriation of amount



where case rests on documentary evidence, while in present cases the accused/ petitioners are charged for offence of committing Qatl-e-amd and attempted to commit Qatl-e-Amd, where the prosecution case mainly rests on ocular account, so a line of distinction is to be drawn in between the cases resting on documentary evidence and ocular account, hence, the case of accused/ petitioners are distinguishable from the case cited by learned counsel for petitioners, hence not attracted to the facts of the present cases.

9. While reliance can reasonably be placed on case titled ***“Ibrahim Vs Hayat Gul and others” (1985 SCMR 382)***, wherein bail cancellation application petition was accepted by the apex court and bail of the accused/ respondent Hayat Gul was recalled by holding that:

***“Learned counsel also tried to show that the respondent couldn’t now be found guilty because the eye-witnesses who are to appear against him, as he understood, have already been disbelieved during the trial of his co-accused. In the circumstances of this case it is not necessary to examine at length this aspect as it might prejudice the decision of***

*the trial Court as a result of a trial which the respondent is going to face. Suffice it however to observe that in so far as the believing or not believing a certain piece of evidence is concerned the trial Court would be entitled to form its own opinion. Moreover a possibility of additional evidence examined at the instance of the parties or the Court at the second trial and/or the admission by the accused under section 342 during this trial which might furnish corroboratory /confirmatory/additional material can never be excluded on account of any bar by any law or principle. And to say the least the very factum of abscondence would ordinarily be led as additional evidence against the respondent which item would be in addition to the evidence led during the trial of his co-accused and it cannot at all even be urged that evidence of abscondence is not relevant in cases like the present one.”*

10. On merits, tentative assessment would show that accused/ petitioners are directly nominated in their respective first information reports by the complainants with their respective roles. Medico-legal/ post mortem reports, recoveries of empties from their respective spots, motive, ocular account of PWs and longstanding abscondence prima facie connect the accused/petitioners

with the commission of offence, falls under prohibitory clause of section 497(1) Cr.PC.

**11.** Moreover, investigation in the cases is almost complete and trial is about to commence in the near future, but in the meanwhile, case file was requisitioned by this Court in connection with the instant petitions. Much has been argued before me from either side, but discussion on all these points would amount to deeper appreciation of evidence which has always been deprecated by the Hon'ble Superior Courts at bail stage.

**12.** Admittedly and as is evident from the record accused/ petitioners remained absconder after the occurrence for a considerable long period and after acquittal of their co-accused, they have surrendered. Prima facie it appears that the petitioners/ accused were waiting for the acquittal of their co-accused. If, in the attending circumstances of the case, they are granted bail merely due to acquittal of co-accused, then most of the accused would remain fugitive from law during disposal of the case of their co-accused. Wisdom is derived from the case of **“Atlas**

**Khan Vs Mazamullah Khan and another” (1989 PCr.**

**LJ 2044 Peshawar)**, where it is held that the accused who

absconded after the occurrence for noticeable period, would

not be invariably entitled to bail merely because his

co-accused had been acquitted in the case.

**13.** For afore stated reasons, all the three petitions

for the grant of bail stand dismissed. However, prosecution

is directed to submit the challan in the competent court

within a stipulated period provided by law.

**Announced.**

26.05.2017

\*Azam/P.S\*

**J U D G E**