

**IN THE PESHAWAR HIGH COURT,
D.I.KHAN BENCH**
(Judicial Department)

Cr. MBA No.129-D/2018

**Hizbullah
Vs
The State and one other**

JUDGMENT

For petitioner Mr. Ahmad Ali Khan, Advocate

For respondents Mr. Saif ur Rehman Khan, Advocate

Mr. Adnan Ali, Assistant Advocate
General

Date of hearing: 17.5.2018

SHAKEEL AHMAD, J.- Through the instant criminal miscellaneous bail petition No.129-D of 2018, the petitioner Hizbullah son of Abdur Raheem resident of Daraban, district D.I.Khan who is detained in crime No.233 dated 25.12.2014, registered under sections 302/324/148/149 PPC read with 15-A.A at police station Daraban, D.I.Khan applied for post arrest bail in the Court of learned Additional Sessions Judge-III, D.I.Khan on the ground of statutory delay, but his prayer was declined by the learned Additional Sessions Judge-III, D.I.Khan vide order dated 04.5.2018, and as per his opinion his case not

covered under 3rd proviso of sub-section (1) of section 497 Cr.P.C.

2. The allegations as set forth in the crime report are that on 25.12.2014 at 11.45 hours, complainant Zeeshan Aziz alongwith dead body of deceased Kamran Aziz aged about 17/18 years reported the matter to the local police at Emergency Room Civil Hospital Daraban that he alongwith his deceased brother had gone to their landed property for its inspection. At 11.00 hours accused/petitioner Hizbullah, who was armed with 12 bore shotgun, accused Fazal armed with 30 bore pistol, accused Khalid Jan armed with 30 bore pistol, accused Ahmad Jan armed with pistol, accused Attaullah son of Ibrahim armed with axe, an unknown accused, who is son of Attaullah and student of 9th class and their tenants Attique son of Afzal , Majeed son of Saeed, Makhan son of Ramzan residents of Daraban who were armed with axe and clubs came to the spot. Accused/petitioner Hizbullah opened fired at them with which he and his brother received injuries whereas his brother succumbed to injuries and expired on the spot. The other accused also

attacked at him with their respective weapons due to which he received injuries on his head and on his eyebrow. Motive behind the occurrence is dispute over landed property. The occurrence is reported to have witnessed by complainant and his father namely Abdul Aziz. After the occurrence the accused fled away from the spot. Complainant charged the accused for attempting at his life, causing injuries to him and for the murder of his brother namely Kamran Aziz, hence, the instant FIR.

3. The petitioner arrested on 12.4.2015, and after arrest, he was put to trial, and was finally convicted under Section 302 (B) Cr.P.C and sentenced to life imprisonment with a fine of Rs.2,00,000/- to be paid to the legal heirs of deceased, and in default of payment, six months S.I, whereagainst, he filed appeal No.41-D/2017, before this Court challenging therein the vires of the impugned judgment, whereby, he was convicted and sentences as stated above, and this Court after hearing the case, set aside the conviction and sentence recorded by the learned trial Court vide judgment dated 03.4.2018 and remanded back the case for decision afresh after

examination of essential witnesses as Court witnesses of the cross FIR No. 232 by treating the petitioner as under trial prisoner. The relevant portion of the judgment dated 03.4.2018 is reproduced as under:-

Thus, in order to meet the ends of justice and *moreso*, for doing a substantial justice, we, without commenting upon the merits of the case, deem it appropriate to set aside the impugned judgment and remand back the case to the learned trial court for decision afresh after examination of essential witnesses as court witnesses of the cross FIR No.232. The appeal bearing No.43-D/2017, is admitted and allowed, and the accused-respondents No.1 to 8 are directed to appear before the trial Court as accused on bail subject to furnishing bail bonds in the sum of Rs.80,000/- each with two sureties each, in the like amount to the satisfaction of the learned trial court. The accused Hizbullah shall be treated as under trial prisoners and he shall be at liberty to file an application for grant of bail under proviso 3rd to subsection (1) of Section 497 Cr.PC. Needless to mention that criminal revision bearing Cr. Rev. NO.11-D/2017, for enhancement of

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sentence is dismissed on having become infructuous. The trial court is directed to complete the entire process positively within a period of one month after receipt of the record which shall be sent back forthwith to the learned trial court.

Whereafter, petitioner moved an application under 3rd proviso of sub-section (i) of Section 497 Cr.P.C for release on bail which was declined, vide order dated 04.5.2017, hence, this petition.

4. It was mainly argued by the learned counsel for the petitioner that the accused was arrested on 12.4.2015, and since then, he is in continuous detention and the delay in conclusion of trial cannot be attributed to the accused, as such, the petitioner is entitled to the concession of bail.

5. As against that, learned counsel for the complainant vehemently opposed the prayer of the petitioner and argued that delay in conclusion of trial is not on the part of prosecution; that on full dressed trial, the petitioner was convicted, vide judgment dated 29.5.2017, by the learned Additional Session Judge-III,

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D.I.Khan, however, on appeal, his conviction and sentence was set aside and the case was remanded back to the learned trial court for decision afresh after examination of essential witnesses as court witnesses of the cross FIR No. 232. He further contended that only one witness of the cross FIR is to be examined, which exercise can be done within one month and prayed for dismissal of the petition.

6. I have given anxious consideration to the arguments of the learned counsel for the parties and scanned the record with their able assistance.

7. Perusal of the record reveal that the accused was arrested on 12.4.2015, and after completion of usual investigation, complete challan was submitted against the petitioner and co-accused, and put to trial on 23.12.2015, charge was framed on 15.12.2016. On 14.3.2016, PWs could not be examined due to pre-occupation of the learned counsel for the parties before the High Court. On 28.3.2016, PWs were absent and on 23.5.2016, PWs could not be examined due to non-availability of the learned counsel for petitioner. On 25.5.2016, PWs were

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not in attendance and on 25.4.2016; PWs could not be examined due to non-availability of the learned counsel for the petitioner. On 09.5.2016, PWs could not be examined due to strike observed by the lawyers' community. On 14.5.2016, PWs were absent and on 20.6.2016, both the learned counsel for the parties were busy before the High Court. On 11.7.2016, the lawyers' community observed strike, therefore, PWs could not be examined. On 18.7.2016, PWs could not be examined due to adjournment sought by the learned defence counsel and on 22.8.2016, again lawyers' community observed strike. On 05.9.2016, the presiding officer was on leave and on 19.9.2016, due to note reader, proceedings could not be initiated. On 01.10.2016, due to non-availability of the counsel for the complainant the case was adjourned and on 15.10.2016, the lawyers' community observed strike.

8. Perusal of record reveals that the petitioner seeks post arrest bail on statutory grounds which is statutory right and cannot be denied under the discretionary power of the court to grant bail. However, bail under the 3rd proviso to Section 497 Cr.P.C could be

refused to an accused only on the ground that the delay in the conclusion of trial had been occasioned on account of any act or omission of the accused or any other person acting on his behalf. Bail under 3rd proviso to Section 497 (1) Cr.P.C could also be refused to an accused by the Court, if case of the accused fell under the 4th proviso to Section 497(1) Cr.P.C, but in all other cases, the Court must grant bail.

9. It is now settled that an early trial is an inherent right of every accused, and inordinate delay in imparting justice was likely to cause erosion of public confidence on one hand, and on the other, it was bound to create sense of helplessness, despair and feelings of frustration apart from adding to the woes of the public. In this respect reliance can well be placed on the case **“Wazir Ali Vs. The State”** (PLD 2005 K 201), wherein it was held as under:-

“I have given due consideration to the arguments of the learned counsel for the applicant and learned State counsel. I have also gone through the material placed on record and the case-law cited at the bar. Indeed, a direction to the trial Court to

conclude the trial within specified time if not complied with, cannot be deemed to be fresh ground as held in the case of Muhammad Nawaz v. The State 2003 MLD 79, nevertheless, the delay in conclusion of a trial when it appears to be shocking and scandalous or when it appears that complainant and his witnesses have played a part in delaying the conclusion of the trial by remaining absent despite having been served in order to see that accused should remain incarcerated for as much time as possible can be taken into consideration for grant of bail. The complainant and the P.Ws who are related inter se and two of the witnesses are real brothers of the complainant, have failed to appear despite issuance and service of P.Ws. against them, this fact speaks for itself. Indeed, Provisos (iii) and (iv) to section 497, Cr.P.C. stand duly omitted during the pendency of this case but even before introducing the said provisos (iii) and (iv) to section 497(1), Cr.P.C. bail was being granted in cases of delay in conclusion of the trial which appeared to be scandalous and shocking. Hardship is also being considered as ground for bail in appropriate cases by the superior Courts of the country.”

Reliance is also placed on the case of "*Sher Ali alias Sheri Vs. The State*" (1998 SCMR 190), wherein it was held that:-

“---S. 497(1), third & fourth provisos---Bail on the ground of statutory delay---Right of accused for bail under the third proviso to S. 497(1), Cr.P.C. cannot be defeated on any other ground except the delay mentioned in the relevant clause and the grounds provided in the fourth proviso thereof.”

10. I am also fortified by unreported judgment of the apex Court in Criminal Petition No.1232 of 2016 titled, *“Adnan Prince Vs. The State through P.G., Punjab and another”* decided on 01.02.2017, wherein it was held that if a case on statutory delay in the conclusion of trial is made out then, ordinarily bail should not be refused on hyper technical ground. It was also held that *“The Primary object behind this view is that in case any accused person under detention is acquitted at the end of the trial then, in no manner the wrong, caused to him due to long incarceration in prison pending trial, he cannot be compensated in any manner while on the other hand, in case, if he is convicted then, he has to be rearrested and put behind the bars to undergo his sentence and in that case no prejudice would be caused to the prosecution/complainant.”*

Reference in this behalf may be made from the judgment of this Court reported as "Shahzad Khan Vs. The State" (2018 P Cr.LJ 104), wherein it was observed as under:-

"S.497---Bail statutory delay---Scope---Bail could not be refused on hyper technical grounds if case on statutory delay in conclusion of trial was made out."

In this respect reference may also be made from the judgment reported as "Behram VS. The State" (2003 P Cr.LJ 73), wherein it was held that *"fair and expeditious trial is fundamental right of the accused person which cannot be denied to him."*


11. In my view it is a fit case for grant of bail, as the accused is to face the agonies of protracted trial, once again, after remand of his case, he cannot be kept in jail for indefinite period, therefore, I hold that the whole period spent in Jail is countable while deciding the bail petition on statutory delay. It is immaterial whether those period spent as convict or under trial prisoner.

12. For what has been discussed above, I am of the view that since the petitioner is in continuous detention and has spent more than three years in Jail, therefore, he is entitled to the grant of bail as a matter of right and not a matter of grace, accordingly, the Cr.MBA. No.129-D/2018 is accepted and the accused is directed to

be released on bail subject to furnishing bail bonds in the sum of Rs.3,00,000/- (Rupees three lac) each, with two sureties each, in the like amount to the satisfaction of Illaqa/Duty Judicial Magistrate.

13. Above are the reasons of my short order of even date.


JUDGE


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