IN THE PESHAWAR HIGH COURT, PESHAWAR,

[Judicial Department].

Cr.Misc.BA No.580-P/2017

Date of hearing:- <u>14.04.2017</u>

Petitioner(s):- Zubair and Noor Nawaz by Syed Gul Hussain, Advocate.

Respondent (s):-<u>State by Mr. Rab Nawaz Khan AAG.</u>
Nemo for complainant.

ORDER

ROOH-UL-AMIN KHAN, J:- Petitioners 1. Zubair and

2. Noor Nawaz, seek bail in case FIR No.442 dated 06.08.2013, registered under sections 302/324/148/149 PPC, in Police Station Duaba, District Hangu.

2. According to report of complainant Baseer Ahmad, on the fateful day he along with his uncles, Mohabat Khan and Ghazi Mat Khan was on the way to Duaba Bazaar in a motorcar and reached near the house of Yousaf Khan, Zahir Khan and Mujahid (acquitted coaccused) along with Noor Nawaz (petitioner), intercepted them. There was exchange of hot words between them, however, on interference of the people/mediators, they were separated. Consequently, he (the complainant) along with his uncles proceeded to Duaba Bazaar where they were busy in purchase of house hold articles when at 15.15 hours, accused Zahir Khan, Mujahid (acquitted co-accused) and Zubair, Noor Nazwaz, (present petitioners), duly

armed with pistols came there on motorbikes. Accused Mujahid opened fired at Mohabat Khan, as a result, he got hit and died on the spot while accused Zahir Khan, Zubair, Noor Nawaz and Afzal opened fire at the complainant and his uncle Ghazi Mat Khan, as a result, the latter got hit and succumbed to the injuries on the way to the hospital. The complainant luckily remained unscathed. Motive behind the occurrence is that one Shakir of accused's family was murdered some two years prior to the occurrence, for which the accused were suspecting the family of the complainant. Hence, this case.

- 3. Complainant Baseer Ahmad has been properly served, but neither had he appeared before the Deputy Registrar nor this Court. Being a bail matter, cannot be kept pending for indefinite period, therefore, is being disposed of on the available record in light of the arguments of learned counsel for the petitioners and learned AAG for the State.
- 4. The role attributed to the petitioners is that of firing at deceased Ghazi Mat Khan and complainant, along with co-accused Zahir Khan and Afzal. The effective shots on the person of the deceased have not been specifically attributed to the present petitioners. In this view of the matter, it is yet to be determined that whose fire shots, out of the four accused, proved fatal as well as sharing of common intention of rest of the accused with the accused

of the effective shot. The role of the petitioners is not distinguishable from co-accused Zahir Khan, who has been acquitted by the Trial Court vide judgment dated 30.09.2016, which judgment has attained finality as the same has not been assailed before the higher forum by the complainant/prosecution. In the circumstances, whether the prosecution would be able to bring home the guilt of the petitioners on the same set of evidence on the basis of which co-accused having similar role to that of the petitioners has already been acquitted, is a crucial question which requires further probe into the guilt of the petitioners. The only ground which prevailed before the learned lower Court for refusal of bail to the petitioners was their abscondence for a period of three years. Such observation of the learned Trial Court is against the dictum laid down by the worthy apex Court in Ibrahim's case (1985 SCMR 382), Muhammad Sadiq's case (PLD 1985 SC 182), Malik Mukhtar Ahmaed Awan's case (1991 SCMR 322), Mitho Pitafi's case (2009 SCMR 299), and Qamar alias Mitho's case (PLD 2012 SC 322), according to which mere abscondence of an accused person would not be sufficient for refusal of bail to accused, if otherwise, on merits a case of bail has been made out.

5. For the reasons discussed above, this petition is allowed. Accused/petitioners are admitted to bail provided they furnishes bail bonds in the sum of Rs.2,00,000/- with

two local, reliable and resourceful sureties each in the like amount to the satisfaction of learned Illaqa Judicial Magistrate/MOD concerned.

Announced:

14.04.2017

Siraj Afridi P.S.

JUDGE