

JUDGMENT SHEET

**IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)**

Cr.M.BA. No. 131-M/2017.

JUDGMENT

Date of hearing: **26.5.2017.**

**Petitioners: - (Muhsin Islam & Salih Islam) by
Mr. Mustaq Ahmad Khan, Advocate.**

**Respondents:- (the State & others) by Mr. Sabir
Shah, A.A.G and Hafiz Ashfaq Ahmad,
Advocate.**

MOHAMMAD IBRAHIM KHAN, J.- Mohsin

Islam and his brother Salih Islam have joined hands for the grant of their post arrest bail in case FIR No. 97 dated 01.03.2017 under sections 302,324,148,149 PPC read with 15 A.A registered at Police Station Dagger District Buner.

2. Prior to, an application bearing No. 39/4 BA of the year 2017 was also jointly filed by both these accused/brothers before the Court of learned Additional Sessions Judge/Izafi Zila Qazi-1st Buner, which was dismissed vide the order dated 24.03.2017.

3. Sher Zameen Khan, who has come forward as complainant was present in the Emergency Ward, who had brought the injured Nazmeen Khan alias Nazoo, another person by the name of Jehan Sher his nephew was also present when at the relevant time reported that he alongwith his brothers Nazmeen Khan, Laiq Zada, Nisar Muhammad and Jehan Sher Khan were on their way through NCP motorcar bearing No. 610-PSSS having some private and domestic engagements. They were approaching toward Sawarai when at about 10.15 hours from the nearby street known as Sahibullah forthwith appeared, accused Ibrahim and his sons Salih Islam, Tariq Islam, Zahoor-ul-Islam and Zia-ul-Islam alias Menai and Mohsin Islam all armed with their respective pistols and Kalashnikovs, on seeing them, all these persons started firing at them. The fire shots of Tariq Islam hit his brother who has received serious injuries. The fire shots of Ibrahim the father of all the accused/persons hit the complainant on his head and was in an injured condition. One of the

passerby was also hit on his head who later on succumbed to the injuries. All other named persons as referred to above however escaped un-hurt. The deceased was taken to the hospital Shanai while all other injured were brought to Dagger hospital for the purpose of their treatment. This occurrence is stated to be witnessed by Gul Nawaz Khan and may be someone else has also seen. The reason set as motive, the previous case registered under section 506 PPC which is still under trial before the competent Court.

4. Having heard arguments of learned counsel for the accused/Petitioners, learned counsel for the complainant and learned A.A.G for the State, record with their assistance gone through.

5. Learned counsel for the Petitioners relied on *PLJ 2014 Cr.C.(Lahore) 1 (Multan Bench) " Asif Shezad vs the State and another", 1995 MLD 1755 " Muhammad Mushtaq vs the State", 2003 YLR 1378*

(Lahore) "Jamshaid Ahmad vs the State", unreported judgment of this Court in Cr.M B.A. No. 1717-P of 2016 decided on 09.09.2016 "Aftikhar vs the State", 2012 YLR 2822 (Sindh) " Godho alias Muhammad Saddique vs the State", 2003 P Cr. LJ 933 (Karachi) " Dosoo vs the State", 2012 YLR 435 (Sindh) " Malik Pahar Khan and another vs the State", 2013 YLR 725 (Lahore) " Nazir vs the State and another", 2012 YLR 1778 (Lahore) " Nadeem vs the State and another", 1986 P Cr.LJ 2676 (Lahore) " Syed Mushtaq Hussain vs the State", 2016 YLR 2443 (Peshawar) " Ikhtar and 2 others vs the State", 1996 SCMR 1654 " Muhammad Sadiq and another vs the State", 2012 YLR 1728 (Peshawar) " Arshad vs the State and another". In the light of these dictums of the Hon'ble superior Courts prayed for the grant of bail as almost all the family members of the accused-party have been roped in the fact of involvement of accused/Petitioners. It would be determined during trial that whose fatal shots

proved effective in respect of murder of the deceased, so, this element makes the case of Petitioners arguable for the purpose of bail. Inversely, learned counsel for the complainant duly assisted by learned A.A.G appearing on behalf of the State referred to 1981 SCMR 1092 "Munawar vs the State", 2015 P Cr. LJ 402 (Peshawar) "Kamran vs Haji Muhammad Zahir Khan and another", 2012 P Cr. L J 690 (Sindh) "Kadir Bux alias Porho vs the State", 2017 P Cr. L J 21 (Islamabad) "Ameer Hamza vs the State and others", 2004 SCMR 1068 "Shaukat Ali alias Shoka vs the State", 2004 P Cr. LJ 849 "Rangbaz vs the State and another", 2016 P Cr. LJ 1781 (Peshawar Abbotabad Bench) "Ali Asghar vs the State, 1995 P Cr. LJ 1663 (Lahore) "Muhammad Arshad and 2 others vs the State", 1995 P Cr. LJ 1635 (Lahore) "Muhammad Anwar vs the State" and 2014 P Cr. LJ 1526 (Peshawar) "Bazir vs the State". They both vehemently opposed the grant of bail mainly on the ground that the accused-party including the

accused/Petitioners have shared common intention within the meaning of vicarious liability and their common act was so severe to the effect that even passerby was not spared and done to death in brutal manner, so, by all counts they are not entitled to the concession of bail.

6. The purpose of bail is to grant liberty to an accused involved in a case if there are reasons to believe even if the offence falls within the purview of prohibitory clause but if there are reasons that there is further scope of inquiry into guilt of each accused for reasons to be recorded each accused be enlarged on bail subject to furnishing of bail bonds for the sum to be announced by the Court which shall follow release of each accused. That is what happened in the case FIR No. 473 dated 05.9.2012 registered under sections 506/34 PPC at Police Station Dagger. In this case present accused Ibrahim, Tariq Islam, Salih Islam and Mohsin Islam amongst these names included the accused/Petitioners who had been granted

bail for the sum of Rs. 50,000/- during the subsistence of the trial.

7. After implication in the present case they absconded during the trial before the learned Senior Civil Judge/ Judicial Magistrate Buner and by the order dated 27.3.2013 their sureties were penalized to the extent of 1/5 share which came out to Rs. 10,000/- for each surety and on realization of forfeiture of bonds coupled with proper notice within the meaning of section 514 Cr.P.C since then these accused/Petitioners have been declared proclaimed offenders. Once a trust is ignored and later after being implicated in a case which invites punishment falling within the prohibitory clause of section 497 (1) Cr.P.C even if the Petitioners have been given the role of vicarious liability with the charge of ineffective firing attributing no overt act on their part even then it would be difficult situation for the accused/Petitioners to be trusted for the grant of bail. The referred authorities by the learned counsel for the

complainant would have more force for refusal of the bail on various counts of vicarious liability and sharing of common intention. The incident was stated to be a daylight occurrence and the previous enmity in between the parties was said to be proceedings under trial. The accused/Petitioners appeared to have acted in pre-concert and shared commonality of intention with the co-accused. When these sons, brother and father such like accused who remained in absconsion and later have been declared proclaimed offenders, obviously their absconsion in a way would be hurdle in their release on bail, especially when conduct of the accused amounted to misuse of the concession of bail. Therefore in view of all such prevailing circumstances when accused-Petitioners have no evidence in their defence that their father Ibrahim who has already been refused bail by the Courts, at all disentitle these Petitioners for such concession.

8. Above all, these accused/Petitioners remained absconder for considerable long period

of more than 3 years, in which respect too, they failed to furnish any plausible explanation that as to why they remained fugitive from law for such long period of time, especially when the proceedings of the *ibid* criminal case registered against them was pending between the parties. So, their willful disappearance soon after the occurrence prima facie connected them with the commission of offence falling within the prohibitory clause of section 497 (1) Cr.P.C. As far as the arguments of learned counsel for the Petitioners that bail to an accused could not be refused on the sole ground of abscondence is concerned, suffice it to say, that when version of prosecution prima facie lends support from other collected material it could be declined as an exception.

9. Needless to mention that the observations made above are purely tentative in nature and should in no way prejudice the case of either party during trial

10. In view of the above, this petition
for the grant of bail stands dismissed.

Announced
Dt: 26.05.2017.

JUDGE