SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Appellate Jurisdiction**]**

PRESENT:
Mohammad Azam Khan, C.J.
Ch. Muhammad Ibrahim Zia, J.

Criminal Appeal No.23 of 2015
(Filed on 21.12.2015)

Abdul Qayoom s/o Ghulam Muhammad r/o Bring Bun, Tehsil & District Haveli, presently in Judicial Lockup, Kahuta/Haveli.

……APPELLANT

VERSUS

1. State through Advocate-General of the Government of the State of Jammu & Kashmir, having his office at Muzaffarabad.

2. Mehmood Iqbal s/o Muhammad Nazir Khan r/o Hallan Shamali, Tehsil & District Haveli.

…..RESPONDENTS

[On appeal from the judgment of the Shariat Court dated 15.12.2015 in Criminal Revision No.386/2015]

FOR THE APPELLANT: Kh. Muhammad Nasim, Advocate.

FOR THE STATE: Ch. Shoukat Aziz, Additional Advocate-General.

Date of hearing: 16.03.2016.

JUDGMENT:

Mohammad Azam Khan, C.J.– The appellant, Abdul Qayoom, along with others is being tried in the offences under sections 302, 342, 147, 148, 149, 201, 202 and 34, APC, by the District Criminal Court, Haveli Kahuta. During the trial, the appellant and Muhammad Shabir filed an application for release on bail on 16th September, 2015, on the ground of the statutory delay of two years. The trial Court dismissed the application. Dissatisfied, the appellant and Muhammad Shabir filed a revision petition in the Azad Jammu & Kashmir Shariat Court. A learned single Judge in the Shariat Court through judgment dated 15th December, 2015, accepted the revision petition to the extent of accused, Muhammad Shabir, while dismissed the same to the extent of

appellant, herein, on the ground that he is a dangerous, desperate and hardened criminal, hence this appeal.

2. Kh. Muhammad Nasim, Advocate, counsel for the accused-appellant submitted that the occurrence took place on 28th September, 2013. The challan was submitted on 28th November, 2013. The appellant was arrested on 9th September, 2013. There are 33 witnesses in the case and the statements of only 7 witnesses have been recorded so far. There is no delay on the part of the accused-appellant. The trial has not been concluded within the period of two years. There is no evidence against the accused-appellant. The Shariat Court has declared the accused-appellant as hardened, desperate and dangerous criminal without any record. The judgment of the Shariat Court is not maintainable. He relied upon the case titled *Irfan & another vs. State through Advocate-General and another* (Criminal Appeal No.7 of 2013, decided on 24.09.2013.

3. Ch. Shoukat Aziz, Additional Advocate-General, submitted that the witness, Muhammad Farooq has implicated the accused in the crime. The hatchet was

recovered from the accused-appellant, therefore, he is not entitled for concession of bail. The judgment of the Shariat Court is perfectly legal.

4. We have heard the learned counsel for the appellant as well as the learned Additional Advocate-General and perused the record. On a report made by one Mehmood Iqbal, s/o Nazir Khan, at Police Station Kahuta on 4th September, 2013, a case under sections 302, 324, 147, 148, 149, 201, 202 and 34 APC, was registered in respect of the crime committed on 28th August, 2013. It was alleged in the report that a weed *Trilium-Gavanaum* (ترے پتری) grows in the mountainous forest of Haveli which is sold in the market against higher price. The people of the locality used to extract the same in a clandestine manner and sell it in the market. On 28th August, 2013, his two brothers, Mehboob Iqbal and Naheem Iqbal went in the forest for extracting the herb. They did not return up to 31st August, 2013. On 1st September, 2013, he got registered a report at Police Station Kahuta. He alleged that when his brothers went towards Dhok-Klan, *Subidar* Muhammad Bashir and

Muhammad Sharif sons of Ghulam Muhammad, caste Gujar, residents of Halin Shumali, went behind them. He himself saw them going towards the deceased. He nominated 20 persons who were already present there. They kept their brothers in wrongful confinement and have murdered them. The dead bodies of the deceased were lying on Kiran Hill. After arresting the accused and necessary investigation, the challan was submitted in the District Criminal Court, Kahuta on 28th November, 2013.

5. There are 33 witnesses in the case. A period of more than two years has passed and the statement of only 7 witnesses has been recorded. There is no delay on the part of the accused appellant, as such he is entitled for concession of bail under the proviso to section 497, Cr.P.C. The only question which needs resolution is that whether the accused-appellant falls in the category of dangerous, hardened and desperate criminal or not.

6. It may be observed that under section 497, Cr.P.C., when any person accused of a non-bailable offence is brought before the Court, he may be released on bail but he shall not be so released if there is a

reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life or for ten years. The offence under section 302, APC, falls in the prohibitory clause. If the Court reaches the conclusion that the accused falls in the ambit of further inquiry then the Court may release him on bail. A proviso has been added to section 497, Cr.P.C. that in the cases where the sentence is of life imprisonment or death and the trial is not concluded within two years and delay has not been caused due to accused or any person acting on his behalf, the accused has a statutory right to be released on bail. The only embargo placed in the proviso that a person who is dangerous, hardened and desperate criminal shall not be released on bail.

7. The standard for declaring an accused as hardened desperate and dangerous criminal has been laid down in the case titled *Irfan and another vs. The State and another*, (Criminal Appeal No.7 of 2013, decided on 24th September, 2013), whereby it was observed in para 9 of the judgment as under:-

"9. For determining whether any person falls in the category of hardened, desperate and dangerous criminal or not, the circumstances of each case have to be considered which include the motive behind the murder, the role played by each of the accused in the completion of offence, prima-facie evidence in support of incriminating act attributed to accused persons, the effect of accused's role on the family of victim and on the society at large. In a recent judgment of this Court titled *Farzana Imtiaz vs. Tariq Hussain and another* [Criminal Appeal No.51 of 2012, decided on 19.7.2013], it was observed in para 10 as under:-

> "10. After the amendment in section 497 Cr.P.C. the statute has conferred a right in an accused person that he shall be released on bail, if the trial has not been concluded within a period of two years and delay in trial has not occasioned due to act or omission of accused or any person acting on his behalf, but an exception has been created that hardened, desperate and dangerous criminal will not be entitled to get the benefit of aforesaid proviso. The Courts are empowered to make tentative assessment of evidence collected against an accused person likely to be produced during the trial for deriving a conclusion that reasonable grounds appear for believing that the accused is guilty of an offence punishable with death or imprisonment for life or 10 years and the proviso authorizes a Court for determining whether the accused falls in the category of hardened,

> desperate and dangerous criminal or not. For the purpose the Court has to consider the material placed before it and derive the conclusion from the tentative assessment of said material. There may be reasonable grounds for believing that the accused is guilty of an offence punishable with death or transportation for life but it is not necessary that on the basis of such grounds the accused is also a hardened, desperate and dangerous criminal. Mere cause of death by firing is not sufficient for declaring an accused as a hardened, desperate and dangerous criminal."

In another case titled *Muhammad Siddique vs. Muhammad Behram and another* [1998 SCR 146], it was observed as under:-

> "We have given due consideration to the arguments and perused the authorities cited by the learned counsel for the parties. It may be stated that the mere fact that the accused-respondent allegedly caused two injuries with dagger to the deceased and injured two other members of the complainant party does not, per se, bring him within the purview of 'desperate' or 'hardened' criminal, especially so when he also allegedly sustained two injuries in the incident. While dubbing a person as a 'hardened' or 'desperate criminal each case has to be decided in view of the material on the record and not on the basis of mere allegation."

In the case titled *Muhammad Aziz vs. the State* [2000 SCR 1], it was observed as under:-

> "5. We have given due consideration to the matter. We are of the opinion that the question as to whether an accused is hardened, desperate or dangerous criminal within the meaning of the aforesaid proviso is to be seen in the light of the circumstances of each case, i.e., (i) the motive for murder, (ii) the part which each of the accused played in the completion of the offence, (iii) prima facie evidence in support of the incriminating act attributed to the accused persons, and (iv) the effects of the act of the accused on the family of the victims and on the society at large. Considering the acts attributed to the accused-appellants along with other principles indicated above, we are of the opinion that in view of the different strings of the prosecution story which, prima facie, implicates the accused-appellants with the commission of offence of murder of five innocent persons, it cannot be said that the acts attributed to them are such that they are not desperate or dangerous criminal persons within the meaning of forth proviso to section 497(1), Cr.P.C. It may be stated that the connotation of these words is wide enough to cover the case in hand. A reference may be made to the view taken by the Supreme Court of Pakistan in the case reported as *Moundar vs. The State* [PLD 1990 SC 934], referred to above…."

In the present case, the allegation against the accused-appellant is that he murdered the deceased with

the help of others and thrown the dead bodies on the mountain. The case is of circumstantial evidence. No direct evidence is available on the record. *Prime facie*, there is no evidence against the accused for connecting him with the crime and to consider him as a dangerous, hardened and desperate criminal. There is only the statement of one witness, Muhammad Farooq, which was recorded on 9th October, 2013. He deposed that he has seen the accused going towards the deceased-persons. The occurrence is stated to be taken place on 28th August, 2013. The statement was recorded on 9th October, 2013 after 12 days of the occurrence. The witness is stated to be a near relative of the deceased and an inhabitant of the locality. Humanely, it is not possible that when two persons have been murdered and the witness shall remain silent and does not disclose the offence to anybody or not states that he is the witness of any event leading to the occurrence. The testimony of such witness is not beyond the doubt and cannot be believed in ordinary circumstance. For the sake of arguments, if the statement of this witness is believed, then too, it cannot be said that

the accused appellant is a dangerous, hardened and desperate criminal. The Shariat Court has declared the accused-appellant as dangerous, hardened and desperate criminal without any record. The judgment of the Shariat Court is not maintainable.

The result of the above discussion is that the appeal is accepted. The judgment of the Shariat Court to the extent of appellant, herein, is set aside. The accused is ordered to be released on bail provided he furnishes the bail bond amounting to one million rupees consisting of two sureties to the satisfaction of any member of Tehsil Criminal Court, Kahuta and personal bond in the like amount. He shall be released forthwith if not required in any other case.

CHIEF JUSTICE **JUDGE**

Muzaffarabad
25.03.2016.