

BEFORE THE HON'BLE SERVICE TRIBUNAL
KHYBER PAKHTUNKHWA PESHAWAR

CM No. ____/2023

In

Service Appeal No. 732/2023

Waheed Ullah.....Appellant

VERSUS

DPO & others.....Respondents

I N D E X

S.No	Description of Documents	Annex	Pages
1.	Early Hearing form		A-B
2.	Application for early hearing		1-2
3.	Affidavit		3
4	Copy of Acquittal Order dated 23-11-2023		4-14


Applicant / Appellant

Through


Ashraf Ali Khattak
Advocate, Supreme Court
Of Pakistan

**BEFORE THE PESHAWAR HIGH COURT, PESHAWAR
PROFORMA FOR EARLY HEARING**

Judicial Branch

Form "A"


Khyber Pakhtunkhwa
Service Tribunal

Diary No. 9644

Dated 1-12-2023

To be filled by the counsel

Case No.	Service Appeal No. 732/2023				
Case Title	Waheed Ullah.....Appellant VERSUS DPO & others.....Respondents				
Date of Institution	30.11.2023				
Bench	SB		DB		
Case Status	Fresh		Pending		
Stage	Notice		Reply		Arguments
Urgency to be clearly stated	That sine the appellant has been acquitted by criminal court on the same charges and the reply of the respondents has also been submitted therefore, the appeal is mature in all respect and more so appellant is job less since term their termination from service and having burdened with school going kids, dependants and ailing parents, therefore, the appeal may kindly be taken for early disposal and the date of final hearing needs acceleration.				
Nature of the relief sought	That the matter pertains to Service of the Appellant				
Next date of hearing	22.02.2024				
Alleged Target Date	Within Week				
Counsel for	Petitioner		Respondent		In Person


Signature of Counsel/Party

BEFORE THE HON'BLE SERVICE TRIBUNAL
KHYBER PAKHTUNKHWA PESHAWAR

CM No. ____/2023

In

Service Appeal No. 732/2023

Waheed Ullah.....Appellant

VERSUS

DPO & others.....Respondents

APPLICATION FOR EARLY
HEARING / ACCELERATION OF
THE CAPTIONED SERVICE
APPEAL.

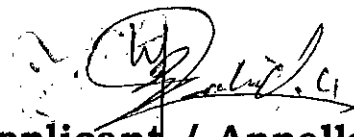
Respectfully Sheweth:

1. That the above noted case is pending adjudication before this Hon'ble Tribunal, which is fixed for 22.02.2023.


2. That sine the appellant has been acquitted by criminal court on the same charges and the reply of the respondents has also been submitted therefore, the appeal is mature in all respect and more so appellant is job less since their termination from service and having burdened with school going kids, dependants and ailing parents, therefore, the appeal may kindly be taken for early disposal and the date of final hearing needs acceleration.

3. That the above noted Service Appeal need early fixation for the larger interest of justice.
4. That being sanguine about the success of Petition it is requested the case may be fixed for early date.
5. That there is no legal bar on acceptance of this application.

It is, therefore, most humbly prayed that on acceptance of this application, the above titled Service Appeal may kindly be fixed for an early date i.e within Week, with the larger interest of Justice.


Applicant / Appellant

Through


Ashraf Ali Khattak
Advocate, Supreme Court
Of Pakistan

BEFORE THE HON'BLE SERVICE TRIBUNAL
KHYBER PAKHTUNKHWA PESHAWAR

CM No. ____/2023

In

Service Appeal No. 732/2023

Waheed Ullah.....Appellant

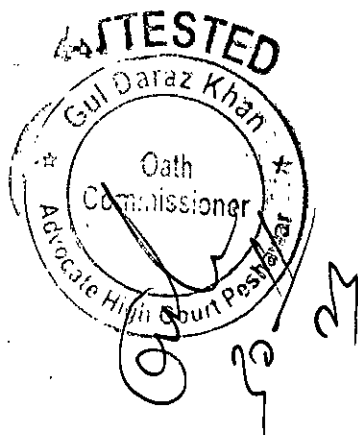
VERSUS

DPO & others.....Respondents

AFFIDAVIT

I, **Waheed Ullah**, do hereby solemnly affirm and declare on oath that the contents of the accompanying **Application** are true and correct to the best of my knowledge and belief and nothing has been kept concealed from this Hon'ble Court.


DEPONENT



IN THE COURT OF RASHID ALI

Judicial Magistrate-II, Kohat.

Case No. : 52/2 of 2023

Date of Institution : 09.02.2022.

Date of Decision : 23.11.2023.

State(Complainant)

VERSUS

(1) Umar Badsah and 28 others(Accused facing Trial)

FIR #729 Dated: 23.11.2022

u/s 222-223 & 224 PPC

PS Cantt, Kohat.

JUDGEMENT

1. Facts: Brief facts of the instant case/FIR are that SHO of the police station Cantt, got information that on 23.11.2022 about 56 prisoners were brought to district courts on challan, by police escort about 28 in number (accused). That when the jail prisoners were shifted to judicial lockup in district courts one of the prisoner/accused namely Najeeb Ullah s/o Taj Ali Khan charged in two cases i.e. FIR#35 dated 30.3.2022 u/s 302,324,353,120-B PPC-4/5 ESA-15AA-7 ATA police station CTD DI Khan, FIR#34 dated 19.5.2022 u/s SESA, 15AA, 120 B PPC-7ATA PS CTD Kohat, to be produced

FIR # 729 Dated: 23.11.2023 u/s 222-223-224 PPC PS Cant, Kohat.

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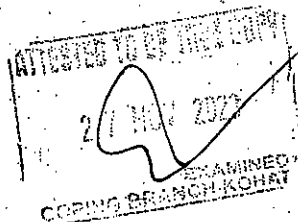
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before the ATC court made possible his escape from custody due to negligence of the police. Hence the present case FIR was registered against all the police personnel (accused herein) on duty as well as absconding accused Najeeb Ullah. After the occurrence has taken place information SHO PS Cantt rushed to the spot and drafted the Murasila which was sent to the PS through Ali Mubarak constable no.1312, and thereafter the present case FIR was lodged.

2. Investigation was entrusted to Tariq Khan ASI. After completion of investigation, complete Challan was put in court before this Court and challan u/s 512 against the absconder accused Najeeb Ullah. Copies of record provided to the accused and provision under section 241-A Cr.P.C was complied with. Formal charge was framed against the accused on 11.07.2023, wherein they denied the allegations and claimed trial.
3. Case was fixed for prosecution evidence and PWs were summoned. Prosecution in support of its case produced four (05) witnesses. Crux of evidence produced by the prosecution is given as below.

4. Evidence:-

- a) PW-1 is the statement of Ali Mubarak who stated that the murasla was handed over to him by the Shah Duran SHO which he brought to the PS and handed over to Mukhtiyar MHC for the registration of FIR.
- b) PW-2 is statement of investigation officer Tariq ASI. Stated that the investigation of the instant case was entrusted to him. He prepared site plan at his own observation as all the Courts were closed and later on he compared the site plan with CCTV camera photos and found the same as correct. Site plan is

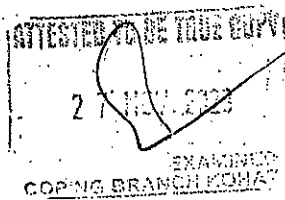


FIR # 729 Dated: 23.11.2023 u/s 222-223-224 PPC PS Cantt Kohat.

(6)

Ex.PW 2/1. He searched for the accused Najeeb Ullah s/o Taj Ali Khan in the various places but the accused was not found. He recorded the statements of PWs namely Mubarak Ali and Mukhtiyar Hussain MHC. In the meantime the accused 28 in number all police official came to the police station. He arrested them formally and issued their card of arrest Ex.PW 2/2. He recorded the statements of arrested accused persons who all are police officials. On the following day he produced the accused in the Court for judicial remand however, all the accused released on bail. He took into my possession one four GB USB Ex.P1 obtained from the CCTV Cameras install in the Court premises vide recovery memo Ex.PW 2/3 in the presence of its marginal witnesses. He on 01.12.2022 obtained warrant u/s 204 Cr.PC against accused Najeeb Ullah vide his application Ex.PW 2/4 and marked the same to DFC for execution. The warrant u/s 204 Cr.PC is Ex.PW 2/5 which was returned as unserved by the DFC and he obtained proclamations u/s 87 Cr.PC vide his application is Ex.PW 2/6 and marked the same for execution to the same DFC whose statement was recorded in the Court to this effect. The proclamation notice is Ex.PW 2/7. He have also recorded the statement of rickshaw driver namely Meer Salam s/o Meer Kalam r/o Buraka Kohat and whose rickshaw the accused had made good his escape. After completion of his investigation he handed over the same to SHO for submission of complete challan after which the DPP opined to add section 222 PPC as well against the accused and the same was added accordingly.

c) PW-3 is statement of Mukhtiyar Hussain: Stated that on receipt of murasila from SHO PS Cantt through Constable Ali Muharak 1312. He registered the case vide FIR EXPW-3/1 by



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correctly incorporating the contents of murasila into the FIR.
My statement was recorded by the IO u/s 161 Cr.PC.

d) PW-4 is Statement of Hameed Badshah: Stated that he is the marginal witness of the recovery memo already Ex.PW 2/3 vide which the ASI took into his possession one 4GB USB Samsung mark in which the record of CCTV cameras installed in the court premises.

5. PW-05 is statement of Shah Doran: Stated that during the days of occurrence he was posted as SHO to PS Cantt. On 23.11.2022, on receipt of information about the occurrence he alongwith police officials came to District Courts Kohat. He was informed that 56 accused were brought from District Jail Kohat under escort of Umar Badshah SI, Riaz Hussain, Sadaqat Ali IHC, Inayat Shah IHC, Wajid Ullah IHC, Sajawal IHC, Azmar Gul LHC, Awaz Khan HC, Tahir Muhammad LHC and 19 constables named in the murasila. The accused was brought to District Courts in a government vehicle. Accused Najeeb Ullah s/o Taj Ali Khan caste Masood r/o Civil 9 Tank involved in Case FIR no. 35 dated 30.3.2022 u/s 302-324-353-120B-4/5 ESA-15AA-7ATA of PS CTD DI Khan and case FIR no. 34 dated 19.05.2022 u/s 5 ESA-15AA-120B-7ATA of PS CTD Kohat who was to be produced in ATC Kohat, decamped from the police custody due to inefficiency of the police officials. He found all the above mentioned police officials for negligence and inefficiency. He drafted murasila which is Ex.PW 5/1 and sent the same to police station for registration of the case through Constable Ali Mubarak 1312. He also informed the high-ups and the control room about the occurrence. After completion of the investigation he submitted complete challan Ex.PW 5/2.

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6. Thereafter prosecution closed its evidence. After closing the prosecution evidence on 10.10.2023; statements of accused recorded u/s 342 Cr.PC. wherein they again stated that they are innocent.

7. Arguments of learned counsel for the accused and SPP Muhammad Saeed for state heard, and record perused.

FINDINGS:

8. Perusal of record would show that it is an admitted fact that the absconder accused Najeeb Ullah had escaped from the custody of police during the early hours i.e. at about 09:30 hrs as per murasila report, and none of the police personnel on duty noted his escape all day. However when the court challan time was up and the prisoners/UTP were counted, it was noticed then that one of the accused is missing which later on turned out to be the absconder accused Najeeb Ullah who was also charged in other two FIRs. The absconder accused was required in some serious nature cases and such like prisoners needs special security and should not be treated like ordinary prisoner in usual major or minor offences. The time of report is 15:00 hours which is too much late as the accused Najeeb Ullah had escaped in early hours, thus efforts for his capturing and arrest does not came out to be successful, even till date.

9. The investigation officer has conducted his investigation however he did not fixed the responsibility of the persons/accused found negligent for the purpose of criminal liability.

10. It is also not clear as to whether the escaped accused has broken his handcuffs, or his handcuffs were either open or was

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found unlocked. Similarly it is also not clear as to whether he was handcuffed or not. Which is also admitted during cross examination by the investigation officer. There is nothing as such nor is any statement to this extent or any interrogation report of the accused police personals to this effect, available on file. On the challan form the SHO concerned is of the opinion that all the accused mentioned in column No.2 are held negligent and found guilty of the charges levelled against them however when gone through the investigation diary of IO in police file, the investigation officer attributed the act of negligence only to 10 police officials on duty while 18 personnel were found not guilty, but astonishingly their name and personnel/belt numbers are not mentioned anywhere. The final opinion of the IO and SHO are contradictory to each other.

11. Departmental inquiry has also been conducted by the police high ups wherein some of the accused personnel are held guilty and major penalties have been imposed upon them while remaining are exonerated. The inquiry report is although not binding upon the court. However if the prosecution wanted to prove the case then the material which was placed before the inquiry officer, should have been produced before the court so as to form its independent opinion about the allegations. Inquiry file was requisitioned by this court on two consecutive order sheets but not submitted before the court. The available orders of penalties shows that only 4 to 6 personals were held responsible and rest of the police officials accused were exonerated from the charges during inquiry. All these facts also makes the case of prosecution doubtful.

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12. The duties of police officials are regulated under entries in relevant record registers thus the IO/prosecution was required to have produced such entries on record but it is a matter of record that the duty roaster of the eventful day and the placement/locations and nature of the duty assigned to each individual police constable/personal is not available nor made part of the file. It is held by Sindh High Court in reported judgment PLD-2017- Sindh 723 as an infirmity and in absence of such record the conviction in such an offence cannot sustain.

13. Similarly the other prisoners jointly handcuffed and locked in one chain with the escaped accused on the eventful day, are also not associated with investigation or proceeded against for willfully suppressing information and supporting the escape for not informing the police on duty timely so as avoid the escape of accused Najeeb Ullah. The Investigation officer has not made any interrogation report of all the accused individually as the same is not part of the judicial file which could show the responsibility of the delinquent personals. The personnel who were in direct hold of the escaped accused and those who put the accused in handcuffs with in-charge, are the one specifically responsible for that but there name has not been specified out of all accused by the investigation officer and left the same a dubious matter.

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14. The site plan is also deficient on material points. No pointation or addition has been made later on from even a single person despite the fact that all the accused personal have tendered their arrest willfully before concerned SHO/IO. Not all the accused personnel were on a same duty rather they were entrusted different duties at the time of occurrence that is to

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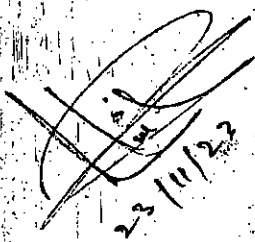
say some were driving the prison van, some were holding weapon for security of van, some of them were deputed with other prisoners inside other prisoner van while some of them were entrusted with jail warrants, however these facts are nowhere specified nor they were given pointation in the site plan. The same fact is also admitted by the investigation officer during his cross examination.

15. The CCTV footage has been obtained from the security cameras installed at different points of the district court premises vide recovery memo 2/3. The CCTV footage was not subjected to FSL nor has been developed into color photographs on the judicial file with name of the accused personnel entrusted with the custody of the absconder escaped accused Najeesh Ullah.

16. The Call Data Record (CDR) is also available on file which does not show any link of absconder accused with the accused personals nor anything was brought on record that the absconder accused has been willfully facilitated by all or any of the accused facing trial.

17. So far section 223 PPC is concerned it has been discussed in case titled Muhammad Yaqoob vs the state (PLD-2001-SC-378).

"The main pre requisite in absence whereof the provisions as contained in section 223, PPC cannot be pressed into service is that the accused must negligently suffer such persons to escape. It is the bounden duty of the prosecution to prove the negligence of a public servant which has resulted in such escape. We may mention here that during

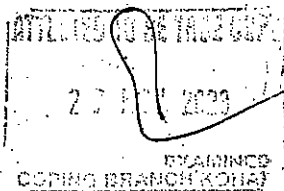


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departmental proceedings initiated under service laws the factum of negligence has its own peculiar characteristics. There is no cavil to the proposition that negligence is a term of art having multiple dimensions in different jurisdictions. It, however, can be defined as 'the omission to do an act, which a reasonable man, guided upon those considerations, which ordinary regulate the conduct of human affairs, would do, or doing an act which 'reasonable and prudent' man would not do. 'Negligence' is the absence of such care, skill and diligence as it was the duty of the person to bring to the performance of the work which he is said not to have performed. There are three degrees of negligence: (1) ordinary which is the want of ordinary diligence, (2) slight: the want of great diligence, (3) gross: the want of even slight diligence (Kedarnath v. State 1965 All. 233 + Nemichand v. Commissioner, Nagpur Division, Nagpur, ILR 1947 Nag. 256: 228 IC 525:1947 NU 281). The factum of negligence as discussed hereinabove can be taken into consideration and negligence may be proved on the basis of presumption or surrounding circumstances while taking disciplinary action, but in criminal proceedings definite and concrete evidence would be required to prove the factum of negligence which is lacking in this case."

18. For what has been discussed above, to avoid serious miscarriage of justice, it is not sufficient that the accused were



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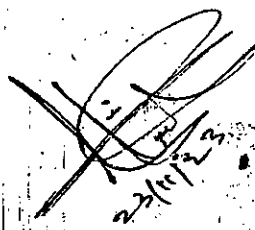
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on duty at the eventful day with challan to hold them all for willful escape and negligence. It is settled principle of criminal administration of justice that no one can be convicted on the basis of presumptions. How much strong the presumption may be it cannot take place of legal evidence. Even as per sayings of Holy Prophet (PBUH), the mistake in releasing a criminal is better than punishing an innocent person. (PLD-2002-SC-1048).

19. For what has been discussed above in the present case the role of negligence is generally attributed to all the accused which as per the available material is doubtful, thus can safely be said that prosecution has not proved the case beyond any shadow of doubts, therefore, accused all the accused police officials except Najeeb Ullah, are hereby acquitted of the charges levelled against them. They are on bail, their sureties are discharged from the liability of the bail bonds.

20. However departmental proceedings under the service law against the accused are not subservient to the criminal proceedings in the instant case as it should be seen in its own parameters having different competent forum and having its own consequences. The august courts of the country has held that in such like cases criminal proceedings and departmental proceedings does not falls in the definition/ambit of double jeopardy.

21. So far absconder accused is concerned sufficient material is available on file to prima facie connect him with the commission of the offence beside that fact that the absconder accused is also required in the serious nature of cases mentioned ibid in detail, hence perpetual warrant of arrest is


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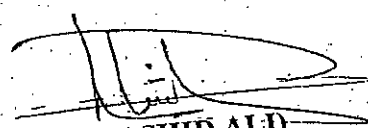
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hereby issued against him. Copy of warrant be forwarded to all the quarters concerned including all DPOs, for execution and to be shared with law enforcement agencies including intelligence agencies. The name of accused Najeb Ullah shall also be noted in the relevant register of PO.

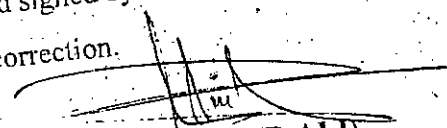
22. Case file be consigned to record room after necessary completion and compilation.

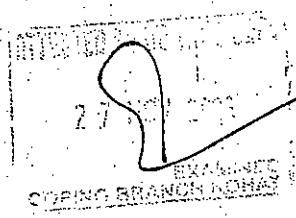
Announced.
23.11.2023


(RASHID ALI)
Judicial Magistrate-II, Kohat

CERTIFICATE

Certified that my, this judgment consist of (11) pages, each page has been read and signed by me after necessary correction.


(RASHID ALI)
Judicial Magistrate-II, Kohat


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