

IN THE HIGH COURT OF SINDH KARACHI

Present:

Mr. Justice Syed Muhammed Farooq Shah
Mr. Justice Mohammad Karim Khan Agha

CONSTITUTION PETITIONS No.D-3905 and 3906 OF 2016

Syed Manzar Abbas Through Mr. Farooq H.Naek, advocate

The Chairman, National Accountability Bureau & 02 others Through Mr. Muhammad Altaf Special Prosecutor, NAB

Date of Hearing: 13-01-2017

Date of Order: 19-01-2017

ORDER

Mohammed Karim Khan Agha, J. These petitions have been filed by Syed Manzar Abbas (the petitioner) for grant of post arrest bail on account of statutory grounds of delay in National Accountability Bureau (NAB) References No.30 and 39 of 2015 The State v. Manzar Abbas & others which were filed by the NAB at Karachi and are proceeding in Accountability Court No.III Karachi by way of consolidated Reference 13, 29, 30 and 39 of 2015 (4 references were consolidated since they revolved around similar subject matter/offense) on account of the petitioner's and other co-accused's involvement in corruption and corrupt practices under the National Accountability Ordinance 1999 (NAO) in connection with a Housing scam involving millions of Rupees.

2. At the outset learned counsel for the petitioner made it clear that he was only pressing this petition on statutory grounds. He submitted that the petitioner was entitled to statutory bail since he had been arrested on 23-06-2015 and had remained in custody for 18 months and yet his trial had still not been concluded despite no fault of his own or anyone acting on his behalf. In support of his contention he placed reliance on the order sheets of the Accountability Court where the case was proceeding. He further submitted that since conclusion of the trial was not likely to occur in the near future, especially as two of the accused were absconders, he was entitled to bail on statutory grounds of delay. He

further contended that bail could not be withheld as a punishment.

3. Learned counsel for the petitioner in support of his submissions placed reliance on the unreported Supreme Court order in the case of **Mir Shah Jehan Khetran V NAB** dated 12-12-2016, **Syed Mansoor Ali V Chairman NAB** (PLD 2016 Sindh P.41) and **Nazir Hussain V Ziaul Haq and others** (1983 SCMR 72)

4. On the other hand learned special prosecutor NAB opposed the grant of bail on the ground of statutory delay as according to him the petitioner had not come to this court with clean hands as he was involved in a scam of millions of rupees, he was the main accused and that bail on statutory grounds of delay was also not available in NAB cases as per recent rulings of the Hon'ble Supreme Court. He did however concede that the petitioner had been in custody for around 18 months and that no delay in the conclusion of the trial had been caused on the part of the petitioner or any one acting on his behalf. However since the ground of statutory bail on account of delay was not legally open to the petitioner his petition may be dismissed. In support of his contentions he also placed reliance on the cases of **Muhammed Jahangir Badar V State** (PLD 2003 SC 525) and **Faisal Hussain Butt V State** (2009 SCMR 133) in terms of the refusal of bail on account of delay in completing the trial.

5. We have considered the submissions of learned counsel for the parties, perused the record, considered the relevant law and case law cited by them at the bar.

6. As this case involves bail on the statutory ground of delay we do not intend to go into the merits of the case although we are aware that the alleged offense has caused a huge loss to the exchequer, the petitioner is one of the main accused in the case and his petition for post arrest bail was dismissed by this Court on merits by order dated 05-10-15. The petitioner challenged the aforesaid order before the Hon'ble Supreme Court which by order of Supreme Court dated 19-01-2016 was dismissed as not pressed.

7. The first issue before us is whether statutory bail is available in NAB cases. This court in its recent order dated 29-11-2016 in CP D 3624/2016 **Syed Rashid Hussain Rizvi V NAB** (of which one

of us was a member Mohammed Karim Khan Agha J) came to the conclusion that bail on the grounds of statutory delay was not available in NAB cases based on a decision of a 3 member bench of the Hon'ble Supreme Court in the case of **NAB V Bakhat Zameen** (CP 1542/2016 dated 26-08-2016) which was reproduced in **Syed Rashid's order** (supra) as under:

JUDGMENT

"Anwar Zaheer Jamali, C.J. – Through this petition, the Chairman, NAB has sought cancellation of bail granted to the respondent No.1 by the Peshawar High Court, Peshawar vide its impugned order dated 03.03.2016, passed in Writ Petition No. 3447-P/2015.

2. We have heard the arguments of learned Special Prosecutor NAB on behalf of the petitioner and learned ASC for respondent No.1. The perusal of material placed on record reveals that respondent No.1 is the only nominated accused in Reference No.3 of 2015, under section 18(g), read with section 24 of the National Accountability Ordinance, 1999 (hereinafter referred to as the "Ordinance of 1999"), submitted by the Director General, NAB before the Administrative Judge, Accountability Courts, KPK Peshawar on 09.1.2015, wherein on 04.02.2015 he has been charged as under:-

"Firstly that you in connivance with others prepared 09 (nine) bogus stamp papers of rent agreements for a period of three years commencing from 2008 to September 2011 with M/s. Jan & Bangash Hotel Kohat Road, Peshawar claiming thereby a payment of Rs. 2,43,71,712/- that trainees in the said hotel stayed only for four months at the actual monthly rent of Rs.5,00,000/- including bus charges and that you accommodated students at small houses in different areas of the city at nominal rents and thus misappropriated an amount of Rs. 1,76,71,254/- in the head of accommodation.

Secondly that you in connivance with your co-accused Ali Akbar, Younas Shah (who entered into plea-bargain with the NAB Authorities) and Nasim Jan (who became approver and was granted conditional pardon) also prepared bogus invoices of J&S Enterprises, Irshad Traders and Yasir Enterprises claiming expenditure of Rs. 1,39,62,027/- but you cannot justify the amount spent on these fake invoices that your liability after deducting the liability of your co-accused comes to Rs. 1,18,67,723/- in the head of procurement.

The vocational training part of the FRDP was outsourced by Project Director to you through Memorandum of Understanding (MOUs) and amount was released in full to your account but you misappropriated / embezzled the fund and caused a total loss of Rs. 2,95,38,977/- to the Government and you thereby committed the offence of corruption and corrupt practices within the meaning of section 9(a)(vi) of the National Accountability Ordinance, 1999 punishable under section 10 of the said Ordinance and schedule thereto and within my cognizance."

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3. The plea for grant of bail on merits raised by respondent No.1 in his earlier Writ Petition No.3545-P/2014 was rejected by the High Court vide its order dated 28.4.2015, which is available at Pages 19 to 23 of the Court file and speaks for itself. On 10.10.2015, another petition under Article 199 of the Constitution for grant of bail was moved by respondent No.1 on the ground of statutory delay. The learned Division Bench in the Peshawar High Court, while admitting respondent No.1 to bail through the impugned order, noted down that the respondent No.1 has remained in custody since 15.9.2014 and during this period the prosecution has only examined 14 out of 31 witnesses, while during ten months period of trial, respondent No.1 has obtained only six adjournments. Thus, he was entitled for grant of bail on the ground of statutory delay of over one year, as the offence for which he was charged was not punishable with death penalty.

4. Before reverting to the facts of the case as regards delay or otherwise in the proceedings of the trial before the Accountability Court and the merits of the findings of the learned Division Bench recorded in the impugned order, we would like to make it clear that the provisions of section 497, Cr.P.C. are not as such applicable for the purpose of grant of bail to an accused facing charge/trial under the Ordinance 1999. However, in appropriate cases, the question of delay in the conclusion of trial, depending upon the facts and circumstances of each case on its own merit, has been considered by the superior Courts on the yardstick of hardship vis-à-vis scheme of Articles 4 and 15 of the Constitution. Thus, *ipso facto*, application of principles for grant of bail embedded in section 497, Cr.P.C, including the provision of statutory delay, is devoid of any legal force.

5. Reverting to the facts of the present case, we have noticed that the observations of the learned Division Bench that respondent No.1 has been attributed only six adjournments during the ten months period of trial before the Accountability Court, is result of patent misreading of record, inasmuch as from the perusal of Court diaries of the Accountability Court, which have been placed on record on behalf of the petitioner, through C.M.A. No.4807/2016, it is evident that after framing of charge on 04.2.2015, from 06.2.2015, respondent No.1 has been instrumental in seeking adjournments on 16.12.2015, 25.2.2015, 06.4.2015, 20.6.2015, 13.7.2015, 28.8.2015, 09.9.2015, 22.9.2015, 20.10.2015, 29.10.2015, 06.11.2015, 19.11.2015, 01.12.2015, 12.12.2015, 02.1.2016, 27.1.2016, 18.2.2016 and 29.2.2016 (i.e. eighteen dates of hearing). Not only this, but even after grant of bail through the impugned order, he continued with such practice by seeking adjournments on 15.3.2016, 30.3.2016, 18.5.2016 and 02.6.2016, while order sheets of subsequent dates are not available before us. It will not be out of context to mention here that even otherwise the practice of making mathematical calculations, for ascertaining the actual period of delay attributable to the prosecution or the accused for the purpose of computing the period of statutory delay has not been approved by this Court, as even delay on few dates of hearing at the instance of an accused can be fatal for this purpose, irrespective of the actual time wasted on that account. More particularly in the cases where accused is being tried under the Ordinance 1999, which is a special law and specifically

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bars grant of bail to an accused by virtue of its sections 3 and 9(b), which respectively read as under:-

Section 3:

"The provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force."

Section 9(b):

"All offences under this Ordinance shall be non-bailable and, notwithstanding anything contained in section 426, 491, 497, 498 and 561A or any other provision of the Code, or any other law for the time being in force no Court shall have jurisdiction to grant bail to any person accused of any offence under this Ordinance."

6. The above discussion clearly goes to show that grant of bail to respondent No.1 through impugned order of the learned Division Bench of the Peshawar High Court, Peshawar is result of misreading of record of the proceedings before the NAB Court as well as erroneous understanding of relevant provisions of law in this regard. Thus, mere fact that in case an accused has remained in custody for a period of 13 months will not be sufficient to hold that it is a case of hardship within the parameters as defined by this Court in this regard in the various earlier pronouncements. For further guidance in this regard, reference can be made to the cases of Khan Asfandiyar Wali v. Federation of Pakistan (PLD 2001 SC 607) and Himesh Khan v. The National Accountability Bureau, Lahore (2015 SCMR 1092). (bold added)

8. In **Syed Rashid's order (supra)** at para 10 this Court had gleaned the following principles from **Bakhat Zameen's case (Supra)** which paragraph is set out below for ease of reference:

"10. What appears to be clear, in our view, from the above Judgment is that (a) bail on account of statutory delay is **not** available in NAB cases, (b) only bail on hardship grounds is available in terms of delay in NAB cases, (c) mathematical calculations in determining the extent of delay based on adjournments sought may not be particularly relevant since a delay on even a few dates may be fatal to the hardship application, (d) usual grounds for hardship will apply which generally involve, as mentioned in **Atta Abbas Zaidi's case**, a substantial period of time being spent in custody with delay not being caused by the petitioner (e) the grounds of what amounts to hardship in NAB cases must be cautiously and strictly construed as the NAO is a special law passed in order to combat a particular evil which is afflicting the country, namely corruption and (f) each application for the grant of bail on hardship grounds must be judged on its own particular facts and circumstances.

9. The order primarily relied upon by the petitioner in support of his submission for the grant of bail on the grounds of statutory

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delay is the unreported Supreme Court order in the case of **Mir Shah Jehan Khetran V NAB** dated 12-12-2016. This order however was passed by a two member bench of the Hon'ble Supreme Court which cannot take precedence over an order of a 3 member bench i.e **Bakhat Zameen's case (Supra)** which was **passed before** the two bench order especially as it appears from the order relied upon that the earlier case of **Bakhat Zameen (Supra)** was not brought to the attention of the Hon'ble Supreme Court when the case of **Mir Shah Jehan Khetran(Supra)** was considered and thus it did not have the benefit of considering **Bakhat Zameen's case (Supra)**.

10. Furthermore, there are also differences in the two cases in that in **Mir Shah Jehan Khetran's case (Supra)** the Hon'ble Supreme Court had on two separate occasions earlier declined bail on account of delay and given specific directions to complete the trial within 4 and then 2 months respectively and despite the passage of this 6 month period the trial had still not been completed and there still remained 33 witnesses to be examined and as such in the view of the court it would still take a considerable time for the trial to be completed. It is not however mentioned in the order relied upon as to how long the petitioner in that case had remained in custody.

11. In the current case this is the first application for statutory bail, no such directions have been given to complete the case within any given period of time and there are only 6 accused and 13 PW's left to be examined some of whom may be given up by the prosecution. The Accountability Court is also proceeding with the case which it can hear and decide expeditiously.

12. The petitioner may be entitled to bail on account of hardship (as opposed to Statutory delay) and in our view the crux of the matter is the extent of the delay and to a certain extent how much this delay has been caused by the petitioner and **most importantly** how much longer it is likely to take to conclude the trial. In this regard we fully endorse the following finding in **Mir Shah Jehan Khetran's case (Supra)** which is reproduced as under:

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"The petitioner may have been attributed a serious role in the commission of crime but he cannot be denied the right of speedy trial. We could have ignored failure of the prosecution to conclude the trial within the time given by this Court, **had there been a chance of its conclusion in the near foreseeable future.** It is rather likely to take a long course when as many as 33 witnesses are yet to be examined. The petitioner thus cannot be kept in jail for an indefinite period when all of his co-accused have been bailed out. We, in the circumstances of the case have no option but to admit the petitioner to bail". (bold added)

13. In this respect when we consider the overall picture of whether the trial can be concluded in the near future once a petitioner has spent a reasonable amount of time in custody and the trial has not been concluded due to no fault of his own we consider that some of the factors as laid down by this Court in the case of **Atta Abbas Zaidi V Chairman NAB (Unreported in CP D 1865 Of 2016 dated 03-10-2016)** may be considered which are set out below for ease of reference:

20 Although, as indicated above, no hard and fast rule can be set out as to what might amount to a hardship case in NAB cases, as opposed to other criminal cases where statutory bail on the ground of delay is applicable, as each case will depend upon its own particular facts and circumstances we have in determining whether the instant case is a hardship case been mindful of the following in exhaustive considerations /factors.

- (a) the time spent in custody without completion of the trial.
- (b) that delay in the completion of the trial should not have been caused by any fault of the accused or someone acting on his behalf.
- (c) the right to an expeditious trial without undue delay as guaranteed by Article 10(A) of the Constitution especially bearing in mind the Preamble to the NAO requiring speedy trials and S.16(a) of the NAO which requires trials to proceed on a day to day basis and be completed within 30 days
- (d) that as pointed out by the Hon'ble Supreme Court in the recent case of **Ziaghham Ashraf V State** (2016 SCMR 18) that if an accused is acquitted at trial then no reparation or compensation can be awarded to him in respect of the time he has spent in jail. It is lost time which may have been spent with his family or in other useful pursuits.
- (e) whether there was a reasonable chance of the trial being completed within 6 months of the date of this order which might justify giving appropriate directions to the Accountability Court rather than enlarging the accused on bail.

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- (f) whether the charge had been framed yet.
- (g) whether a majority of the PW's had at the time of hearing the petition been examined.
- (h) how many PW's were left to be examined
- (i) whether there were more than 7 accused left in the reference (some of the original accused may have entered into plea bargain or been declared proclaimed offenders).
- (j) whether the loss to the exchequer had been made up or otherwise how substantial was the loss bearing in mind the time already spent in jail.
- (k) whether the post arrest bail of the accused had been declined on merits
- (l) whether the accused was the main accused in the case
- (m) whether the accused was of an advanced age
- (n) whether the accused suffered from any serious medical conditions.
- (o) the general principle that bail should not be withheld as a punishment.
- (p) the chances of the accused absconding and/or interfering with witnesses if he is enlarged on bail
- (q) whether the accused has been convicted before under any Anti corruption legislation or entered into a plea bargain or voluntary return.
- (r) Whether the circumstances leading to the delay could be said to amount to an abuse of the process of law
- (s) And finally in our constitutional and discretionary jurisdiction under A.199 of the Constitution the requirement that we do complete and substantial justice.

14. This is because not only does an accused have a right to an expeditious trial in terms of access to justice and A.10 (A) of the Constitution but a three member bench of the Hon'ble Supreme Court in the case of **Hamesh Khan V NAB** (2015 SCMR 1092), which was decided before the recent **Barkat Zameen case (Supra)**, has already made it clear that no one can be locked up in jail for years on end without the completion of his trial in the following terms at P.1095.

"11. The contention of the learned Senior Advocate Supreme Court for the Bank of Punjab that the petitioner even after such a long delay in the

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conclusion of the trial cannot be let free on bail because application of section 497, Cr.P.C. with its 3rd proviso relating to grant of bail on ground of statutory delay is inapplicable and not attracted at all to his case, in our view, is not of paramount consideration.

12. Pakistan is a welfare State where liberty of individual has been guaranteed by the Constitution beside the fact that speedy trial is inalienable right of every accused person, *therefore, even if the provision of section 497, Cr.P.C. in ordinary course is not applicable, the broader principle of the same can be pressed into service in hardship cases to provide relief to a deserving accused person incarcerated in jail for a shockingly long period. This principle may be vigorously pressed into service in cases of this nature if the objects and purposes of mandatory provision of section 16 of the National Accountability Ordinance, 1999 is kept in view*, which is reproduced below:-

"S. 16 (a) Notwithstanding anything contained in any other law for the time being in force an accused shall be prosecuted for an offence under this Ordinance in the Court and the case shall be heard from day to day and shall be disposed of within thirty days."

13. An accused person cannot be left at the mercy of the prosecution to rot in jail for an indefinite period. **The inordinate delay in the conclusion of trial of detained prisoners cannot be lightly ignored provided it was not caused due to any act or omission of accused.** In the case of The State v. Syed Qaim Ali Shah (1992 SCMR 2192) the accused was facing charges under the Suppression of Terrorist Activities (Special Courts) Act (XV of 1975) where under section 7 thereof grant of bail even in bailable offences was taken out of the discretion of the Court, however, it was held that despite of exclusion clause beneficial provision of section 497, Cr.P.C. can be pressed into service in some genuine and rare cases to provide relief of grant of bail to a highly deserving accused, incarcerated in prison for a longer duration.

14. The grant of bail on account of inordinate delay in prosecution was discussed and guiding principle was laid down by this Court in the case of Riasat Ali v. Ghulam Muhammad and the State (PLD 1968 SC 353), which is to the following effect:-

"Criminal Procedure Code, S. 497---Grant of bail in non-bailable offences:-

Delay in prosecution of accused amounts to abuse of process of law and is a valid ground for bailing out accused however, delay in prosecution of each case as a ground for bail

is to be weighed and judged, in each case on its merits." (bold and italics added)

15. Indeed as this Court observed in the **Atta Abass Zaidi case** (Supra) in paras 16 to 18 (inclusive) which are set out below for ease of reference the key to a hardship case under the NAO seems to be the length of time already spent in jail and how much longer the trial is likely to take to conclude:

16. Generally speaking the superior judiciary has tended to classify hardship cases as being those where there has been a "shocking" or "inordinate" or "repulsive and unconscionable" delay in completing the trial, which often runs into a delay of a number of years and where there seems little chance of the trial being completed in the near future, as opposed to a lesser degree of delay. For example, in cases such as **Hamesh Khan V NAB** (2015 SCMR 1092 almost 5 years delay), **The State V. Syed Qaim Ali Shah** (1992 SCMR 2192), **Riasat Ali V. Ghulam Muhammad and the State** (PLD 1968 SC 353), **Gul Hasan Penhyar V The State** (1997 SCMR 390 around 6 years delay) **Muhammad Azim V The State** (2009 P Cr. L J 1314, Kar. Around 6 years delay), **Hashim V The State** (2009 YLR 1777, Kar. Around 6 years delay) **Shah Nawaz V The State** (2010 YLR 3182, Kar. Around 3 years delay) **Anwar Ali V The State** (2002 P Cr. L J 186, Kar. Around 2 years to even frame the charge)

17. In our view based on **Hamesh Khan's case** (Supra) and **Mir Shan Jehan Khan Khetran's case** (Supra) (this was the second bail application which was declined by the Hon'ble Supreme Court whilst giving directions to conclude the trial within a given period of time and not the case relied by the petitioner which was the 3rd application for bail in that case on account of delay) it would seem that the primary guideline for determining hardship cases appears to be the duration in which the accused has been in custody, whether or not any delay in the conclusion of the trial has been caused by the accused and how much longer the trial is likely to take to conclude. It may be that even if the accused has been in jail for over 2 years if there are very few PW's left to be examined and the trial is in full swing the case might not be regarded as a hardship case. Likewise if a large amount of the delay was attributable to the conduct of the accused or those acting on his behalf.

18. It would appear however that the passage of one year in jail without conclusion of the trial due to no fault of the accused or some one acting on his behalf may not on its own be enough to make out a hardship case. This is because the concept of bail on statutory grounds of delay and hardship although to a degree both have their genesis in delay the two grounds are distinct. Statutory bail on account of delay is generally

a right whereas a hardship case although involving delay is not a right and is in the discretion of the Court. Much therefore would depend on the particular facts and circumstances of each case to determine whether it qualifies as a hardship case. For example, along with delay, the age of the accused, the medical condition of the accused, the amount of loss caused to the exchequer, whether the accused was the main accused and other relevant factors would need to be weighed on the scales to see if a case of hardship had been made out".

16. Turning to the particular facts and circumstances of this case we note that the petitioner has been in custody for around 18 months and no delay has been caused on his part. This is quite a long period of time although we do not consider that it is sufficient time to amount to a hardship case based on the findings of the Supreme Court in **Bakhat Zameen's case (Supra) especially as the trial is now proceeding**. The next question to be posed in our view is how long is the trial likely to take to conclude from the date of this order.

17. Although Judges do not have a crystal ball to see into the future we consider that we can make a reasonable estimate based on the facts and circumstances of the particular case of how long it may take to complete the trial. Namely, in this case there are only 6 accused (i.e 6 separate cross examinations of each PW which is less than in most NAB cases where the accused are often above 10) and 13 PW's left to be examined. The charge has been framed on 07-04-2016 and the trial is proceeding. We do not consider the assumption that the two absconders may be arrested and the charge may need to be reframed and the trial started a fresh to be particularly relevant as such circumstance may never arise. In our view therefore the trial may be concluded within a period of 6 months provided that an appropriate direction is given to the Accountability Court hearing the case.

18. As such, based on the particular facts and circumstances of this case, we do not find this to be a hardship case and the petition for bail is dismissed. However Accountability Court No.III is directed to hear this case on a day to day basis and not adjourn the same on any flimsy ground and to decide the case within 6 months of the date of this order.

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19. The office is directed to provide a copy of this order immediately to Accountability Court No.III for compliance which shall report the progress made in this case to this Court on a monthly basis through MIT II. Should the trial not be completed within this 6 month period the petitioner may again approach this Court on hardship grounds if so advised. In passing this order we have attempted to strike a fair balance between the right to an expeditious trial, S.16 (a) NAO and the rulings of the Hon'ble Supreme Court, which we are constitutionally bound by, on bail on account of statutory delay/hardship in NAB cases.

Dated: 19-01-2107

