IN THE HIGH COURT OF SINDH, KARACHI

Before Mr. Justice Naimatullah Phulpoto.
Mr. Justice Mohammed Karim Khan Agha.

Petition No. and name of petitioner along with counsel.

1. C.P. No.D-1982 of 2016 Iqbal Z. Ahmed v. NAB, through its Chairman and other.
Iqbal Z. Ahmed S/o Zafar Ziauddin Ahmed. (Petitioner No.1)
Through Mr. Farooq H. Naek, Advocate.

2. C.P. No. D-6126 of 2017 Sharjeel Inam Memon v. NAB through its Chairman and others.
Sharjeel Inam Memon S/o Inam-ul-Haq Memon (Petitioner No.2)
Through Mr. Farooq H. Naek, Advocate.

3. C.P. No. D-95 of 2017 Inam Akbar & others v. NAB through its Chairman and others.
1. Inam Akbar Khan S/o Ghulam Akbar (Petitioner No.3).
2. Riaz Munir S/o Fakhar Munir, (Petitioner No.4).
3. Muhammad Hanif S/o Muhammad Bashir (Petitioner No.5)
4. Asim Amir Khan Sikandar S/o Yaqoob Khan Senior (Petitioner No.6).
Through Muhammad Azhar Siddiqui and Mr. Yaseen Azad, Advocates.

4. C.P.No.D-1824/2016 Basharat A. Mirza v. NAB through its Chairman & others.
Basharat A. Mirza S/o Ghulam Ahmed Mirza (Petitioner No.7),
Through M/s. Muhammad Azhar Siddiqui and Mian Shabir Asmail, Advocates.

Counsel for the Respondents.

M/s. Waqar Qadeer Dar Prosecutor General NAB, Syed Amjad Ali Shah, Deputy Prosecutor General NAB, Muhammad Altaf, Special Prosecutor, NAB and Munsif Jan, Special Prosecutor NAB.

Mr. Salman Talibuddin, Additional Attorney General for Pakistan and Mr. Ashfaq Rafiq Janjua, Assistant Attorney General for Pakistan.

Dates of Hearing: 30.10.2017 and 13.11.2017

Date of Order/Reasons: 22.11.2017

ORDER

MOHAMMED KARIM KHAN AGHA J. Petitioner No.1 (Iqbal Z Ahmed) has been arrayed as an accused in National Accountability Bureau (NAB) Reference 19/2016 in

connection with his alleged acts of corruption under S.9 of the National Accountability Ordinance 1999 (NAO) concerning officials of the Government, officers of the Oil and Gas Development Corporation Limited (OGDCL), Sui Southern Gas Company (SSGC) and Jamshoro Joint Venture Limited (JJVL) of which he is the CEO which is preceding before the Accountability Courts at Karachi. He is currently on pre arrest bail.

2. Petitioner No.2 Sharjel Inam Memon is facing corruption charges in NAB reference 50/2016 filed under the NAO and he is currently in custody as his pre arrest bail was recalled by this court vide order dated 25-10-2017. Likewise the cases of petitioner No.5 Muhammed Hanif and petitioner No.6 Asim Aamir Khan

3. Petitioner No.3 Inam Akbar is also facing corruption charges in NAB reference 50/2016 filed under the NAO however when his pre arrest bail was recalled by order dated 25-10-2017 he absconded. Petitioner No.4 Riaz Munir who is also facing corruption charges in the aforesaid reference had his pre arrest bail confirmed by this court vide order dated 25-10-2017. Whilst petitioner No.7 Basharat A. Mirza is an accused in the same reference as petitioner No.1 Iqbal Z.Ahmed, as mentioned earlier, and is on pre arrest bail

4. Since all the petitions involve common questions of law we propose to dispose of all of the petitions by this one common order.

5. In essence the case of the petitioners is that they attended the inquiries and investigations conducted against them by the NAB when required by NAB and no warrants of arrest were issued against them by the Chairman NAB until he filed the references against them. As such they were entitled to execute a bond for appearance under S.91 Cr.PC before the accountability court especially as the accountability court had no power to arrest them which lay

within the exclusive domain of the Chairman NAB (even after the filing of the references) and as such the non bailable warrants (NBW's) issued by the accountability courts were of no legal effect and should be set aside and the accountability courts should accept a bond under S.91 Cr.PC for their appearance.

6. Learned counsel for petitioner No.1 contended that under the NAO the powers of arrest lay solely and exclusively with the Chairman NAB and not the accountability court. In this respect he referred to S.24 and S.18 of the NAO. According to him if the Chairman had not issued warrants of arrest by the time the reference was filed then at the time of summoning the accused for trial the accountability court could not issue NBW's against the accused since it had no power of arrest. The accountability court had to resort to S.91 and S.92 Cr.PC to ensure the attendance of the accused especially as S.3 NAO made the NAO a special law with overriding effect and under S.17 NAO when the provisions of the NAO were not inconsistent with the Cr.PC the provisions of the Cr.PC would prevail. Thus since the NAO had not provided a particular mechanism for summoning the accused S.91 and 92 Cr.PC would be applicable. In addition he submitted that a complaint under S.18 NAO was akin to a complaint filed under S.200 Cr.PC and as such the procedure in summoning an accused by way of S.204 Cr.PC had to be followed which did not provide for arrest but rather a simple summons whereafter the accused could take bond for appearance under S.91 Cr.PC. In the case of petitioner No.1 he only applied for protective and later pre arrest bail after the accountability court had taken cognizance of the offense on 05-03-2016 and issued NBW's against him since he had been under the impression that under the law he could provide a bond for his appearance under S.91 as the accountability court had no power to issue NBW's. Thus, due to this illegal act of the accountability court he had been compelled to seek pre arrest bail otherwise he might have

been arrested. He further submitted that if the accountability court had no power to grant bail then it had no power to issue arrest warrants.

7. In support of his contentions he placed reliance on **Reham Dad v. Syed Mazhar Hussain Shah** (2015 SCMR 56), **Messrs Tank Steel and Re-Rolling Mills (Pvt.) Ltd. Dera Ismail Khan & Others v. Federation of Pakistan and others** (PLD 1996 SC 77), **Standard Chartered Bank v. Karachi Electric Supply Corporation Ltd.** (PLD 2001 Karachi 344), **Tanveer Hussain v. Divisional Superintendent, Pakistan Railways and 2 others** (PLD 2006 SC 249), **Muhammad Ijaz v. Nadeem and 3 others** (PLD 2006 Lahore 227), **Mazhar Hussain Shah v. The State** (1986 P Cr.L.J 2359), **Sarwar and others v. The State** (2014 SCMR 1762) and two unreported judgments of Peshawar High Court passed in Writ Petition No.3506-P of 2015 on 05.11.2015 in the case of **Prof. Dr. Abdur Rahim Khan and another v. Chairman, NAB and others** and Writ Petition No.255-P of 2016 in the case of **Masoom Ahmed Awan v. Chairman, NAB and others** on 16.02.2016.

8. Learned counsel for petitioners 2, 3, 4, 5, 6 and 7 adopted the arguments of petitioner No.1. In addition they emphasized that the accountability court could only issue summons for appearance under S.91 and could not issue NBW's. The exclusive power of arrest lay with the Chairman NAB throughout the reference proceedings and not the accountability court which had no power to issue NBW's.

9. In support of their contentions they placed reliance on the following case law **Zahoor Ahmed Sheikh and others v. Chairman NAB, Islamabad and others** (PLD 2007 Karachi 243), **Maqbool Ahmed Sheikh and others v. The State** (2014 YLR 2644), **Khan Asfandyar Wali and others v. Federation of Pakistan through Cabinet Division, Islamabad and others** (PLD 2001 SC 607), **Sardar Ahmed Siyal and others v. NAB through Chairman and 4 others**

(2004 SCMR 265); **Tariq Masood v. Director General, NAB Lahore and another** (PLD 2012 Lahore 287), **Luqman Ali v. Hazaro and another** (2010 SCMR 611), **Sarwar and others v. The State and others** (2014 SCMR 1762), **Shaukat Rasool v. The State and another** (PLD 2009 Lahore 590), **Nazeer Ahmed and others v. The State** (Cr. Accountability Revision Application No.75 of 2002), **State through Chairman NAB v. Zahoor Ahmed Sheikh** (Civil Appeal No.1152 to 1157 of 2007), **Syed Sohail Hassan v. Director General , NAB (Sindh) and others** (C.P. No.D-2382/2016) and **Maqbool Ahmed Sheikh v. The State** (2014 YLR 2644),

10. Learned PGA contended that S.91 was not applicable to NAB cases as under S.9(b) NAB cases were non bailable and as such it was not possible for an accountability court to grant bail to an accused let alone accept a bond for his appearance. He was of the view that the Chairman NAB had power to issue arrest warrants during inquiry and investigation and after the original reference had been filed if the NAB was collecting further material against further accused and intended to file a supplementary reference other wise once the reference was filed the power of arrest switched to the accountability Court which since the offense was non bailable had to issue NBW's as opposed to taking a bond under S.91. In support of his contentions he placed reliance on **Syed Sohail Hassan V DG NAB** dated 16-12-2016 in CPD 2382/16 an Unreported order of a Divisional Bench of this court, **Zia-ur-Rehman Sajid v. Muhammad Aslam and another** (2005 P Cr.LJ 1706), **Noor Ahmed v. Ghulam Mustafa and another** (2009 YLR 1414), **Muhammad Ashraf v. The State and another** (2017 P Cr. LJ 721) **and unreported order passed by Hon'ble Supreme Court of Pakistan in the case of Olas Khan V Chairman NAB in Civil Petitions No.1885 and 2259 of 2017 dated 04-08-2017**

11. Learned Additional Attorney General for Pakistan adopted the arguments of the PGA. Namely, that after the reference was filed the accountability court had to issue NBW's for the accused and that S.91 Cr.PC was inapplicable in NAB cases.

12. We have considered the arguments of the parties, pursued the record, considered the relevant law and cases cited at the bar.

General.

13. At the outset we make it clear that S.91 Cr.PC is not applicable to petitioner's No.2, 5 and 6 Sharjeel Inam Memon, Muhammad Hanif and Asim Aamir Khan since they are in custody following the recalling of their pre arrest bail. Likewise petitioner No.3 Inam Akbar who absconded (and remains an absconder for whom proceedings under S.87 and 88 have been initiated by the accountability court) through his conduct is not entitled to any benefit or relief which may accrue from this order since we have already found that there is prima facie sufficient material on record to connect him to the commission of the offense for which he has been charged which lead to the recalling of his interim pre arrest bail which order despite being an absconder he has not challenged before the Hon'ble Supreme Court. Likewise petitioner No.4 Riaz Munir whose pre arrest bail was confirmed by this court which decision NAB has not challenged and as such he has no need to resort to S.91 Cr.PC. Thus from our perspective the issue at hand may only be applicable to petitioner No.1 Iqbal Z. Ahmed and petitioner No.7 Basharat A. Mirza both of whom are on ad interim pre arrest bail and as such are not in custody and have not absconded.

Liberty of the Individual.

14. At the outset we are of the view that the liberty of the individual is paramount as recognized by the Constitution and in particular Article 9 which is a fundamental right. In

addition in a criminal case the golden principle since time immemorial is that the accused is presumed to be innocent until he is proved guilty and as such his liberty should not be lightly curtained in criminal cases especially because if the accused is acquitted at the end of the trial he cannot get back the time which he has lost in jail nor be compensated for it. This was emphasized in the recent Supreme Court case of **Ziagham Ashraf V. State** (2016 SCMR 18)

15. Thus, in most cases the concept of bail exists. Generally speaking the rule is bail not jail. The main universal reasons for not granting bail is if there is a genuine concern that the accused will abscond (i.e. run away and not face trial), will interfere with witnesses or tamper with evidence otherwise he should be free to consult his lawyers and prepare his defense without being confined in jail. Other factors also determine whether bail should be granted in this country such as whether or not the case falls within the non prohibitory clause; the heinousness/seriousness of the offense; whether there is prima facie sufficient material to connect the accused to the offense for which he has been charged etc. In all such cases however the law must be strictly followed and applied by the courts

The trichotomy powers.

16. Our constitution is based on the trichotomy of powers shared between the legislature, the executive and the judiciary each of whom has its distinct and separate role to play in our system of governance and each of which is supposed to act as a check and balance on the other organs of state operating within its own defined sphere of power as provided in the law and the Constitution.

17. Within the trichotomy of powers it is the role of the legislature to make laws and the role of the judiciary to interpret those laws if such interpretation is necessary. It is well settled law that if a statute has expressly provided for something without any ambiguity then there is no question of

the courts interpreting the same as the legislative intent is clear and the Act/Ordinance must be given effect to unless it is deemed to be contrary to the constitution. The judiciary's role of interpretation of the statute only arises when the statute is to a certain extent either unclear or ambiguous or is prima facie in violation of the constitution and in such cases it is for the judiciary to interpret that piece of legislation by trying to ascertain the intent of Parliament in passing that legislation. **The Courts have absolutely no authority or power to substitute their views for those intended by the legislature simply because they may disapprove of a particular law and the way in which that law is being applied.** In this respect whether it appears harsh in not allowing a bond under S.91 to be taken as opposed to applying for pre arrest bail in NAB cases is completely irrelevant **unless** it can be anchored on a legal basis.

18. In this respect reference is made to the case of **Justice Khurshid Anwar Bhinder V Federation of Pakistan** (PLD SC 2010 P.483. Relevant P.492 -493 whereby it was held as follows:

> "A fundamental principle of Constitutional construction has always been to give effect to the intent of the framers of the organic law and of the people adopting it. The pole star in the construction of a Constitution is the intention of its makers and adopters. **When the language of the statute is not only plain but admits of but one meaning the task of interpretation can hardly be said to arise. It is not allowable to interpret what has no need of interpretation. Such language beside declares, without more, the intention of the law givers and is decisive on it. The rule of construction is "to intend the Legislature to have meant what they have actually expressed". It matters not, in such a case, what the consequences may be. Therefore if the meaning of the language used in a statute is unambiguous and is in accord with justice and convenience, the courts cannot busy themselves with supposed intentions, however admirable the same may be because, in that event they would be traveling beyond their province and legislating for themselves.**

> But if the context of the provision itself shows that the meaning intended was somewhat less than the words plainly seem to mean then the court must interpret that language in accordance with the indication of the intention of the Legislature so plainly given. **The first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself. If the words used are capable of one construction only then it would not be open to the court to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act.** (bold added)

Original Legislative Intention behind the NAO.

19. Initially the law; which replaced the Ehtesab Act of 1997 which at that time dealt with corruption and accountability, was known as the National Accountability Bureau Ordinance 1999 (NABO) and the legislative intent in that law was made abundantly clear. Namely, that offenses under the NABO were non bailable by any court.

20. The Constitutionality of the NABO was challenged in the case of **Asfandyar Wali Khan V Federation of Pakistan** (PLD 2001 SC 609) which in an exhaustive judgment by a larger bench of the Hon'ble Supreme Court spanning around 350 pages covering nearly every aspect of the NABO was examined in terms of its constitutionality.

21. With regard to bail the Hon'ble Supreme Court held as under at P.885;

> BAIL
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> "197. It was held in the case of Zafar Ali Shah (supra) that the powers of the superior Courts under Article 199 of the Constitution "remain available to their full extent...notwithstanding anything contained in any legislative instrument enacted by the Chief Executive. "Whereas, **section 9(b) of the NAB Ordinance** purports to deny to all Courts, including the High Courts, the jurisdiction under section 426, 491, 497, 498 and 561-A of any other provision of the Code of Criminal Procedure or any other law for the time being in force, to grant bail to any person accused of an offence under the NAB Ordinance. **It is well**

> **settled that the Superior Courts have the power to grant bail under Article 199 of the Ordinance, independent of any statutory source of jurisdiction such as section 497 of the Criminal Procedure Code, section 9(b) of the NAB Ordinance to that extent is ultra vires the Constitution. Accordingly, the same be amended suitably."** (bold added)

22. Thus, by virtue of **Asfandyars case** (Supra) bail could be granted to an accused under the NAO only by the superior Courts exercising their discretionary constitutional jurisdiction under A.199 of the Constitution. There was **no right to bail** and even today bail on the statutory ground of delay is not open to an accused in a NAB case as opposed to bail on hardship ground which once again is of a discretionary nature.

23. In the case of **Abdul Aziz Memon V The State**(PLD 2013 SC 594) when discussing whether only public officials fell within the purview of the NAO the Supreme Court held as under at P.639 with respect to the heinousness of offenses under the NAO.

> "This court had also found that such provisions of the National Accountability Ordinance, 1999 were quite justified in view of the gravity of the menace of rampant corruption the said Ordinance was meant to tackle. Dealing with such stringent provisions of the Control of Narcotic Substances Act, 1997 and their interpretation one of us (Asif Saeed. Khan Khoso, J) had observed as a Judge of the Lahore High Court in the case of Nazir Hussain v. The State (2002 PCr.LJ 440) as under:-
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> > "7. The learned counsel for the petitioner is quite right in pointing out that in the case of Ghani-ur-Rehman v. The State 1996 PCr.LJ 347, Muhammad Afzal v. The State 1998 PCr.LJ 955 and Naveed Ahmed Khan v. The State 1999 PCr.LJ 63 it had been held that if the allegation leveled against an accused person attracts the provisions of section 9(b) of the Control of Narcotic Substances Act, 1997 as well as the provisions of Article 3 and 4 of Prohibition (Enforcement of Hadd) Order, 1979 then in such a case of two penal provisions attracted to the same allegation against an accused person that penal provision is to be applied which carried a

lesser punishment or attracts lesser rigours of the law, i.e. Article 3 and 4 of the Prohibition (Enforcement of Hadd) Order, 1979. However, we have noticed in this context that in all the abovementioned cases the provisions of section 76 of the Control of Narcotic Substances Act, 1997 had not been brought to the notice of the Honourable Judges deciding those case. Section 76 of the said Act of 1997 **provides for giving an overriding effect to the provisions of the Control of Narcotic Substances Act, 1997 over anything contained in any other law for the time being in force.** The provisions of section 74 of the said Act may also be advantageously referred to in this context. The overriding effect of section 76 of the Act of 1997 was clearly noticed and expressly referred to in the case of Khalil-ur-Rehman v. The State 1998 PCr.LJ 1625 for brushing aside an argument that the case of the accused person in that case may be considered to be one under Article 3 and 4 of the Prohibition (Enforcement of Hadd) Order, 1979 and not to be that under section 9 of the Control of Narcotic Substances Act, 1997, for the purposes of the said accused person's bail. We respectfully subscribe the view expressed in this regard in this precedent case.

11. **We are conscious that some of the views expressed by us above and some of the interpretations advanced by us vis-à-vis different provisions of the Control of Narcotic Substances Act, 1997 may appear to some to be somewhat harsh or stringent but we maintain that the same are in consonance with the spirit of the said law. The said law is not an ordinary law as the menace that it purports to curb is not commonplace and the criminals who indulge in it are not of the normal type. The mischief sought to be suppressed by this law is not just a crime against a human being but a crime against the humanity and, therefore, a response to the same has to be aggressive and punitive rather than benign and curative. It may be true that an individual subjected to the rigours of this law may sometimes suffer disproportionately but the greater good of the society emerging from stringent application of this law may make this approach worth its while.**

The perils of corruption in a society are far greater than the hazards of narcotics and, thus, the observations made above in the context of the Control of Narcotic Substances Act, 1997 are attracted with a greater force in the context of the National Accountability Ordinance, 1999. It may not be forgotten that by virtue of section 3 of the National Accountability Ordinance, 1999 the provisions of the said Ordinance are to have an overriding effect over any other law for the time being in force." (bold added)

24. Crimes of corruption under the NAO are not ordinary crimes. They are crimes against society as a whole. For offenses of corruption charged under the NAO (white collar crimes) the Hon'ble Supreme Court in the recent case of **Rai Mohammed Khan V NAB** (2017 SCMR P.1152) has emphasized that the **grant of bail in such cases must be construed strictly and rigidly** even if, as in that case referred to above, the amount involved was on the lesser side being only approx RS 12M in the following terms at P.1154 para 7;

> "Under the principle of law and justice, each bail petition is to be decided on its own merits and the law applicable thereto, however, this Court cannot remain oblivious of the undeniable fact that the tendency of corruption in every field, has become a threatening danger to the State economy, striking on its roots. The public money, allocated for social sector and economic well being of the poor people, is consistently embezzled / misappropriated at a large scale and why the majority of the population is deprived of essential daily utilities, like pure drinking water, health care and education facilities, etc. **It has become the foremost obligation of each and every institution, including the Judicator, to arrest this monster at this stage, before it goes out of proportion, posing threat to the very survival of the State and State economy, therefore, the Courts shall apply the Anti-Corruption laws somewhat rigidly, once on fact the case is made out, at bail stage, against the accused person.** Distinction, however, is to be drawn between the ordinary criminal cases and of corruption on the above analysis and grounds, while dealing with bail matter to an accused person, charged for such like crimes and also at the time of conviction,

> once the case is proved against him then, Courts are not supposed to show any mercy by taking a lenient view in the matter of sentence."

25. Thus, even for the grant of bail in NAB cases this must be considered on a stringent and rigid plane due to the nature of the crime. **The reason for citing these NAB bail cases is to show how stringently the law of bail is applied to NAB cases and thus if the grant of bail is to be construed so strictly and rigidly how can it be expected that it was the intent of the legislature that S.91 could be applicable?** It would in our view in effect render the **Asfandyar case** (Supra) on the ability of the High Courts to grant bail in its constitutional jurisdiction almost redundant (along with section 9(b) NAO) which in itself entitled accused under the NABO for the first time to be granted bail which was against the original intention of the legislature which was in essence found to be unconstitutional.

Even otherwise turning to the power of arrest.

26. The power of arrest in the NAO is set out in S.18 (e) and S.24 which are set out as under:

> **S. 18(e)** - The Chairman NAB and such members, officers and/or servants of the NAB shall have and exercise, **for the purposes of an inquiry and/or investigation the power to arrest** any person, and all the powers of an officer-in-charge of a Police Station under the Code, and for that purpose may cause the attendance of any person, and when and if the assistance of any agency, police officer or any other official or agency, as the case may be, is sought by the NAB such official or agency shall render such assistance **provided that no person shall be arrested without the permission of the Chairman or any officer duly authorized by the Chairman NAB.** (bold added)
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> **Section 24. Arrest–**
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> (a)The Chairman NAB shall have the power, **at any stage of the investigation under this Ordinance**, to direct that the accused, if not already arrested, shall be arrested.

(b)If the Chairman, NAB decides to refer the case to a Court, such reference shall contain the substance of the offence/offences alleged to have been committed by the accused and a copy of such reference shall be forwarded to the Registrar of the Court to which the case has been sent to try the accused, and another copy shall be delivered to the accused

©The provisions of sub-section (a) shall also apply to cases, which have already been referred to the Court.

(d)Notwithstanding anything contained in the code, where the holder of the public office or any other person accused of an offence is arrested by NAB under this Ordinance, NAB shall, as soon as may be, inform him of the grounds and substance on the basis of which he has been arrested and produce him before the court established under this Ordinance within a period of twenty four hours of arrest excluding the time necessary for the journey from the place of arrest to the court and such person shall, having regard to the facts and circumstances of the case, be liable to be detained in the custody of NAB **for the purpose of inquiry and investigation** for a period not exceeding ninety days **provided that no accused arrested under this Ordinance shall be released without the written order of the Chairman NAB or the order of the Court** (bold added)

(e) All persons presently in custody shall immediately upon coming into force of this sub-section, unless previously produced before an Accountability Court, be produced before such court as provided in sub-section (d) and the Order authorizing retention of custody by NAB shall be deemed to relate to the date of arrest.

(f)The Chairman, NAB may declare and notify any place as a police station or a sub-jail at his discretion

27. In our view it is quite apparent from these sections that **after** the reference is filed the Chairman NAB becomes functious officio i.e he no longer has the power of arrest except in respect of persons for whom he has already issued an arrest warrant prior to the filing of the reference which remains unexecuted or in respect of persons for whom he is inquiring/investigating with a view to filing a supplementary reference. As rightly pointed out by learned counsel for petitioner No.1 S.24 © it appears is a provision which ties in with S.33 NAO at the time when proceedings were transferred

from the Ehtesab Courts to the accountability courts after the promulgation of the NAO. To accept that the Chairman NAB during the course of a trial could arrest an accused person mid way through a trial who had been regularly attending that trial in our view simply does not appeal to reason, logic or common sense and in our view could not have been the intention of the legislature. Once the reference has been filed the trial and its conduct is in the hands of the accountability court.

28. So the question arises as to how the accountability court deals with those persons who have not been arrested by NAB and who form a part of the reference as an accused.

29. According to the petitioners the answer lies in S.90, 91 and 92 Cr.PC which provide as under:

> **Section 90 Cr.P.C.: Issue of warrant in lieu of, or in addition to summons.** A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person ***** issue, after recording its reasons in writing, a warrant for his arrest,
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> (a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or
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> (b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.
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> **91 - Power to take bond for appearance.** When any person whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer **may** require such person to execute a bond, with or without sureties **for his appearance in such Court.**
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> **92 - Arrest by breach of bond for appearance.** When any person who is bound by any bond taken under this Code to appear before a Court, does not so appear, the officer presiding in such Court may issue warrant directing that such person be arrested and produced before him. (bold added)

30. The petitioner's contention is that the accountability court should issue a summons to the accused who then on receipt of the summons may attend the court and submit a bond under S.91. If he fails to appear pursuant to the summons under S.91 then the court may take steps against him under S.92 since a complaint under S.18 (b) (ii) NAO can be equated to a complaint under S.200 Cr.PC.

31. In our view where this argument fails is that generally the application of S.91 and S.92 is linked to complaint cases under S.200, S.204 and S.205 CR.PC or FIR's registered under S.154 Cr.PC which provide as under:

> **S.200 – Examination of complainant.** 1****, a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate:
> Provided as follows:
> (a) when the complaint is made in writing nothing herein contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under section 192; 2[or sending it to the Court of Session];
> 3[(aa) when the complaint is made in writing nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties:]
> 4 * * * * *
> (c) when the case has been transferred under section 192 and the Magistrate so transferring it has already examined the complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant.
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> **S.204 – Issue of process.** (1) If in the opinion of a [Court] taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be one in which, according to the fourth column of the Second Schedule, a summons should issue in the first instance, [it] shall issue his summons for the attendance of the accused. If the case appears to be one in which according to that column, a warrant should issue in the first instance, [it] may issue a warrant, or, if [it] thinks fit, a summons, for causing the accused to be brought or to appear at a certain time

before such [Court] or (if[it] has not jurisdiction [itself]) some other [Court] having jurisdiction.

(2) Nothing in this section shall be deemed to affect the provisions of section 90.

(3) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid, if such fees are not paid within a reasonable time, the [Court] may dismiss the complaint.

205- Magistrate may dispense with personal attendance of accused. (1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in manner hereinbefore provided.

"**S.154. Information in cognizable cases.** Every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police-station, shall be reduced to writing by him or under his direction and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the [Provincial Government] may prescribe in this behalf."

32. **However in our view a complaint under S.200 Cr.PC or an FIR filed under S.154 Cr.PC (or even a challan under S.173 due to the differences between the trial court taking cognizance under S.190 Cr.PC in ordinary criminal cases and the accountability Court only being able to take cognizance on a reference under S.18 (a) NAO) cannot be equated to a reference filed under S.18 (g) of the NAO which is the procedure provided by a special law with overriding effect due to S.3 NAO over other laws and thus we find the cases Mazhar Hussain Shah** (Supra) **and Muhammad Ejaz** (Supra) **to be distinguishable from the present case** based upon the particular facts and circumstances of the case in hand aside from the fact that they were both passed by a single Judge of the Lahore High

Court and at the most are only persuasive authorities and not binding on this Divisional Bench

33. As noted above S.91 Cr.PC is usually applied in criminal cases triable by courts of ordinary jurisdiction which in our view are a distinct category of cases under the PPC which may or may not be bailable. Such ordinary criminal cases however have their own procedures under the Cr.PC and are distinct from **special laws** such as the NAO which has overriding effect over other laws by virtue of S.3 NAO.

34. The cases referred to by the petitioners are by and large complaint cases under S.200 Cr.PC and in our view cannot be equated with cases under the NAO which is a special law which was promulgated to deal with the menace of a particular offense. In this respect we have read the authoritative and scholarly judgment on S.91 and bail in the case of **Sarwar V State** (2014 SCMR 1762) but find that it is distinguishable from the particular facts and circumstances of the instant case which does not concern complaint cases under S.200 Cr.PC, a FIR or even a challan under S.173 Cr.PC but the filing of a reference under a special law with overriding effect in connection with the NAO concerning crimes of the most heinous nature. Likewise the two unreported cases of the Peshawar High Court and **Reham Dad's** (Supra) which foundations are based on the **Sarwar case** (Supra).The earlier order of this court in the case of **Syed Sohail Hassan V DG NAB** dated 16-12-2016 in CPD 2382/16 is distinguishable from the present case as that case concerned the interpretation of S.91 in respect of a person who was already in custody and had already had his bail applications dismissed by the superior courts whilst in this case only two of the petitioners (Iqbal Z Ahmed and Basharat A. Mirza) are on ad interim pre arrest bail (yet to be confirmed) and are not in custody.

35. The contention that a reference under the NAO is the equivalent of a complaint under Cr.PC in our view is

misconceived. Just as the procedure of a complaint under the Cr.PC S.200 onwards has it own mechanism of dealing with the same the NAO has a distinct (and different to S.200 Cr.PC) scheme of inquiry, investigation and filing of a reference under the NAO which is provided in S.18 NAO whereby a complaint (S.18 (b)) may be received to get the inquiry ball rolling just like an FIR may be lodged to get a criminal investigation rolling. After the complaint is lodged with NAB a complaint verification stage is under taken to see if prima facie the complaint is genuine, if found to be so the Chairman NAB may authorize an inquiry (S. 18 (c), (d) and (e)) and if after the inquiry the Chairman is satisfied that there is a prima facie case he may upgrade the inquiry into an investigation which may be converted into a reference which is filed before an accountability court once the Chairman is satisfied that the requirements of S.18 (g) have been made out and the accountability court then takes cognizance of the same under S.18(a) and cannot add any other accused on its own motion (unlike ordinary criminal cases which allow the trial court to do so under S.190 Cr.PC). The procedure for a complaint under S.200 CR.PC, in our view, is entirely different and very often the accused may be summoned via S.91 Cr.PC as he is completely unaware of any allegations levelled against him. In a NAB case **before** a reference is filed the accused is fully aware of the allegations against him as he would have received a call up notice at the stage of inquiry informing him what the inquiry was about, his statement would have been recorded and the documents which he produced (if any) would have been considered. He would have had no doubt that he was under investigation for an offense under the NAO. Which also in our view covers the cases cited by the petitioner whereby it is contended that the accountability court cannot arrest the accused without notice to him once the reference is filed. This is because due to the steps taken by NAB before filing the reference involving the accused as alluded to above the accused was on full notice that he was under investigation and ran the risk of being

arrested at any time by NAB and thus he could have opted for seeking pre arrest bail.

36. Reverting back once again S.90 and 204 Cr.PC in the case of **Nazir Ahmed V The State** (1990 MLD 2084) it was held that even in complaint cases under S.200 Cr.PC there was nothing to prevent a trial court issuing a NBW under S.90 in the first instance if it deemed it appropriate in the following terms at P.2084 Para 7 onwards which reads as under:

> "7. The other grievance, learned counsel for applicants ventilates is about the issuance of non-bailable warrants by learned Additional Sessions Judge against applicants and others. He has contended that section 90 Cr.P.C., requires a Court to record its reasons in writing before doing so. This argument, however, is effectively answered by the language of section 204, Cr.P.C., which I have reproduced above. **According to the forth column of Second Schedule to the Code of Criminal Procedure, 1898, in a case under section 302, P.P.C., a warrant should issue in the first instance, although in such cases also the Court, if it thinks, fit, may issue a summons to an accused. The issuance of warrant "in the first instance" where according to fourth column of Second Schedule of the Code of Criminal Procedure, 1898, a summons should issue is undoubtedly illegal. The case of A.K. Khalid v. Khan Ghulam Qadir Khan, reported in PLD 1962 Lahore 411, is relevant authority on this point. However, in the present case falling under section 302, P.P.C. a warrant could issue against the accused.**
>
> 8. Section 90, Cr.P.C. empowers the Courts to issue a warrant only in cases in which it is empowered to issue summons. It was, therefore, considered necessary to record reasons before issuing a warrant in such cases. It was in this context that In Re: Karuthan Ambalam and another, reported in A I R 1961 Madras 1063, it was held that where a warrant purports to be issued under section 90, Cr.P.C., it is a necessary preliminary for the exercise of the power by the Magistrate that reasons should be given in writing and failure to do so vitiates the warrant. **However, in latter cases reported as Mahar Singh and others v. Emperor (A I R 1920 Allahabad 245(2) and The Government of Assam v. Sahebulla and others (A I R 1924 Calcutta 1), the issuance of warrant without reasons was not found as illegal. In the latter citation a Full Bench of Calcutta High Court held**

that the words "After recording his reasons in writing" in section 90, Cr.P.C. are not imperative but directory.

9. The difference between mandatory and directory provisions is one of effect only. According to Bindra's Interpretation of Statutes, the real question in all such cases is whether a thing has been ordered by the legislature to be done? What is the consequence if it is not done? The general rule is, that an absolute enactment be obeyed or fulfilled substantially. From a plain reading of section 90, Cr.P.C., it will appear that the requirement of 'recording reasons in writing' is only directory. (bold added)

37. If we also consider the CNSA, as briefly referred to above, due to the gravity of offenses under that Act which are also crimes against society S.51 provides as under concerning bail

> "S.51. No bail to be granted in respect of certain offences.---(1) Notwithstanding anything contained in sections 496 and 497 of the Criminal Procedure Code, 1898 (V of 1898), bail shall not be granted to an accused person charged with an offence under this Act or under any other law relating to narcotics where the offence is punishable with death".
>
> (2) In the case of other offenses punishable under this Act, bail shall not be normally granted unless the court is of the opinion that it is a fit case for the grant of bail and against the security of a substantial amount"

38. Likewise, as in cases under the NAO the Supreme Court in recent times has taken a stringent view in granting bail under the CNSA. For example, in the case of **Socha Gul V State** (2015 SCMR 1077) it was held as under at P.1081

> "**It is pertinent to mention here that offences punishable under C.N.S. Act of 1997 are by its nature heinous and considered to be the offences against the society at large and it is for this reason that the statute itself has provided a note of caution under section 51 of C.N.S. Act of 1997 before enlarging an accused on bail in the ordinary course.** When we refer to the standards set out under section 497, Cr.PC for grant of bail to an accused involved in an offence

> under section 9(c) of C.N.S. Act of 1997, even on that basis we find that an accused charged with an offence, prescribing various punishments, as reproduced above, is not entitled for grant of bail merely on account of the nature or quantity of narcotic substance, being four kilograms. Firstly, as deeper appreciation of evidence is not permissible at bail stage and secondly, in such situation, looking to the peculiar features and nature of the offence, the trial Court may depart from the normal standards prescribed in the case of *Gulham Murtaza (supra)* and award him any other legal punishment. Thus, in our opinion, ratio of judgment in the case of *Gulham Murtaza* (supra) is not relevant at bail stage." (Bold added)

39. In cases under the CNSA either bail is granted to the accused under S.51 or it is refused by the trial court. There is no concept of bond being taken under S.91 Cr.PC for the appearance of an accused before the trial court.

40. Likewise under the Anti Terrorism Act 1997, which is also a special law dealing with heinous crimes, the same is the position as under the CNSA. Namely, there is no concept of taking a bond for appearance of an accused under S.91.Either the accused is granted bail by the trial court or he is not. **This is in stark comparison to the NAO which does not even empower the accountability court to grant bail by virtue of S.9 (b) NAO since offenses under the NAO are non bailable**

41. We must also take into account S.17 NAO which provides as under:

> 17.(a) Notwithstanding anything contained in any other law for the time being in force, **unless** there is anything inconsistent with the provisions of this Ordinance, the provisions of the Code of Criminal Procedure, 1898 (Act V of 1989), shall mutatis mutandis, apply to the proceedings under this Order.
>
> (b)Subject to sub section (a), the provisions of Chapter XXIIA of the Code shall apply to trials under this Ordinance.

©Notwithstanding anything contained in sub-section (a) or sub- section (b) or in any law for the time being in force, the Accountability Court may, for reasons to be recorded, dispense with any provision of the Code and follow such procedure as it may deem fit in the circumstances of the case.

(d)Notwithstanding anything in section 234 of the Code, a person accused of more offences than one of the same kind committed during the space of any number of years, from the first to the last of such offences, may be charged with and tried at one trial for any number of such offences.

42. S.17 (a) in effect means that the Cr.PC will apply unless there is any inconsistency with the NAO and in case of such inconsistency the NAO will prevail. S.9 (b) of the NAO states as under;

> S.9(b) **All offences under this Order shall be non-bailable** and, notwithstanding anything contained in sections 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 Order (bold added)

43. S.9(b) makes the NAO a non bailable offense thus in our view it is inconceivable that in the face of S.9(b) the accountability court could summon an accused for taking a bond. In our view the only way of calling an accused by the accountability court would be by issuing an NBW which would be in consonance with S.9 (b) NAO and in keeping with the legislative intent behind the NAO.

44. In the recent **unreported order passed by Hon'ble Supreme Court of Pakistan Olas Khan V Chairman NAB in Civil Petitions No.1885 and 2259 of 2017 dated 04-08-2017** the supreme court after an exhaustive historical analysis of the grant of bail in NAB cases held as under at Para 10, 11 and 12 which seems to also exclude the taking of a bond under S.91 Cr.PC:

"10. **Accountability Court has no jurisdiction to grant either pre-arrest and or post-arrest bail, as provisions of Cr.P.C regulating grant or otherwise pre-arrest and or post-arrest bail in cases under NAO, 1999 in view of non-obstinate provisions of section 9(b) of NAO, 1999 are inapplicable.** However, position as regards High Court and this Court is altogether different, superior Courts extract jurisdiction under Article 199 and 184 respectively of the Constitution, 1973 to consider and grant bail or otherwise, in cases under NAO, 1999 and not under section 9(b) and or 17(c) the NAO, 1999, **which jurisdiction, neither can be taken away nor, made subservient through sub-ordinate legislation.** Contention of the learned Special Prosecutor NAB is correct to the extent that the assumption of jurisdiction by the Peshawar High Court to concede bail under section 497 Cr.P.C. to the Respondent *Sahibzada Alamgir (in CPLA 2259 of 2017)*, is not available. However, in view of the stated legal position, such objections retreats merely of form bereft of any substance. Exercise of jurisdiction by the High Court to concede bail in instant case cannot be set a naught merely because such jurisdiction was erroneously assumed under section 497 Cr.P.C. though admittedly jurisdiction to concede bail or otherwise was very much vested in the High Court under Article 199 of the Constitution of Pakistan, 1973, and such assumption of jurisdiction in the given facts and circumstances can always be considered under Article 199 of the Constitution, 1973. It is now settled position in law that merely citing or relying on wrong provision of law to assume jurisdiction over a lis is of no consequence, provided the Court otherwise has jurisdiction under the Constitution, statue or any other provision of law to pass order as has happened in the instant case. For reference one may see *Mst. Safia Bibi versus Mst. Aisha Bibi* ***(1982 SCMR 494)***, *Jane Margrete Willian versus Abdul Hamid Mian* ***(1994 SCMR 1555)***, *Rauf B Kadir versus State Bank of Pakistan and another* ***(PLD 2002 Supreme Court 1111)***.

11. While assuming jurisdiction under section 497 Cr.P.C learned bench of the High Court, was influenced and has misconstrued section 17 of the NAO, 1999 which makes the provisions of Cr.P.C including procedure for session, trial (per chapter XX-A of the Cr.P.C) applicable, unless otherwise, provided in the NAO, 1999 itself. Section 17(c) ibid; librated the Accountability Court from the procedural and technical trapping of Criminal Procedure Code, giving it authority not only to *"dispense with any provision of Code"* and at the same time empowered *it "to follow such procedure as it may deemed fit in circumstances of case"* [17(c) ibid;]. However, freedom to *"follow such procedure as it may*

deem fit" **does not empower the Accountability Court or for that matter the High Court to assume jurisdiction and or invoke provisions of Cr.P.C, which are specifically excluded by virtue of section 9(b) ibid; from application in cases triable under NAO, 1999 in ostensible exercise of power under section 17(c) ibid; of the NAO, 1999. Such enabling power of the Accountability Court were conditional by this Court in the case of *Khan Asfandyar Wali* (PLD 2001 SC 607 @ 926),** "not exercise its discretion arbitrarily but on sound judicial principles by assigning valid reasons.," such exercise of discretion was also held to be "Justiciable in exercise of Constitutional jurisdiction of Superior Court". Excluding the words "including High Court" from Section 9 (b) ibid; as noted above has not brought about any change on overall scheme of the provision regulating matters under the exclusionary provisions of Code of Criminal Procedure mentioned therein including Section 497 and 498 Cr.P.C. regulating pre-arrest and post-arrest.

12. Judgment in the case of *Muhammad Saeed Mehdi* (2002 SCMR 282) was not appreciated by the learned bench of the High Court in its true perspective. In the judgment it was specifically observed that the *"High Court has jurisdiction to grant bail in NAB cases under Article 199 of the Constitution"* relevant part of paragraph 8 of cited judgment is reproduced in preceding paragraph 8 above and, perhaps attention of the learned bench was also not drawn to the cases of *Haji Ghulam Ali, supra,* (2003 SCMR 597 @602), *Himesh Khan versus National Accountability Bureau* (2015 SCMR 1092 @ 1095). In view of the forgoing discussion, conclusion of the learned Bench of the Peshawar High Court; as contained in paragraphs 12 to 15 of the impugned judgment to the effect that High Court by virtue of section 17(c) ibid; can import and or exercise power contained in Sections 491, 496, 497, 498, 561-A Cr.P.C. is not correct exposition of law, to such an extent impugned order cannot be sustained".

45. S.17 (d) NAO also specifically states that the provisions of chapter XXIIA of the code (Cr.PC) will apply to trials under the NAO.S.91 is found in Chapter VI of the code and S.200 is found in chapter XVI of the code and S.204 is found in Chapter XVII of the code in order to supplement complaint cases under Chapter XVI of the code. None of these sections are found in Chapter XXIIA Cr.PC as provided in S.17(b) NAO.

46. Thus, we do not find the authorities cited by learned counsel for the petitioners to be of much assistance based on the particular facts and circumstances of this case and the applicable law.

Logic, common sense and appeals to reason.

47. Very often we find in considering legal issues rather than being overwhelmed by the various legal concepts and complexities of a given law or factual situation it sometimes helps to clarify matters if one pauses and considers the issue from the point of view of logic, common sense and whether the conclusion appeals to reason.

48. Having already observed that the NABO (later the NAO) was intended by Parliament to be non bailable (and still remains non bailable under S.9(b) NAO which successive Parliaments over the last 17 years have not amended and as such are deemed to have accepted the position) due to the severity of the crime against society of corruption and that even the superior courts have recognized the extreme gravity of offenses under the NAO regarding them as worse than offenses under the CNSA and have most recently emphasized that due to the heinous nature of the offense, being crimes against society, under the NAO that even at the bail stage they should be dealt with rigidly and strictly does it make sense that a person on ad interim pre arrest bail or not on bail at all could saunter up to the trial court when summoned and simply take a bond under S.91? To our minds this simply does not appeal to logic, common sense and reason. If this was the case virtually in all crimes, no matter whether serious or not, the accused could simply take a bond from the court and in effect the provisions of S.497 and 498 Cr.PC would virtually be rendered redundant likewise the powers to grant bail by High Courts in their constitutional discretionary jurisdiction under A.199 in NAB cases which was specifically given to the High Courts by the Supreme Court in **Asfandyar's case** (Supra). **Significantly NAB is a special law**

with overriding effect. S.9 (b) makes all offenses non bailable by the Accountability Court. So if the Accountability Court cannot grant bail and only the High Court can in its constitutional discretionary jurisdiction does it make any sense for a court which cannot grant bail in a crime against society simply to take a bond for appearance? This would also seem to be completely against the legislative intent of making NAB cases non bailable as discussed earlier. Again to our minds this seems to defy logic, common sense and does not appeal to reason.

49. For example, an accused (for whom NAB has not issued a warrant of arrest) is denied pre arrest bail by the High Court since there is no malafide on the part of NAB and there is prima facie sufficient material to connect him to the offense for which he has been charged and he then runs away from the high court and approaches the Supreme Court for pre arrest bail which also deny him pre arrest bail by upholding the High Courts order and he again runs away could he then saunter along to an accountability Court once the reference is filed and take a bond under S.91 despite both the high court and the supreme court finding that there was prima facie sufficient material to connect him to the commission of the offense for which he had been charged? This would again in our view defy logic, common sense and would not appeal to reason.

50. In our view an attempt to ask for executing a bond under S.91 Cr.PC instead of applying for pre arrest bail before the High Court at the time when the reference is filed is a classic example of the violation of the settled principle of law that what cannot be done directly through the law cannot be done indirectly through other means. Namely, the taking of a bond under S.91 when the intent of S.9 (b) NAO is that in order to avoid arrest at the time when the reference is filed or even during inquiry and investigation of the offense under the NAO the accused must seek pre arrest bail.'

Conclusion.

51. Thus, for the reasons discussed above as a matter of legal interpretation we find no room for an accountability court under the NAO and the common law to summon an accused other than by way of a NBW once a reference is filed before the accountability court by the NAB under the NAO and S.91 Cr.PC is inapplicable to NAB references filed under the NAO so far as an accused is concerned.

52. The office shall immediately transmit a copy of this order to all Accountability Courts in Sindh for information and compliance.

53. These are the reasons for our short order dated 13-11-2017 which reads as under:

> "Heard counsel for the parties. For reasons to be recorded later on the petitions are dismissed"