

IN THE HIGH COURT OF SINDH, KARACHI

Present **Mr. Justice Ahmed Ali M. Sheikh**
Mr. Justice Muhammad Karim Khan Agha

C.P No.D-7850/2015

Muhammad Aqeel Munawar Abro

V

The State & another

Date of hearing.	24-02-2016
Date of order.	31-03-2016
Petitioner:	Through Mr. M.A. Kazi, advocate
Respondents:	Through Noor Muhammad Dayo, ADPG, NAB.

ORDER

MUHAMMAD KARIM KHAN AGHA, J:- By this order, we propose to dispose of the petition of Muhammad Aqeel Munawar Abro (the Petitioner) for grant of post-arrest bail arising from NAB Reference 01/2015 State v. Muhammad Aqeel Munawar Abro and three others which was filed before the Administrative Judge Accountability Courts Karachi on 12-01-2015 by the National Accountability Bureau (NAB).

2. This is the Petitioners second application for post arrest bail before this Court. The first was dismissed on 25-02-2015.

3. As per NAB Reference No.1/2015 State V Muhammad Aqeel Munawar Abro and 3 others which was filed before the Administrative Judge of Accountability Courts Karachi on 12-01-2015 the main allegation against the petitioner is that he along with other co-accused in collusion with each other committed forgery and caused loss to the government exchequer by illegally changing and transferring Government (Na-Qabooli) land situated in Bhitshah bearing Survey No.387/182 measuring 15-08 acres fraudulently in the name of accused Nisar Ahmed S/o Munshi Khan with malafide intentions. Subsequently the same land was procured / acquired for an amount of Rs.11.4 million by the Government for construction of Public School Bhitshah. In so doing the Petitioner according to NAB had committed the offense of corruption under S.9 (a) of the National Accountability Ordinance 1999(NAO) by misusing his authority which lead to a loss to the Exchequer.

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4. Learned Counsel for the Petitioner submitted that the Petitioner was entitled to bail on a number of grounds. For instance, that since one of the accused had repaid the whole amount by way of plea bargain there was no loss, that one of his co-accused was on bail so the law of consistency applied, that his wife had died and that he had 3 small children who needed to be looked after by him and that he had been in custody for more than a year and that the trial was not proceeding expeditiously in accordance with S.16(a) NAO due to no fault of his and at the rate it was proceeding he would be stuck in jail for years before a decision was made. In effect he submitted that he was entitled to statutory bail.

5. In support of his various contentions he placed reliance on the following authorities.

1. Asif Ali Zardari v. The State (1993 P.Cr.L.J 781)
2. Allah Dino V. The State (2006 S.C.J 603)
3. Mohammad Zareen and others v. The State (PLJ 2009 Sh. C (AJ&K) 105)
4. Murad Usmani v. The State (PLD 2012 Sindh 225) (5) (SBLR 2012 Sindh 1096) (part-8)
5. Jamila Durrani v The State (PLD 2003 Karachi 393).
6. Asghar Mashi v. The State (1995 P.Cr.L.J 544)
7. Agha Jahanzeb v. NAB and others (2005 SCMR 1666)
8. Muhammad Saeed Mehdi v. The State (2002 SCMR 282)
9. M.Idrees Ghori and others v. The State (2008 SCMR 1118)
10. Muhammed Nadeem Anwar (PLD 2008 SC 166)
11. Pir Mazharul Haq v. The State (PLD 2005 SC 63)
12. Ali Nawaz Shah v. The State (PLD 2003 SC 837)
13. Syed Amanullah v. The State and others (PLD 1996 SC 241)
14. Manzoor and others V State (PLD 1972 SC 81)
15. Ayub Masih V State (PLD 2002 SC 1048)

6. On the other hand learned ADPGA objected to the grant of bail but when questioned by the Court conceded that the trial was moving slowly however this was not on account of the prosecution but due to some procedural issues.

7. We have perused the record, considered the submissions of learned counsel and the relevant law along with the authorities cited by them.

8. We are of the view that having small motherless children who need looking after although tragic is not in and of itself a ground for justifying the grant of bail although it may be

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considered as a factor along with other factors which when all put together may be weighty enough to justify the grant of bail.

9. The Petitioner's contention that the rule of consistency applied to him had already been rejected in his first bail application as his case was not at par with his co accused who had been granted bail and as such was not relevant for the purposes of this bail application as it was not a fresh ground.

10. The fact that all the loss had been made good by another co-accused by way of a plea bargain also in our view did not in and of itself entitle the Petitioner to bail as the NAO is also penal in nature and because the loss had been made good by another party did not absolve the Petitioner of his part in the criminal act although it could be viewed as one factor to be considered in the grant of bail as earlier mentioned with regard to his small motherless children.

11. In our view the Petitioner's main ground for bail was of statutory bail under S.497 Cr.P.C.

12. This is a new ground which was not raised in the Petitioner's first bail application. At this Juncture we would observe that in the case of **Khan Asfandyar Wali V State** (PLD 2001 SC 607) which is one of the seminal cases on the NAO it was held that despite the NAO not providing for bail an accused could apply for bail to the High Court under A.199 of the Constitution.

13. Significantly, it was not held in that case that Statutory bail would not be applicable to NAB cases under the NAO and learned ADPGA has neither challenged the applicability of Statutory bail under A.199 nor brought to our attention any authority which indicates that statutory bail unlike other forms of bail under S.497 Cr.PC is inapplicable to NAB cases under A.199 of the Constitution.

14. In fact in our view since A.199 is the discretionary jurisdiction of this Court Statutory bail would appear to be particularly applicable as in all good conscience no person should remain in jail for years on end if the delay in the conclusion of his trial is due to no fault of his own. The later referred to case of **Hamesh Khan V NAB** (2015 SCMR 1092) tends to support this contention.

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15. Thus, in our view under A.199 of the Constitution the provisions relating to statutory bail in S.497 Cr.PC are fully applicable to NAB cases which have been brought under the NAO.

16. S.497 Cr.P.C. is set out below for ease of reference:

"497. When bail may be taken in case of non-bailable offence. (1) when any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years.

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

Provided further that a person accused of an offence as aforesaid shall not be released on bail unless the prosecution has been given notice to show cause why he should not be so released.

Provided further that the Court shall, except where it is of the opinion that the delay in the trial of the accused has been occasioned by any act or omission of the accused or any other person acting on his behalf, direct that any person shall be released on bail.

(a) **who, being accused of any offence not punishable with death, has been detained for such offence for a continuous period exceeding one year or in case of a woman exceeding six months and whose trial for such offence has not concluded;** or (bold added);

(b) who, being accused of any offence punishable with death, has been detained for such offence for a continuous period exceeding two years and in case of a woman exceeding one year and whose trial for such offence has not concluded;

Provided further that the provisions of the foregoing proviso shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life."

17. It is an admitted position that the Petitioner was arrested and taken into custody on 24-12-2014 and that his maximum punishment on conviction under the NAO is not the death penalty.

18. Since it is now 07-03-2016 the Petitioner has been in custody for approx 1 year and 3 months and thus he would prima

facie qualify for the grant of statutory bail. The next question since his trial has not yet concluded is whether the delay in concluding the trial has been caused by the Petitioner.

19. We have carefully reviewed the dairy sheets from 13-01-2015 to 29-01-2016 (over a year) which form a part of the record.

20. Regrettably the diary sheets reveal a tale of inefficiency and lack of a serious desire to conclude the trial and associated issues on behalf of both NAB and the Accountability Court as detailed below.

21. The charge was framed on 21-04-2015. Prior to this date 2 adjournments were made on behalf of the Petitioner in respect of hearing his 265K Cr.PC application although on both occasions it is unlikely that it caused a delay in the trial since on both dates in February 2015 NBW's were still being issued for other accused and the charge had not yet been framed.

22. It is alarming that the diary sheets reveal that from 25-02-2015 to 29-01-2016 (almost a year) not a single witness had been examined.

23. A brief overview of the diary sheets is informative in this respect as set out below:

(a) On 06-04-2015 the charge was framed and the case was adjourned to 21-04-15 for Prosecution evidence.

(b) On 21-04-2015 no PW's were present and the Prosecution made an application to summon PW Abdul Sattar. The case was adjourned to 09-05-2015 for Prosecution evidence.

(c) On 09-05-2015. PW Abdul Sattar was present and bound down but no evidence appears to have been recorded. The case was adjourned by consent for Prosecution evidence to 22-05-2015 with PW Naubat Khan to be summoned.

(d) On 22-05-2015 the Prosecution requested an adjournment because the original record was not available with PW's. The case was adjourned to 03-06-2015 for Prosecution evidence.

(e) On 03-06-2015 Application under S.265-K Cr.P.C. was made on behalf of accused Yousaf and Ilyas. Prosecution was given notice. The matter was adjourned to 17-06-2015 for hearing application under 265-K Cr.P.C. and Prosecution evidence. PW Abdul

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Sattar was discharged for the time being. No evidence was recorded.

(f) On 17-06-2015 the Presiding Officer was on summer vacation. The case was adjourned to 01-07-2015 for hearing of 265 K Cr.PC applications and Prosecution evidence. No evidence was recorded.

(g) On 01-07-2015 the rot set in when it was recorded that reference was to be made to Hon'ble High Court of Sindh, Karachi to transfer this case to Accountability Court Hyderabad. 265-K applications were adjourned at the request of accused Yousaf and Illyas. No evidence was recorded. The case was adjourned to 10-07-2015 for hearing of 265K applications and Prosecution evidence.

(h) On 10-07-2015 the case was adjourned to 28-07-2015 for the same reasons and for the same purpose as order dated 01-07-15. No evidence was recorded.

(i) On 28-07-2015 the case was adjourned to 12-08-2015 for the same reasons and for the same purpose as order dated 01-07-2015. No evidence was recorded.

(j) On 12-08-2015 the case was adjourned to 25-08-2015 for the same reasons and for the same purpose as order dated 1-7-15 and on account of one of the accused being unwell. No evidence was recorded.

(k) On 25-08-2015 the case was adjourned to 07-09-2015 for the same reasons and for the same purpose as order dated 1-7-15. No evidence was recorded.

(l) On 07-09-2015 the case was adjourned to 21-09-2015 for the same reasons and for the same purpose as order dated 01-07-2015. No evidence was recorded.

(m) On 21-09-2015 the case was adjourned to 05-10-2015 for the same reasons and purpose as order dated 01-07-2015. No evidence was recorded.

(n) On 05-10-2015 the case was adjourned to 21-10-2015 for the same reasons and purpose as order dated 01-07-2015. No evidence was recorded.

(o) On 21-10-15 the case was adjourned to 13-11-2015 for the same reasons and purpose as order dated 01-07-2015 **and in addition because one of the accused was absent on account of election training.** No evidence was recorded.

(p) On 13-11-2015 the case was adjourned to 04-12-2015 for the same reasons and purpose as order dated 01-07-2015 **and in addition because one of the accused was absent on account of election training.** No evidence was recorded.

(q) On 04-12-2015 the case was adjourned to 21-12-2015 for the same reasons and purpose as order dated 01-07-2015. No evidence was recorded.

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(r) On 21-12-2015 the case was adjourned to 12-01-2016 for the same reasons and purpose as order dated 01-07-2015. No evidence was recorded.

(s) On 12-01-2016 the case was adjourned to 29-01-2016 for the same reasons and purpose as order dated 01-07-2015 and the fact that one of the accused was absent as he was unwell and the Prosecution had informed the Court of the proposal to abolish the Accountability Court at Hyderabad. No evidence was recorded.

24. As can be seen from the dairy sheets no progress was made in this case for 7 months. The issue of transferring the case to Hyderabad remained outstanding however this did not in our view prevent the recording of evidence or deciding the 265-K Cr.PC applications which were outstanding. It is also quite incredible that on at least 2 occasions the trial could not proceed because one of the accused was allowed to be absent because he was on election training/duty. The fact that one of the accused was permitted to perform public service instead of attending the criminal trial under which he faced serious criminal charges seems to be indicative of the routine manner and lack of seriousness in expeditiously completing the trial which detrimentally effected the Petitioner who was in custody.

25. What is even more troubling is that the NAO as per its Preamble was set up, amongst other things, to ensure the speedy disposal of cases which concerned corruption and to achieve this end S.16(a) was included in the NAO.S.16(a) provides as under:

"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.**"(bold added).

26. In this respect the following findings of the superior Courts, all of which related to NAB cases, are both illuminating and relevant.

27. In the case of **Jamil A Durrani V State** (PLD 2003 Kar 393) it was held as under at P.398.

"The applicant is in jail for last more than nineteen (19) months and the trial is not within sight in near future. It is cardinal principle of law that bail cannot be withheld as a punishment and nobody can be kept

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in jail for indefinite period as held in the case of Abdul Qadir (supra), therefore, we feel inclined to hold that under these circumstances a case for grant of bail has been made out."

28. In the case of **Aga Jahanzeb V NAB** (2005 SCMR 1666) the Hon'ble Supreme Court observed as under at P.1167.

"When questioned that under the NAB Ordinance trial is to conclude within 30 days. Mr. M.Ibrahim Satti, Advocate Supreme Court submitted that this time period is not mandatory but directory for the time being we would refrain from expressing any opinion as to whether the timeframe is mandatory or directory, but would direct that after submission of challan in this case on 7th of May, 2003 if the trial does not commence or conclude within 30 days from the said date petitioner would automatically become entitled to the grant of bail subject to his furnishing bail bonds in the sum of Rs.five millions with one surety in the like amount to the satisfaction of the trial Court at Lahore."

29. In the case of **Muhammed Nadeem Anwar** (PLD 2008 SC P.645) the Hon'ble Supreme Court held as under at P.649.

"The object of criminal law is to ensure availability of the accused to face trial and not to punish him for offence allegedly pending final determination by a competent Court of law. It is well settled principle of law that grant of bail cannot be withheld as punishment on accusation of non-bailable offence against an accused. **An accused is entitled to expeditious and inexpensive access to justice, which includes a right to fair and speedy trial in a transparent manner without any unreasonable delay. This intention has been re-assured in section 16 of the N.A.B. Ordinance laying down criteria for day to day trial and its conclusion within 30 days.** But in the instant case such object does not appear likely to be achieved anywhere in the near future and would not constitute a bar for grant of bail to the petitioners. The truth or otherwise of charges leveled against petitioners would only be determined at the conclusion of trial after taking into consideration the evidence adduced by both the parties. It was held by this Court in the case of *Aga Jehanzeb v. N.A.B. & others* (2005 SCMR 1666) that if trial of case is not concluded within 30 days from date of submission of challan, accused would automatically become entitled to grant of bail" (bold added)

30. In the instant case there were no day to day hearings and the case has been continuing for almost 1 year and 3 months without a single PW being examined. Notably the Petitioner has

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been present on all occasions having been produced from custody. It may not be possible to hear cases on a day to day basis or complete them within 30 days due to the large number of accused, large number of witnesses which need to be examined, documents to be considered, the complex nature of the cases etc, but there at least must be a serious, concerted and determined effort to comply with S.16 (a) which seems completely lacking in this case

31. There are apparently 29 witnesses to be examined so it is clear from the past proceedings in this case that there is little, if any, chance of this case being concluded in the near future.

32. It is the duty of the Prosecution to vigorously prosecute the case and of the Court to expeditiously deal with and manage the case. In our view both have failed in their respective obligations to the detriment of the Petitioner and any other of the accused who remain behind bars in this reference

33. The liberty of the individual is one of the most precious aspects of a person's life. It is guaranteed by A.9 of the Constitution and is associated with so many other constitutional guarantees like A.15, 18 etc.

34. A person cannot be lightly deprived of his liberty especially in a criminal case where the maxim that a person is presumed innocent unless proved guilty is the globally accepted norm.

35. As was recently held in the case of **Hamesh Khan V NAB** (2015 SCMR 1092) by the Hon'ble Supreme Court 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 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

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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 added)

36. In this case the delay may not be so shocking as in **Hamesh Khan's case (Supra)** whereby he was incarcerated for 5 years and his trial was still not complete but the fact that the Petitioner has been behind bars for one year and three months to date and not a single prosecution witness out of a potential 29 has been examined indicates that it may well reach such shocking proportions. In our view it can therefore also be deemed to be a hardship case.

37. We should not be aloof to the fact, however heinous the offense charged is, that if an accused is ultimately acquitted he cannot get back the lost time which he spent whilst in custody.

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Indeed, in our view the legislature by giving the accused the ability of being granted statutory bail if the delay is of no fault of his own has provided a good safety valve to ensure that accused, who may be acquitted at the end of the trial, are not left to rot in jail and be deprived of their liberty for years on end due to the inefficiency of the criminal justice system. It is a provision which aims to ensure that both the Prosecution and the Court, through its management of the case, are alive to the necessity of trials being completed expeditiously. As is often said, justice delayed is justice denied

38. In this case we are of the view that the Petitioner has been let down by the entire criminal justice system. The Petitioner's access to justice through an expeditious trial has been denied to him as have so many other rights. The State or any prosecuting authority has an obligation to expeditiously proceed with matters where a person is behind bars yet in this case the lethargy of the whole system is exposed through the diary sheets.

39. In this respect the MIT of this Court is also not entirely blameless. The MIT ought to have picked up on this uncalled for delay and brought it to the attention of the monitoring Judge of this Court. The monitoring Judge must serve a useful purpose otherwise there is no need of him. In our view the purpose of the monitoring Judge is not to involve himself in the merits or demerits of a case but to try to ensure by keeping a close watch on the progress of cases that there is no unnecessary delay in the proceedings especially where accused are behind bars. This is a role which he must perform diligently to ensure the good and effective administration of Justice

40. In our view therefore, as disclosed by the dairy sheets, the Petitioner has not been responsible for the delay.

41. No material has been placed before us to show that the Petitioner is a previously convicted offender for an offense punishable with death or imprisonment for life or a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life. Besides which it appears that one of the co-accused has already entered into a plea bargain with NAB whereby the entire loss was repaid

42. Under the particular facts and circumstances of this case we have no hesitation in granting the Petitioner post arrest bail on

account of statutory delay subject to him depositing solvent surety of Rs. 500,000 (five lacs) and PR Bond in the like amount to the satisfaction of the Nazir of this Court.

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43. The office is directed to supply a copy of this order immediately to:

- (a) DG NAB Karachi to ensure that in future the prosecution proceeds with and concludes all of its cases before the Accountability Courts expeditiously without unnecessary adjournments as envisaged under S.16 (a) NAO and
- (b) The Administrative Judge Accountability Courts Sindh for his attention, and for him to send a copy to all Accountability Courts in Sindh, to ensure that no such delay is occasioned again in a trial proceeding before the Accountability Courts in Sindh.
- (c) The Accountability Court hearing this reference which is directed to complete the same within 3 months of the date of this order with fortnightly progress reports to be submitted to this Court through MIT II.
- (d) The head of MIT II of this Court who is directed to ensure that a closer watch is kept on the progress of all trials before the Accountability Courts in Sindh especially where accused are in custody and bring any undue delays to the immediate attention of the monitoring Judge of this Court.

Dated: 31-3-2016