

IN THE HIGH COURT OF SINDH, KARACHI

Before:-

Mr. Justice Ahmed Ali M. Shaikh, C.J.

Mr. Justice Mohammad Karim Khan Agha, J.

Petition numbers, name of the petitioners and their counsel.

1. C.P. No.D-1817 of 2017 Mustafa Jamal Kazi V. NAB.
Mustafa Jamal Kazi S/o Ahmed Muhammad Kazi
Through M/s. Aamir Raza Naqvi & Afaq Ahmed,
Advocates.
2. C.P. No.D-3401 of 2017 Ubedullah Pahore V. Chairman
NAB & others.
Ubedullah Pahore S/o Abdul Raheem
Through M/s. M. Rehman Ghous & M. Anwar Tariq,
Advocates.
3. C.P. No.D-1979 of 2017 Abdul Latif V. Federation of
Pakistan & others.
Abdul Latif S/o Abdul Aziz Brohi
Through Mr. Ayaz Hussain Tunio, Advocate.
4. C.P. No.D-3901 of 2017 Agha Asghar Ali V. Federation
of Pakistan & another.
Agha Asghar Ali S/o Abdul Sattar
Through M/s. Khawaja Naveed Ahmed & Irfan Bashir
Butta, Advocates.

Counsel for the Respondents

Mr. Mohammed Altaf, Special Prosecutor, NAB.

Date of hearing: 26.01.2018.

Date of order: 30.01.2018

ORDER

Mohammed Karim Khan Agha, J:

By this common

order, we propose to dispose of the above petitions filed on
behalf of the above mentioned petitioners for confirmation of

their ad interim pre-arrest bail which was granted earlier to them by orders of this Court. All of the petitioners are allegedly involved in acts of corruption under S.9 of the National Accountability Ordinance 1999 (NAO) which lead to the National Accountability Bureau (NAB) filing **Reference 15 of 2017 (State Vs. Shahzar Shamoan & others)** before the concerned Accountability Court in Karachi against the petitioners and their co-accused.

2. NAB has alleged in Reference No.15/2017 that State land measuring 530 Acres in Sea-Shore, Deh, Dih Korangi Karachi was illegally allotted through forged and fictitious entries into Revenue Record to private persons in connivance with officers/officials of Revenue Department, Government of Sindh (GOS). That in June, 2004, 4 individuals namely (i) Mr. Amjad Hussain (ii) Mr. Aslam Pervez (iii) M. Sultan (iv) Mst. Nasreen Akhtar, managed a bogus heir-ship certificate which was issued by a Justice of Peace. It is certified that they are the only legal heirs of one Muhammad Ibrahim POSTI s/o Baggu who is reported to have died on 30.11.1994. Fake and fictitious VF-VII Entry No.19/23 dated 20.09.1936 was managed which purported that their deceased father was the owner of 30 acres from Naiclass 24 and 500 acres from sea-shore which he allegedly purchased for Rs.8500/- on oral statement. Based on the said bogus heir-ship certificate, FOTI

KHATA BADAL for 530 acres was made on 15.7.2004 in favour of the said 4 heirs. After the FOTI KHATA BADAL the said 4 heirs disposed off 280 acres of land. The investigation also reveals that allegation of forgery in Revenue Records surfaced in the media and the Ex-CM, Sindh ordered an investigation to be conducted by the Ex-DCO, CDGK. The investigation Report concluded that the ownership of 530 acres in favor of Ibrahim s/o Baggu was not genuine as it was based on the fake VF-VII entry dated 20.09.1936. The Ex-EDO (Rev), CDGK cancelled all fake Revenue Entries including 530 acres entry dated 20.9.1936. Being aggrieved by the Cancellation Order of the EDO (Rev), the said 4 heirs (all co-accused in this reference) and subsequent Khatedars filed series of Constitutional Petitions and Suits in this Court. The AEDO (Rev-I), CDGK did not conduct the inquiry to establish whether the said land VF-VII entry dated 20.9.1936 was genuine or otherwise but heard the Appeal No.10/2010 instead which was filed jointly by Mr. Ismail Baloch and Mr. Qasim Thaim. On 18.12.2010, Ex-AEDO (Reve-I), restored/maintained all revenue entries including the said FV-VII entry dated 20.9.1936. The Ex-Secretary, Land Utilization issued directions vide letter dated 18.7.2011 to the Ex-Commissioner for compliance of restoration order of the Ex-AEDO (Rev-I), along with the additional directions.

3. The investigation revealed that Mustafa Jamal (petitioner/accused No.2) with conscious knowledge misused his authority when he passed the illegal order to restore/maintain all subsequent entries including the initial entry. His order dated 18.12.2010 lacked good faith and was based on misuse of authority, hence illegal.

4. The investigation revealed that Obaidullah Pahore (petitioner/accused no.10) knowingly committed misuse of authority by willfully failing to exercise his official functions to check whether the forwarded copies of the said VF-VII Entry was genuine or otherwise and by willfully accepting the said heir-ship certificate issued by irrelevant holder of public office, i.e. Justice of Peace.

5. The investigation revealed that Abdul Latif Brohi (petitioner/accused no.11) knowingly committed misuse of authority by forwarding attested photocopies of fake and bogus VE-VII Entry No.19/23 dated 20.9.1936 and by being custodian of Record of Rights, he willfully failed to apply his mind to check the veracity of said FV-VII before forwarding the same to Mukhtiarkar, Korangi.

6. The investigation revealed that Agha Asghar (petitioner/accused no.9) has been the main manipulator in terms of buying & selling of land in question. Accordingly,

notice u/s 19 of NAO, 1999 was issued at his residence which he deliberately avoided.

7. In the end it has come on record that the Accused No.1 to 11 in connivance with each other illegally allotted through forged and fictitious entries into Revenue Record 530 acres land in Sea-Shore, Deh, Dih Korangi Karachi which resulted into loss of Rs.53 Billions to the Government Exchequer which has been cancelled recently. Thus the petitioners and the other co-accused have committed the offence of corruption and corrupt practices under S.9 NAO and hence the Reference was filed against them.

8. Learned counsel for the petitioner Mustafa Jamal who was AEDO Revenue at CDGK GOS at the time when the entry in question was restored candidly admitted that he had restored the entry under a mistaken belief of its correctness based upon the information which he had received at that time; that he had acted in good faith; that when he came to know that the entry was illegal he immediately took corrective steps for the cancellation of the entry and it was through his efforts that the entry was again removed. He submitted that the malafides of the NAB could be shown by the fact that the NAB had deliberately ignored documents which exonerated him and had deliberately concealed these documents both from the Court and himself and that he only obtained copies

of the documents pursuant to his application before the Accountability Court when NAB was ordered by the Accountability Court to hand those documents over to him. He also pointed to a S.161 statement of Muhammed Moosa Khan Rind which NAB had not disclosed to him and who was neither an accused nor a PW in the Reference which also exonerated him. Thus for all the above reasons he submitted that the petitioner's pre arrest bail should be confirmed.

9. Learned counsel for petitioner Obaidullah Pahore who was the Mukhtiarkar Korangi Town at the relevant time submitted that the petitioner was completely innocent of any wrongdoing; that he had not signed any document and that he had been malafidely roped into this case by the NAB based on no evidence and for all the above reasons he was entitled to the confirmation of his pre arrest bail.

10. Learned counsel for Abdul Latif who was Mukhtiarkar Scheme 33 Karachi at the relevant time submitted that the petitioner was completely innocent of any wrongdoing; there was no material against him; that in any event the entry had been cancelled and as such no loss had been caused and for all the above reasons he was entitled to the confirmation of his pre arrest bail.

11. Learned counsel for petitioner Agha Asghar submitted that he was a private individual who by occupation was involved in the business of fisheries; that he was completely innocent; that the allegations against him as set out in the Reference were vague and there was not an iota of evidence against him to connect him to any offense as alleged in the reference and as such NAB's inclusion of him in the reference based on no evidence was malafide. Thus, for all the above reasons he was entitled to the confirmation of his pre arrest bail.

12. Learned counsel for the NAB vehemently opposed all of the petitioners bail applications. He submitted that there had been no malafide on the part of the NAB and that there was more than sufficient material on record to connect each of the petitioners to the crime for which they had been charged in the reference and in this respect took the court through numerous documents.

13. We have considered the submissions of the parties and have carefully gone through the record.

14. We would also like to make it clear that the findings in this order are only based on a tentative assessment of the material available on record and shall have no bearing on the

trial which shall be decided on merits based on the evidence placed before the trial court.

15. At this junction, it is pertinent to mention that this Court vide order dated 15-06-2017 has already dismissed the pre arrest bail petitions of 3 out of the 4 other co-accused who managed a bogus heir-ship certificate and fake and fictitious VF-VII Entry No.19/23 dated 20.09.1936 which purported that their deceased father was the owner of 30 acres from Naiclass 24 and 500 acres from sea-shore which he allegedly purchased for Rs.8500/- on oral statement which enabled the 500 acres of land to be transferred in their names. Namely Accused No. 4 Amjad Hussain, Accused No.5 Mohammed Sultan, accused No.3 Aslam Pervez on account of their being no malafides on the part of NAB and there being sufficient material on record to make out a case for the aforesaid accused to answer. Only Accused No. 6 Nasreen Akhtar had her pre arrest bail confirmed on account of the fact that she was a women and was of an old age.

16. In cases of pre arrest bail there must be some element of malafide on the part of the complainant or the investigative agency. In this respect reliance is placed on the cases of **Rana Mohammed Arshad V Muhammed Rafique** (PLD 2009 SC 427) and the more recent Supreme Court case of **Mukhtar Ahmad v. The State and others** (2016 SCMR 2064).

17. It is difficult for the accused to expressly prove malafide as was recognized in the recent Supreme Court case of **Khalil Ahmed Soomro and others V State** (unreported dated 28-07-2017) where it was held as under in terms of proving malafides at the pre arrest bail stage (although this was not a NAB case we consider the finding relevant) at Para 5;

“Para 5. Although for grant of pre-arrest bail one of the pre-conditions is that the accused person has to show that his arrest is intended by the prosecution out of mala fide and for ulterior consideration. At pre-arrest bail stage, it is difficult to prove the element of mala fide by the accused through positive/solid evidence/materials **and the same is to be deduced and inferred from the facts and circumstances of the case and if some events-hints to that effect are available, the same would validly constitute the element of mala fide.** In this case, it appears that net has been thrown wider and the injuries sustained by the victims except one or two, have been exaggerated and efforts have been made to show that the offences are falling within those provisions of law, punishable with five years or seven years imprisonment. All those aspects if are combindly taken, may constitute element of mala fide” (bold added).

18. Thus, malafides can be deduced/inferred from the particular facts and circumstances of each case.

19. In this case Mustafa Jamal, Obaidullah Pahore and Agha Asghar have pled malafides.

20. With regard to the case of Mustafa Jamal he has pointed to numerous documents which may at least reflect that his involvement in the case in hand requires further

probe. It seems these documents were deliberately concealed from him by the NAB. In this respect reference can be made to order dated 20-10-2015 in Suo Moto No.02/15 before the Court of Mr.Ghulam Mustafa Phul Member (land Utilization) Board of Revenue Sindh whereby the allotment of the land was ordered to be cancelled on a complaint made by the petitioner (Mustafa Jamal) on 03-09-2012 and application dated 06-10-2015 and S.161 statement of Muhammed Moosa Khan Rind. In our view these documents seem to be of a material nature with respect to the case in hand and should have been deeply considered by NAB before filing a Reference against the petitioner and even if NAB was of the view that other sufficient material was available to justify the filing of a reference against the petitioner under the NAO these documents should have been disclosed to the petitioner as they would have assisted him in making his defense. As such we find that there is an element of malafide on the part of NAB in not disclosing these documents to the petitioner Mustafa Jamal.

21. We have already held in our order in the case of C.P. No.D-1955 of 2017 **Sharjeel Inam Memon V Chairman NAB & others** dated 25-10-2017 that NAB is bound to turn over to the accused documents which it had [↳] come across during their investigation which may assist the accused in his

defense at the time of handing over documents under S.265 (c) Cr.PC. In this respect it is worth reiterating and reproducing paragraphs 57 to 64 of our aforesaid order which are set out below for ease of reference:

“The Prosecution concealing favourable/exculpatory material from the accused.

57. Some of the petitioners have contended that the NAB deliberately concealed material which was favorable to them (both at the bail stage and also at trial)

58. Although there are no specific rules regarding disclosure of exculpatory material which tends to exonerate an accused we consider that this situation is covered by Article 10 (A) of the Constitution which provides as under.

“A.10 (A). Right to fair trial. For the determination of his civil rights and obligations **or in any criminal charge against him a person shall be entitled to a fair trial and due process.**”(bold added)

59. Although Article 4 of the Constitution through judicial determination had been regarded as the due process clause in Pakistan the 18th Amendment through A.10 (A) formally made it a part of the constitution.

60. So what is due process? By way of just one example the 14th Amendment to the United States of America Constitution provides as under:

“AMENDMENT XIV [1868]. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**”(bold added)

61. In the case of **Brady V Maryland** (373 US 83 (1963)) The US Supreme Court held that it was a due process right of the accused to have disclosed to him any material gathered by the prosecution which may tend to show his innocence in the following terms:

"The Third Circuit, **in the Baldi case**, construed that statement in **Pyle v. Kansas to mean that the "suppression of evidence favorable" to the accused was itself sufficient to amount to a denial of due process.** 195 F.2d at 820. In *Napue v. Illinois*, 360 U.S. 264, 269, we extended the test formulated in *Mooney v. Holohan* when we said: **"The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."** And see *Alcorta v. Texas*, 355 U. S. 28; *Wilde v. Wyoming*, Cf. *Durley v. Mayo*, 351 U. S. 277, 285 (dissenting opinion).

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor, but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: **"The United States wins its point whenever justice is done its citizens in the courts."** [Footnote 2] A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals. 226 Md. at 427, 174 A.2d at 169". (bold added)

62. The US Supreme Court in the recent case of **Charles S. Turner et al V United States** (2017 SCMR 1489) affirmed **Brady's case** (Supra) only highlighting whether or not the exculpatory evidence to be disclosed to the accused by the prosecution was **material** to the guilt or innocence of the accused. If material it was to be disclosed. In **Charles S. Turner** (Supra) **it was also held that it was not the role of the prosecution/prosecutor in a criminal trial to win at all costs** (i.e. obtain a conviction) in the following terms at P.1503.

"I note that the majority and I share some common ground. We agree on the universe of exculpatory of impeaching evidence suppressed in this case: The majority's description of that evidence, and of the trial held without it, is scrupulously fair. See *ante*, at 2-6, 7-9. **We also agree-as does the Government - that such evidence ought to be disclosed to defendants as a matter of course.** See *ante*, at 10. Constitutional requirements aside, **turning over exculpatory materials is a core responsibility of all prosecutors - whose professional interest and obligation is not to win cases but to ensure justice is done.**" (bold added)

63. In our view when Article 10(A) was added to the Constitution by the 18th Amendment, after lengthy debate and detailed consideration of a cross party committee of Parliament, it was **not** meant to be just a paper right or illusionary right but a meaningful right for the accused in all criminal cases especially as it is a **fundamental right** under the Constitution and we fully endorse the findings and sentiments expressed in **Brady's case** (Supra) and **Charles S. Turner case** (Supra)

64. Thus, we expect the NAB investigators as assisted by NAB legal officers to consider any material which they uncover during the course of an inquiry/investigation or before a determination is made whether or not to file a reference whether that material tends to exonerate the accused from the proposed charge and as such justifies the exclusion of the accused from the reference. If it does and the reference is not filed against the said accused then that material

may lose its relevance. However if a reference is filed against an accused the NAB prosecutors at the time of handing over all the material supporting the reference under S.265 © Cr.PC should also **without request** hand over to the accused/counsel for the accused any material which has come to their attention during the course of inquiry/investigation which lead to the filing of the reference or is otherwise in their possession which tends to exonerate the accused even to the slightest extent. **The Chairman NAB shall take note of this paragraph"**

22. With regard to the cases of Obaidullah Pahore and Agha Asghar when the learned prosecutor for NAB was confronted with what material there was against such petitioners to substantiate the allegations made against them by the NAB he was not able to point out any such material. Thus, prima facie it appears that there are tinges of malafides in including them in the Reference.

23. Petitioner Abdul Lateef Brohi did not raise the plea of malafides and even otherwise after a brief perusal of the record there does not seem to have been any malafides on the part of NAB against him whether express, deducible or inferred.

24. **Turning to the cases of the petitioners on merits.**

25. **With regard to the case of petitioner Mustafa Jamal** NAB contended that he was not a genuine whistle blower and he had only made his complaint for cancellation of the allotment once he knew his illegal act had come to light. The

record shows that he made an initial complaint on 03-09-2012 which was **before** NAB received a complainant on this issue from transparency international which lead to the opening of this inquiry and ultimately the filing of this Reference. Thus, based on this factor and along with the above mentioned concealed material by NAB we are of the view that this is a case of further inquiry in respect of the petitioner Mustafa Jamal. Since we have already found that malafides existed in his case we hereby confirm his pre arrest bail on the same terms and conditions.

26. **With regard to the cases of petitioners Obaidullah Pahore and Agha Asghar** we have already found tinges of malafides in there cases by NAB and the fact that NAB was not able to point out to us any specific material against the petitioners at this stage we consider the cases of both the petitioners to be one of further inquiry. As such we hereby confirm the pre arrest bail granted to both the petitioners Obaidullah Pahore and Agha Asghar on the same terms and conditions.

27. **With regard to the case of petitioner Abdul Lateef Brohi** we have already observed that there has been no malafide on the part of the NAB.

28. He was Mukhtiarkar Scheme 33 Karachi at the time when the offense was committed. He has been given a specific role at Para 15 of the reference which reads as under:

“15. The investigation reveals that Abdul Latif Brohi (petitioner/accused no.11) knowingly committed misuse of authority by forwarding attested photocopies of fake and bogus VE-VII Entry No.19/23 dated 20.9.1936 and by being custodian of Record of Rights, he willfully failed to apply his mind to check the veracity of said FV-VII before forwarding the same to Mukhtiarkar, Korangi”.

29. Thus, the allegation is different to the allegation against petitioner Obaidullah Pahore who was the Mukhtiarkar Korangi Town which was in essence confined to a failure to check the records.

30. The case against petitioner Abdul Lateef Brohi is much more significant in that he laid the foundations for this mega scam. Likewise there is material to connect him to the commission of the offense.

31. Para 9.8 of the Investigation Report sets out the role of the petitioner as under:

“9.8. Role of Abdul Lateef Brohi Mukhtiarkar Scheme 33.

i. **Criminal Role of accused No.11, Abdul Lateef Brohi is most vital. He laid foundations of this mega fraud/scam. He misused the letter forwarded by Ali Akbar Hingoro D.O.R. Karachi vide Letter No.DO/Rev/K/RB/4213/3287/2004; dated 25.05.2004, addressed to all DDORs and**

Mukhtiarkar “to transfer the registers containing all the entries belonging to other Towns the same may be entirely transferred in Original to the concerned Town under proper receipt. Under pretext of this letter dated 25.05.2004, accused No.11 falsely attested the Entries (which were non-existent in his whole revenue record under his custody as Mukhtiarkar Scheme 33 Town), and forwarded to office of DDOR Korangi Town Karachi through a letter dated 13.07.2004, signed by him.

ii. Actually the accused received copies of these forged documents, from accused Aga Asgar Ali and accused Aslam Pervaiz and falsely attested the same and forwarded to DDOR Korangi for onward submission to the Mukhtiarkar Korangi Town. The proof of this assertion is that fourteen days before his forwarding letter dated 13.07.2004, on 29-06-2004, accused Aslam Pervaiz attached the same fabricated revenue record and submitted to the office of the DOR Karachi, with his application for transfer of record from office of Mukhtiarkar Scheme 33 Town. Thus collusion and complicity of accused No.11 with accused No.3 and accused No.9 established crystal clear.

iii. The PW 1 also produced three Letter/ Reports dated 07.04.2009 and 12-04-2010, signed by his three predecessor or respective Mukhtiarkar Scheme 33, who also reported that “all record of this office has been verified which revealed that there is no entry available in the record of rights maintained by this office in name of Muhammad Ibraheem S/o Baggu in respect of land measuring 530 acres located in Deh Dih”

iv. Hence through the 161 statements of Prosecution Witness No.1 and 2 and the record produced by them Under a Seizure Memo, the guilt of accused Abdul Lateef Brohi is glaringly established. Accused once joined investigation on 10-02-2017 and conceded his guilt. He said he has no defence to justify. He denied receipt of any corruption proceeds for this illegal act. He stated that he had done this under political pressure and under influence. He expressed his intention to pray the Chairman NAB for Tender of Pardon under Section 27 of National Accountability Bureau in lieu of full and candid disclosure of all hidden facts and circumstances by him before the court of Judicial Magistrate. But he never returned to join the investigation as per promise despite several contacts.

v. **He is prime accused. His guilt is crystal clear. He is responsible for the whole fraud. He has criminally misused his authority and breached the trust reposed in him by Government of Sindh and has jeopardized the national exchequer to the tune of Billions of Rupees.**" (bold added)

32. We have examined a number of the documents referred to in para 9.8 of the investigation report set out above. It appears that letter dated 25-05-2004 was a general letter and gave no authority whatsoever to the petitioner to tamper with the record. It appears that it was under the camouflage of this letter that the fraud was committed by the petitioner. By letter dated 13-07-2004 **duly signed by him** he then forwarded on the documents which he had illegally managed by misusing his authority. If the petitioner had not forwarded attested photocopies of fake and bogus VE-VII Entry No.19/23 dated 20.9.1936 which it was his duty to check being custodian of the record this land scam of which he was an integral part could have never taken place.

33. Thus, since there has been no malafides on the part of NAB and as discussed above prima facie there is sufficient material to link the petitioner Abdul Lateef Brohi to the commission of the offense for which he is charged in the reference his pre arrest bail granted to him earlier by this court stands recalled with immediate effect.

34. In summary, pre arrest bail is confirmed on the same terms and conditions to petitioners Mustafa Jamal, Obiadullah Pahore and Agha Asghar Ali whilst the ad interim pre arrest bail granted by this court to Abdul Lateef Brohi is recalled with immediate effect.

35. These are the reasons for our short order dated 26-01-2018 which is set out below.

“We have heard learned counsel for petitioners in the captioned petitions and also Spl. Prosecutor NAB. For reasons to be recorded later on, order dated 03.04.2017 passed in C.P.No.D-1979 of 2017 whereby petitioner Abdul Latif was granted ad-interim pre-arrest bail stands recalled, whereas interim pre-arrest bail granted to petitioners in rest of the petitions stand confirmed on the same terms and conditions.”