

IN THE HIGH COURT OF SINDH, KARACHI

Before:-

Mr. Justice Muhammed Iqbal Kalhoro, J.

Mr. Justice Mohammed Karim Khan Agha, J.

Petition No. and name of petitioner along with counsel.

1. C.P. No.D-1965 of 2018 Muhammad Hanif (petitioner) V/s. Chairman NAB through Mr. S. M. Iqbal, Advocate
2. C.P. No.D-1963 of 2018 Asim Amir Khan Sikandar (petitioner) V/s. Chairman NAB through Mr. Shahab Sarkil, Advocate
3. C.P. No.D-2604 of 2018 Syed Masood Hashmi (petitioner) V Chairman NAB & another through Mr. Mahmood Alam Rizvi, Advocate
4. C.P. No.D-2891 of 2018 Sharjeel Inam Memon (petitioner) V Chairman NAB & another through M/s. Khalid Javed Khan and Muhammad Ahmer, Advocates

Counsel for the Respondents.

Mr. Mohammed Altaf, Special Prosecutor, NAB.

Date of Hearing: 26.04.2018 and 02.05.2018

Date of Order: 14.05.2018

ORDER

Mohammed Karim Khan Agha, J. By this common order we propose to dispose of the above mentioned petitions for post arrest bail which have been filed by petitioners Muhammed Hanif, Asim Amir Khan Sikander, Syed Masood Hashmi on merits and Sharjeel Inam Memon on medical grounds. The pre arrest bail petitions of all the petitioners were recalled by this court vide order dated 25.10.2017. The post arrest bail on merits in respect of petitioner Sharjeel Inam Memon was dismissed by this court vide order dated 02-03-2018.

2. The brief facts of the case are that following inquiries/investigations conducted against the petitioners and the other co-accused by the National Accountability Bureau (NAB) in relation to acts of corruption and corrupt practices falling within the purview of S.9 of the National Accountability Ordinance 1999 (NAO) NAB filed Reference **No.50/16 State v Sharjeel Inam Memon and others** on 28-09-2016 against the petitioners and other co-accused in connection with a scam by officials of the Information and Archives Department Government of Sindh (GOS)

and various advertising agencies whereby the advertising agencies were appointed illegally and in violation of the relevant rules through a misuse of authority/failure to exercise authority by the Government officials who malafide, deliberately and in connivance with each other awarded contracts to advertising agencies at exorbitant rates which unduly benefited the advertising agencies who are beneficiaries in this case who acted in connivance with the government officials which led to a colossal loss of approximately **RS 5 Billion** to the state exchequer.

3. Petitioner Sharjeel Inam Memon was the Minister for Information and Archives Department (GOS) who along with other official co accused allegedly misused their authority/failed to exercise their authority in order to unduly benefit certain advertising agencies and has approached this court on the ground of medical bail only. Whereas petitioners Muhammed Hanif and Asim Amir Khan Sikander were employees of one of the main beneficiary advertising agency Evernew Concepts Pvt. Ltd which was headed by co-accused Inam Akbar whom we have already found to be the master mind behind this act of corruption in so far as it related to Evernew concepts through our pre arrest bail order recalling his and the other petitioners and co-accused pre arrest bail as referred to earlier in this order. Petitioner Syed Masood Hashmi was the owner of Orient Advertising Agency which was also one of the main beneficiaries of the scam.

4. Learned counsel for petitioner Muhammad Hanif submitted that he was not subject to the NAO as he was an employee of a private company and in this respect he was covered by the companies Ordinance for any wrong doing. In support of his contentions he placed reliance on numerous sections of the company Ordinance 1984 and the case of **Chairman NAB V Fehmida Begum** (2015 SCMR 172); that his role was confined to operating the accounts of Evernew Concepts which authority had been given to him through a Board resolution and as such he operated the accounts on the instructions of the directors in good faith; that he had no idea that the funds which he transferred were the proceeds of crime; that he had not made any personal benefit and for all the above reasons he should be granted post arrest bail. Learned counsel for petitioner Asim Amir Khan Sikander conceded that the NAO was applicable to him however like petitioner

Muhammad Hanif mentioned above he submitted that he was an employee of Inam Akbar who was the owner of the company, the key player and main beneficiary and he like petitioner Hanif operated the accounts on his instructions; that he had no idea that the monies which he had transferred were proceeds of crime and he had made no personal gain and thus for all the above reasons he was also entitled to post arrest bail.

5. Learned counsel for Syed Masood Hashmi mainly contended that the petitioner was prepared to deposit the amount which NAB claimed was his liability with the NAB and on this basis he should be granted post arrest bail. In this respect he referred to various authorities including, and on similar lines, to **Shamraiz Khan V State** (2000 SCMR 157), **Nisar Ahmed Dina v. The State** (2005 SCMR 1875), **Mohammad Rashid Umar v. The State through Chairman NAB** (SBLR 2012 SC 78) **Syed Muzaffar Ali V Chairman NAB** (2016 P.Cr.LJ 1183) and **Ehsanullah Shah V NAB** unreported Supreme Court case dated 24.04.2018 .He also submitted that his case was on a better footing than the other advertising agencies who were co-accused in the reference as at least he had provided some documents in support of his claims when he invoiced the GOS whilst none of the other co-accused advertising agencies had done so. Thus, for the above reasons he was entitled to be granted post arrest bail.

6. Learned counsel for petitioner Sharjeel Inam Memon who had approached this court only for the grant of bail on medical grounds in this respect relied on the reports of various medical boards which showed that he satisfied the legal requirements for the grant of bail on medical grounds.

7. Learned Special Prosecutor NAB submitted that with regard to merits there was more than sufficient material on record to connect all the petitioners to the commission of the offenses for which they had been charged and in this respect took the court through various documents in support of his contentions. He also relied on the finding on merit in the consolidated pre arrest bail order whereby the pre arrest bail of all the petitioners had been recalled by this court and thus for all the above reasons submitted that the post arrest bail petitions of all of the petitioners should be dismissed.

8. With regard to medical bail in respect of petitioner Sharjeel Inam Memon he submitted that the medical reports did not show that he met the legal requirements for grant of bail on medical grounds and as such his petition for bail on medical grounds should also be dismissed or in the alternative he may be confined to hospital and not released on medical bail. In this respect he placed reliance on **Muhammad Arshad v. The State and another** (1997 SCMR 1275) and **The State v. Haji Kabeer Khan** (PLD 2005 S.C. 364),

9. We have heard the parties and have carefully gone through the documents on record and considered the medical reports and other medically related material placed on record and the various authorities relied upon by the parties in the light of the particular facts and circumstances of this case.

10. 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 not a deep appreciation of the same and shall have no bearing on the trial which shall be decided on merits based on the evidence placed before the trial court.

11. We regard to the argument of petitioner Muhammad Hanif that since he was only a humble employee of the company under the NAO he could not be liable we completely reject this contention. This is because in the case of **Abdul Aziz Memon V State** (PLD 2013 SC 594) it was explicitly held by the Hon'ble Supreme Court that the word, "person" as defined in the NAO applied to all persons including private persons. Persons who commit white collar crime are generally cunning and crafty in their modus operandi notwithstanding the fact that it is difficult enough to gather evidence in white collar crimes. If employees of companies were excluded from the purview of the NAO this would enable persons who committed corruption and were liable to be proceeded against under the NAO to be **by design deliberately** placed on junior positions within the company or as humble employees so that their acts of corruption in league with others would not fall under the NAO which may defeat the legislative intent and judicial interpretation of the NAO. Such novel, clever and devious tactics cannot be allowed to flourish. S.4 NAO also needs to be kept in mind which applies to all citizens in Pakistan.

12. Otherwise with regard the cases of Muhammad Hanif and Asim Amir Khan Sikander although there is material on record to show that they operated the bank accounts of Evernew concepts and even transferred funds to Inam Akbar's private bank accounts and other companies owned by him we have taken into account the fact that they were relatively minor players in the scam which was orchestrated by Inam Akbar who was the de jure and later de facto head of Evernew Concepts and the main beneficiary of the scam; that they were acting on instructions of the Directors of the company; that they appear to have made no personal financial gain; the fact that they have already spent ^{by} approx 6 months in jail would also tilt the balance in favour of the grant of bail and as such they are granted post arrest bail subject to them each furnishing solvent surety in the sum of 1.5M (fifteen lacs each) and PR bond in the like amount to the satisfaction of the Nazir of this court. The names of both the petitioners shall also be placed on the ECL

13. With regard to the case of Syed Masood Hashmi he has submitted that he is prepared to pay the amount of the alleged loss to the Chairman NAB pending the out come of the trial. This is not a new ground and was rejected by this court through its aforesaid consolidated order recalling the petitioners pre arrest bail at Para 93. With regard to **Shamraiz's Khans case** (Supra) which is the foundational case, which the petitioner relies on, this case is distinguishable based on the particular facts and circumstances of that case. In **Shamraiz's case** (Supra) the petitioner **had deposited virtually the whole amount of misappropriated funds to the Food Department who he had allegedly embezzled it from. i.e. he had returned the money. Whereas in this case the petitioner wants NAB to hold the amount in trust for him until conclusion of the trial and then if he is acquitted return the amount to him.** This is a major difference and makes the cases and even the principle relied on in **Shamraiz Khan's case** (Supra) distinguishable. Even otherwise in **Shamraiz Khan's case** (Supra) 17 other co-accused had already been granted bail which is not the case in this reference. In our view if the amount is relatively minor in nature there **may** be some scope for such an approach to be adopted provided that NAB has no objections. For example, in **Muzaffar Ali'a case** (Supra) NAB had no objections. Otherwise we are of the considered view that by allowing such

deposits to effect be held in trust by NAB or the Nazeer of this Court until the outcome of the trial would to a certain extent amount to circumventing the provisions of voluntary return and plea bargain as provided in S.25 NAO and thereby defeat the legislative intent as other accused and particularly beneficiaries are likely to adopt such an approach. In the recent case of **Fida Hussain Shah V NAB** and other (CP.No.D-1904 unreported dated 19-06-2017) this court rejected a similar proposal (and although Fida Hussain Shah was later granted bail in the aforesaid case by the Hon'ble Supreme Court it was **not** on account of him depositing any funds with the court but on other considerations) and thus we need to be consistent in our approach. **It is also significant** that in this case four other accused beneficiaries entered into VR with NAB prior to the filing of the reference. If those illegal beneficiaries would have known that they could pay their illegal gain into a deposit account pending finalization of the trial this would have most probably been the route which they would have taken. Thus, this is a precedent which we would not like to set. Furthermore the petitioner in this case was a major beneficiary who was directly involved in the scam. **Ehsanullah's case** (Supra) is distinguishable because in that case the petitioner had already spent almost 3 years in jail and the conclusion of the trial was not within sight which is not the position in the petitioner's case. As such his request to deposit the amount of his liability is declined. He may, if so advised, apply for plea bargain under S.25 NAO.

14. In this reference we found in our consolidated pre arrest bail order that there was deliberate and malafide misuse of authority/failure to exercise authority in violation of the relevant rules and regulations by the Government officials in connivance with the beneficiaries which caused a massive financial gain to the beneficiaries and a huge loss to the government exchequer.

15. There is both a general allegation in the reference against all the advertising agencies (including the petitioner) as well as a specific one. The general one which is found at Para 4 of the Reference reads as under:

"Para 4. That the investigation also reveals that **advertising agencies suppressed the invoices issued by the media channels which had showed the actual amounts, with ulterior motives and malafide intention in connivance with the officials**

of Sindh Information Department and claimed much higher amounts as compared to the amounts invoices issued by the media channels. **Whereas, as per well settled practice, advertising agencies are entitled to get only 15% agency commission against the total bill / invoice received from the media channel.** (bold added)

16. **At the outset it is both pertinent and relevant to observe** that 4 other Media/advertising companies (M/s Connect Marketing Pvt Ltd, M/S Value Added Marketing Services Pvt Ltd, M/S Xnine Pvt Ltd and M/s Sync Advertisement Pvt Ltd) all of whom had allegedly been illegally awarded advertising contracts in violation of the Rules by the Ministry of Information and who had all over charged the Ministry of Information and were faced with the same allegations as the petitioner in the reference by using the same modus operandi all admitted their guilt and entered into voluntary returns with the NAB whereby they repaid their ill gotten gains.

17. Apart from his general role of suppressing invoices the petitioner has also been given a specific role at Para 12 of the reference which reads as under;

"12. The investigation further reveals that Accused No.13 **Syed Masood Hashmi** is CEO/Director/ overall owner of the advertising agency of M/s. Orient Communication Pvt. Ltd (Orient). which received Rs.320 Million from Sindh Information Department against release of advertisement campaigns on Electronic Media (FM/TV). He obtained invoices on the exorbitant rates from the media and same amount was claimed from the Sindh Information Department, but he got special discounts / credit notes in addition to 15% agency commission from the media and as such was major beneficiary of exorbitant rates which resulted into loss to the national exchequer to the tune of Rs.75,830,568/-

18. The petitioner's main defense was that he did not charge exorbitant rates and that he was fully entitled to charge the rates which he did. This was because according to him this was an unregulated industry. In this respect he placed reliance on The Pakistan Broadcasting Association Rules and Regulations Governing Conduct of Advertising Agencies / MBHS.

19. Thus, according to the rules the petitioner through his proprietorship Orient was entitled to keep (a) 15% commission as of right (b) any other form of bulk discount or (c) credit note availed by then

20. In this respect Orient referred to numerous transmission certificates, bulk discounts credit notes which they had received and were entitled to keep.

21. **Modus Operandi:** In effect by way of an example of what was the happening was that the advertising agency for example would be given an invoice by the T.V company for the advert of RS 100 out of which the advertising agency kept 15% as commission, then kept another amount as bulk discount say 15%, then kept another amount by way of credit note say another 15%, so the advertising agency would only pay RS 55. However when the advertising agency invoiced the Information Department GOS for the advert run by the T.V company the advertising agency **gave a different invoice** which would only show RS 100 less 15% commission so that the cost of the advert to the GOS was RS 85 which allowed the advertising agency in this example to pocket an extra RS 30 on top of its allowed commission (with the GOS allegedly having no idea about this practice when for all practical purposes this extra RS 30 was most probably split between the advertising agency which had been favoured and the Government officials who are also co-accused in this reference and favored them by violating the Rules). As such the true amount paid to the T.V company by the advertising agency has been dishonestly suppressed by the advertising agency in its invoices to the GOS.

22. Even if we accept that the advertising agency was allowed 15% commission as per Para 7 of the amended Pakistan Broadcasting Association Rules and Regulations Governing Conduct of Advertising Agencies / MBHS only an extra 15% was available making a total of 30% if the bills were paid within a specified period. However as is apparent from the documents on record the petitioner (Orient) was claiming far more than this as indicated by the table in the reference (which is reproduced below) which has not been disputed by Orient which in the various columns shows the amount received by Orient from GOS, amount actually paid to the TV Channel by Orient and the resultant loss to the exchequer. In nearly all cases the discount **was well over 30% reaching as high as 70% in some cases.**

M/s Orient Communications Pvt Ltd.

S. No	Channel (TV/FM)	Amount received from Govt. by the Agency	Actual paid or payable by the agency to the channel after deduction of agency commission & special discounts	Difference / loss to national exchequer which also includes amount of credit Note / Special discount obtained by the agency
1	Dunya News TV Channel	7,382,667	4,773,884	1,501,383
2	Geo TV Network	30,792,184	23,482,085	3,166,202
3	Metro One TV Channel	16,551,500	6,060,371	8,704,259
4	Samma TV Channel	3,647,000	2,306,919	793,031
5	ARY News TV Channel	9,102,916	7,501,958	682,763
6	Awaz TV Channel	23,173,800	8,190,113	16,679,734
7	Health TV Channel	1,790,248	1,253,174	228,257
8	Sindh TV Network	15,901,999	2,767,818	11,582,671
9	Mehran TV Channel	16,517,001	10,234,254	6,431,854
10	Dawn News TV Channel	17,010,663	11,175,915	3,283,150
11	News One TV Channel	5,285,000	2,676,011	1,934,364
12	Solo Media Group	21,671,500	5,000,000	13,420,775
13	Digi Media	4,306,500	2,500,000	1,431,500
14	FM 100	Fake TC & Invoice		5,990,625
Total		173,132,978	87,922,502	75,830,568

23. The above modus operandi of dual invoices and the above chart in our view comprehensively shows that Orient was deliberately and with malafide intention suppressing invoices from the GOS which enabled it to illegally benefit greatly and caused a colossal loss to the GOS. **This was the modus operandi adopted**

by all the advertising agencies who are co-accused except that the other agencies conduct was far more illegal as they had no credit notes or bulk billing discount to show precisely why they had deducted what amount. Thus, it may be true that the case of the petitioner is on a better footing than the other advertising agency co-accused such as Evernew Concepts, Adarts etc as the petitioner at least provided some documents in support of his claim. We have already dismissed the post arrest bail petitions in respect of Adarts advertising agency which was another illegal beneficiary, on merits which was appealed before the Hon'ble Supreme court and was withdrawn by Adarts with the direction that they may again if so advised approach this court for post arrest bail.

24. With regard to over billing by the **petitioner (Orient)** and Evernew reference can be made to S.161 statements of Mohammed Harris Hussain and associated documents (IR P.215 to 223) Ghulam Hussain and associated documents (IR P.225 to 231) Kaleem Ahmed and associated documents (IR P.239 to 245, 251, 253), Mohammed Ali Saeed and associated documents (IR P.255-267) Kaneel Iqpat (IR P.269 to 273) and Qazi Ahmed Mateen (IR P.275)

25. Ultimately however there is no getting away from the fact that the material on record shows that the petitioner through his illegal conduct and connivance with the official accused from the Ministry of Interior in this case caused a massive loss to the GOS and there is more than sufficient material on record to connect him to the commission of the offense for which he has been charged and as such his petition for post arrest bail is dismissed.

26. **With regard to the case of Sharjeel Inam Memon** who has applied for bail on medical grounds we first need to consider the relevant law on what amounts to bail on medical grounds and then consider his medical reports to see if they meet these legal requirements.

The law on bail on medical grounds.

27. The statutory basis for the grant of bail on medical grounds can be found in the first proviso to S.497 Cr.PC which provides as under:

"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.**" (bold added)

28. After a detailed study of the law on medical bail as enunciated by the superior judiciary in the case of **Kifayatullah V Federation of Pakistan** (2017 P.Cr.LJ 192) this court came to the conclusion that the test for the grant of bail on medical grounds was laid down as long ago as 1995 by the Hon'ble Supreme Court in the case of **Mohammed Yousafullah Khan V State** (PLD 1995 SC 58) which in our view still remains good law, even after the later cases of **Muhammed Saeed Mehdi V State** (2002 SCMR 282) and **Peer Mukaram Ul Haq V NAB** (2006 SCMR P.1225), where it was held at P.65 as under:

"From the above discussed position it is clear to us that the bail on medical ground can be granted under section 497, Cr.P.C. if the Court reaches the conclusion **on the basis of medical report** that the ailment with which the accused is suffering is such that it cannot be properly treated while in custody in Jail. The fact that the appellant is not suffering from any particular type of injury (as observed by the learned Judge that there was no fracture of bone in that case), would not be a ground either to refuse or grant the bail on medical ground. **The correct criteria for grant of bail to an accused in a non-bailable case, on medical ground, in our view, would be that the sickness or ailment with which the accused is suffering is such that it cannot be properly treated within the premises of jail and that some specialized treatment is needed and his continued detention in Jail is likely to affect his capacity or is hazardous to his life**". (bold and italics added)

29. Thus, the test would therefore appear, in non bailable cases such as the instant case, to have the following limbs as set out below all of which in turn the court would need to be satisfied of, **based on the medical reports**, before the Court before bail on medical grounds may be granted under the first proviso to S.497 (1) Cr.PC based on the particular facts and circumstances of each case.

- (a) the sickness or ailment with which the accused is suffering is such that it cannot be properly treated within the premises of jail **and**
- (b) that some specialized treatment is needed **and**
- (c) his continued detention in Jail is likely to affect his capacity **or** is hazardous to his life.

30. In the final analysis however bail on medical grounds is of a **discretionary nature** and it is up to the court whilst applying the criteria in **Mohammed Yousafullah Khan's case** (Supra) **based on the medical reports and based on the particular facts and circumstances of each case** to determine whether bail on medical grounds should be granted.

Turning to the medical reports

31. At this juncture it may be mentioned that the petitioner had earlier applied for bail on merits and medical bail and had completed his arguments in respect of both aspects of the case. In the meantime however before announcement of the order the Hon'ble Supreme Court in **HRC No.4977/2018** (regarding reported shifting of accused of NAB Namely Sharjeel Inam Memon from Jail to Hospital) took up this issue and as such although we dismissed the petitioners bail on merits we restrained ourselves from making any findings on the aspect of his petition relating to medical bail as the matter was now subjudice before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide order dated 31-03-2018 after reviewing some tentative reports of a new medical board which it had established disposed of the matter and left the matter of the petitioners bail on medical grounds to be decided by the court of competent jurisdiction. Hence the petitioner has again approached this court for bail on medical grounds.

32. From the record it appears that the petitioner has been suffering from back problems for some time and the leaned counsel for the petitioner took us through some medical reports from the UK and Dubai concerning the petitioner's prior medical condition. Thus, it would appear that the petitioner's condition has not been feigned.

33. In essence the petitioner has three medical boards all duly constituted by the accountability court comprising Dr's from the JPMC which by and large confirm that he meets the requirements of medical bail.

34. **The first special medical board** was held on 20.12.2017 at the Jinnah Post Graduate Medical Centre (JPMC) which opined as under:

Recommendations

- A. **The facilities at Jail Hospital, Karachi, are inadequate for proper diagnosis/management and follow up of UTP Sharjeel Inam Memon.**
- B. Mr. Sharjeel Inam Memon **needs multidisciplinary treatment in terms of (neurosurgery/orthopaedic/physiotherapy)**, periodic monitoring of liver enzymes uric acid levels, radiology examination, blood pressure monitoring, and further investigations (video monitoring EEG/colonoscopy etc.).
- C. (i) The power of dorsiflexors of (Rf foot) has **deteriorated** in L5 nerve root distribution which can further deteriorate. (bold added)
 (ii) (iii) (iv).....
(v)Therefore in view of all the above he is unable to be managed at the jail hospital and the board recommends proper medical treatment and investigations at the hospital (bold added)

35. **The second medical board** held on 15-01-2018 opined as under:

Recommendations

- (a) He cannot be treated properly in jail hospital
- (b) There is already deterioration of his backache and weakness in his right lower limb.
- (c) There is further risk of deterioration and he needs surgery.

36. **The Report of the third medical board dated 06-02-2018** opined as under:

CONCLUSION

The overall condition of Mr. Sharjeel Inam Memon remains unsatisfactory as there is a need for surgery as soon as possible failing which he may suffer permanent disability on account of spinal pathology. Backache is still persistent and has not improved medication. (bold added)

37. In the past we have expressed our doubts as to the veracity and reliability of some of the medical reports/material which has been placed before us in NAB cases where pre or post arrest bail is sought as it appears that in nearly every second NAB case the application for bail is on medical grounds (despite in many cases the petitioners appearing to be fit and well and regularly attending their offices until the NAB inquiry started) and the file is filled with medical documents from almost every hospital in Karachi whether public or private. In fact such doubts and reservations concerning medical documents and opinions lead us to pass specific guidelines to the accountability courts hearing NAB cases under the NAO when dealing with accused complaining of medical ailments in our order in the case of C.P. No.D-6761 of 2017 **Syed Ali Raza and others V Federation of Pakistan & another** (unreported) dated 28-12-2017 in this respect we set out below para's 32 to 34 of the aforesaid order.

32. On account of the above discussion, concerning jailed prisoners and the medical issues which they may have during their confinement in jail we consider it appropriate to set out some guidelines for medical treatment for those prisoners in jail in NAB cases since a consistency in approach appears to be lacking and all prisoners suffering from any ailment must be treated equally.

33. **As such we hereby lay down the following guidelines** (although **flexible and non exhaustive** as much will depend on the nature and seriousness of the particular illness and the particular facts and circumstances of each case) for all NAB cases which should be followed by the jail authorities, concerned Doctors, hospitals and accountability courts.

(a) if an accused whilst in jail requires urgent medical treatment which cannot be provided within the jail premises and is potentially an immediate threat to his life the jail superintendent under signature of the jail doctor shall send the accused under guard to the nearest government hospital for his check up with intimation to the accountability court.

(b) the concerned specialist Dr shall then give a check up to the accused and shall return him to the jail premises under guard the next day if the check up finds no serious life threatening illness and such illness can be treated in jail premises with the appropriate medication. On return to the jail the superintendent shall immediately intimate the accountability court.

- (c) If however in the opinion of the Dr further tests etc are required the hospital may admit the accused and complete such tests within 7 days. If the results are similar to (b) above the hospital shall act in the same manner as per (b) above.
- (d) If however, the concerned Dr is of the view that the illness is more serious the Dr. may under intimation to the jail superintendent and accountability court keep the accused under treatment and observation for a further 7 days.
- (e) After the expiry of this further 7 day period the hospital shall return the accused as per (b) to jail under intimation notice to the jail superintendent and the accountability court subject to (f) below.
- (f) If, however after this further 7 day period, the Dr. is of the view that due to the serious nature of the accused ailment it is necessary for the accused to remain admitted in hospital he shall intimate the same to the accountability court setting out the nature of the illness.
- (g) The accountability court shall then establish a medical board to assess the extent of his illness.
- (h) An accountability court when establishing a medical board shall **generally** request the secretary health to constitute a medical board consisting of the required experts in most cases from a Government hospital which will be directed through the order constituting the board to:
 - “give their independent expert opinions in respect of the given illness of the petitioner in black and white on the following two (2) aspects:-
 - (i) Whether the sickness or ailment with which the petitioner is suffering is such that it cannot be treated or cured inside the jail premises hospital **and**
 - (ii) Whether the petitioner's continuous detention in jail is likely to affect his capacity **or is hazardous to his life.**
- (i) In such cases the secretary health will be directed to constitute such a board within 5 to 7 days of the order of the Court and the board shall submit its report to the Court within 15 days of its constitution.
- (j) **However in exceptional cases** where the court is of the view that it would not be appropriate after recording reasons for a medical board to be constituted by the secretary health consisting of Dr's

from Government hospitals. For example, if the accused was deemed to be an influential person on account of his position, status in life, wealth, relationships with influential personalities etc the court shall be at liberty through exercising its discretion to constitute its own board of medical experts on the given illness from experts from non government hospital such as Aga Khan University Medical hospital, Liaquat National Hospital, South city Hospital, PNS Shifa etc from a list of Dr's provided by the NAB along with their expertise, experience and specialization from such hospitals having the required expertise or even from outside the province e.g. PIMS under the same terms of reference at the cost of the petitioner.

(k) In any case if the court has any doubt or concerns or lack of clarity about the medical report so furnished it will be open to the court to call the members of the board to seek explanations and fully satisfy itself as to the its next course of action vis a vis the petitioners medical treatment/place of hospitalization which it shall keep under review through calling for periodic reports on the petitioners medical condition.

(l) If it is found that any Dr or hospital has filed an inaccurate, misleading incorrect or false report/opinion then that Dr/and or hospital shall be subject to the consequences under the law.

34. By setting out the above guidelines, **which we stress are flexible and non exhaustive**, based on the particular facts and circumstances of each individual case it is hoped that only genuine sufferers of serious ailments will be hospitalized outside of prison based on the principles governing bail on medical grounds and that such relief shall be available to all those prisoners confined in jail with medical problems who meet the relevant legal requirements **regardless of their status, standing or position in society or their financial means.**

38. However, **after** the Hon'ble Supreme Court took notice of the petitioners shifting from prison to jail in the aforesaid HRC matter it established another medical board of Dr's from Punjab, Sindh and the military and thereafter on receipt of its report disposed of this matter.

39. This report was not placed before us but based on the above circumstances, and our own guidelines as mentioned above, we considered it prudent to constitute a new medical board of 3 Dr's specializing in neurosurgery and neurology from the Agha Khan University Hospital Karachi (namely Dr.Syed Ather Enam (who was

also a part of the Supreme Court medical Board) Dr. Rashid Jooma and Dr. Sarwar Jamil Siddiqui who vide report dated 24-04-2018 opined as under:.

Opinion:

With reference to the two questions raised by this Honourable Court in its Order dated 18th April 2018, the Medical Board has opined:

- a. On the basis of detailed history, a thorough neurological examination and the MRI films provided, the most likely diagnosis is musculo-skeletal back pain without signs of radiculopathy [nerve root compression]. **Conservative treatment for pain relief including physical therapy is required at this point.** There is no indication for surgical intervention such as discectomy or disc replacement surgery. **Whether the petitioner can be adequately treated in jail would depend on the facilities for pain therapies including physical therapy available there and the jail medical authorities could best provide the information.**
- b. Regarding the second question, **the board is of the opinion that this condition is not life-threatening and is not likely to cause disability.** The natural history of this kind of back pain is one of remission and relapse, meaning over a period of time, the pain will subside only to re-surface every now and again but overwhelming majority of patients continue to live active life with exercise, precautions (like avoiding handling of heavy weight and abrupt bending) and conservative measures." (bold added)

Sd/-

Syed Ather Enam, S.I.
MD, PhD (USA), FRCS (ire), FRCS (Can, SN),
Diploma American Board of Neurological Surgeons

Professor of Neurosurgery
& Chair, Department of Surgery

Sd/-

Rashid Jooma
MBBS (Kar) FRCS (Edin) FRCS (SN)

Professor Neurosurgery
Department of Surgery

Sd/-

Sarwar Jamil Siddiqui
MBBS (Karachi), MRCP(Ireland), FRCP(Glasg)
Assistant Professor &
Section Head, Neurology
Department of Medicine.

40. It would appear that this report to a large extent contradicts the earlier reports vis a vis its findings and it would not meet the requirements of medical bail.

41. As suggested however on the request of the counsel for the petitioner we referred the question raised in point (a) by the Board

to the jail medical authorities namely whether the petitioner can be adequately treated in jail bearing in mind the facilities for pain therapies including physical therapy available there.

42. In response to our query the jail medical authorities vide letter dated 30-04-2018 replied to the effect that they do not have the necessary facilities in order to treat the petitioner.

43. We have also noted via a letter sent to the concerned accountability court on 30-04-2018 a report dated 21-04-2018 from the JPMC's Department of Physical Medicine and rehabilitation from Mr Muhammed Riaz Baig Chughtai who was head of the above department which reads as under:

"DEPARTMENT OF PHYSICAL MEDICINE & REHABILITATION
JINNAH POST GRADUATE MEDICAL CENTRE
KARACHI 75510 PHONE: 99201300 Ex.2734, 2465.
21st April, 2018

Patient's Name:	Sharjeel Inam Memon
Father's Name:	Inam ul Haq.
Age:	48 years.
Diagnosis :	Backache & C. Spcody

Patient is **getting physiotherapy twice a day**, but he is not responding well.

Therefore, **he is advised for "Hydrotherapy" 3-4 times a week**, hopefully it, may produce some good result.

Sd/
21.04.2018
M. Riaz Baig Chughtai
B.Sc. BSPT MPTM SC (PT), PGO
DPT (Post Professional, M. Phil (PT)
Incharge
Orthopedic Workshop
J.P.M.C. Karachi."

44. At this juncture we would like to mention that after the case was reserved for orders the petitioner filed an application in his own name in effect challenging the opinion of the medical board constituted by this court in effect stating that he was not examined properly; that the board had already made up its mind against him and in particular two of its members were not reliable citing reasons. He made the following prayer:

"It is, therefore prayed in the interest of justice that this Hon'ble Court may be pleased to disregard the report of the Agha Khan Board and decide the bail application on the basis of detailed past history including report from 2015 onwards from the UK, UAE, South City Hospital, Karachi, JPMC and three detailed reports of the earlier Board which were never objected to by any party/Nab or may be pleased

to constitute another Board to examine the petitioner and submit its report.”

45. At this belated stage, we do not consider it appropriate or justifiable at this point in time to set up a third medical board. The reason being that in our view if the petitioner had any doubts about the composition of the Board established by this court then such doubts along with reasons should have been brought before this court a few days after the board was established by this court. If the petitioner also at the time of examination considered his examination inadequate or based on pre conceived notions he should again also have brought this to the attention of this court promptly. However the petitioner chose to remain silent on both aspects until the finding of the board was known. Had the Board found in his favor the petitioner would almost certainly neither have challenged its composition nor its findings. Also at this stage to establish yet another medical board may lead to a never ending saga of medical boards being set up with either the NAB or the petitioner challenging both the composition and the findings and as such his application is dismissed.

46. We thus find ourselves in a situation where 3 medical boards of reputed Dr's in their field of JPMC suggest that the petitioners condition entitles him to bail on medical grounds as per the settled law and a yet another medical Board established lastly by this court comprising of all private Dr's which suggests that the final limb of the legal test for medical bail has not been met. Namely, the board is of the opinion that the petitioner's condition is not life-threatening and is not likely to cause disability.

47. What does seem to be clear however is that (a) NAB has not objected to the JPMC's medical boards or their findings and their members have give personal affidavits as to the correctness of their findings.(b) NAB has no objection if the petitioner remains in hospital for his treatment but should not be released on bail (c) that the petitioners treatment cannot be carried out within the jail premises (d) it cannot be said with certainty that the petitioners back problems may not effect his capacity as 3 reports to one suggest that it may with the later report from the JPMC suggesting surgery (e) we are not doctors and are under a duty to ensure that the petitioner does not suffer any permanent disability because of a lack of treatment (Reliance is placed on **Imtiaz Ahmed V State**

(2017 SCMR 1194) but at the same time not to open the floodgates to bail on medical grounds to all persons in jail through potentially dubious and engineered medical reports.

48. We have therefore sought a middle ground based on all the competing medical information before us.

- (a) We do not consider that the petitioner has made out a case for the grant of bail on medical grounds and as such his petition for bail on medical grounds is dismissed.
- (b) Due to the petitioners past medical history his ailment does not appear to be feigned. We note that it appears to be the agreed position by all boards that the petitioner needs physiotherapy.
- (c) That according to the JPMC he needs physiotherapy 2 X's a day and now hydrotherapy 3 to 4 times a week and that hydrotherapy is **not** available at JPMC.
- (d) That according to the JPMC and as confirmed by the Jail authorities the physiotherapy and hydrotherapy which the petitioner now needs is not available in the jail hospital.
- (e) Thus, although the petitioner be returned to jail when so advised by the jail doctors he may be taken under guard from the jail to a hospital of his choice in Karachi where the required physiotherapy and hydrotherapy whichever the petitioner needs shall be provided to him at his own expense and then returned to jail after each treatment.

49. In summary.

- 1. Petitioners Muhammad Hanif and Asim Amir Khan Sikander are both granted post arrest bail subject to them **each** furnishing one solvent surety in the sum of RS 1.5 M (15 lacs) and PR bond in the like amount to the satisfaction of the Nazir of this court.
- 2. Petitioner Syed Masood Hashmi's petition for post arrest bail is dismissed.
- 3. Petitioner Sarjeel Inam Memon's petition for post arrest bail on medical grounds is dismissed however he may be taken to hospital for specialized treatment as and when advised by his Dr's in accordance with para 48 of this order.