

IN THE HIGH COURT OF SINDH, KARACHI

Before:-

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

Mr. Justice Mohammed Karim Khan Agha, J.

Petition No. and name of petitioner along with counsel.

C.P. No.D-456 of 2018 Mst. Rahila Batra V. National Accountability Bureau through its Chairman and others.
Mst. Rahila Batra wife of Fawad Ahmad Batra, petitioner
through Mr. Mohammad Ilyas Khan, Advocate.

Date of Hearing: 27.02.2018

Date of Order: 09.03.2018

ORDER

Mohammed Karim Khan Agha, J. By this order we propose to dispose of the above mentioned petition filed by Mst. Rahila Batra wife of Fawad Ahmad Batra (petitioner) whereby the order of Accountability Court No.IV, Sindh at Karachi in **Reference No.09/2009 (State v. Fawad Ahmad Batra and others)** dated 22.11.2017 (impugned order) has been challenged.

2. The brief facts of the case are that the husband of the petitioner is facing trial in Reference No. 09 of 2009 filed by the National Accountability Bureau (NAB) under the National Accountability Ordinance, 1999 (NAO) for his involvement in corruption and corrupt practices, more particularly his role in embezzling approximately RS7 crore whilst he was Habib Bank Limited (HBL) Garden Branch Manager through operating a parallel banking system with other co-accused who have now entered into plea bargains under NAO, which reference is presently proceedings before the Accountability Court No.IV, Karachi and his case is at an advanced stage,

whereby the I.O. is now subject to cross examination. Earlier the petitioner had filed an application under S. 465 Cr.P.C. which was dismissed by the Accountability Court vide order dated 02.12.2015. This order was challenged by the petitioner before this court which this court dismissed vide a detailed order dated 03.10.2017. The petitioner did not appeal the aforesaid order of this court before the Hon'ble Supreme Court which has now attained finality.

3. Based on paragraph 59 of the aforesaid order of this Court, it appears that the petitioner had moved an application for constitution of a medical board to determine the current medical condition of the accused under S. 465 Cr.P.C. After hearing the parties the learned Judge of the accountability court dismissed the application filed by the petitioner through the impugned order and hence the petitioner has approached this Court for relief.

4. Learned counsel for the petitioner primarily argued that the learned trial judge had erred in the impugned order and failed to take into consideration S. 465 Cr.P.C. in its true perspective and that the learned trial judge should have constituted a medical board to assess the current mental health condition of the petitioner's husband.

5. On the other hand, learned Special Prosecutor, NAB submitted that there was no legal infirmity in the impugned order and he fully supported the same and that this further petition was in fact a delaying tactic on behalf of the petitioner as the trial was close to completion as the

Investigating Officer was now being cross examined and thus for the above reasons he submitted that the petition should be dismissed.

6. We have considered the arguments of learned counsel for the parties and have also gone through the record with their able assistance. For ease of reference we set out paragraph 59 of our order dated 03.10.2017, which dealt with this issue in a detailed manner. Paragraph 59 reads as under:-

“Thus, this petition stands dismissed however it is made clear that **if in the opinion of the trial court** the petitioner’s husband is becoming incapable of making his defense due to a deterioration in his medical condition or another application to this effect is made to the trial court by the petitioner the trial court **may** consider seeking a medical boards opinion on whether the medical condition of the petitioner at the relevant time is **preventing him** from having the capability of making his defense: In addition since the trial of the petitioner’s husband appears to be at an advanced stage with only a few witnesses left and the petitioner’s husband is now the only accused we hereby direct the trial court to decide this matter within 3 months of the date of this order. A copy of this order shall be sent to the concerned trial court for compliance.”

7. According to para-59 if another application was made concerning the petitioner’s mental health condition to the trial Court, the trial Court **may** consider seeking the opinion of a medical board whether the medical condition of the petitioner at the relevant time is preventing him from having the capability of making his defense.

8. Since the petitioner has also largely relied on S. 465 Cr.P.C., we set out the same for ease of reference herein below:-

"Procedure in case of person [sent for trial] before Court of Session or High Court being lunatic. [(1)] **If any person before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence,** the Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Court is satisfied of the fact, it shall record a finding to that effect and shall postpone further proceedings in the case."

9. As can be seen from a bare reading of S. 465 Cr.P.C. it **is for the trial Court to assess by using its discretion** whether the accused at the trial is of unsound mind and consequently incapable of making his defence.

10. It is quite clear from this wording that this is the first hurdle which needs to be crossed **before** the court shall try the fact of such unsoundness and incapability.

11. The above reproduced para 59 of our earlier order also made it clear that if the petitioner made another application regarding fitness to stand trial on account of medical reasons, the trial Court **may** consider seeking the opinion of a medical board whether the medical condition of the petitioner at the relevant time is preventing him from having the capability of making his defence. Thus, it was up to the trial court after hearing the parties to consider whether it was appropriate in its discretion based on the particular facts and circumstances of the case whether or not to constitute a medical Board. There was no direction from this court that a medical board be established if such an application was made. We also consider para 59 of our order to be in consonance with S.465 Cr.PC whereby it is left to the trial court to make the initial

assessment of the medical/mental health condition of the accused before choosing whether or not to proceed further under that section.

12. In our view the impugned order is both a detailed and speaking order and seems to have attended to all the relevant issues. In particular paragraph 8 of the impugned order shows that the trial Court having made its own assessment of the accused who had been appearing before it on a regular basis is not of such unsoundness of mind and incapable to make his defence. Para 8 of the impugned order is set out below for ease of reference:-

"8. In view of the above circumstances I am of the humble opinion that the observations of Hon'ble High Court of Sindh is binding upon this Court and according to which the illness of the applicant is being controlled by medication and it's not reached to the extent that it will prevent him from understanding the nature of the proceeding or prevent him from being incapable of making his defence, which is the requirement of section 465 Cr.P.C. and at this point of time, the applicant is not of such an unsound mind so as to make it incapable for him to make his defence. **The act, conduct and behavior of the applicant accused before this Court is smooth and normal and his behavior is too like other accused person, therefore, I am of the humble opinion that at this stage, due to medication, the applicant accused is living normal health and capable enough to make his defence hence, there is no need to seek further opinion from the Medical Board as suggested by the learned defence counsel in his application.** In view of the above circumstances, I find no merit in the instant application, which is hereby dismissed."(bold added)

13. As such, it is clear that the petitioner has not been able to cross the first hurdle which would enable the further steps envisioned by S. 465 Cr.P.C. to come into play. Furthermore, it is to be noted that the aforesaid order of this

Court which considered the same issue in detail was passed only about six months ago which also dismissed a similar application made by the petitioner in terms of para-59 (supra).

14. For the reasons mentioned above we are of the considered view that the impugned order does not require any interference and as such the impugned order is upheld and the instant petition is dismissed.

15. Before parting with this order we have observed that in our earlier order dated 03.10.2017 (approx 6 months ago) we had directed the trial court to decide this matter within three months of the date of that order. It appears that even at that time the trial was at a relatively advanced stage but it has still not been concluded. We have been informed that the Investigating Officer has given his evidence in chief and is now subject to the cross examination of the petitioner. As such we direct the trial court to hear this case on a day to day basis and decide the same within 45 days of the receipt of this order. The trial Court shall after 6 weeks of the date of this order submit compliance report through MIT-II as to the status of the trial. Office is directed to put up this matter in Court on **03.05.2018** alongwith aforesaid report of the trial Court which should explain, if the trial has not been concluded, why any delays have been caused in the conclusion of the trial.