

IN THE HIGH COURT OF SINDH AT KARACHI

Before: Mr. Justice Syed Muhammed Farooq Shah
Mr. Justice Mohammad Karim Khan Agha

C.P. No.D-5122/2016

Athar Ali Abbasi

v.

The State & another

Athar Ali Abbasi, Petitioner	Through Mr. Zulfiqar Ali Solangi, Advocate.
Respondents No.1 & 2 the State and the Chairman, NAB	Through Mr. Muhammad Altaf, Special Prosecutor NAB. Mr. Ashfaq Rafiq Janjua, Standing Counsel.
Date of hearing:	17-01-2017
Date of Order	24-01-2017

ORDER

Mohammed Karim Khan Agha, J. By this order we propose to dispose of the petition filed by Athar Ali Abbasi (the petitioner) for post arrest bail. The brief facts of the case are that the National Accountability Bureau (NAB) filed Reference No.12 of 2011 The State v. Abdul Majeed & others on 23-02-2011 before the Administrative Judge Accountability Courts Sindh at Karachi whereby 04 accused (Abdul Majeed, Nawabuddin Bhambhro, the petitioner and Ghulam Hadi) were accused of corruption and corrupt practices under the National Accountability Ordinance, 1999 (NAO) on account of their involvement in the misappropriation/embezzlement of RS 7.179M from Habib Bank Limited (HBL).

2. The petitioner and co-accused Ghulam Hadi were declared as proclaimed offenders and the trial proceeded against Abdul Majeed and Nawabuddin Bhambhro which resulted in judgment dated 21-05-2015 whereby the accused Abdul Majeed was given the benefit of doubt and was acquitted and accused Nawabuddin Bhambhro was convicted and sentenced to 07 years Rigorous Imprisonment. As per the aforesaid judgment since the petitioner Athar Ali Abbasi and Ghulam Hadi had already been declared as proclaimed offenders the case against them was ordered to be kept

on dormant file for the revival of the proceedings as and when they were arrested and produced before the Court.

3. After announcement of the judgment the petitioner, who had been outside Pakistan, on his return to Pakistan on 21-08-2016 was arrested at Karachi Airport and is now facing trial in the aforementioned revived Reference. He has currently been in custody for around 5 months.

4. Learned counsel for the petitioner submitted that his case did not fall under the NAO as it was a question of a disputed loan and not one of corruption. He also submitted that he had been issued with a show cause notice in connection with alleged embezzlement by M/s. HBL which had led to the termination of his service with HBL by letter dated 06.12.2008 and as such he had already been punished for any wrong doing which he may have done which he contended was of a civil rather than criminal nature. He further submitted that there was insufficient material on record to connect him to any offence under the Reference and this was a case of further inquiry and, therefore, he was entitled to be enlarged on post arrest bail.

5. In support of his contentions he placed reliance on **Sajid Dadabhoy V NAB** (2015 P Cr. L J 729), **Tauqeer Sadiq v. The State and others** (2014 P Cr. L J (Islamabad) 1019) and **Ehsan Ullah v. The State** (2012 SCMR 1137).

6. On the other hand, learned Special Prosecutor for NAB vehemently opposed the grant of post arrest bail to the petitioner. He contended that the petitioner was an absconder and was not entitled to any relief under the law. Furthermore, the role of the petitioner in the reference was almost identical to that of accused No.2 (Nawabuddin Bhambhro) who was convicted for 07 years Rigorous Imprisonment in the aforesaid judgment arising out of the Reference. He also submitted that there was sufficient evidence to connect the petitioner to the offence as charged and in this regard referred to the S.161 statements of Mr. Zahoor Ahmed Abro dated 16-12-2010, Mr. Bakht Nasar Rathore dated 27-09-2010, Mr. Muhammed Maroof dated 07-01-2011, Mr. Imdad Ali dated 18-10-2010 and others who according to him have fully implicated the petitioner in his role in the embezzlement which amounted in total to a loss of RS11.36 million to HBL and that

evidence of his involvement in embezzlement was further bolstered by deposit slips which clearly implicated him in the offence and had been exhibited at trial and that his submission regarding a loan was simply a smokescreen in order to hide his mis deeds. He did however concede that the liability of the petitioner was of Rs.11,30,000/-. In support of his contention with respect to absconsion he placed reliance on the cases of **Noor Qadir Tawakkal v. Chairman Accountability Bureau** (2007 YLR 550) and **Abid Saeed V DG NAB (Sindh)** (2015 P.Cr.LJ 1732)

7. We have heard the arguments for the parties, considered the documents on record, the relevant law and the case law cited by them at the bar.

8. As is usual in bail cases we make it clear that we have only made a tentative assessment of the evidence on record and that this order will not have any influence on the trial proceedings which will be decided on merits based on the evidence produced before the trial court.

9. Ordinarily we would have had no hesitation in declining the post arrest bail of the petitioner on account not only of his absconsion but the deviousness behind his absconsion and the consequences of that absconsion to the effective administration of justice support for which can be found in the cases of **Noor Qadir Tawakkal v. Chairman Accountability Bureau** (2007 YLR 550) and **Abid Saeed V DG NAB (Sindh)** (2015 P.Cr.LJ 1732)

10. The petitioner could give no explanation as to why he deliberately absented himself from the trial. The facts indicate that he deliberately concealed himself abroad in order to avoid trial and only returned once the trial had concluded and one of the accused had been acquitted. He was therefore deliberately in our view adopting a "wait and see" approach and only when a judgment which he deemed relatively favorable to him was delivered did he attempt to return to Pakistan. It is even unclear whether his return was motivated by his desire to stand trial as he did not surrender to NAB authorities rather he was arrested on his arrival in Pakistan at the airport.

11. Such conduct was not only deliberately made in an attempt to benefit himself but also had the effect of wasting valuable time

of the Accountability Courts which are already over burdened as now the charge will have to be framed against him and the prosecution witnesses again be recalled to give evidence in order to prove the case against him. This consumption of time could have been avoided if the petitioner had not absconded and had faced trial with the other two co-accused. It is also trite law that an absconder should not benefit from his actions which now appears to be the position in this case as the petitioner now knows the extent of the prosecution case against him, loop holes and all, and is now in a position to manufacture a better defense.

12. We are also of the view that the prosecution through the judgment and the S.161 statements before us may well have sufficiently connected the petitioner to the offense charged and thus on this count alone ordinarily the petitioner would probably not be entitled to bail.

13. There is however case law, albeit distinguishable from this case, to the effect that absconsion on its own may not necessarily be fatal to the grant of bail as laid down in the cases of **Ehsan Ullah v. The State** (2012 SCMR 1137) and **Tauqeer Sadiq v. The State and others** (2014 P Cr.LJ (Islamabad) 1019)

14. In **Tauqeer Saddiq's case (Supra)** at P.1022 Para 7 it was held as under:

"7.As far as abscondance is concerned, the petitioner/accused had been convicted in absentia and that conviction has been set aside. Furthermore, abscondance under the NAB law is an offense and is required to be proved through evidence; but it is yet to be proved along with the main allegation leveled against the petitioner/accused. So at present the bail cannot be withheld simply for the reason that the petitioner had absconded. Though it is yet to be proved whether absence of the petitioner amounted to abscondance or not. We are therefore of the opinion that the petitioner is entitled to the concession of bail"

15. In **Ehsan Ullah's case (Supra)** at P.1139 Para 4 the Hon'ble Supreme Court held as under:

"It is settled law that in a case calling for further inquiry into the guilt of an accused person bail is to be allowed to him as of right and not by way of grace on concession and in such a

case the mere absconsion of the relevant accused person may not be sufficient to refuse bail to him"

16. In our view, however, based of the facts and circumstances of this particular case **there exists an exceptional circumstance** which would justify the grant of post arrest bail notwithstanding the absconsion of the petitioner, the evidence potentially connecting him to the offense and the wastage of court time. This exception is the fact that this is a NAB case under the NAO and as recently observed by the Hon'ble Supreme Court by order dated 24-10-2016 in Suo Moto Case No.17 of 2016 (unreported) the NAO should only be used in cases of mega scams rather than petty cases. The aforementioned order in material part observed as under:

"This Court on 02.09.2016, during hearing of Civil Appeal No.82-K of 2015, noticed abuse of authority by the NAB while taking cognizance of petty matters in terms of Section 9 of the National Accountability Ordinance, 1999 (hereinafter referred to as the Ordinance). **The Ordinance was primarily legislated to counter the cases of mega scandals and initiate proceedings against the accused persons who are involved in scandals of mega corruption and corrupt practices.**" (bold added)

17. In this case the prosecution has conceded that the maximum liability of the petitioner is 11 lacs and 30,000. In our view in the scheme of the NAO and its purpose the above amount can be regarded as relatively minor and we do not consider that it would be just to keep the petitioner locked up for what may be a long trial on account of such a relatively minor amount of loss which has been attributed to him especially when such amount can be secured by an appropriate order of this Court.

18. Indeed, this is not a novel concept, as the Hon'ble Supreme Court in the case of **Shamraiz Khan V State** (2000 SCMR 157) granted post arrest bail subject to the accused depositing the entire amount of the alleged loss. Although **Shamraiz Khan's case** (Supra) was not a NAB case it does have some affinity with cases under the NAO as it was a case under S.5(2) of the Prevention of Corruption Act 1947 and thus in our view its concept of depositing the alleged amount of loss may be pressed into service in appropriate cases under the NAO as well in order to avoid accused

persons unnecessarily languishing in jail for long periods of time. provided that other safeguards are also put in place to ensure their non absconsion and attendance at trial. Even otherwise if an accused on bail continuously fails to join the trial proceedings the relevant body may move the Court for the cancellation of that accused's bail on this ground.

19. We are also mindful of the fact that bail should not be withheld as a punishment simply because the petitioner absconded and the potential longevity of his trial bearing in mind that in the earlier trial of the reference as many as 16 PW's gave evidence and the fact that even if the petitioner does deposit his potential liability this does not exonerate him of any penal consequences which may follow if he is convicted in the reference against him.

20. Thus, based on the exceptional facts and circumstances of this case in terms of it not really being a mega scam and the petitioners maximum liability being relatively minor (being only 11 lacs and 30,000), the petitioner is hereby enlarged on post arrest bail **subject to him** depositing 11 lacs and 30,000 with the Chairman NAB which shall be invested in some profitable Government savings scheme by NAB which shall be held by NAB until the disposal of this case, the petitioner furnishing solvent surety in the amount of Rs 500,000 (five lacs) with PR bond in the like amount to the satisfaction of the Nazir of this Court and depositing his original passport with the Nazir of this Court. The Ministry of interior is also directed not to issue the petitioner with any new or duplicate passport and to place his name of the ECL. A copy of this order shall be sent by facsimile to the secretary Ministry of Interior Government of Pakistan, Islamabad for compliance.

21. The petition stands disposed of in the above terms.

Dated: 24-01-2017