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ORDER SHEET
**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.**

Cr. Bail Application No.D-12 of 2024

Cr. Bail Application No.D-15 of 2024

Cr. Bail Application No.D-17 of 2024

Cr. Bail Application No.D-18 of 2024

DATE	ORDER WITH SIGNATURE OF JUDGE(s)
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24.04.2024.

Mr. Shahab Sarki, Advocate for applicant in Cr. Bail Application No.D-12 of 2024.

M/s. Ishrat Ali Lohar & Muhammad Arif Kallar, Advocate for applicant in Cr. Bail Application No.D-15 of 2024.

Mr. Muhammad Arshad Shar, Advocate for applicant in Cr. Bail Application No.D-17 of 2024.

Mr. Farooq H. Naek, Advocate for applicant in Cr. Bail Application No.D-18 of 2024.

Mr. Ghulam Abbas Sangi, Asst. Attorney General for Pakistan.

Mr. Niaz Hussain Mirani, Special Prosecutor NAB along with Irfan Ali Deputy Director NAB (Investigating Officer).

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We have heard the learned counsel(s) for the applicant(s) as well as learned Special Prosecutor NAB and Asst. Attorney General for Pakistan in all captioned bail applications. Reserved for order(s).

Hafiz Fahad

HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Bail Application No.D-12 of 2024
[Mukhtiar Ali Chandio versus The State]

Cr. Bail Application No.D-15 of 2024
[Tabish Ali Shah Hussaini versus The State]

Cr. Bail Application No.D-17 of 2024
[Saood Ul Haq versus The State & another]

Cr. Bail Application No.D-18 of 2024
[Muhammad Adnan Rasheed versus The State Ors.]

BEFORE:

MR. JUSTICE MUHAMMAD KARIM KHAN AGHA
MR. JUSTICE OMAR SIAL

M/s Shahab Sarki, Farooq H. Naek, Ishrat Ali Lohar,
Muhammad Arif Kallar and Muhammad Arshad Shar,
advocates for applicants

Mr. Ghulam Abbas Sangi, Assistant Attorney General

Mr. Niaz Hussain Mirani Special Prosecutor NAB a/w
IO Irfan Ali

Date of hearing : 24.04.2024

Date of decision : 09.05.2024

ORDER

MUHAMMAD KARIM KHAN AGHA, J. The applicants seek post-arrest bail in Reference No.01 & 03 of 2023 after rejection of their post-arrest bail the by learned Accountability Court No.II Hyderabad (Trial Court).

2. The brief facts of the prosecution case are that based on news clipping dated 12.11.2022, regarding misappropriation in government funds meant for acquisition of land for construction of Hyderabad to Sukkur M-6 Motorway, an inquiry was authorized on 23.11.2022 by the NAB authorities to probe the matter and on its completion, the said inquiry was upgraded into investigation. During the course of the investigation it surfaced that various

private persons of both Districts i.e Matiari and Naushahro Feroze in collusion with government officials (**which include the present applicants**) are involved in embezzlement of funds which were meant for acquisition of land for construction of Hyderabad to Sukkur M-6 Motorway by way of dummy awards in violation provisions of Land Acquisition Act. The present accused persons were arrested during course of investigation and on completion of investigation References bearing No.01 & 03 of 2023 were filed against them and co-accused persons before the learned trial Court, which were clubbed together and are pending adjudication before the learned trial Court. As noted above the present accused persons filed applications for post-arrest before the learned trial Court in aforesaid References which were dismissed hence they have approached this Court for post-arrest bail. Since common question of law and facts is involved in all the captioned bail applications, as such all are being decided through this single Order.

3. Learned counsel for the applicants have contended that all the applicants be admitted to post arrest bail based on the ground of Statutory delay in accordance with S.497 Cr.P.C. According to them, all the applicants have been in jail for a period of 18 months and no delay in the trial has been caused on their part and as such they are entitled to bail on statutory grounds of delay in that they have served more that one year in jail and the trial against them has not yet been completed through no fault of their own. In support of their contentions they placed reliance on the cases (i) SHAHID UMAR vs. CHAIRMAN NAB and 2 others [2019 P Cr.L.J 370], (ii) The STATE/ANF vs. MUHAMMAD ASIM KHAN [2022 YLR Note 64 Sindh], (iii) CHAIRMAN NAB versus NASAR ULLAH and 5 others [PLD 2022 SC 497], (iv) MUHAMMAD USMAN vs. The STATE and another [2024 SCMR 28], (v) Dr. ASIM HUSSAIN and others vs. The STATE [2017 P Cr. L.J 631], (vi) HUSNAIN MUSTAFA vs. The STATE [2019 SCMR 1914] and two unreported Orders dated 24.06.2021 and 03.04.2024 passed by a Division Bench of this Court

in C.Ps No.D-2148, 2281 of 2017, C.P No.D-2069 of 2019 as well as Cr. Bail Application No.D-51 of 2023 respectively.

4. On the other hand learned Special Prosecutor NAB opposed the grant of bail on Statutory grounds of delay on the basis that the offence was a very heinous one which had caused a large loss to the national exchequer; that there was a likelihood that the applicants would abscond; that no delay had been made on the part of the NAB in concluding the trial although he conceded that no delay had also been caused by any of the applicants and as such the grant of bail to all the applicants be dismissed.

5. We have considered the submissions of the parties, perused the material available on record and considered the relevant case law.

6. It is noted that none of the applicants have applied for bail on merits but only on the statutory ground of delay in conclusion of their trial. As such it is only this aspect which we shall consider in determining their bail applications.

7. Initially under the National Accountability Ordinance 1999 (NAO) offences under the NAO were not bailable and the accused had to approach the high court for bail under its constitutional jurisdiction. Statutory bail due to delay in conclusion of the trial was also excluded although bail could be granted for delay in concluding the trial on hardship grounds at the discretion of the court acting in its constitutional jurisdiction on criteria laid down by the authorities of the Supreme Court.

8. In the last few years whole sale amendments however have been made to the NAO. One of the most significant ones is that NAO offences are now bailable and bail can be granted by the trial court under the relevant provisions of the Cr.PC. In this respect Section 17 of the NAO reads as under;

"17. [Provisions] of the Code to apply."

- (a) *Notwithstanding anything contained in any other law for the time being in force, unless there is anything inconsistent with the provisions to this Ordinance, the provisions of the code of Criminal Procedure, 1898 (Act V of 1989), shall mutatis mutandis, apply to the proceedings under this Ordinance. (bold added)*
- (b) *Subject to sub-section (a), the provisions of Chapter XXIIA of the code shall apply to trials under this Ordinance.*
- (c)
- (d)"

9. As such following such amendment now a days since the NAO does not specifically bar the right to bail or make the offences under the NAO non bailable Section 497 (post arrest bail) and S.498 Cr.PC (pre arrest bail) will now govern bail in cases under the NAO which has now to be applied for initially before the trial court and appealed to the High Court, and finally the Supreme Court under these sections, if necessary.

10. No longer is it necessary to seek bail directly from the High Court in offences under the NAO through its constitutional discretionary jurisdiction but even when it was the case the Supreme Court had deprecated the delay in concluding trials under the NAO equating such delays to the potential violation of the fundamental right to life, liberty and the right to an expeditious trial and had underlined the importance of granting bail in cases under the NAO for delay in their conclusion from this perspective and was quite prepared to grant bail on hardship grounds especially on the touch stone of the above violations of the Constitution. In this respect the Supreme Court in the case of **Chairman NAB V Nasrullah** (supra) held as under;

"7. "Delay" in the conclusion of a criminal trial is antithetic to the very concept of a "fair trial" and "due process" guaranteed by Article 10A of the Constitution. The right to a fair trial is a cardinal requirement of the rule of law. If an accused cannot be tried fairly for an offence, he should not be tried for it at all. Conclusion of trial within a reasonable time is an essential component of the right to a fair trial. The

prolonged pre-trial detention of the accused also defies the presumption of innocence, another essential element of the right to a fair trial, for an accused is presumed innocent until he is proven guilty by proof beyond reasonable doubt. Even before the addition of Article 10A in the Constitution, the right to a fair trial and due process was well-entrenched in our jurisprudence and considered to be a part of the right of access to justice enshrined in the constitutional right to be dealt with in accordance with law guaranteed by Article 4 and the fundamental right to life and liberty guaranteed by Article 9 of the Constitution. The incorporation of the right to a fair trial and due process by Article 10-A in the Constitution as an independent fundamental right underscores the constitutional significance of fair trial and due process and like other fundamental rights, it is to receive a liberal and progressive interpretation and enforcement.

8. The NAB Ordinance though does not provide for the release of an accused on bail pending his trial but ensures the expeditious conclusion of the trial, and thereby eliminates the possibility of protracted detention of the accused before his conviction. Under Section 16(a) of the NAB Ordinance, the trial is to proceed on a day-to-day basis and to be concluded within thirty days. The bar on granting bail to the accused under the NAB Ordinance is equitably balanced by providing for the trial to proceed on a day-to-day basis and its conclusion within thirty days. This statutory balance between the bar to grant bail and the expeditious conclusion of the trial would be rendered meaningless if an under-trial accused is detained for a long unexplained and unjustified period without determination of his guilt. While Section 16(a) of the NAB Ordinance that provides for concluding the trial within a period of thirty days is not to be construed strictly and applied rigidly as held in *Tallat Ishaq*, it manifests clearly the legislative intent for expeditious conclusion of the trial. The Legislature cannot be presumed to have intended an inordinate delay in conclusion of the trial and a prolonged detention of an under-trial accused, as a reasonable intention must always be attributed to the Legislature. Therefore, when the provision of NAB Ordinance requiring conclusion of trial within thirty days is not implemented, the corresponding provision barring grant of bail to the accused would also become proportionally plaint. If the scheme of a law in regard to a vital part fails, the sanctity of the other part, as observed by *Salahuddin, J. in Zahur Ilahi*, must of necessity be affected and what appears to be rigid must give way to flexibility. Inordinate delay in conclusion of the trial of an accused, for no fault on his part, being not envisaged by the NAB Ordinance would inevitably attract the

constitutional protections under Articles 4, 9 and 10A of the Constitution. In such a situation, it is just, fair and equitable that the prosecution (NAB) should not oppose bail, and if it does so, the courts would consider the opposition as unreasonable and grant bail, enforcing the fundamental rights of the accused.

9. Inordinate or long delay in the conclusion of the trial for no fault of the accused and his protracted detention without determination of his guilt, as held by this Court in *Riasat Ali*, amount to harassment and abuse of the process of law. Such delay can therefore be a valid ground for releasing the accused on bail and restoring his fundamental right to life and liberty. No doubt, the right to life and liberty guaranteed by Article 9 of the Constitution is "subject to law" but the law, which can curtail this right, means a law that promotes larger public interest and not a law that impedes "fair trial" and limits "due process". The general criminal law has balanced the public interest and individual rights to life and liberty by recognizing the right of an accused to be released on bail, in case the trial against him is not concluded, for no fault on his part, within a specified period from the date of his detention, that is, one year for offences not punishable with death and two years for offences punishable with death. Tallat Ishaq relied upon by the learned counsel for the petitioner also recognizes the ground of "shocking, unconscionable and inordinate delay" in the conclusion of the trial as a ground for granting the accused the relief of bail. Tallat Ishaq, however, does not specify what period of delay would be considered as "shocking, unconscionable and inordinate". It has left to the discretion of the courts to determine it in the peculiar facts and circumstances of each case. Such a discretion must be structured equitably and exercised uniformly. In this regard, the courts can borrow guidance from, and act upon, the legislative wisdom codified in the general criminal law balancing the public interest with the individual rights, and can accordingly give effect to the scheme of the NAB Ordinance and enforce the fundamental rights of the accused to life, liberty, fair trial and due process guaranteed under Articles 9 and 10A of the Constitution".

11. As noted above now a days Section 497 Cr.PC which deals with post arrest bail, which the applicants have applied for, is applicable to bail in cases under the NAO which is set out below for ease of reference;

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

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

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

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

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

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

12. It is noted that the applicants have all applied for post arrest bail under the third proviso to S.497 Cr.PC. which has three main limbs which all need to be satisfied;

- (a) They are not accused of an offence punishable with death and
- (b) They have been detained for such offence for a continuous period exceeding one year and

(c) They are not a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

13. It is significant that when dealing with cases of statutory bail on the ground of delay under S.497 Cr.PC this **is not a discretionary relief** to be given by the courts. Once all the limbs of the third proviso of S.497 Cr.PC have been made out bail is to be granted **as of right** as was held as under in the case of **Muhammad Usman** (Supra);

"The right of an accused to seek bail on statutory grounds cannot be defeated for any other reason except on the ground as has been explicitly described under the third and fourth provisos to section 497(1) of Cr. P. C. The accused becomes entitled to bail as of right after the statutory period expressly stated in clauses (a) and (b), as the case may be, have expired and the trial has not concluded. This accrual of right is manifest from the language of the third proviso. Such a right can only be defeated if the prosecution is able to show that the delay in the trial was attributable to an act or omission of the accused or a person acting on his behalf."(bold added)

14. Turning to see whether the three limbs of the third provision to S.497 Cr.PC have been made out in the applications in hand.

(a) Since none of the applicants have been accused of an offence punishable with death the first limb is made out.

(b) All of the applicants have been in jail for a period of about 18 months (i.e over one year) and no delay has been caused on their part in the conclusion of the trial and as such the second limb is made out.

In terms of delay in concluding the trial it is notable that the Reference against the applicants was filed before the concerned accountability court on 18.07.23 with the charge being framed on 15.08.23 and thereafter 3 witnesses evidence was recorded. The National Accountability Bureau (NAB) then filed a supplementary reference on 17.01.24 and an amended charge was framed on 21.02.24 which means that the evidence of all 3 witnesses will now need to be rerecorded. The net result now is that the applicants have been in jail for 18 months and no witness has been examined to date. There are 43 accused who will all be

entitled to cross examine 208 witnesses through a separate counsel so it is hard to see how such a trial can be concluded in a minimum of 5 years and in such circumstances it would be unjust and potentially a violation of various articles of the Constitution to keep the applicants behind bars especially as they might be acquitted at the end of the trial and no compensation would be available to them despite such a long period of incarceration. Even if we gave a direction to complete the trial within 6 months it is apparent that this direction could not be complied with based on the above discussion (where the evidence of not a single one of the potential 208 witnesses has been lead. It is certainly not a case which is at the fag end. Quite the opposite.) and as such would prove fruitless and only prolong the misery of further incarceration for another 6 months for the applicants and as such would achieve no useful purpose. Even otherwise since statutory bail on the grounds of delay is a **right** as opposed to discretion, as discussed earlier, it is doubtful whether any such direction could be given under the law which in any event would not be binding on the trial court. In many ways NAB seems to be its own worst enemy in delaying trials but putting so many accused and so many witnesses into a reference so that the trials virtually become never ending. Most NAB trials continue for years on end so inevitably statutory bail on the grounds of delay will be granted by the courts. The time has come, in order to ensure effective and expeditious prosecutions, for NAB to carefully manage its cases and ensure that only the most responsible persons are included in the reference with the strongest documentary evidence and fewest number of witnesses.

(c) None of the applicants is a previously convicted offender for an offence punishable with death or imprisonment for life or is a person who, in the opinion of the Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

15. Thus, based on the above discussion since all the applicants have met all the requirement of the third provision to S.497 Cr.PC they are all entitled to statutory bail on the grounds of delay in concluding their trial under that section as of **right**.

16. The argument that the crime is heinous and therefore bail should be denied on statutory grounds we find to be misconceived as even the legislature under S.497 Cr.PC has given person's accused of murder (which carries a potential death sentence or life

imprisonment on conviction whereas for offences under the NAO the maximum sentence on conviction is 14 years imprisonment) the ability to be permitted bail on Statutory grounds due to a delay in the conclusion of their trial. It is not the heinousness of the offence which is of such significance as per the scheme of S.497 Cr.PC but the necessity of completing trials speedily so that persons who might be acquitted after their trial have not been left to languish in jail for years on end whilst their trial is concluded provided that they have not caused the delay in concluding the trial keeping in view that it is the duty of the State to expeditiously prosecute those it charges with offences and deprives them of their liberty. In this respect reliance is placed on the case of **Dr. Asim** (Supra) which held as under;

"It is well settled that object of trial is to make an accused to face the trial and not to punish an under trial prisoner. The basic idea is to enable the accused to answer criminal prosecution against him rather than to rot him behind the bars. Accused is entitled to expeditious access to justice, which includes a right to fair and expeditious trial without any unreasonable and inordinate delay. The intention of law is that the criminal case must be disposed of without unnecessary delay. It is not difficult to comprehend that inordinate delay in imparting justice is likely to cause erosion of public confidence in the judicial system on one hand and on the other hand it is bound to create a sense of helplessness, despair feeling of frustration and anguish apart from adding to their woes and miseries"

17. It is also well settled by now that bail cannot be withheld as a punishment and the heinousness nature of the crime is no reason to refuse bail. In this respect reliance is placed on the cases of **The State through ANF V Muhammed Asim Khan** (Supra) and **Hasnain Mustafa v State** (supra). Furthermore, despite the entitlement to bail for the applicants on the statutory ground of delay it cannot be lost sight of that this is a case involving white collar crime where the evidence is mostly based on documentary evidence which cannot be tampered with by the applicants and the fact that the applicants are no longer required for investigation as the amended charge has now been framed.

18. We must also take a step back and consider what is the actual purpose of bail? The answer is to ensure that the accused attends the trial proceedings which can be achieved in most cases by providing an adequate surety. It must be remembered that the accused is innocent until proven guilty and even then beyond a reasonable doubt and is entitled to the benefit of the doubt (which also applies at the bail stage) so the continued incarceration of an accused must also be taken with a great deal of care and caution and on solid legal grounds. In this case we have not commented on the merits of the case at all and as such if the accused are granted bail this will not prejudice either side at trial and the trial court will be left to reach its own conclusions based on the evidence before it in accordance with law. The contention that the applicants might abscond is mere speculation and could be unfairly used to deny bail to any accused in nearly every case. Even otherwise measures can be put in place to make any potential absconsion extremely difficult.

19. The upshot of the above discussion is that each of the applicants Mukhtiar Ali Chandio, Tabish Ali Shah Hussaini, Saood Ul Haq and Muhammad Adnan Rasheed are all granted post arrest bail on the statutory ground of delay in conclusion of their trial under the third proviso of S.497 Cr.PC **subject** to them furnishing solvent surety in the amount of **Rs.15,00,000 /- [Rupees Fifteen Lacs]** each and PR bond in the like amount to the satisfaction of the Additional Registrar of this court.

20. The Ministry of Interior shall immediately place the names of all the applicants namely Mukhtiar Ali Chandio, Tabish Ali Shah Hussaini, Saood Ul Haq and Muhammad Adnan Rasheed on the ECL.A copy of this order shall be sent by the office to the secretary ministry of Interior for compliance.

21. The bail applications stand disposed of in the above terms.