

IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-

MR. JUSTICE MUHAMMAD IQBAL KALHORO

MR. JUSTICE SHAMSUDDIN ABBASI.

C.P. No. D-6373 of 2019

Petitioner Syed Atif Hussain Naqvi son of Syed Abid Hussain Naqvi through Mr. Shaukat Hayat, Advocate.

Respondents The Chairman NAB & 2 others through Mr. Riaz Alam Special Prosecutor NAB.

C.P. No. D-4092 of 2019

Petitioner Muhammad Feroze son of Haji Shaukat through Mr. Qamar Iqbal, Advocate.

Respondents Federation of Pakistan & 2 others through Mr. Riaz Alam Special Prosecutor NAB.
Mr. Irfan Memon, DAG.

C.P. No. D-4407 of 2019

Petitioner Faheem-ud-din Ahmed son of Rafi-ud-din Ahmed through Mr. Muhammad Fahim Zia, Advocate.

Respondents Federation of Pakistan & 3 others through Mr. Riaz Alam Special Prosecutor NAB.
Mr. Irfan Memon, DAG.

C.P. No. D-6774 of 2019

Petitioner Sarfraz Ahmed son of Bashir Ahmed through M/s Dildar Khan Jahangiri and Muhammad Saeed Abbasi, Advocates.

Respondents The Chairman NAB & 2 others through Mr. Riaz Alam Special Prosecutor NAB.

Dates of hearing 11.11.2019 and 25.11.2019

Date of order **09.12.2019**

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ORDER

SHAMSUDDIN ABBASI, J:- Through their respective petitions noted above, petitioners Syed Atif Hussain Naqvi, Muhammad Feroze, Faheem-ud-din Ahmed and Sarfraz Ahmed seek post-arrest bail in

NAB Reference No.14 of 2017, pending adjudication before Accountability Court No.II, at Karachi, mainly on the ground of statutory delay.

2. Earlier the petitions for pre-arrest bail of petitioners Syed Atif Hussain Naqvi, Sarfraz Ahmed and Muhammad Feroze have been declined by this Court on merits vide order dated 23.12.2017. Feeling aggrieved by the said order, petitioner Syed Atif Hussain Naqvi preferred Civil Petition No.43-K of 2018 before Hon'ble Supreme Court, which was dismissed as not pressed through order dated 28.03.2018. Then through their respective petitions, the petitioners applied for post-arrest bail, which were dismissed by this Court on merits vide consolidated order dated 04.09.2018 with the following directions:-

“15. We may add here that object of the criminal trial is to make an accused to face the trial and not to punish an under trial prisoner for the offence alleged against him and accused is entitled to expeditious excess to justice which included a right to fair and expeditious trial without any unreasonable delay. The trial Court is, therefore, directed to expedite the trial and conclude it at an earliest, preferably within a period of six months under intimation to this Court through M.I.T-II”.

Impugning the above order, petitioner Syed Atif Hussain Naqvi again approached the Hon'ble Supreme Court in C.P. No.1109-K of 2018 for post arrest bail. The Hon'ble Supreme Court by an order dated 25.01.2019 disposed of the petition with the following observation:-

“Learned counsel states that if an order is passed for early disposal of Accountability Reference pending before the Accountability Court No.II, Karachi he will not press the instant petition. He states that charge was framed in the year 2017 and since then only two prosecution witnesses have been produced and their evidence has been recorded by the Accountability Court and as many as 21 more witnesses are remained to be examined as per statement made by the Investigating Officer.

2. *In the circumstances, we direct the Accountability Court No.II, Karachi to record the evidence of all the witnesses. The prosecutor NAB so also Investigating Officer shall ensure that all the witnesses do appear before the Accountability Court on next date to be fixed before the said court and their evidence is recorded day to day and reference is heard and decided within three*

months. With the above observation, this constitution petition stands disposed of”.

Thereafter, the petitioners have applied for post-arrest bail through instant petitions.

3. It is jointly contended on behalf of the petitioners that in terms of the directions given by this Court on 04.09.2018, the trial was to be completed within six months which time elapsed on 04.03.2019 whereas the timeframe given by the Hon'ble Supreme Court vide its order dated 25.01.2019 has expired on 25.04.2019 but the learned trial Court has miserably failed to conclude the trial. Therefore, the petitioners are entitled to be released on bail on the ground of delay in trial. It is next submitted that out of 23 witnesses the prosecution has only been able to partly examine one PW namely, Jameel Ahmed Baloch whose cross-examination is reserved for want of his appearance. It is also submitted that the petitioners or their counsel are not responsible for inordinate delay caused in the trial, which has been occasioned due to the prosecution. The prosecution was duty bound to produce its witnesses before the trial Court for recording their evidence and failing to discharge its responsibility, the petitioners may be enlarged on bail. Reliance has been placed on the cases of *Talat Ishaq v National Accountability Bureau* {PLD 2019 Supreme Court 112}, *Sharjeel Inam Memon v National Accountability Bureau* {SBLR 2019 Sindh 1499}, *Syed Manzar Abbas v Nationality Accountability Bureau* {2019 MLD 581}, *Atta Abbas Zaidi v Chairman National Accountability Bureau and 2 others* {PLD 2017 Sindh 120}, *Abid Wali Khoso and others v National Accountability Bureau and others* {2018 P.Cr.L.J. 1607}, *Zaigham Ashraf v The State and others* {2016 SCMR 18}, *Muhammad Saeed Mehdi v The State and 2 others* 2002 SCMR 282}, *Anwar Saifullah Khan v The State and 3 others* {2001 SCMR 1040}, *Himesh Khan v National Accountability Bureau and others* {2015 SCMR 1092}, an unreported order dated 28.10.2019, passed by a Division Bench of this Court in the matters of *Sarang Latif etc. v National Accountability Bureau*, in C.P. No.D-4526 of 2018 etc. and another unreported order dated 09.01.2019, rendered by Hon'ble Supreme Court in the matter of *Muhammad Ashraf v National Accountability Bureau*, in Civil Petition No.2672 of 2018.

4. In contra, the learned Special Prosecutor NAB has opposed the grant of bail to the petitioners on the ground that their petitions for grant of post-arrest bail have already been declined by this Court on merits and seeking bail on the pleas of delay in trial and non-compliance of directions by the trial Court are not valid grounds. In support of his submissions, he has placed reliance on the cases of *Nusrat Hussain Shah v Chairman National Accountability Bureau* {2019 MLD 680} and *Mumtaz Ali Malik v National Accountability Bureau* {2018 MLD 1975}.

5. Heard and record perused minutely.

6. The case of the prosecution as per reference is that Karachi Development Authority {KDA} was tasked with development within the Karachi City and in that connection KDA had reserved a number of amenity plots in KDA Scheme No.36, Karachi, which could not be allotted, exchanged and/or transferred for residential and/or commercial purposes, however, the officers/officials of KDA, nominated in the Reference, with conscious knowledge misused their authority and indulged themselves in allotting, transferring 23 amenity plots in Gulistan-e-Jauhar, KDA Scheme No.36, Karachi, by creating 296 residential plots (china cutting) illegally and unauthorizedly for pecuniary benefits/illegal gains for co-accused/beneficiaries named in the Reference, who in connivance with the KDA officials received the said plots through fake allotments, challans and then sold out the same to the purchasers, who were completely unaware of the scam, thereby earned huge profits for themselves and caused heavy losses to the Government exchequer.

7. Since the petitioners have applied for bail on the ground of statutory delay, hence we would like to see what is the stage and progress of the case in the trial Court and whether any delay is attributable to the petitioners or not, which is the prime factor and ought to be considered before allowing the bail to an accused on the ground of statutory delay.

8. To ascertain as to whether the delay in the trial has been caused or occasioned by the petitioners or the prosecution, we have carefully perused the diary sheets annexed with the petition and the

report submitted by the learned trial Court as to the progress of the case. A bare perusal of the record reflects that the Reference was filed on 28.04.2017 and the petitioners were arrested on 23.12.2017, and are, thus, behind the bars for a period of more than 23 months. It is also to be noted that the directions given by this Court as well the Hon'ble Supreme Court for completion of trial have not been complied with by the trial Court. As per case diaries the charge was framed on 07.12.2017 and out of 23 witnesses only one PW Jameel Ahmed Baloch has been partly examined on 07.04.2018 and 08.05.2018 and since then his cross-examination is reserved for want of his appearance before the trial Court. The diary sheet dated 11.06.2019 shows that the said PW was arrested by NAB Rawalpindi in the fake account case and was remanded to judicial custody on 16.05.2019. The record does not reflect as to whether any serious effort was made either by the prosecution or the learned trial Court for causing production of PW Jameel Ahmed Baloch for the purposes of cross-examination or in his absence procuring attendance of other witnesses. The petitioners are behind the bars since 23.12.2017 and despite directions of this Court as well Hon'ble Supreme Court, the learned trial Court has failed to complete the trial within specified time. During hearing we asked learned Special Prosecutor NAB that in what period, the said witness could be produced by NAB in the trial Court for recording of his further evidence, he could not give any timeline for this purpose, which would essentially mean that the trial has been virtually struck up and there is no likelihood of any progress in it in near future. Hence, in view of this background of the matter, the delay is not caused or occasioned due to any inaction or impediment and /or any deliberate attempt on the part of the petitioners or their counsel. As noted above out of 23 witnesses, only one PW has been partly examined so far. Naturally, it would take considerable time for recording evidence of remaining witnesses and keeping in view the present speed, velocity and pace of trial, there is no likelihood of the trial being concluded in near future. 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 shocking, unreasonable and inordinate delay.

9. It is true that the statutory law is not available to an accused facing charges under NAO, 1999, however, in the case of *Khan Asfandyar Wali v Federation of Pakistan through Cabinet Division* {PLD 2001 SC 607} the Hon'ble Supreme Court has devised a strategy for granting bail to such accused through Constitutional Jurisdiction of the High Court provided their cases are arguable for the purpose of grant of bail. In the case of *Himesh Khan v The National Accountability Bureau (NAB), Lahore and others* {2015 SCMR 1092}, the Hon'ble apex Court held as under:-

"An accused person cannot be left at the mercy of the prosecution to rot in jail for an indefinite period. The inordinate delay in the conclusion of trial of detained prisoners cannot be lightly ignored provided it was not caused to any act or omission of accused. In the case of The State v Syed Qaim Ali Shah {1992 SCMR 2192}, the accused was facing charges under the Suppression of Terrorist Activities (Special Courts) Act (XV of 1975) where under section 7 thereof grant of bail even in bailable offences was taken out of the discretion of the Court, however, it was held that despite of exclusion clause beneficial provision of section 497, Cr.P.C. can be pressed into service in some other genuine and rare cases to provide relief of grant of bail to a highly deserving accused, incarcerated in prison for a longer duration".

In another case of *Muhammad Jameel Rahi v D.G. NAB and others* {2012 SCMR 552}, the Hon'ble Supreme Court held that:-

"S. 9(a) (ix) & (b)---Cheating members of public at large---Bail, grant of---Delay in conclusion of trial---Accused who started his career as a school teacher and when arrested was an Assistant Education Officer, was behind the bars for the last more than 28 months and during that period, out of 416 prosecution witnesses only 150 witnesses had been examined and conclusion of trial in near future was not in sight---Effect---Nothing was available on record to indicate that accused was in any manner, responsible for the delay nor it had been alleged by prosecution---Bail was allowed".

Similarly, in the case of *Talat Ishaq v National Accountability Bureau and others* {PLD 2019 Supreme Court 112}, it has been observed as follows:-

"There is also a long chain of authorities and dicta of this Court where bail has been granted on account of shocking delay in the conclusion of trial in cases falling under the NAB laws".

23. The survey of the precedent cases detailed above and a careful reading of the judgments rendered or

orders passed in those cases leads us to conclude as follows:-

- (a)*
- (b)*
- (c)*
- (d)*
- (e)*
- (f) Ordinarily bail is allowed to an accused person on the ground of delay only where the delay in the trial or the period of custody of the accused person is shocking, unconscionable or inordinate and not otherwise. The primary consideration for grant of bail on the ground of such delay is undue hardship and more often than not prime facie merits of the case against the accused person are also looked into before admitted him to bail on the ground of delay.*
- (g) Before admitted an accused person to bail on the ground of hardship caused by a shocking, unconscionable or inordinate delay a High Court or this Court also looks for the reasons for the delay and if some significant or noticeable part of the delay is found to be attributable to the accused person than the relief of bail is withheld from him”.*

10. In view of the dicta laid down by the Hon'ble apex Court in the judgments (supra), the case of petitioners is good for the purpose of bail and they are entitled to the concession of bail on the ground of delay in conclusion of trial. Consequently, the petitioners are admitted to bail provided they furnish a solvent surety in the sum of Rs.10,00,000/- {Rupees ten lac only} each and execute personal bond in the like amount to the satisfaction of the Nazir of this Court. However, while parting with this order, we would direct the learned trial Court to expedite the trial and complete it as quickly as possible by adopting all methods in procuring the attendance of prosecution witnesses. It may also be clarified that the trial Court shall not be influenced by the observations made herein above and shall decide the case purely on merits and material made available before it without causing prejudice to either side.

11. The above four petitions stand allowed in the foregoing terms.

JUDGE

JUDGE