ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI.

Present:
Mr. Muhammad Iqbal Kalhoro J.
Mr. Justice Shamsuddin Abbasi J.
Mr. Adnan Iqbal Choudhry J:

C.P.No.D-1914 of 2020

Amir Akber Khan..……..…….……Petitioner

VERSUS

NAB & others ……..……Respondents

C.P.No.D-1911 of 2017
C.P.No.D-1912 of 2017

Makhdoom Syed Faiz Mustafa…….…….……Petitioner

VERSUS

The NAB & others……..…….……Respondents

C.P.No.D-1991 of 2017

Syed Midhat Kazmi……..……Petitioner

VERSUS

NAB & others ……Respondents

C.P.No.D-2357 of 2017

Muhammad Qaiser Hayat……..……..…….Petitioner

VERSUS

NAB & another……..……Respondents

C.P.No.D-2500 of 2017

Ali Asghar Kalwar……..……Petitioner

VERSUS

The NAB & others…..……..……Respondents

C.P.No.D-5429 of 2018

Syed Shafqat Hussain Shah…….…..……Petitioner

VERSUS

NAB & another……..……Respondents

C.P.No.D-6336 of 2018

Ghulam Hyder Jamali…….…… Petitioner

VERSUS

Chairman, NAB & others…….……..Respondents

C.P.No.D-6387 of 2018

Syed Naeem Shah…….……Petitioner

VERSUS

NAB & another …….……Respondents

C.P.No.D-3677 of 2019

Rizwan Hussain…….……..……Petitioner

VERSUS

NAB …….…….Respondent

C.P.No.D-1543 of 2020

Ashraf Jabbar Qureshi…….……Petitioner

VERSUS

NAB & others…….……Respondents

C.P.No.D-1655 of 2020

Ameer Bux & others…….……Petitioners

VERSUS

NAB & others …….……Respondents

C.P.No.D-2163 of 2020

Najam uz Zaman ……Petitioner

VERSUS

Federation of Pakistan & others……Respondent

C.P.No.D-5802 of 2020

Javed Iqbal …….……..Petitioner

VERSUS

NAB & others…….…….……..Respondent

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Mr. Farooq H. Naik, advocate for petitioners in C.P.No.D-6336 of 2018.
M/s. Raghib Ibrahim Junejo and Muhammad Rahman Ghous, Advocate for petitioner in C.P.No.D-1914/2020.
Mr. Raj Ali Wahid, advocate for the petitioner in C.P.Nos.D-1543, 1655 and 5802 of 2020.
Mr. Rizwan H. Nadeem, Advocate for petitioner in C.P.No.D-1991/2017.

Mr. Waleed Rehan Khazada, Advocate for petitioner in C.P.No.D-2357/2017.
Mr. Irfan Ahmed Memon, advocate for petitioner.D-1911 & 1912 of 2017.
Mr. Mutti Ali, Advocate for petitioner in C.P.No.D-6387/2018.
Mr. Mian Ali Ashfaq, advocate for petitioner in CP No.D-5429/2018
Mr. Naveed Ahmed Khan, Advocate for petitioner in C.P.No.D-3677/2019
Syed Arif Raza, advocate for petitioner in CP No.D-2163/2020
Mr. Amjad Ali Shah and Shahbaz Sahotra, Special Prosecutors NAB.
Mr. Mukesh Kumar Khatri, Assistant Attorney General.
Mr. Hakim Ali Shaikh Addl. A.G

Dates of hearings: **11.01.2021, 14.01.2021 and 19.01.2021**.
Date of order: **26.4.2021**.

O R D E R

Muhammad Iqbal Kalhoro, J. Petitioners, standing a trial separately in different Accountability Courts Sindh at Karachi in different references, have impressed a common issue in all listed petitions that relates mainly to a question of applicability of regime u/s 90 and 91 of the Criminal Procedure Code, 1876 (the Code) to an accused called upon to face prosecution in a reference through a process issued u/s 204 CrPC but against whom the Chairman NAB did not issue a direction/warrant of arrest during enquiry or investigation. Their case to the extent of regulating their attendance before the trial court hinges upon an answer to this question. They have claimed that the Chairman NAB did not issue a warrant of arrest against them in inquiry or investigation, therefore, in response to process u/s 204 CrPC by the court to procure their attendance in the reference, they are required to appear before it and furnish a bond undertaking future appearance in the court in terms of section 91 CrPC. Some of the petitioners, in custody, have maintained the same ground and have further insisted that they were not arrested in the subject reference nor any warrant was issued against them during enquiry or investigation. When the subject reference was filed, they were already in custody in some other reference in which they have been either acquitted or granted bail but because of pendency of the subject reference are not being released by the jail authorities.

2. All the learned defense counsel in their submissions are unanimous in projecting a proposition spelling out a prospect allowing an accused to appear before the accountability court, even when it has issued a warrant against him in terms of section 204 CrPC along with an application u/s 91 CrPC containing an undertaking to execute a bond (with or with sureties to be decided by the court) for his future appearance. And which shall be sufficient in law to regulate and sustain his regular appearance in the court obviating the procedure to be applied to a person under the Code when he being accused in a non-bailable offence either appears himself or is brought in the court.

3. Underlying background to such construction urged by the learned defense counsel first is the power of the Chairman NAB u/s 24 (a) of the National Accountability Ordinance, 1999 (NAO, 1999), which he can wield only during inquiry or investigation, to issue warrant of arrest of an accused. And second is non-issuance of such warrant by him against the accused for one reason or the other till filing of the reference in the court. They related that since after filing of the reference, the Chairman NAB ceases to have such power and becomes *functus officio* viz-a-viz attendance of the accused in the court, he will not be competent to issue a warrant of arrest of the accused for such purpose. Thereafter, such matter will come within sphere of the trial court which for procuring attendance of the accused not arrested can issue a process u/s 204 CrPC. This provision contemplates the court taking cognizance of the offence to issue summons in the first instance to secure attendance of an accused before it, and warrant only when it is so provided in Second Schedule of the Code. But even in such cases discretion has been given to the court to issue summons, if it thinks fit to do so. In any case, when the accused would appear before it in response to such a process, the court will proceed in terms of section 91CrPC and require him to execute a bond with or without surety to ensure his future appearance.

4. They next urged that as per scheme of section 90 CrPC, a warrant in lieu of summons would be issued against the accused only when the court has reasons to believe that he has absconded or he has disobeyed the summons or when despite service of summons he fails to appear or when he breaches a bond executed u/s 91 CrPC for his appearance in the court. They further added that it is universally accepted that even in a non bailable offence it is not necessary to arrest an accused unless some impeachable evidence reasonably connecting him in the offence is collected. As the powers u/s 497 CrPC, etc. have been specifically ousted from jurisdiction of the trial court and it cannot grant bail to an accused, it cannot apply the scheme contained therein either at the time of appearance of an accused and commit him to custody for want of its compliance. It was contended that NAO, 1999 has overriding effect on other laws as defined in section 3 thereof, and, since it does not confer any power on the accountability court to order for arrest of an accused, any such step by the court and consequent arrest of the accused would be illegal, void *ab initio* and nullity in the eyes of law. In order to support their contentions, learned counsel referred to several provisions of the Code and NAO, 1999, discussed herein under, besides citing the orders passed by this court in almost identical circumstances in C.P. No.D-7235/2018, C.P. No.D-5271/2019, and C.P. No.D-7275/2019; an order dated 09.10.2017 passed by learned Accountability Court-I, Islamabad; a judgment dated 19.02.2018 by learned Islamabad High Court, Islamabad in W.P. No.3765/2017; the order dated 24.04.2018 passed by Honorable

Supreme Court of Pakistan in Civil Petition No.1435/2018; and an order dated 10.12.2019 in C.P.D-7465/2019 by learned Peshawar High Court, Peshawar_in addition to the case law reported in 2017 SCMR 1218, PLD 2016 PESH 298, 2016 PC.R.L.J 27, 2015 SCMR 56, 2014 SCMR 1762, PLD 2018 SC 595, 2015 SCMR 1724, PLD 2007 SC 539, PLD 2005 Lahore 470, PLD 2018 SC 40, 1990 MLD 1161, PLD 2018 Karachi 724, 2016 MLD 1902, 2005 PCRLJ 1889 and 2010 SC 483, 2014 SCMR 1762, 2015 SCMR 56, 1986 P Cr. LJ 2359, PLD 2006 Lah 227, PLD 2006 SC 249, PLD 1996 SC 77, PLD 2001 Karachi 344, 2002 P Cr. LJ 310 and 2018 P Cr. LJ 1694.

5. Learned special prosecutors NAB and learned Additional Attorney, in their arguments, however, mounted counter onslaught to such propositions and stressed that offences under NAO, 1999 are non-bailable as defined in section 9 (b) and in such cases appearance of the accused before the trial court would not be regulated in terms of sections 90 and 91 CrPC in isolation of other relevant provisions of the Code on the question. If, for any reason, during the enquiry or investigation, a warrant of arrest was not issued against him, the accountability court, sans of powers provided u/s 497 and 498 CrPC, would commit the accused to judicial custody on his appearance before it in response to process. They further opined that section 204 CrPC is applicable only in private complaint cases and not in the Challan cases or NAB references; and that in terms of section 17 of NAO, 1999 the court has discretion to apply or dispense with any provisions of the Code, and adopt its own course to regulate appearance of the accused before it. But it would not release the accused merely on furnishing a bond by him u/s 91 CrPC as it would amount to granting him bail indirectly u/s 497 or 498 CrPC. Leaned Asst. Advocate General, however supported the case of the petitioners.

6. As the discussion in this order is going to revolve, *inter alia,* around sections 91 and 204 CrPC, we reproduce them for the purpose of reference and convenience.

> **"Section 204. Issue of process.--- (1) If in the opinion of a Court taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be one in which, according to the fourth column of the Second Schedule, a summons should issue in the first instance, it shall issue his summons for the attendance of the accused. If the case appears to be one in which according to that column, a warrant should issue in the first instance, it may issue a warrant, or if it thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Court or if it has no jurisdiction itself some other Court having jurisdiction.**
>
> **(2) Nothing in this section shall be deemed to affect the provisions of Section 90 CrPC.**
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> **(3) When by any law for the time being in force any process fee or other fees are payable, no process shall be issued until the fees are paid and if such fees are not paid within a reasonable time, the Court may dismiss the complaint."**

> **"Section 91. Power to take bond for appearance.---When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court."**

7. Since two different division benches of this court had rendered converse findings on the issue, one vide an order dated 02.04.2019 in C.P. No. D-7235 of 2018 accepting the proposition contended by the learned defense counsel, the other in the case of Iqbal Z. Ahmed and others V. NAB through Chairman and others reported in 2018 P Cr.L.J. 1694 rejecting the same, we made a request to the Honorable Chief Justice for forming a larger bench for deciding the controversy. His lordship was pleased to agree vide an order dated 16.11.2020 and resultantly this full bench was constituted. Realizing significance of the point, for and against positions of the parties notwithstanding, we proceeded to frame following questions for its determination.

1. **What is the scheme of National Accountability Ordinance in respect of an accused against whom no warrant of arrest has been issued by the Chairman NAB in the inquiry or investigation and against whom a reference has been filed in the court?**

2. **What if the warrant of arrest has not been issued against the accused for some reason including his being on ad-interim pre arrest bail granted during the inquiry/investigation and he subsequently appears before the trial court in pursuance of a reference, may be after dismissal of his pre arrest bail application; whether he would be released in terms of section 90, 91, r/w section 204 CrPC or he would be taken into custody?**

3. **What is the regime of CrPC in respect of a person who is accused of a non-bailable offence and who appears or is brought before the court?**

8. In an effort to clinch the issue, besides considering contentions of the parties and taking guidance from the case law cited by them, we have gone through yet a few other relevant judgments for our enlightenment. Before harping on the subject, we may clarify that instead of treating each point separately we have discussed them together for a reply. At the onset, we feel obligated to emphasize that liberty of an individual has always been supreme and paramount in any scheme of law and has been so recognized by the Constitution under Article 9 appearing noticeably in a chapter catering for fundamental rights of a person. We are mindful and wish to urge that under no excuse liberty of a person can be allowed to be trifled with and made subject of any adventurism. No person shall be deprived of life and liberty save in accordance with law is one of the most distinctive features of the Constitution and our courts have been leaving no stone unturned to guard against any breach in its

application in all disciplines of law involving such a question. The golden principles being followed in criminal justice system i.e. an accused is innocent until proven guilty; bail and not jail and that accused's liberty shall not be lightly curtailed or played with as in case of his acquittal, his time spent in jail would forever be lost to him, have their *raison d'etre* embodied mainly in such a concept. And this appears to be the reason why the concept of bail to forestall any such eventuality, subject to certain terms and conditions, exists almost in all criminal cases and the courts never hesitate to grant such a relief in appropriate cases. However, in certain circumstances like when there is a genuine concern that the accused will abscond or tamper with evidence, etc. such concession is usually withheld but only temporarily. When the prosecution is not able to conclude the case expeditiously, a right to accused guaranteed under Article 10-A of the Constitution, this facility is normally approved. Besides, there are other factors that also weigh in to determine a right of an accused to bail particularly in offences falling within prohibitory clause u/s 497 (1) CrPC, etc. but that being not the subject matter here is left to be taken up at some other occasion.

9. However, there are special enactments like NAO, 1999 which, keeping in view nature of offences and their impact on the society, specifically bar extension of concession of bail pending trial to the accused. Absence of such a right to accused in any special law has often come up for discussion before the superior courts. The Honorable Apex Court on one such occasion while examining over all vires of NAO, 1999 in the case of **Asfandyar Wali Khan (PLD 2001 SC 609)** has held that despite such bar the High Courts in exercise of jurisdiction under Article 199 of the Constitution can admit an accused to bail. This monumental determination is considered a step forward in establishing that criminal charges brought in the court of law against an accused without a right to him to apply for bail will invariably be deemed harsh and will always entail intervention by the superior courts. What was held in respect of bail matter is reproduced herein under:-

> **"197. It was held in the case of Zafar Ali Shah (supra) that the powers of the superior Courts under Article 199 of the Constitution "remain available to their full extent... notwithstanding anything contained in any legislative instrument enacted by the Chief Executive. "Whereas, section 9(b) of the NAB Ordinance purports to deny to all Courts, including the High Courts, the jurisdiction under sections 426, 491, 497, 498 and 561-A of any other provision of the Code of Criminal Procedure or any other law for the time being in force, to grant bail to any person accused of an offence under the NAB Ordinance. It is well settled that the Superior Courts have the power to grant bail under Article 199 of the Constitution, independent of any statutory source of jurisdiction such as section 497 of the Criminal Procedure Code, section 9(b) of the NAB Ordinance to that extent is ultra vires the Constitution. Accordingly, the same be amended suitably."**

10. Next, we intend to remind that our constitutional scheme is based on trichotomy of powers shared between the legislature, the executive and the judiciary. Each has its distinct and separate role to play and to act as a check and balance on the others while operating within its own defined sphere of power. The role of the legislature is to make laws and that of the judiciary to interpret those laws, if necessary. If a statute has expressly provided for something without any ambiguity and is being applied accordingly, there would hardly be any question of interpreting the same by the courts. The judiciary's role of interpretation of a statute or any provision thereof would arise only when it is to a certain extent either unclear or vague or uncertain or is *prima facie* opposed to the Constitution. A fundamental principle of interpretation has always been to give effect to the intent of the framers of the law and of the people adopting it. It has been often held that to interpret what does not need to be interpreted is not permissible. But when it is found that the back ground of a certain provision is such that the intended meaning is different than the words of the said provision seem to convey, the courts intervene and interpret the same as per intent of the legislature. Otherwise, we must emphasize, the courts have absolutely no authority or power to substitute their views for those intended by the legislature on any ground which may include their reservation about a particular law and its applicability in a given context

11. After a brief sojourn in highlighting the principle of interpretation, we return to the subject and recall that the law which replaced the Ehtesab Act of 1997 dealing with corruption, accountability, and related matters came to be known as the National Accountability Bureau Ordinance, 1999. Legislative intent qua nature of the offenses and the court's jurisdiction to grant bail was abundantly clear under section 9 (b) thereof: they were non-bailable and no court was having jurisdiction to release an accused on bail in the said offences. But, as noted above, this ouster of jurisdiction was catered for by the Honorable Supreme Court in the case of **Asfandyar Wali Khan.** It was primarily that decision which paved the way for entertaining bail applications of the accused under NAO, 1999 by the High Courts in exercise of constitutional jurisdiction under Article 199 of the Constitution. At a later stage in the year 2013, while probing provisions of NAO, 1999 from a different angle, the Honorable Supreme Court in the case of **Abdul Aziz Memon v. The State (PLD 2013 SC 594)** held as under:-

> **"This court had also found that such provisions of the National Accountability Ordinance, 1999 were quite justified in view of the gravity of the menace of rampant corruption the said Ordinance was meant to tackle. Dealing with such stringent provisions of the Control of Narcotic Substances Act, 1997 and their interpretation one of us (Asif Saeed. Khan Khoso, J) had observed as a Judge of the Lahore High Court in the case of Nazir Hussain v. The State (2002 PCr.LJ 440) as under:-**

> **11. We are conscious that some of the views expressed by us above and some of the interpretations advanced by us vis- -vis different provisions of the Control of Narcotic Substances Act, 1997 may appear to some to be somewhat harsh or stringent but we maintain that the same are in consonance with the spirit of the said law. The said law is not an ordinary law as the menace that it purports to curb is not commonplace and the criminals who indulge in it are not of the normal type. The mischief sought to be suppressed by this law is not just a crime against a human being but a crime against the humanity and, therefore, a response to the same has to be aggressive and punitive rather than benign and curative. It may be true that an individual subjected to the rigours of this law may sometimes suffer disproportionately but the greater good of the society emerging from stringent application of this law may make this approach worth its while.**
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> **The perils of corruption in a society are far greater than the hazards of narcotics and, thus, the observations made above in the context of the Control of Narcotic Substances Act, 1997 are attracted with a greater force in the context of the National Accountability Ordinance, 1999. It may not be forgotten that by virtue of section 3 of the National Accountability Ordinance, 1999 the provisions of the said Ordinance are to have an overriding effect over any other law for the time being in force."**

In the above decision, on the one hand special context of NAO, 1999 has been articulated, and on the other it has been emphasized that bail in such cases being against the society shall be construed strictly and rigidly. These principles were again reiterated in the case of **Rai Mohammed Khan v. NAB (2017 SCMR 1152)** by the Honorable Supreme Court in the words, by and large, that the courts shall not remain oblivious of the fact that the tendency of corruption in every field has become a threatening danger to the State economy. The public money, allocated for social sector and economic wellbeing of the poor people, is consistently being embezzled and misappropriated at a large scale depriving the majority of the population of essential utilities, like potable water, health care and education facilities, etc. Therefore, it is the foremost obligation of each institution including the judiciary to arrest this monster before it is too late and the very survival of the State and State economy are imperiled perpetually. Further, the courts shall apply the Anti-Corruption laws rigidly at bail stage against the accused. But a distinction needs to be drawn between an ordinary criminal case and that of corruption while dealing with either the question of bail to an accused charged under such offenses or for deciding the term of his conviction ultimately. It has been further advised that once the case is proved against the accused, the courts shall not show any mercy and take a lenient view in awarding sentence to him. We for a ready reference quote herein below the relevant passage from that judgment.

> **"Under the principle of law and justice, each bail petition is to be decided on its own merits and the law applicable thereto, however, this Court cannot remain oblivious of the undeniable fact that the tendency of corruption in every field, has become a threatening danger to the State economy, striking on its roots. The public money, allocated for social sector and economic wellbeing of the poor**

> **people, is consistently embezzled/ misappropriated at a large scale and why the majority of the population is deprived of essential daily utilities, like pure drinking water, health care and education facilities, etc. It has become the foremost obligation of each and every institution, including the Judicator, to arrest this monster at this stage, before it goes out of proportion, posing threat to the very survival of the State and State economy, therefore, the Courts shall apply the Anti-Corruption laws somewhat rigidly, once on fact the case is made out, at bail stage, against the accused person. Distinction, however, is to be drawn between the ordinary criminal cases and of corruption on the above analysis and grounds, while dealing with bail matter to an accused person, charged for such like crimes and also at the time of conviction, once the case is proved against him then, Courts are not supposed to show any mercy by taking a lenient view in the matter of sentence.**

12. While picking up a trail from above observations, we may say that legislature's decision to make offences under NAO, 1999 as non-bailable and conferring no jurisdiction on any court to release the accused on bail u/s 497, 498 CrPC etc. is not without a specific object. It conveys strongly a reflection of its intent to take away otherwise a normal right to bail from an accused and to hold him in custody pending trial for the purpose that looks both punitive and reformative. The idea is to infuse deterrence into the society against corruption and corrupt practices as a whole, and imbue the accused with a sense of fear dissuading him from repeating the offence in future. In our estimation, this specific idea behind legislative exercise and exhortations by the Honorable Apex Court for regarding entitlement of an accused to bail rigidly and stringently shall undergird any discourse aimed at determining applicability of regime u/s 90 and 91 CrPC for regulating appearance or release of an accused in a reference, who is either not arrested or a warrant of arrest was not issued against him by the Chairman NAB in enquiry or investigation on account of some reason including but not limited to his being on pre arrest bail.

13. Now, if we pause and take a holistic view at this juncture of material so far affecting our discussion, the emerging scenario would be like this: the trial court is bereft of usual powers u/s 497and 489 CrPC to release the accused on bail, the appellate court, which is the High Court in this case, has no such jurisdiction under the said provisions of law or suspend sentence in exercise of powers u/s 426 CrPC, the offences are non-bailable, and it is only in exceptional cases and on a strong justification, this court, only under constitutional jurisdiction, can grant such relief to the accused. This layout, the trial court and the appellate court not having the standard power to release an accused on bail during trial or appeal, begs an irresistible question whether such a view of the matter can admit to any construction permitting failure of the Chairman NAB, to issue warrant against an accused in enquiry or investigation, to anchor jurisdiction of the court bestowed by the Code to regulate attendance or custody of an accused after filing of the reference. It must be remembered that custody of an accused in investigation is mainly sought for collection of evidence from him, which otherwise he is not willing to offer or

produce or which he may otherwise attempt to tamper with. In the trial, however, the custody of the accused, subject to law including bail provisions, is desired not on perception of above consideration but on grounds of public policy, such as to ensure fair trial, or to prevent possibility of commission of further offence by the accused, as has been held in the case of **Abdul Shakoor V. The State and 5 Others {PLJ 1987 Cr.C (Lahore) 266}**. Purpose of custody of an accused being quite distinct in and after investigation, the power of the trial court to regulate his custody would not stand eclipsed or overlapped by non-exercise of such authority in the investigation on any ground. In the trial, the court assumes charge of entire matter and proceeds as per procedure provided in the Code. Its relevant provisions, applicable to the trial under NAO, 1999 in terms of section 17, are fully attracted and which amply guide how appearance of a person accused of a non bailble offence has to be regulated by the court. Then, there is yet another relevant question, whether the specific ouster of jurisdiction of the trial court u/s 497 and 498 CrPC can be allowed to be replaced by and subsumed in jurisdiction u/s 90 and 91 CrPC. These questions, we believe, are not likely to beg answers in affirmative, or a concomitant composition that section 90, 91 and 204 CrPC would be read in isolation of the entire scheme of the Code plus intent of legislature expressed in NAO, 1999 on the issue.

14. In any case, for finding answers to what has been deliberated above, we proceed to examine relevant provisions of NAO, 1999. Sections18 (e) and 24 stipulate authority of the Chairman to issue a directions to arrest an accused which palpably he can exert only in enquiry/investigation and not in the trial. It seems that the legislature has enforced this limitation on his power on purpose, which on an attentive insight would appear to be in complete sync with provisions of the Code visualizing the court to wield authority in all respects of the matter after taking cognizance of offences including regulating attendance of an accused, irrespective of the fact whether he is absconder, on bail, or in custody. Likewise, after filing of a reference when the accountability court takes cognizance of offences, legislature's purpose, evidenced from not providing specific provisions in NAO, 1999 streamlining the trial, is to empower the court to do the needful in the light of provisions of the Code and supervise all relevant matters in the trial accordingly. Meaning thereby that failure or non-exercise of authority by the Chainman to order arrest of an accused in the investigation for whatever reason will not have any bearing in the trial, and the court would be free to regulate attendance of the accused before it accordingly in the light of jurisdiction conferred by the Code. We believe it is this perspective which is behind insistence of learned defense counsel that after filing of the reference, the scheme u/s 90 and 91 CrPC will set in and the court would issue a summons to the accused in a first instance. If he after its receipt attends the court and submits a bond as required under section 91 CrPC, it would be accepted

with instruction to him to attend the court on future dates of hearing. It would be only when he fails to appear in response to such process, or the court has reasons to believe that he has concealed himself in order to avoid the process or has absconded, it will issue warrants against him. But on his appearance or being brought in the court as the case may be, the same procedure as provided in section 91 CrPC would follow and he would be released to attend the court next time.

15. Before proceeding further and assessing merit of such contention, we would like to relate the precedents and procedures being observed on this question in the cases registered under the other special laws. The offences under the Control of Narcotics Substances Act, 1997 are considered as crimes against the society like the offenses in NAO, 1999 and are non-bailable. The provisions of section 497 and 498 CrPC are not applicable and the bail application of a person accused under said Act is entertained only u/s 51 thereof. History shows that the trial court, sans of powers u/s 497 and 498 CrPC to grant bail, is not extending the same relief to the accused under section 91CrPC indirectly and releasing them merely on executing a bond. If the accused is not arrested in the investigation, the trial court issues a warrant to procure his presence and on his surrender or being brought in the court commits him to custody till for his release on bail a judicial order strictly in terms of section 51 CNS, 1997 is passed.

16. Likewise under the Anti-Terrorism Act, 1997, which is also a special law dealing with heinous crimes; no court has ever adopted a procedure or conceded to a scheme of taking a bond under section 91 CrPC independent of section 497 and 498 CrPC from an accused on his appearance in the court. He is either committed to custody or granted bail. He does not just go and log his appearance in the court and plead to execute a bond with an undertaking to appear in future on the ground of him being not arrested in investigation and/or non-execution of warrant of arrest against him. These precedents have been cited with a view to first delineate the procedure, duly recognized by the Code as discussed herein under, being observed on this issue in the cases registered under the other special laws, and second to make a comparison of them with NAO, 1999, which, admittedly, is more stringent and stern in dealing with an accused, and divests the court of otherwise normal powers to release him on bail u/s 497 and 498 CrPC. Analyzing jurisdiction of the accountability court u/s 497 and 498 CrPC in the NAB cases, the Honorable Supreme Court in the case of **Olas Khan v. Chairman NAB and others (PLD 2018 SC 40)** has made certain observations, which being relevant to this discussion are being reproduced herein under.

> **10…… Accountability Court has no jurisdiction to grant either pre-arrest and or post-arrest bail, as provisions of CrPC regulating grant or otherwise pre-arrest and or post-arrest bail in cases under N.A.O., 1999 in view of non-obstante**

> **provisions of section 9(b) of N.A.O., 1999 are inapplicable. However, position as regards High Court and this Court is altogether different, superior Courts extract jurisdiction under Articles 199 and 184 respectively of the Constitution, 1973 to consider and grant bail or otherwise, in cases under N.A.O., 1999 and not under section 9(b) and or 17(c) the N.A.O., 1999, which jurisdiction, neither can be taken away nor, made subservient through sub-ordinate legislation. ……**
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> **11. While assuming jurisdiction under section 497, CrPC learned bench of the High Court, was influenced and has misconstrued section 17 of the N.A.O., 1999 which makes the provisions of CrPC including procedure for session, trial (per chapter XX-A of the CrPC) applicable, unless otherwise, provided in the N.A.O., 1999 itself. Section 17(c) ibid; liberated the Accountability Court from the procedural and technical trapping of Criminal Procedure Code, giving it authority not only to "dispense with any provision of Code" and at the same time empowered it to follow such procedure as it may deem fit in circumstances of case [17(c) ibid.]. However, freedom to follow such procedure as it may deem fit does not empower the Accountability Court or for that matter the High Court to assume jurisdiction and or, invoke provisions of Cr.P.C, which are specifically excluded by virtue of section 9(b) ibid; from application in cases triable under NAO, 1999 in ostensible exercise of power under section 17(c) of the NAO, 1999. Such enabling power of the Accountability Court were conditional by this Court in the case of Khan Asfandyar Wali (PLD 2001 SC 607 @ 926), "not exercise its discretion arbitrarily but on sound judicial principles by assigning valid reasons," such exercise of discretion was also held to be "Justiciable in exercise of Constitutional jurisdiction of Superior Court". Excluding the words "including High Court" from section 9(b) ibid; as noted above has not brought about any change on overall scheme of the provision regulating matters under the exclusionary provisions of Code of Criminal Procedure mentioned therein including sections 497 and 498 CrPC regulating pre-arrest and post-arrest.**

17. After quoting luminous observations of the Honorable Supreme Court declaring in unambiguous words that neither the accountability court nor the High Court can assume jurisdiction u/s 497 and 498 CrPC for releasing the accused on bail through the prism of section 17 NAO, 1999, we would like to reiterate that the offences under NAO, 1999 are non-bailable and no court has jurisdiction to release the accused on bail in exercise of powers conferred by such or any other provisions of the Code. Even the superior courts have recognized extreme gravity of the offenses under this law and have emphasized time and again that being heinous in nature and against the society, theses offences even at the bail stage should be dealt with rigidly and strictly. Is it not prudent, therefore, to suspect, on the principle of logic, the right or ability of a person to walk in the accountability court after dismissal of his application for pre arrest bail and walk out after executing a bond u/s 91 CrPC undertaking to attend the court in future, particularly when it *ex facie* seems to be against the scheme behind NAO, 1999.

18. Notwithstanding, an argument was made during hearing of these matters that may be jurisdiction u/s 497 and 498 CrPC in terms of section 17 of NAO, 1999 is not available to the court, but other provisions of the Code including procedure for the trial is applicable in the NAB cases, as such the accountability court can exercise jurisdiction under section 90 and 91 CrPC. In our view, such contention is not

sustainable firstly in view of what has been held by the Apex Court in the case of **Olas Khan** (*supra*) and secondly it appears opposed to the object behind section 17, which is to relieve the accountability court of usual procedural and technical trappings of the Code, and to allow it to follow such procedure as it may deem fit in the circumstances of a case. The words **'follow such procedure as it may deem fit in the circumstances of a case'** do not signify a permission to the accountability court to assume a jurisdiction, not conferred on it expressly by NAO, 1999, and express opinions upsetting the very purpose behind legislator's will of divesting it of authority to release an accused on bail pending trial. This expression essentially lends a legal cover to any procedure adopted by the court in the trial to expedite pace of proceedings before it and dispense with any procedural hiccup causing hindrance in achieving such object.

19. Further, section 17 reads that if in the Code there is anything inconsistent with the provisions of this law, it shall not apply to proceedings held thereunder. Section 9 (b) puts a specific bar on the court to admit an accused to bail under any of the provisions of the Code. A reading of these two provisions together creates an indelible impression in the mind that the court under no circumstances can extend a relief contemplated under the Code to an accused which is opposed or inconsistent to aim and object of this law. Effect of extending a relief u/s 91 CrPC in favour of an accused in the manner as agitated by defense counsel is almost identical to the one envisaged u/s 496, 497 and 498 CrPC in that in both the cases, with necessary alterations, the accused is set free to attend the court next time on furnishing a bond. It therefore eludes logic to accept that a court sans jurisdiction to admit an accused to a relief of bail can still have a power to extend alike relief to him u/s 91 CrPC.

20. Besides, we see such a description of the matter has all the hallmarks of descending into a profile where if the accused is not arrested till taking cognizance of the offence by the court, he would be free to join the trial by just appearing in the court and executing a bond with an undertaking to do the same in future regardless of nature of the offence. The difference between a bailable and non-bailable offence would stand obliterated insofar as manner of regulating appearance of an accused in the court is concerned. There would be no need for an accused to resort to provisions u/s sections 496, 497 and 498 CrPC to get bail to skirt restraint, otherwise a requirement recognized by law itself in non-bailable offences. These provisions would stand obsolete and overridden by section 91 CrPC and the constitutional jurisdiction of this court to grant bail to an accused in the NAB cases outranked. The accused would need to evade arrest till filing of the reference, and then appear in the court sparkling a willingness to execute a bond for his future appearance and be free. An accused, denied pre arrest bail by the High Court and the Supreme Court, would turn up before the court with an application u/s 91 CrPC undertaking to appear in

future. The court would have no option but to accept it without passing any juridical order granting him bail or otherwise to regulate his attendance as required in non bailable offences in terms of provisions of the Code. A course otherwise not recognized by the law would stand charted out.

21. In any case, in our view, the above discussion and conclusion purely drawn in the context of special laws including NAO, 1990 and induced mostly by a logic conceived out of the scheme contained therein would be incomplete without looking at in detail relevant provisions of the Code and contour concerning institution of a case, issuing of process, and the trial. A reading of the Code has led us to find that it is divided into several Parts divided into Chapters sub-divided in Sub-Chapters. They all have been given separate headings relevant to the subject they deal with. It is quite notable however that some subjects are categorized as general applicable to all realms of a trial covered under the Code, and some are special that comprise provisions dealing with a specific situation. Yet there is a third kind of subjects known as supplementary containing provisions meant to add, supplement, compliment, fill need, remove deficiency and give further information to other provisions wanting explanation to become relevant in a given backdrop. All these provisions, rolling out a scheme encapsulating registration of a case, investigation, submission of a final report for trial etc. are set into motion, when an aggrieved party lodges an FIR regarding commission of a cognizable offence at police station; or when a private complaint is filed in the court under section 200 CrPC; or when the Magistrate, himself receiving information or knowledge of commission of an offence, takes cognizance and proceed as is provided u/s 190 CrPC. Through these three sources this whole scheme contained in the Code is played out, proceedings are instituted, evidence is collected, and trial is held.

22. It may be reminded that the procedure spread over several provisions containing prerequisites for initiating proceedings in the court is provided in Part VI of the Code which Part also deals with proceedings in prosecutions. It has in all 17 Chapters from XV to XXX. However, relevant to the point in hand are Chapters XV, XVI, XVII and XX. Chapter XV is divided into two sub-chapters A and B. Sub-chapter A deals with place of enquiry or trial and sub-chapter B caters for conditions requisite for initiation of proceedings. Chapter XVI covers provisions relating to institution of complaints to a Magistrate. Last is the Chapter XVII that explains how the proceedings in the court commence. This journey starting from initiation of proceedings however ends at Chapters XX, XXII and XXII-A which lay out elucidations respecting trials before Magistrates, summary trials and trials before High Court and Court of Session respectively.

23. Sub-chapter B of Chapter XV relating to conditions requisite for initiation of proceedings is spread over 15 sections starting from section 190 to 199-B. It may be retold that proceedings will not start in the court unless the Magistrate takes cognizance of an offence as laid down in section 190 CrPC either on a police report u/s 173 CrPC, or a private complaint filed under section 200 CrPC, or information received by him from any person other than Police Officer or upon his own knowledge or suspicion. To say that the Magistrate's taking cognizance in the manner as above is a harbinger to start of proceedings would not be wrong. If on a private complaint, cognizance is taken, Chapter XVI would come into play which has only seven sections starting from section 200 to 203-C. Acting in terms thereof, the Magistrate holds a preliminary enquiry for verifying allegations in the complaint and dismisses it in *limine*, if there is no sufficient evidence to justify a trial. But when the Magistrate takes cognizance of the offence, Chapter XVII concerning commencement of proceedings before a court is rolled out. There are two sections in this Chapter, section 204 and 205 CrPC. Under section 204 CrPC the court taking cognizance of offences issues a process for procuring attendance of the accused before it, while section 205 CrPC confers power on the Magistrate to dispense with personal attendance of the accused during the trial.

24. Normally, it is assumed that section 204 CrPC is applicable to a case filed on a private complaint only. But it is not a correct construction as is signified by the words **"if in opinion of a Court taking cognizance of an offence"** focusing on the court's satisfaction about presence of sufficient material against the accused warranting a trial rather than the source providing such material. This provision as a whole reads as, when a court forms an opinion while taking cognizance of an offence that there are sufficient grounds for proceeding in the case, it shall issue summons in the first instance for securing attendance of the accused, if the case appears to be one in which, according to the fourth column of the Second Schedule, a summons should issue. But if the case appears to be one in which according to that column, a warrant should issue in the first instance, it may issue a warrant, or if it thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such court. The purpose of reproducing verbatim this provision is to show that a holistic view thereof with a focus on bold words above is sufficient to bring home the aforesaid opinion and it need not further demystification to establish applicability of this provision to all cases.

25. As long as it is a case requiring issuance of a summons in the first instance to procure attendance of the accused, there is no ambiguity that the court will issue summons. But when the case entails issuance of warrant for such purpose, the court has been given discretion to issue the warrant or, if it thinks fit, a summons. In any case, since this provision stipulating issuance of process is set out in Chapter XVII, it

is this Chapter which heralds start of a trial before a court. After receiving summons, the accused would be required to attend the court on the date mentioned in it, but in case of a warrant, he could be arrested and brought before the court. In both the cases, on his appearance in the court, the trial will start. However, it is possible that before execution of such process, the accused may appear in the court after having received knowledge thereof. In that case he would be required, subject to all exceptions including the ones contained u/s 496, or 497 or 498 CrPC, to execute a bond with or without sureties for his future appearance and this shall mark start of the trial. But if he is already in jail in some other case, the court will issue a production order to secure his presence before it, and that shall indicate beginning of proceedings in the court. In the trial, first a charge against the accused, disclosing allegations and offences he is to stand, is framed in compliance of requirements envisaged in various sections of Chapter XIX.

26. After setting out aforesaid elucidations, we proceed to look at Part III of the Code which deals with **general provisions**. Chapter VI therein spells out **process to compel appearance** and is sub-divided into five subchapters from A to E. Subchapter A relates to summons, subchapter B to warrants of arrest, subchapter C to proclamation and attachment, subchapter D to other rules regarding process, and subchapter E signifies special rules for service outside of Pakistan, etc. This Chapter provides for general provisions relating to issuance of process to cause appearance of persons through summons, warrants, issuance of proclamations and attachment of property of the accused if he is untraceable, and other rules ancillary in nature conferring authority on the court to issue warrants in lieu of summons, take bonds, etc. plus the procedure for service outside Pakistan or a process received from abroad. In this Chapter a detail regarding forms of summons and warrants, the officers competent to issue them and the ones who serve them and the manner of service has been provided. The relevant subchapter here is subchapter D that has four sections from 90 to 93. Section 90 deals with the issuance of warrants in lieu of or in addition to summons and section 91 gives power to the court to require a person, against whom it can issue a summons or warrant, to execute a bond with or without sureties for his appearance.

27. The terms of section 91 CrPC are commonly believed to be applicable when complainant or a witness appears before the court in response to the process and their evidence is not recorded for one reason or the other and the case is adjourned, and then a bond with or without sureties is taken from them with an undertaking to appear on the next date of hearing. But, we must insist, it is a wrong notion and does not correspond with the expression used in this provision of law. The words **"any person"** in our view shall encompass, besides complainant or a witness or a person whose attendance is required in the court, a person accused in some offence. Object

of this provision seems to be twofold, first to empower the court to seek an undertaking through a bond from a person present for his future appearance before it, and second to enforce this scheme equally not only in respect of a witness but for an accused, etc. required to appear in the court. But what is important and needs to be kept in mind is the fact that section 91 is in Part-III, Chapter VI of the Code which covers only general provisions relating to process and largely speaks of overall powers given to the court to cause appearance of any person before it and related matters. To put simply, this Part caters exclusively to a standard approach to be had by the court for seeking attendance of a person, who may be an accused, required in the case.

28. However, it is hard to understand why in section 91 CrPC no delineation has been laid down to explain identical treatment to two differently classified persons i.e. an accused and a witness/complainant qua their presence before the court. We therefore felt that some explanation to justify the same must be forthcoming. While trying to find one; we again looked at the Code and came across provisions enacted for the purpose of complimenting other provisions that need further addition or clarification to get relevant with the context. For instance, Part-IX of the Code stipulates **Supplementary Provisions** which cater for deficiency, and give further information to other provisions wanting in some respect to make them complete and meaningful. This Part has 9 Chapters starting from Chapter XXXVIII to XLVI. It may be pointed out that Chapter XXXVIII is in respect of Public Prosecutors and has four sections from 492 to 495 CrPC, it deals with the process of their appointment and powers, etc. It is in this Chapter where a detail about the procedure of appointment of a Public Prosecutor, a method of conducting prosecution by him and his power to further his duty has been spelt out. Therefore, it can be said that wherever the word Public Prosecutor would appear in the Code will be interpreted and understood in the light of provisions of Chapter XXXVIII. Now, we look at section 265-A CrPC that explains that a Public Prosecutor would conduct the prosecution but nothing to describe him i.e. his identity, his powers, his appointing authority, etc. is available. So, if we look at this section in isolation, it will lead to a kind of ambivalence qua the Public Prosecutor. But if we read this section with sections 492 to 495 CrPC, everything about him would become identifiable. Meaning thereby that in order to lend a proper meaning and clarification to the word Public Prosecutor, section 265-A CrPC needs to be read together with sections 492 to 495 CrPC.

29. Similarly in section 91 the word ‘bond’ has been used which the court may require from a person present to execute, with or without sureties, for his future appearance before it. But no further details are set out to understand amount, mode or manner of execution or forfeiture of a bond, and whether instead of a bond other

recognizance can be executed, etc. Further, although expression ‘any person’ used in this provision includes an accused, but conspicuously further details in this connection are lacking. Such as, at what stage of the trial the accused would be required to execute a bond for this purpose; whether such process is relevant to only first time appearance of the accused in the court in response to process issued u/s 204 CrPC or it can be invoked at any stage of the trial. Besides, if this requirement meant for regulating appearance of an accused is independent of bail which too entails a condition of execution of a bond by the accused for his appearance in the court; and most importantly whether this scheme shall liberate the accused charged with a non-bailable offence from applying for bail. Many more alike questions come in the mind but unluckily a bare reading of this provision does not seem to take anywhere substantial furnishing satisfactory replies in this regard. But if it (section 91 CrPC) is read with Chapter XLII relating to **Provisions as to Bonds** appearing in Part IX **supplementary provisions**, the entire matter will be fully fathomed. This Chapter to comprehend the bond and relevant issues specifies in full detail all the prerequisites qua modes of executing or forfeiture of a bond, procedure to be had in case of insolvency or death of surety, bond from a minor, etc. In the same Part, there is Chapter-XXXIX, spread over sections 496 to 502 CrPC, which deals with all necessary questions of bail, discharge of sureties, the procedure to be followed in a bailable or non-bailabe offence, and gives specifics relating to a bond to be executed by the accused and sureties for his appearance. So, in order to grasp all relevant points qua a bond, its execution, etc., sections 90 needs to be read in concert with sections 496 to 502 CrPC. Any inverse construction would suggest this provision’s independent and special status in law overriding and superseding said provisions of the Code on the subject.

30. This has brought us to reading of section 496 CrPC that states that when any person **other than a person accused of a non-bailable offence** is arrested or detained **without warrant** by Officer In-charge of a police station or appears or brought before the court and is prepared to give bail then such person shall be released on bail. The words ‘shall be released’ have been used in this section, which imply that in a bailable offence the accused will be released on bail as of a right. It is further set out that if the court thinks it fit may instead of taking bail from such person discharge him on his executing a bond without sureties for his appearance. But section 497 CrPC contemplates a dissimilar position in this respect and reads that when any person accused of a non-bailable offence is arrested or detained **without warrant** by an Officer In-charge of a police station, or appears or is brought before the Court, **he may be released on bail** but **shall not be so released** if there appears reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for 10 years. Noticeably, two different

propositions qua releasing the accused on bail have been aligned in this provision, and in addition, discretion of the court to discharge the accused on his executing a bond (available in bailable offences) has been lifted. First proposition is set at motion when an accused against whom there are no reasonable grounds to believe he is involved in an offence punishable with 10 years or above appears or is brought before the court. In such case, the court is bestowed with a kind of intemperate discretion to release him on bail. But in the second case viz. when there are reasonable grounds to believe his involvement in such an offence (within prohibitory clause), no such discretion is available to the court. The court's jurisdiction to grant bail in such cases, an admitted position, is a different topic that we for the time being do not want to harp on here. But in any case, it is quite clear that regardless of whether the accused's case falls within ambit of first category or the second one, if he is brought arrested, or appears on his own would be set at liberty **only after the court has exercised discretion in his favour by giving bail through a judicial order** under the said provision of law.

31. Notwithstanding a dissimilarity qua right of an accused to be released on bail u/s 496 and 497 CrPC, one thing is common and *sine qua non* in both the provisions, that is, the court **exercising discretion** through a juridical order **granting bail** to him when he either appears himself or is brought before it. Under section 496 CrPC dealing with bailable offences, such discretion is exercised in favour of the accused under the influence of of law itself. But in a non-bailable offence, this discretion, be it the first category or the second one , is not automatically generated in favour of the accused on account of his right to it but is contingent upon fulfillment of certain conditions, which include, among others, a compulsory notice to the prosecution, resultant adjudication to determine existence or otherwise of reasonable material/grounds against him, exercise of discretion by the court in his favour in the form of a judicial order, reasons for doing so, and its compliance by the accused. Only after meeting of all such preconditions, the stage requiring the accused to execute a bond u/s 91 CrPC to ensure his future appearance in the court arrives.

32. It may additionally be stressed here that sections 496 or 497 CrPC are special provisions in that they are exclusively designed to respectively regulate accused's appearance or his release in a bailable and non-bailable offence. While, section 91 CrPC applicable to all persons i.e. a witness, complainant, accused or any other person who is required by the court to appear is a general provision It is a trite law that if a statute contains special and general provisions on the same subject, the special ones shall prevail over the general ones. Having a special status in the Code, the *ibid* provisions viz. sections 496 or 497 CrPC shall certainly override section 91 CrPC, albeit deals with the identical situation, indistinguishably refers to a person required to execute a bond for his appearance in the court. But if this section is read

together with section 496, 497 (and 498) CrPC, the entire realm would stand demystified edifyingly. This picture rolling out the whole scheme explaining how appearance of the accused in the court gets governed has in fact contributed to our understanding of the matter that unless a judicial scrutiny to determine right of the accused to remain present in the court without a restraint is made on the touchstone of presence or otherwise of reasonable material against him, he will not be required to execute a bond to guarantee his further appearance in the court. Likewise, in the NAB case, in absence of adjudication of such question by the High Court or the Honorable Supreme Court in favour of the accused, the accountability court will not permit/require him to execute a bond for such purpose.

33. Leaned defense counsel during arguments had urged that since specifically sections 496 or 497 CrPC and others provisions relating to bail have been ousted from jurisdiction of the accountability court, it has no authority to follow any of directions or policies contained therein for regulating appearance of the accused. It has no option but to resort to the procedure provided u/s 91 CrPC for this purpose. This argument, in view of entire narrative above detailing interrelation and interdependency between said provision of law and sections 496 or 497 CrPC etc. is not only legally unsustainable but is beside the mark tending to ignore a striking fact that it is only the power to grant bail under the said provisions of law that has been taken away from jurisdiction of the accountability court u/s 9(b) NAO, 1999. Insofar as the regime/guidance or policy prescribing the manner of release of an accused in a non-bailable offence thereunder is, there is nothing to infer that it will not be effectuated at the time when the accused appears on his own or is brought before the court, and instead will be required to execute a bond for future appearance in absence of a decision regarding existence or otherwise of reasonable grounds against him.

34. In order to further accentuate this point, we may refer to section 86 CrPC, which is available in subchapter B of Chapter VI and relates to warrant of arrest. It basically prescribes a procedure to be followed when a person, arrested outside of jurisdiction of the court which issued a warrant of his arrest is brought before the Magistrate within whose local limits such arrest has been made. It says that such Magistrate shall direct removal of arrested person **in custody** to the court which issued the warrant. It does not seem to lay down or endorse execution of a bond independently by such person to earn release for appearing before the relevant court without getting through rigors of methodology set forth either u/s 496 or 497 CrPC. It further states that when the offence is bailable and such person is ready **to give bail** to the satisfaction of the Magistrate or is willing **to give security** in compliance of direction endorsed on the warrant u/s 76 CrPC, the Magistrate shall take such bail or security as the case may be and forward such bond to the court which issued the warrant. The language is plain and clear and conveys in express terms accused's

release to appear before the relevant court to take place only after bail given to him by the court where he has been brought, and its compliance by him. The Magistrate does not even require his custody or presence and is acting on the warrant issued by a court outside of the district has no authority in law to release such person on execution of a bond without invoking section 496 CrPC. It is worth noting that the law here when speaks of a bailable offence recognizes only one mode of releasing the accused to appear in the relevant court without further restraint, that is, granting him bail and his giving bail accordingly to the satisfaction of the Magistrate. Without fulfillment of such conditions, it is obvious, the Magistrate would not require him to execute a bond and let him appear in the relevant court but would forward him to the court concerned **in custody.**

35. But, it is further provided, if the offence is non-bailable or no direction as contemplated u/s 76 CrPC is on the warrant, the arrested person would be taken to the Sessions Judge in whose jurisdiction arrest is made, and who **subject to provisions of section 497** and for sufficient reasons **may grant him interim bail** and release him on execution of a bond with direction to appear on a particular date before the court which issued the warrant. Now here, the situation speaks of a non-bailable offence that is allegedly committed by arrested person beyond jurisdiction of the court wherein he has been brought; and which does not require his custody or presence in any case and is seized with a setup, interregnum in nature, enforced only for ensuring attendance of arrested person before the relevant court. Yet it has not been left to such court's ambit to require the arrested person to execute a bond and appear before the court concerned without first adjudicating his right to bail u/s 497 CrPC in his favour and citing sufficient reasons for it. This provision not recognizing release of an accused on bail on execution of a bond independent of scheme u/s 496 and 497CrPC has explained in concise manner what we have been trying to figure out that how a person accused of some offence under NAO, 1999 would be dealt with by the court when he appears or is brought in it.

36. Therefore, in our view, it shall not call for further articulation to know that the scheme to release an accused executing a bond for his appearance pending trial is not self-contained or self-sufficient and is mainly dependent on what is provided u/s 496, 497, 498 and other provisions of the Code in this regard. The distinctive mechanisms, in a bailable and non-bailable offence under the said provisions, bound yet by a common thread entailing **exercise of discretion by a judicial order** for releasing an accused on bail is an additional signature of the scheme being urged here on the subject. It may be reminded that issuance of process which includes summons and warrant is provided u/s 204 CrPC. A warrant, sent outside of jurisdiction or a district for execution in terms of section 86 is also issued thereunder. When it is a bailable offence, the terms of section 496 CrPC apply and the accused is

released only when he gives bail in compliance. But when it is a non-bailable offence, unless the prerequisites u/s 497 CrPC are observed in letter and spirit, the accused is not released on execution of a bond u/s 90 CrPC to appear before the relevant court. This plain outlook explaining how to deal with a person accused in bailable or non-bailable offence present in the court leaves no room for us to concede to the contention of learned defense counsel that regardless of nature of offence and the material against the accused, after the reference, the court, when he appears or is brought, would require him to furnish a bond for his appearance independently and let him go. It is noteworthy, and deserves reiteration, that the court exercising powers u/s 86 CrPC has no concern with the matter, does not require custody or presence of the accused, and is only acting upon the warrant issued by the court outside of its district or jurisdiction. Yet in no ambiguous words it has been laid down that such court would not simply ask him to execute a bond and appear before the relevant court, but for this purpose would act strictly in terms of sections 496 or 497 CrPC as the case may be. When even in a bailable offence, the Magistrate, not seized with the matter, has no jurisdiction to release the accused brought before him without observing the procedure specified u/s 496 CrPC, and its actual compliance by him. We wonder, how a proposition, different to it in a non-bailable offence such as in NAO, 1999, can be held to be valid under the law. In our view, unless an order granting bail to the accused is passed and satisfied by him, he would not be allowed to execute a bond in terms of section 91 CrPC and be released pending reference.

37. Learned defense counsel in support of their case relied upon a decision dated 24.04.2018 of the Honorable Supreme Court passed in Cap ® Muhammad Safdar case (Civil Petition No.1435 of 2018) and submitted that it is binding on this court in terms of Article 189 of the Constitution and any view other than what has been held there regarding applicability of regime u/s 91 CrPC in the NAB cases cannot be taken by this court and any such view would be a nullity in the eyes of law. As per background cited in above decision, against Cap ® Muhammad Safdar a reference was filed in the accountability court Islamabad, which after failing to secure his attendance in reply to summons and bailable warrants issued ultimately non-bailable warrants. He was arrested in execution whereof and brought before the court, which instead of remanding him to custody released him on furnishing a bail bond u/s 91 CrPC. This was questioned by NAB unsuccessfully before learned Islamabad High Court and the matter ultimately reached before the Honorable Supreme Court and decided vide aforesaid order. We have respectfully gone through this order and state with due deference to what has been observed that it is a leave refusing order and no principle of law has been enunciated therein firstly and secondly it is distinguishable. In the whole exercise, right from the accountability court to Honorable Apex Court, neither the issues as framed by us were agitated nor was the scheme behind them

explored to put up any bar before us to proceed and decide these issues accordingly. It is a settled proposition of law that leave refusing order of the Supreme Court not spelling out any principle of law does not constitute any binding force on this court. It is well known that these orders are mostly issued, on the basis of pleadings filed by the parties, without any appraisal of the underlying factual or legal aspect of the case, and therefor are not to be considered as definitive and conclusive declaration of law. For reliance, following cases can be cited. **Muhammad Tariq Badar V. National Bank of Pakistan (2013 SCMR 314), Gulstan Textile Mills Ltd. V. Soneri Bank Ltd. (2018 CLD 203), Muhammad Jibran Nasir V. The State (PLD 2018 SC 351), Province of Punjab V. Muhammad Rafique (PLD 2018 SC 178)**.

38. The next most important judgment relied upon by learned defense counsel to further stress the point has been rendered in the case of **Sarwar and others V. the State and others (2014 SCMR 1762).** The Honorable Supreme Court in this case has formulated principles respecting furnishing a bond u/s 91 CrPC when an accused has been summoned by the trial court u/s 204 CrPC to face the trial in connection with a private complainant. In this case, the Honorable Apex Court, after undertaking an exhaustive exercise analyzing all the reported cases on both sides of the divide, has concluded, among others, that when in response to summons, an accused appears before the court but fails to submit the requisite bond for his future appearance to the satisfaction of the court, or fails to provide requisite sureties, he may be committed to custody till he complies with any of the said conditions as may be required of him. We have already concluded, in complete sync with above inference, that when a person accused of a bailabe offence appears or is brought before the court, he will be committed to custody till he satisfies required condition for his release. The court asking the accused to satisfy the condition(s) is indeed exercise of power by it u/s 496. There is otherwise no provision in the Code empowering the court to ask a person accused of a bailable offence present before it to furnish surety for his future appearance in the court, and on his failure commit him to custody. This illustrates very clearly that in absence of exercise of such power (unless the court thinks it fit to discharge the accused on his executing a bond without sureties for his appearance, instead of taking bail from him) and its compliance by the accused, stage of executing a bond by him u/s 91 CrPC will not arrive and the court would not release him from custody.

39. It has been further held in aforesaid judgment that when a process u/s 204 CrPC is through a warrant, bailable or non-bailable, the accused may come under some kind of restraint and therefore he may at his choice apply for his pre arrest bail, which may or may not be granted depending upon merits of the case, but even in such cases, upon his appearance, he may be required by the court to execute a bond for his future appearance with or without sureties obviating the requirement of bail.

While explaining the difference between a bail and a bond, it has been held in Para 25 that a bail is release from a restraint, (actual, threatened, or reasonably apprehended loss of liberty) and a bond is an undertaking for doing a particular thing and in the present context it is an undertaking for appearance before the court in future as and when required to do so. A bond invariably stipulates a penalty for nonfulfillment of the undertaking and in case of failure to fulfill the same the bond may be forfeited and the stipulated penalty may be imposed in full or in part. We may say that this illustrative expression neither tends to overtake requirement of bail for an accused pending trial in a non-bail offence nor postulates doing-that-particular-thing (undertaking to appear in the court by executing a bond) independent of a bail itself. It essentially, to our humble view, alludes to a process issued u/s 204 to secure attendance of an accused pending trial before a court (mainly in a private complaint), and the procedure a court can adopt at the time of his resultant appearance before it to regulate his future appearance in absence of any real or perceived restraint to warrant an order granting him bail and its satisfaction by him.

40. At the same time, it may be noted that it has also been held that in the aftermath of a warrant, the accused would come under a kind of restraint and therefore he can apply for bail, which, depending on merits of the case, could be allowed or refused to him. Meaning thereby neither the merits of a case and nature of the offence are irrelevant nor an inevitability to turn to availing bail for an accused for warding off (actual or threatened) restraint. The expression **'**but even in such cases, upon his appearance the accused may be required by the court to execute a bond for his future appearance with or without sureties obviating requirement of bail**'** made immediately after the observation that accused's application for bail could be allowed or refused would be understood to mainly speak of (i) when his appearance in the court is required not on account of any real or perceived restraint imposed by law; and (ii) when he appears in the trial court after his application has been allowed and he is required to execute a bond to ensure his further appearance.

41. Further, in the same decision, harping on a question of pre arrest bail application by an accused after issuance of process u/s 204 CrPC to him, it has been held in Para 27 that the matter of bail in a criminal case, be it a Challan case or a private complaint case, is relevant only where the accused is either under actual custody/arrest or he genuinely and reasonably apprehends his arrest on the basis of some process of the law initiated either by the court or the police. It has been further maintained, issuance of process by a court through summons for appearance of an accused before it neither amounts to arrest of the accused nor it can *ipso facto* give rise to an apprehension of arrest on his part and, thus such accused cannot apply for pre arrest bail and even if he applies for such relief the same cannot be granted to him by the court. In the same Para, whilst pointing out to a necessary element

warranting a relief of pre arrest bail to an accused, it has been held that in a criminal case the court admitting an accused to such relief has to be satisfied that the intended or apprehended arrest of the accused is actuated by ulterior motives or mala fide on the part of the complainant, etc. However, in a complaint case, when an accused appears before the court in response to summons issued u/s 204 CrPC, he is still unaware of the exact nature of allegations against him or the basis of his summoning by the court, and therefore he is not expected to be in a position at that stage to urge or substantiate before the court that the private complaint against him is accentuated by malice. It has been further observed, in such a case, the police are not looking for arrest of such person and what is authority of the court to order for his arrest upon refusal to require him to execute a bond for his future appearance before the court u/s 91 CrPC, or upon dismissal of his application for pre arrest bail is a question which abegs an answer that is nowhere to be found in the Code. In the Code arrest of a person is an incident of investigation by the police and in a case of a private complaint there is no investigation involved unless that is ordered by the court concerned u/s 202 CrPC before issuance of process u/s 204 CrPC. And if the investigation is so ordered, the suspect person apprehending a restraint on him can apply for pre arrest bail u/s 498 CrPC and if he is arrested can apply for post arrest bail u/s 496 or 497 CrPC.

42. We reiterate here that whatever view of the issue is held by us, a decision of the Supreme Court on it shall always be binding on us and that we are constitutionally bound to follow. After having expressed our obeisance in clear words to what has been laid down in above judgment and its binding nature on us, we want to stress here, nevertheless, the aforesaid judgment is distinguishable from the context and issues being looked at here in that in the said decision applicability of aforesaid sections has been examined in a particular background relating mainly to the trials concerning with a private complaint. In such cases, being held under the general law, the courts have the power to release an accused present in compliance of process u/s 204 CrPC by invoking jurisdiction either u/s 496, 497 or 498 CrPC. While here we are discussing the issue exclusively in the backdrop of NAO, 1999. The courts holding trials thereunder are different and have no jurisdiction to invoke powers embodied in *ibid* provisions and release an accused on bail. This is a special law and has been enacted for a special purpose to eradicate corruption and corrupt practices, to hold accountable all those persons accused of such practices, and recover looted money from them. Section 3 thereof gives it an overriding effect notwithstanding anything contained in other laws. In terms of section 9 (b), all the offences have been categorized as non-bailable and the standard power of the courts to release an accused on bail in such offences has been specifically rolled back. Section 17 renders provisions of the Code applicable to proceedings thereunder only if they are not

inconsistent with the Ordinance and if they carry forward its object. The court under this section is further authorized, for reasons to be recorded, to dispense with any provision of the Code and follow such procedure as it may deem fit in the circumstances of the case.

43. The arrangement, followed in a private complaint making it difficult for an accused summoned by the court to know exact nature of the case against him to urge malice, etc. by the complainant and seek protection, is altogether different to what accompanies a person called upon to face proceedings in the court as accused under NAO, 1999. In the NAB cases, an enquiry followed by an investigation is pursued. The accused is summoned by the IO and confronted with allegations in order to provide him an opportunity to defend himself. In the process, the accused gets well versed with the nature of accusations against him. Fearing restraint, he invariably approaches a High Court for a pre arrest bail on the ground of apprehension of his arrest pending enquiry or investigation, and is usually admitted to ad interim pre arrest bail. Or if he in the process is arrested applies for a post arrest bail. In both the cases**:** him apprehending arrest, or his actual arrest is the incident occurring at the time of enquiry or investigation, and it is effectuated by a process of law initiated by the court respecting non-bailable offences. The Honourable Supreme Court in the above decision has held that bail matter will become relevant where the accused is under actual custody or he genuinely and reasonably apprehends arrest on the basis of some process initiated by the court or the police. These developments, arrest or apprehension of arrest under a special law caused by the court process, quite diverse to what a person happens to stand after being summoned as accused in a private complaint case, therefore, will not be offset by mere execution of a bond by the accused at the time of his appearance in the court but will require adjudication of the questions as contemplated u/s sections 497 or 498 CrPC. It, however, goes without saying that since such powers are not available to the trial court, the accused for such a relief will be required to invoke constitutional jurisdiction of a High Court first.

44. However, it has been observed that when the accused during enquiry/investigation is granted ad interim bail, the Chairman NAB does not order his arrest. This interim set up often lingers on for want of required material till filing of the reference against him and ultimately either his application is allowed or dismissed on merits. In case of a dismissal, albeit the Chairman NAB now cannot issue a direction/warrant to arrest him, but it must be remembered, his status as an accused wanted in a non-bailable offence has not changed meanwhile and his position when he had first approached the High Court for protection has immediately been restored. It may be recalled that even in above decision the Honorable Apex Court has held that when an accused comes under restraint pursuant to process issued against him, he may apply for bail. There is nothing in the law suggesting that after

filing of the reference, such position will change and requirement of taking the accused in custody subject to bail would vanish allowing him to attend the court. We have already held above that in a non bailable offence custody of the accused is not only desired at investigation stage under certain circumstances but in the trial on grounds of public policy as well in order to ensure fair trial and to prevent possibility of commission of further offence by him. So even after filing of the reference, despite no warrant against him in investigation, his status as an accused wanted in a non bailable offence will not be changed, and that is sufficient to stoke apprehension of arrest in his mind against which the only remedy, as noted by the Honourable Supreme Court, for him would lie in seeking bail protection.

45. But now that situation cannot be offset, he has already exhausted the jurisdiction for a relief identical to one set out u/s 498 CrPC up to the highest level. There is no other provision in the Code providing alike relief to the accused in supersession thereof or in addition to it. In such circumstances, the only remedy he seems to have in law for regulating his attendance in the court without any further restraint could be either u/s 496 or 497 CrPC. Since neither the offences in NAO, 1999 are bailable, nor does the accountability court have jurisdiction to convert them so and release the accused on bail on his appearance or discharge him on his executing a bond, his remedy shall legally be the one like u/s 497 CrPC before the High Court. But for that to happen, the incidence of his arrest has to happen, and that will be only when he is committed to custody on his appearance in the court. It does not require any ingenuity to understand a simple point of law that an accused who is not in custody cannot ask for a relief provided u/s 497 CrPC.

46. But if the accused was neither on ad interim bail nor against him warrant was issued during enquiry or investigation till filing of the reference. He either would be shown not arrested or absconder. The trial court after taking cognizance, keeping in view nature of the offenses being non-bailable, would be required to issue a warrant in the first instance as contemplated u/s 204 CrPC. We may add here that although the court has been given authority to issue summons in such cases but it is only when it **thinks it fit.** In normal course, otherwise, the court is obligated to issue a warrant in the first instance against a person accused in a case requiring issuance of a warrant as per second schedule of the Code to procure his attendance. It is not an issue before us to determine in what cases the court may tend to **think fit** to issue summons to procure attendance of the accused instead of warrant as required by the Code. But we believe it would not need a deep insight and a lengthy line of references to get that this expression could ultimately be understood to be in respect of those accused against whom sufficient material connecting them in the alleged non-bailable offence is not found during investigation and they are either released u/s 169 CrPC or

granted bail by the investigating officer u/s 497 CrPC. But the court, analyzing the material submitted along with the Challan, finds sufficient grounds to disagree with such opinion/finding and thinks it fit to summon the accused to stand the trial. And then when he appears in response, unless the court forms an opinion or the prosecution is successful to show that his involvement in the case is based on reasonable grounds, he would be given bail and released, subject to compliance of all prerequisites as discussed above. But, in the cases where the court forms an opinion that there are reasonable grounds to believe that the accused has committed a non-bailable offence, it will be required to issue a warrant against the accused. On his appearance, unless he effectively establishes the contrary (there are no reasonable grounds to believe that he has committed such offence), he will not be released on bail and would be rather committed to custody until such question pending trial is resolved by the court in his favour. As it has already been settled that filing of a reference is equal to filing of a Challan, the position qua a process u/s 204 CrPC in the NAB cases for procuring attendance of an accused and resultants events culminating in release of the accused on bail as explained herein above will *mutatis mutandis* be attracted. But, as the accountability court has no authority to undertake such an exercise to determine existence or otherwise reasonable material connecting the accused with the offence, a precondition to be actuated for release of the accused on bail in non-bailable offences, it will not be competent to release the accused on his appearance before it.

47. After having had a word on above point, we resume discussion cut short in preceding paragraph that after filing of the reference, the court after analyzing the material made available before it on above touchstone would issue a warrant u/s 204 CrPC accordingly to procure attendance of the accused. It is the process of law and issued in respect of non-bailable offences and the court issuing such process has no jurisdiction to undertake an analysis of a kind as discussed above to determine right of the accused to bail. These factors, in our humble view, are sufficient to give rise to a genuine apprehension of restraint in the mind of an accused, and which in ordinary course shall prompt him to make an attempt to seek protection against it. Or, it cannot be ruled out, pursuant to such process; he is arrested and brought before the court. His apprehension of arrest in the first case and arrest in the second case both are actuated by a process issued by the court. Therefore, as has been laid down in in Para 27 of Sarwar's case (*supra*) that in such a situation the accused's remedy is in applying for bail. In the first instance, he has a remedy as justifiable and justiciable u/s 498 CrPC, and in the second case, to apply for post arrest bail for his release. There is nothing in law to indicate that after the reference, such situation will be rendered rendunt allowing the court to require the accused, on his appearance, to execute a bond u/s 91 CrPC, instead of requiring him to get his entitlement to bail

adjudicated first. So, obviously, in the light of such extrapolation, it is not hard to say that when a person accused in a reference, neither on ad interim bail nor wanted through a direction/warrant in enquiry/investigation, appears in response to process seeking his attendance, he will be dealt with in the likewise manner as explained above. As his release on bail is dependent upon adjudication of a question whether or not there are reasonable grounds to believe he is involved in the alleged offence and which as the accountability court has no power to do, it shall not be competent to pass any order, except of acquittal, to release him pending trial.

48. But suppose the accused's ad interim pre arrest bail is ultimately confirmed, there will arise no situation as being dilated upon here. But when it is dismissed, the circumstances as discussed in preceding Paras are bound to follow, the incidence of accused's arrest, after exhaustion of all remedies for pre arrest bail, would become a reality induced by none other than disposition of law itself not postulating any other arrangement to supersede it. His remedy, therefore, would lie only in the terms as provided u/s 497 CrPC and for which he would be required to be committed to custody on his surrender. However, there could be the cases, where after issuance of process by the court neither the accused is arrested nor he approaches a High Court for pre arrest bail, but appears before the accountability court on his own. The point that needs to be kept in mind is that he has appeared as an accused in a non-bailable offence under a special enactment which neither bestows any authority on the trial court to determine presence or otherwise of reasonable grounds against him to extend its benefits to him nor gives it a power to discharge him on his execution of a bond by treating the offence as bailable.

49. We may be allowed to reiterate that it is settled that in a case pertaining to a non bailable offence, presence of an accused in the trial or his release for such purpose is regulated on a consideration of existence of reasonable material/grounds involving him or otherwise in the offence. *Ergo*, even when he turns up on his own in the accountability court after such process, his further attendance would be ruled in the light of such principles. Only after compliance thereof, the procedure as laid down in section 91 CrPC would unveil allowing the court to require him to execute a bond which in the given situation is but satisfaction of one of the conditions of bail for ensuring his unhindered appearance in the court. Minus such compliance, and since the accountability court has no jurisdiction to administer the same, the accused on his appearance would be committed to custody by the accountability court till an order granting him a relief as arranged u/s 497 CrPC is coined by a High Court or by the Honorable Supreme Court in his favour.

50. In the light of foregone discussion, we conclude that in the given facts and circumstances section 91 CrPC cannot be applied in isolation for ensuring attendance

of an accused called upon to stand a trial in a NAB reference. Whenever it is invoked by the court, taking cognizance of offence in the NAB case, requiring the accused present to execute a bond for his future appearance, it would be only after a judicial order admitting him to bail has been passed, and that he has abided by and given bail as required. This seems to be an impregnable scheme of the Code that not being in conflict with any provisions of NAO, 1999 is applicable *mutatis mutandis* to the NAB cases as stipulated in section 17 thereof. This shall definitely lead to a conclusive inference that since the power to admit/release an accused on bail u/s 497 CrPC, etc. or discharging the accused on his execution of a bond are not conferred on the accountability court, it shall not be competent to require the accused, when he appears or is brought before it, to execute a bond u/s 91 CrPC for his future appearance. It is settled that when the court has no power under the law to grant a particular relief, it cannot extend the same indirectly. The court's action releasing the accused after filing of the reference either from jail or on his appearance on execution of a bond, in absence of a bail-granting-order by the High Court or the Supreme Court in constitutional jurisdiction, shall not only amount to admitting him to bail indirectly against express intention of the legislature not conferring such power on the court. But it would be in clear violation of the regime coined u/s 497 CrPC governing release of a person accused in a non-bailable offence when he is brought before the court.

51. The process to cause attendance of an accused after filing of the reference is no doubt issued in terms of section 204 CrPC. But, as explained already, the offences are non-bailable and the court has no authority to attend to a question of bail and consider existence or otherwise of reasonable grounds against him for such relief, as such it shall issue a warrant in the first instance and on appearance of the accused commit him to custody. We have already highlighted above the kind of cases in which the court can incline to think it fit to adopt a different course in non bailable offences and issue a summons instead to secure attendance of the accused. In our humble estimation, the NAB cases, with sufficient material connecting the accused with the alleged offence, are at least not the ones justifying approval of such a step to seek his presence through. Be that as it may, after the accused appears voluntarily or in compliance of such process, the accountability court shall not release him on his mere willingness to execute a bond u/s 91 CrPC undertaking to appear on the next date but commit him to custody till his acquittal by it or till in his favour a bail granting order is delivered by the High Court or by the Honorable Supreme Court. Non issuance of a direction/warrant against the accused by the Chairman NAB, for any reason including his being on pre-arrest bail granted to him during enquiry or investigation (subsequently recalled), whose authority in this regard lasts only till filing of the reference, would not be a legal bar for the trial court to exercise

jurisdiction otherwise bestowed on it by the Code to regulate appearance of the accused accordingly. All three questions are replied in the terms as above.

In the above terms, C.Ps.No.D-1655/2020, and 5802/2020 are disposed.

Office is directed to fix remaining Petitions filed for pre arrest and post arrest bail before the regular bench as per roster for hearing within two weeks; and send a copy of this decision to all the accountability courts in Sindh for a perusal and compliance.

JUDGE

Adnan Iqbal Chaudhry J. with Shamsuddin Abbasi J. agreeing - We have studied the eloquent and earnest discourse by our learned brother, Mr. Justice Muhammad Iqbal Kalhoro. With all humility, and for reasons that follow, we have not been able to convince ourselves to take the same view.

2. The legal questions propounded for our consideration and submissions of learned counsel thereon are recorded in the opinion of our learned brother, and therefore we do not repeat them here. The facts of each of the Petitioners are not discussed in detail as we had deemed appropriate to answer only the legal questions raised and leave the petitions to be decided by the Division Bench in light of the law discussed herein.

3. The legal questions before us arise from various scenarios. Some of the Petitioners contend that no warrant for their arrest was issued by the Chairman NAB during inquiry or investigation, nor by the Accountability Court on taking cognizance on the Reference, but the NAB is still looking to arrest the Petitioners even though the Petitioners are ready to appear before the Accountability Court and execute a bond under section 91 CrPC to assure their appearance before the Court at trial. Some Petitioners contends that they had appeared before the NAB on call-up notices, had cooperated during investigation, and hence were not arrested; but subsequently when a

Reference has been filed against them, the NAB is looking to arrest them thus compelling them to seek pre-arrest bail. In one of the petitions, the Petitioner was already under arrest in one Reference when he was arrested in two subsequent References although there was no warrant for his arrest in the latter References. He was granted bail in the first Reference and was released in the latter References on the ground that there was no warrant for his arrest; but now the NAB has moved an application before the Accountability Court for a non-bailable warrant for his arrest even though he is willing to execute a bond under section 91 CrPC to assure his presence before the Court at trial.

4. Another set of cases that came under discussion were lead by the case of *Syed Fida Hussain Shah v. Superintendent Central Jail Karachi* (C.P. No. D-7235/2018) decided on 02-04-2019 by a Division Bench headed by the Honourable Chief Justice of this Court. There the facts were that the petitioner was granted post-arrest bail by the Supreme Court in one Reference; however before he could be released, the Accountability Court issued his production order in another Reference and committed him to jail without requiring him to execute a bond under section 91 CrPC. In such circumstances the learned Division Bench framed the following question for the NAB :

> *"Whether a person accused in any Reference could be kept behind the bars without issuance of a warrant of arrest by the Chairman NAB or a person duly authorized by him in this behalf or by the trial court, whatever the case may be?*
>
> In response, the Chairman NAB submitted the following reply:
>
> *"No, the accused in a Reference cannot be kept behind the bars without a warrant of arrest issued by the Chairman NAB or a person duly authorized by him in this behalf or by the trial Court.*
>
> *-sd-*
> *Chairman NAB".*

Consequently, it was held in *Fida Hussain* that in the absence of any warrant for arrest by the Chairman NAB or by the Accountability Court, confining the petitioner to jail was unlawful and ordered his

release. In similar circumstances, similar orders were passed by this Court in the cases of *Imran Khan Yousufzai v. National Accountability Bureau* (C.P. No. D-7465/2019) and *Tanveer Ahmed Tahir v. Province of Sindh* (C.P. No. D-7275/2019).

5. The underlying question is that when an accused under the National Accountability Ordinance, 1999 [NAO] appears or is brought before the Accountability Court pursuant to a process issued by said Court on taking cognizance on a Reference, whether the accused can be required to execute a bond under section 91 of the Code of Criminal Procedure, 1898 [CrPC] for his appearance in Court ? or is it that the special provisions of the NAO do not admit of such procedure ? The Petitioners are of course for the taking of said bond. The proponents of the latter proposition submit that since section 9(b) NAO makes offences thereunder non-bailable and expressly ousts the jurisdiction of Courts to grant bail[1], that by implication also ousts the taking of a bond under section 91 CrPC, otherwise that would amount to granting bail by the Accountability Court. *Ergo*, it is contended that the only process that the Accountability Court can issue is that of a non-bailable warrant, leaving the accused to seek bail under Article 199 of the Constitution of Pakistan. In other words, it is contended by the Respondents that since the Accountability Court does not have jurisdiction to grant bail under sections 497 and 498 CrPC, it also cannot take a bond from the accused under section 91 CrPC.

6. Prior to *Sarwar v. The State* (2014 SCMR 1762), there were conflicting opinions on the nexus between sections 91 and 204 CrPC on the one hand, and the provisions of bail in sections 496 to 498 CrPC on the other hand. The first view, lead by the Lahore High Court in *Mazhar Hussain Shah v. The State* (1986 PCrLJ 2359) was that where the Second Schedule to the CrPC provided for a warrant to issue in the first instance as process under section 204 CrPC, but the trail Court

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[1] Bail can nonetheless be granted by the superior Courts under Article 199 of the Constitution of Pakistan as held by the Supreme Court in *Khan Asfandyar Wali v. Federation of Pakistan* (PLD 2001 SC 607).

chooses instead to issue summons, then if the accused appears, the Court should proceed under section 91 CrPC by requiring the accused to execute a bond with or without sureties for his appearance in Court instead of dismissing his application for pre-arrest bail inasmuch as:

> "Process is issued to the accused when the Court taking cognizance of the offence is of the opinion that there is sufficient ground for proceeding. Such opinion is not to be equated with the existence of reasonable ground for believing that the accused was guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years."

7. The case of *Mazhar Hussain* (*supra*) was upheld by the Supreme Court in *Reham Dad v. Syed Mazhar Hussain Shah* (decided in 1987 but reported later at 2015 SCMR 56). Though the case of *Mazhar Hussain* emanated from a private complaint, its ratio was also applied by the Supreme Court in a challan case in *Syed Muhammad Firdaus v. The State* (2005 SCMR 784) where the offence alleged was under section 302 PPC. There, the process issued was a non-bailable warrant; the accused obtained pre-arrest bail from the trial court which was cancelled by the High Court on the ground that the offence was non-bailable; but the Supreme Court held that bail should not have been cancelled as the accused were to be dealt under section 91 CrPC in view of the case of *Mazhar Hussain*. The view to the contrary, taken by a Division Bench of this Court in *Noor Nabi v. The State* (2005 PCrLJ 505) and subsequently reiterated by the Supreme Court in *Luqman Ali v. Hazaro* (2010 SCMR 611), was that when an accused appears or is brought before the Court pursuant to a summons or warrant, he cannot be released upon a bond under section 91 CrPC, but he is either to be taken into custody or he may be released on bail under sections 496, 497 or 498 CrPC depending upon whether the offence is bailable or non-bailable.

8. The conflict in opinions discussed above was laid to rest by a five-member Bench of the Supreme Court in *Sarwar v. The State* (2014 SCMR 1762) (hereinafter '*Sarwar's case*') where the the Supreme Court was seized of the question "whether after having been summoned by a trial court under section 204, Cr.P.C. to face a trial in connection with a

private complaint the person so summoned is required only to furnish a bond, with or without sureties, under section 91, Cr.P.C. for his future appearance before the trial Court or he is to apply for pre-arrest bail under section 498, Cr.P.C.". The five-member Bench approved the earlier view taken in the cases of *Mazhar Hussain, Reham Dad* and *Muhammad Firdaus* viz., that in such circumstances the Court can require the person summoned to executed a bond under section 91 CrPC. It was held in *Sarwar's case* :

> "25. In the context of the legal issue under discussion it is of critical importance to understand and appreciate the difference between a bail and a bond and unfortunately in the cases of *Noor Nabi* and *Luqman Ali* that difference and distinction had not been noticed or realized at all. A bail is a release from a restraint (actual, threatened or reasonably apprehended loss of liberty), and a bond is an undertaking for doing a particular thing and in the present context it is an undertaking for appearance before the court in future as and when required to do so. A bond invariably stipulates a penalty for non-fulfillment of the undertaking and in case of failure to fulfil the undertaking the bond may be forfeited and the stipulated penalty may be imposed in full or in part. It had not been appreciated in the cases of *Noor Nabi* and *Luqman Ali* that in a case of issuance of summons against an accused person under section 204, Cr.P.C. such person is under no actual, threatened or reasonably apprehended restraint at the time of his appearance before the court and, thus, his applying for bail is not relevant at such a stage and if he undertakes before the court to keep on appearing before the court in future as and when required to do so then he may be required to execute a bond, with or without sureties, in support of such undertaking. The position may, however, be different where the process issued against the accused person under section 204, Cr.P.C. is through a warrant, bailable or non-bailable, in which case the accused person may come under an actual, threatened or reasonably apprehended restraint. In such a case the accused person may choose to apply for bail which may or may not be allowed by the concerned court. Even in such a case upon appearance of the accused person before the court or upon his having been brought before it the court concerned may, if it thinks appropriate, require the accused person to furnish a bond, with or without sureties, without even considering bail to be necessary because issuance of a warrant, bailable or non-bailable, was meant only for procuring attendance of the accused person before the court and not for any other purpose.
> ……..
> …….

27. The masterly analysis of the relevant legal question undertaken in the above mentioned case leaves no room for doubt that the matter of bail in a criminal case, be it a Challan case or a case arising out of a private complaint, is relevant only where the accused person concerned is either under actual custody/arrest or he genuinely and reasonably apprehends his arrest on the basis of some process of the law initiated either by a court or by the police. It is but obvious that issuance of process by a court through summons for appearance of an accused person before the court neither amounts to arrest of the accused person nor it can ipso facto give rise to an apprehension of arrest on his part and, thus, such accused person cannot apply for pre-arrest bail and even if he applies for such relief the same cannot be granted to him by a court. …….

……..

……..

Those conditions and requirements have consistently been insisted upon by all the courts in the country as prerequisites ever since and one of such prerequisites for pre-arrest bail is that the accused person applying for such relief must have a good case for bail on the merits and for having a good case for bail on the merits the requirements of section 497, Cr.P.C. have to be kept in mind which requirements are totally different from those contemplated by the provisions of sections 204 and 91, Cr.P.C. as was noticed by the Lahore High Court, Lahore in the case of *Mazhar Hussain Shah (supra)* and by this Court in the cases of *Reham Dad* and *Syed Muhammad Firdaus (supra)*. Unfortunately all these critical aspects of the matter had completely escaped notice of the Honourable Judges deciding the cases of *Noor Nabi* and *Luqman Ali (supra)* and it had been held in those cases as a matter of course that after having been summoned by a court to appear before it the accused person concerned has to apply for bail or he has to be committed to custody. ……..

……..

…….

To us those observations apply with equal force to a case of a private complaint wherein a process has been issued against an accused person by a court under section 204, Cr.P.C. through summons requiring him only to appear before the court. In such a case the police is not looking for arrest of such person and what is the authority of the court to order that he may be taken into custody upon refusal to require him to execute a bond for his future appearance before the court under section 91, Cr.P.C. or upon dismissal of his application for pre-arrest bail is a question which begs an answer which is nowhere to be found in the Code of Criminal Procedure. In the said Code arrest of a person is an incident of investigation by the police and in a case of a private complaint there is no investigation involved unless an investigation is ordered by the court concerned under section 202, Cr.P.C. which can be done before the issue of process under section 204, Cr.P.C. If an investigation under section 202, Cr.P.C. is ordered by

> the court seized of a private complaint and if during such investigation the police or the investigating person intends to arrest the suspect then such suspect apprehending a restraint on him can, obviously, apply before the court for pre-arrest bail under section 498, Cr.P.C. and if he is actually arrested then he can apply for post-arrest bail under section 496 or 497, Cr.P.C. It has already been observed above that if a person summoned under section 204, Cr.P.C. fails to submit a bond under section 91, Cr.P.C. to the satisfaction of the court or fails to provide the requisite sureties then he may be committed to custody but such custody would last for as long as he does not fulfil the said requirements and he is to be released from the custody the moment those requirements are fulfilled by him. Such custody would surely not be an arrest in connection with the offence in issue but such custody would only be in connection with compelling him to comply with the court's requirements under section 91, Cr.P.C. It had not been appreciated in the cases of *Noor Nabi* and *Luqman Ali* that even in cases of the most heinous offences the police, not to speak of a court, is under no statutory obligation to necessarily and straightaway arrest an accused person during an investigation as long as he is joining the investigation and is cooperating with the same."

9. The findings in *Sarwar's case* are summarized in the penultimate paragraph as follows:

> "30. As a result of the discussion made above we hold that the law propounded by the Lahore High Court, Lahore in the case of *Mazhar Hussain Shah v. The State* (1986 PCr.LJ 2359) and by this Court in the cases of *Reham Dad v. Syed Mazhar Hussain Shah and others* (Criminal Appeal No. 56 of 1986 decided on 14-1-1987) and *Syed Muhammad Firdaus and others v. The State* (2005 SCMR 784) was a correct enunciation of the law vis-a-vis the provisions of sections 204 and 91, Cr.P.C. and it is concluded with great respect and veneration that the law declared by the High Court of Sindh, Karachi in the case of *Noor Nabi and 3 others v. The State* (2005 PCr.LJ 505) and by this Court in the case of *Luqman Ali v. Hazaro and another* (2010 SCMR 611) in respect of the said legal provisions was not correct. As held in the cases of *Mazhar Hussain Shah, Reham Dad* and *Syed Muhammad Firdaus (supra)* the correct legal position is as follows:-
>
> (i) A process is issued to an accused person under section 204, Cr.P.C. when the court taking cognizance of the offence is of the "opinion" that there is "sufficient ground" for "proceeding" against the accused person and an opinion of a court about availability of sufficient ground for proceeding against an accused person cannot be equated with appearance of "reasonable grounds" to the court for "believing" that he "has been guilty" of an offence within the contemplation of subsection (1) of section 497, Cr.P.C. Due to these differences in the words used in section 204 and section 497, Cr.P.C. the intent of the

legislature becomes apparent that the provisions of section 91, Cr.P.C. and section 497, Cr.P.C. are meant to cater for different situations.

(ii) If the court issuing process against an accused person decides to issue summons for appearance of the accused person before it then the intention of the court is not to put the accused person under any restraint at that stage and if the accused person appears before the court in response to the summons issued for his appearance then the court may require him to execute a bond, with or without sureties, so as to ensure his future appearance before the court as and when required.

(iii) If in response to the summons issued for his appearance the accused person appears before the court but fails to submit the requisite bond for his future appearance to the satisfaction of the court or to provide the required sureties then the accused person may be committed by the court to custody till he submits the requisite bond or provides the required sureties.

We may add that

(iv) If the process issued by a court against an accused person under section 204, Cr.P.C. is through a warrant, bailable or non-bailable, then the accused person may be under some kind or form of restraint and, therefore, he may apply for his pre-arrest bail if he so chooses which may or may not be granted by the court depending upon the circumstances of the case but even in such a case upon appearance of the accused person before the court he may, in the discretion of the court, be required by the court to execute a bond for his future appearance, with or without sureties, obviating the requirement of bail."

10. Whether the principles enunciated in *Sarwar's case* vis-a-vis sections 204 and 91 CrPC are applicable to proceedings under the NAO, is also a question that has been debated before the superior Courts.

In the case of *Professor Dr. Abdul Rahim Khan* (W.P. No. 3506-P/2015 and other connected petitions) decided on 05-11-2015, a learned Division Bench of the Peshawar High Court held that *Sarwar's case* was applicable to cases under the NAO and directed the Accountability Court to apply section 91 CrPC to ensure presence of the accused before the Court. A contrary view was taken by a learned Division Bench of this Court in *Iqbal Z. Ahmed v. National Accountability Bureau* (2018 PCrLJ 1694) decided on 22-11-2017. The facts of that case

were that on taking cognizance on a Reference, the Accountability Court issued non-bailable warrants against the accused who challenged the same contending that when the Chairman NAB had not issued warrants for their arrest during investigation, the Accountability Court could at best issue summons under section 204 CrPC, in which case the petitioners would be entitled to execute a bond under section 91 CrPC for their appearance in Court instead of compelling them to seek pre-arrest bail. However, the learned Division Bench held that section 91 CrPC could not be invoked in a Reference under the NAO which was special law with overriding effect; that since offences under the NAO were non-bailable, the only process the Accountability Court could issue was that of a non-bailable warrant; and that *Sarwar's case* was distinguishable as it did not pertain to cases under the NAO.

It is worthwhile to note here that *Iqbal Z. Ahmed* (*supra*) and decisions of this Court in the cases lead by *Fida Hussain* (discussed in para 4 above), are in different set of circumstances. In *Iqbal Z. Ahmed*, though the NAB was not looking to arrest the accused, the Accountability Court had issued a non-bailable warrant for his arrest. On the other hand, in *Fida Hussain* neither the NAB was looking to arrest the accused nor had the Accountability Court issued any warrant for his arrest; hence the finding in *Fida Hussain* that the Accountability Court had no legal basis to send the accused into judicial custody. In same circumstances, the learned Judge who had penned *Iqbal Z. Ahmed* had followed *Fida Hussain* in deciding the case of *Tanveer Ahmed Tahir v. The Province of Sindh* (C.P. No. D-7275/2019). Therefore, there does not appear to be a conflict between the cases of *Iqbal Z. Ahmed* and *Fida Hussain*. Rather there is consensus on the point that where the NAB is not looking to arrest the accused, and the Accountability Court too has not issued a warrant for his arrest, the accused cannot be committed to judicial custody when he enters appearance before the Accountability Court. That is also in consonance with *Sarwar's case*.

11. On 19-02-2018, a learned Division Bench of the Islamabad High Court gave judgment in *National Accountability Bureau v. Capt. (Retd.) Muhammad Safdar* (W.P. No. 3765/2017). There the facts were that the accused was never arrested by the NAB for investigation nor was the NAB looking to arrest him. On a Reference against him he did not appear before the Accountability Court despite summons and bailable warrant, and thus a non-bailable warrant was issued to procure his attendance. The accused was arrested and produced before the Accountability Court; the NAB pressed for judicial custody; but in view of *Sarwar's case* the Accountability Court released the accused on the execution of bond with surety under section 91 CrPC. That order was challenged by the NAB before the Islamabad High Court contending that *Sarwar's case* was not applicable to cases under the NAO and the only option with the accused was to apply for bail. The Islamabad High Court rejected that argument and held that *Sarwar's case* was applicable; that where the NAB did not seek to arrest an accused for investigation and a Reference is filed against such person, the Accountability Court can issue summons and/or warrants, bailable or non-bailable, to procure his attendance; that where bailable warrants are issued, the accused can either appear before the Court and submit bond pursuant to section 91 CrPC, or he can seek bail before arrest by way of a petition under Article 199 of the Constitution; however, where an accused is arrested pursuant to such warrants, though the Accountability Court has no jurisdiction to grant bail, it can nonetheless require the accused to furnish bond with surety under section 91 CrPC as the purpose of arrest is only to procure his attendance before the Court. The NAB assailed the judgment of the Islamabad High Court before the Supreme Court of Pakistan in Civil Petition No.1435/2018. By order dated 24-04-2018 the Supreme Court upheld the judgment of the Islamabad High Court as under:

> "In the instant case the accused was not arrested either at the stage of inquiry or during the investigation of the case as provided under Section 24 of the Ordinance, so also there is nothing on record to show that the Accountability Court has either examined the entitlement of the accused to be released on bail or has admitted him on bail in

> violation of the statutory command. It appears that the Accountability Court was of the view that since it has procured the attendance of the accused while exercising power under Section 91 of the Code of Criminal Procedure by issuance of non-bailable warrants, therefore, adopted the procedure provided under section 90 and released the accused upon execution of a bond with sureties. The order, in the circumstances, appears to be in consonance with the principle laid down by this Court in the case of *Sarwar and others v. the State (supra)*.
>
> No case of interference is made out. The petition is, therefore, dismissed and leave to appeal is declined."

12. While the above order dated 24-04-2018 passed by the Supreme Court in the case of *Capt. (Retd.) Muhammad Safdar* is a leave refusing order, it has nonetheless enunciated that the principle laid down in *Sarwar's case* is applicable to cases under the NAO. The ratio of *Khan Gul Khan v. Daraz Khan* (2010 SCMR 539) and *Muhammad Tariq Badar v. National Bank of Pakistan* (2013 SCMR 314) is that even a leave refusing order of the Supreme Court is binding precedent under Article 189 of the Constitution of Pakistan if it enunciates a principle of law. Therefore, *Capt. (Retd.) Muhammad Safdar* decided by the Supreme Court prevails over *Iqbal Z. Ahmed*.

13. Though the case of *Capt. (Retd.) Muhammad Safdar* does not leave room to argue that *Sarwar's case* does not apply to cases under the NAO, however, in order to answer some of the arguments raised by learned counsel and to formulate answers to the questions listed before us, a further discussion on the matter is necessitated.

> ***Question 3: "What is the regime of CrPC in respect of a person who is accused of a non-bailable offence and who appears or is brought before the court?"***

14. The first instance where a person accused of a non-bailable offence is brought before the Court is where he is arrested and is produced before the Court under section 167 CrPC for the purposes of taking remand. The second instance is where the accused arrested as aforesaid, has been investigated and is brought before the Court pursuant to section 170 CrPC for taking cognizance of the offence. The third instance, and the one relevant for the present purposes, is where

an accused of a non-bailable offence who was not arrested during investigation, appears himself or is brought before the Court arrested pursuant to a process issued under section 204 CrPC. The procedure that then follows has been laid down in *Sarwar's case* which is to the following effect:

(i) Bail can only be considered where the accused is either under actual custody/arrest or he genuinely and reasonably apprehends arrest on the basis of some process of law initiated either by a court or by the police. Where process issued under section 204 CrPC is a summons, there can be no apprehension of arrest at that stage, and thus the Court may require the accused to execute a bond under section 91 CrPC, with or without sureties, so as to ensure his future appearance before the Court. If the accused fails to submit said bond or to provide the required sureties, he can be committed to custody till he complies.

(ii) Where the process issued under section 204 CrPC is a warrant, bailable or non-bailable, then the accused person can be said to be under an apprehension of arrest, and therefore, he may choose to apply for pre-arrest bail, which may or may not be granted by the Court depending upon the circumstances of the case. But even then, upon his appearance before the Court, or having been brought before the Court, the accused may, in the discretion of the Court, be required to execute a bond under section 91 CrPC, with or without sureties, for his future appearance thereby obviating the requirement of bail inasmuch as, the warrant was meant only for procuring the attendance of the accused before the Court and not for any other purpose.[2] If then the accused commits breach of the bond, he can be arrested under section 92 CrPC.

15. The *ratio decidendi* in *Sarwar's case* is:

(a) that a non-bailable case does not entail that the accused has to be arrested straightaway by way of a necessity[3];

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[2] *Sarwar's case* (2014 SCMR 1762), para 25.

[3] For the same proposition also see *Sughran Bibi v. State* (PLD 2018 SC 595), and *Muhammad Bashir v. Station House Officer* (PLD 2007 SC 539).

(b) that the considerations of bail under sections 497 and 498 CrPC in respect of a non-bailable offence, are not attracted while issuing process under section 204 CrPC in a non-bailable case;

(c) that the arrest of an accused without warrant under sections 54 CrPC at the stage of the investigation, and the arrest of an accused pursuant to a warrant issued as process under section 204 CrPC also have distinct purposes. The purpose of the latter is only to procure the attendance of the accused before the Court. That is why even when such process is a non-bailable warrant and the accused appears before the Court on pre-arrest bail against such warrant, or he is brought in custody pursuant to said warrant, the Court may still in its discretion require the accused to execute a bond with or without sureties under section 91 CrPC to assure his appearance in Court, thereby obviating the requirement of bail.

It therefore follows that the taking of a bond from the accused under section 91 CrPC for his appearance in Court even in a non-bailable case does not amount to bail under sections 497 or 498 CrPC, and both sets of provisions cater to different situations. That being settled, the proposition that an offence against the Society as a whole is to be construed strictly as distinct from an offence against an individual, would be relevant while considering bail and not while issuing process.

16. Under the scheme of the CrPC, a non-bailable case does not entail that the Court is mandatorily required to issue a 'non-bailable warrant' for the arrest of the accused in the first instance. When column 4 of the Second Schedule to the CrPC provides for a 'warrant' to issue in the first instance in a non-bailable case, it does not stipulate whether a bailable warrant or a non-bailable warrant. Further, section 204 CrPC itself provides that even where the Second Schedule to the CrPC requires the issue of a warrant for arrest in the first instance, the Court "may issue a warrant, or, if it thinks fit, a summons, for causing the accused to be brought or to appear before it." In *Mazhar Hussain*, though a case of private complaint, the offence alleged was under

section 302 PPC, which, under the Second Schedule to the CrPC, is non-bailable, and for which a warrant for arrest is to issue in the first instance, but the Sessions Judge issued summons instead. The Lahore High Court held that such was the discretion of the trial Court under section 204 CrPC. The principle of that, as approved in *Sarwar's case*, was that in issuing process to the accused under section 204 CrPC, the Court taking cognizance of the offence has only to form an opinion that there is sufficient ground for proceeding against the accused, not that there exists reasonable ground for believing that the accused is guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years, the latter opinion being a requirement for bail under section 497 CrPC and not for issuing process.

17. Para 27 of *Sarwar's case* manifests that the findings in that case are both for private complaints and challan cases. The case of *Syed Muhammad Firdaus v. The State* (2005 SCMR 784) approved in *Sarwar's case* was also a challan case. Therefore, it is futile to urge that *Sarwar's case* is confined to private complaints only. Question 3 stands answered.

> ***Question 1: "What is the scheme of National Accountability Ordinance in respect of an accused against whom no warrant of arrest has been issued by the Chairman NAB in the inquiry or investigation and against whom a reference has been filed in the court?"***

18. The above question was essentially to decipher whether the regime of the CrPC (discussed under question 3 above) with regards to a person accused of a non-bailable offence who appears or is brought to the Court, is applicable also to cases under the NAO. As already discussed, that question stands answered in the affirmative by the Supreme Court in the case of *Capt. (Retd.) Muhammad Safdar*. The argument advanced by the Respondents is that the NAO is special law with overriding effect which does not admit of the general procedure of the CrPC. That argument is examined as follows.

19. Section 5(2) CrPC provides that all offences under any other law shall be investigated, enquired into, tried according to the CrPC but subject to any enactment regulating the manner or place of investigation, enquiry or trial of such offences. Thus, the existence of special law *per se* does not exclude the operation of the CrPC until the special law envisages a special procedure. Section 17(a) and (b) NAO itself make applicable the provisions of CrPC *mutatis mutandis* to proceedings under the NAO unless there is an inconsistency in the CrPC. While section 17(c) NAO empowers the Accountability Court to "dispense with any provision of the Code and follow such procedure as it may deem fit in the circumstances of the case", such power of the Accountability Court is not uncontrolled but is regulated by the principles of section 24A of the General Clauses Act, 1897 as so held by the Supreme Court in *Khan Asfandyar Wali v. Federation of Pakistan* (PLD 2001 SC 607) as under:

> "244. ……Thus visualized the Court's power to dispense with a provision of Criminal Procedure Code is not uncontrolled and will be governed by the principles enshrined in Section 24A (supra). If the Accountability Court deems fit to make departure from the provisions of the Criminal Procedure Code reasons will have to be recorded in writing under the section. In appropriate cases such reasons are justiciable in the exercise of constitutional jurisdiction of the Superior Courts at the instance of an aggrieved party. ……
>
> 245. The upshot of the whole discussion is that in terms of the impugned provision of section 17(c) of the NAB Ordinance, an Accountability Court shall not exercise its discretion arbitrarily but on sound judicial principles by assigning valid reasons. We, therefore, hold that section 17(c) is not violative of Articles 4 and 25 of the Constitution."

20. The NAO does not stipulate the mode in which process is to issue in the first instance by the Accountability Court on taking cognizance on a Reference, i.e., whether by a summons or a warrant. Therefore, for issuing process on a Reference the question of inconsistency between the NAO and the CrPC does not arise. It would be absurd to suggest, especially in view of the contours of section 17(c) laid down in *Khan Asfandyar Wali*, that an Accountability Court can

dispense with process to an accused. Therefore, by virtue of section 17(a) NAO, the provisions of sections 204, 90 and 91 CrPC will apply *'mutatis mutandi'* to proceedings under the NAO. The words *'mutatis mutandi'* would entail that when the Second Schedule of the Code is not relevant to offences under the NAO, it is for the Accountability Court to determine whether to issue summons in the first instance or a warrant, and if a warrant, whether bailable or non-bailable. That determination by the Accountability Court is not to be arbitrary but is to be guided by the opinion it forms on taking cognizance on the Reference that there is sufficient ground for proceeding against the accused; and that in the given facts it may be fit to issue a warrant in the first instance instead of a summons, including but not limited for reasons set-out in section 90(a) CrPC.

21. Here, the argument put forth by the Respondents is that the Accountability Court can only issue process in the form of a non-bailable warrant because offences under the NAO are non-bailable; and if the Accountability Court were to issue process in the mode of summons or a bailable warrant that would amount to granting bail which is prohibited by section 9(b) NAO. Both arguments are misconceived. As discussed in para 16 above, a non-bailable case does not entail that the Court is mandatorily required to issue a non-bailable warrant in the first instance. Per section 76 CrPC, "Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody". Such warrant issued with the endorsement of section 76 CrPC is called a 'bailable' warrant, presumably because Form II prescribed for such warrant in Schedule V CrPC uses the words "if (person) gives bail himself". Firstly, section 76 CrPC nowhere restricts the warrant thereunder to bailable cases only. When prescribing a warrant to issue in the first instance, column 4 of the

Second Schedule to the CrPC does not specify whether such warrant is to be bailable or non-bailable, rather leaves that discretion with the Court under section 204 CrPC. Section 78 CrPC also illustrates that a bailable warrant can issue for a non-bailable offence. Secondly, though section 9(b) NAO ousts the provisions of 'bail' contained in the CrPC, it does not oust the provisions of 'process' contained in the CrPC. The Accountability Court is clearly not granting bail under sections 496, 497 or 498 CrPC when it issues process under section 204 CrPC to call or compel appearance of the accused in Court to answer the case against him. Consequently, if the Accountability Court were to issue process in the form of summons or a bailable warrant, the prohibition against bail in section 9(b) NAO remains intact. Had the intent of the framers of the NAO been to restrict process by the Accountability Court to a non-bailable warrant, that much would have been specified when provisions of bail were being expressly ousted.

22. The contention that the Accountability Court cannot take a bond for appearance under section 91 CrPC is premised on the submission that the taking of such bond amounts to granting bail which power the Accountability Court is devoid of. That very misconception of linking 'bail' in sections 496 to 498 CrPC with the bond in section 91 CrPC has been highlighted by the Supreme Court in *Sarwar's case* and in the case of *Capt. (Retd.) Muhammad Safdar*.

> ***Question 2: "What if the warrant of arrest (by Chairman NAB) has not been issued against the accused for some reason including his being on ad-interim pre arrest bail granted during the inquiry/investigation and he subsequently appears before the trial court in pursuance of a reference, may be after dismissal of his pre arrest bail application; whether he would be released in terms of section 90, 91, r/w section 204 CrPC or he would be taken into custody?"***

23. The above question is in the backdrop of the submission that the Chairman NAB becomes *functus officio* after filing Reference and can no longer arrest the accused. Therefore, it will be expedient to first discuss the powers of arrest vested in the Chairman NAB under the NAO.

Under section 18(e) NAO, "The Chairman NAB and such members, officers or servants of the NAB shall have and exercise, for the purposes of an inquiry or investigation the power to arrest any person, and all the powers of an officer-in-charge of a Police Station under the Code, …….. provided that no person shall be arrested without the permission of the Chairman NAB or any officer of NAB duly authorized by the Chairman NAB." Under section 24(a) NAO, "The Chairman NAB shall have the power, at any stage of the inquiry or investigation under this Ordinance, to direct that the accused, if not already arrested, shall be arrested." And finally, section 24(c) NAO reads that "The provision of sub-section (a) shall also apply to cases which have already been referred to the Court."

Here it is to be noted that sections 18(e) and 24(a) NAO do not mention the word 'warrant'. The 'permission' to arrest under section 18(e) NAO or the 'direction' to arrest under section 24(a) NAO is not a 'warrant'. A warrant is a process issued by a Court as prescribed in section 75 CrPC. Said permission or direction to arrest given by the Chairman NAB is akin to the one granted by the Officer in charge of a Police Station to a sub-ordinate officer under section 56 CrPC for making an arrest without warrant in a cognizable case.

24. Under section 18(e) NAO the arrest is 'for the purposes of an inquiry or investigation' and can be of 'any person' including the accused. Section 24(a) NAO on the other hand deals only with the arrest of the 'accused', and the words 'if not already arrested, shall be arrested' denote that the arrest envisaged thereunder is at that stage of the inquiry or investigation when the Chairman NAB forms the opinion that custody of the accused is now necessary for completing the inquiry/investigation, **or** that there is sufficient evidence to tie the accused to a non-bailable offence. It follows that section 24(a) NAO is also testament of the intent that it is not mandatory to arrest a person straightaway solely because he is accused of a non-bailable offence.

25. This brings us to section 24(c) NAO which enjoins section 24(a) NAO to enable the Chairman NAB to issue a direction for the arrest of

an accused after filing the Reference. However, at that stage the legal premise for arresting the accused is not that he is required for investigation, but that there exists a reasonable suspicion that he has committed a non-bailable offence and may abscond. Consequently, the arrest envisaged under section 24(c) NAO is to take and forward the custody of the accused to the Accountability Court for the purposes of taking cognizance of the offence which is akin to the procedure in section 170 CrPC. It was held by the Supreme Court in *Khan Asfandyar Wali* that when the Chairman NAB decides to make a Reference to the Court under section 18(g) NAO, the procedure in section 170 CrPC will apply accordingly.[4] The challenge thrown to section 24(c) NAO on the ground of retrospectivity and on the threshold of Articles 4 and 25 of the Constitution of Pakistan, was also rejected in *Khan Asfandyar Wali*.[5]

In view of the foregoing, the submission that the Chairman NAB becomes *functus officio* after filing the Reference is not accurate. That submission if accepted, would also rule out the possibility of further investigation and a supplementary Reference if need be after filing the first Reference. A learned Division Bench of this Court in *Dr. Ghulam Raza v. Director General (Sindh Region) National Accountability Bureau* (2019 MLD 433) has held that the scheme of the NAO does not oust further investigation by the NAB after filing the Reference if fresh evidence is discovered.[6] A similar view was taken by the Lahore High Court in *Dr. Majid Naeem v. National Accountability Bureau* (PLD 2012 Lahore 293) where the accused had never joined the investigation before the Reference was filed. However, since the matter of further investigation after filing Reference is not a question directly before us, we do not discuss that aspect any further.

26. The first scenario in question 2 above is where an accused under the NAO obtains interim pre-arrest bail under Article 199 of the

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[4] PLD 2001 SC 607, paras 275 and 276.
[5] *Ibid*, para 259.
[6] Further investigation after submission of challan is not alien to the scheme of the CrPC. See *Muhammad Akbar v. The State* (1972 SCMR 335); *Aftab Ahmed v. Hassan Arshad (*PLD 1987 SC 13); and *Bahadur Khan v. Muhammad Azam* (2006 SCMR 373).

Constitution at the stage of inquiry/investigation before or after the Chairman NAB issues permission/direction for his arrest, and subsequently a Reference is filed against him. The question is, can the accused in such circumstances be required by the Accountability Court to execute a bond under section 91 CrPC on his appearance before the Court ?

When section 91 CrPC states : '…. when a person appears in the Court which can compel his appearance by summon or warrant', the provision envisages a person who is not under custody or under some form of restraint. After citing *The Crown v. Khushi Muhammad* (PLD 1953 Federal Court 170)[7] it was reiterated in *Sarwar's case* that bail is considered only where the person seeking bail is either under actual custody, or where he genuinely and reasonably apprehends arrest by the police; and that a person on bail is nonetheless perceived to be in custody *albeit* he is released from the custody of police and delivered into the custody of sureties who undertake to produce him in Court whenever required to do so; hence the finding that section 498 CrPC and section 91 CrPC cater to different situations. In other words, section 91 CrPC is not meant nor available for an accused who appears before the Court on bail except where that bail is against the very warrant pursuant to which he has appeared in Court, the latter exception having being carved out in *Sarwar's case*.

27. Adverting to the other scenario in question 2; needless to state that interim pre-arrest bail is granted on the condition, express or implied, that the accused will cooperate in the investigation, and in extending such bail the High Court acting under Article 199 of the Constitution strikes a balance between the fundamental right to liberty and the hampering of investigation. Therefore, when the interim pre-arrest bail continues and the Reference is filed, it is to be taken that up till that point the Court is of the view that physical custody of the accused is not required for investigation. Since the direction to arrest

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[7] The pre-conditions to pre-arrest bail laid down in *Khushi Muhammad* were liberalized in *Sadiq Ali v. The State* (PLD 1966 SC 589) to include a situation where arrest under the law was imminent.

issued by the Chairman NAB is not a 'warrant' (para 22 *supra*), we do not see any impediment to the Chairman NAB issuing such direction pending the petition for pre-arrest bail as long as such direction stipulates that it is to be executed only if the interim pre-arrest bail is not confirmed. If the petition for pre-arrest bail is rejected after the Reference, such rejection generally is not to say that custody of the accused is required for investigation, but that the accused has not otherwise been able to make out a case for pre-arrest bail on the merits.[8] In such a situation the accused is exposed to arrest by the NAB either under section 24(a) NAO if a direction for arrest had been issued by the Chairman NAB prior to the Reference, or under section 24(c) NAO if such direction is given after the Reference, and if the accused is so arrested then section 91 CrPC will not be available when the accused is brought before the Court in custody. But, if on the rejection of the petition for pre-arrest bail there is no direction for arrest pending under section 24(a) NAO, nor is one subsequently issued under section 24(c) NAO, it will be taken that the NAB is not looking to arrest the accused, in which case section 91 CrPC will be available when the accused appears or is brought before the Accountability Court pursuant to a process under section 204 CrPC. The latter eventuality is also keeping in view the observation of the Supreme Court in *Sadiq Ali v. The State* (PLD 1966 SC 589), reiterated in *Jamaluddin v. The State* (1985 SCMR 1949), that the recall of ad-interim bail does not entail the consequence that the Court is to order that the accused be taken into custody without there being such a request by the police itself.

28. To formalize the answers to the questions above, *albeit* not in the same order:

(i) An accused under the NAO against whom the Chairman NAB has not issued any permission/direction to arrest, but against whom a

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[8]. It is reiterated in *Sarwar's case* that in considering pre-arrest bail one of the conditions to be satisfied is that it should also be a fit case on merits for exercise of discretion, and in that regard the provisions of section 497 CrPC are to be kept in mind.

Reference is filed, when such accused appears or is brought before the Accountability Court pursuant to a process issued under section 204 CrPC, whether summons, bailable warrant or non-bailable warrant, he can be required by the Court to execute a bond with or without sureties under section 91 CrPC to assure his appearance before the Court;

(ii) Section 91 CrPC is not available for an accused who appears before the Court on bail, except where he is on bail against the very warrant issued to compel his appearance in Court;

(iii) If the accused under the NAO is denied pre-arrest bail, he is exposed to arrest by the NAB either under section 24(a) NAO if such direction had been issued prior to the Reference, or under section 24(c) NAO if a direction for his arrest is given after the Reference, and if the accused is so arrested then section 91 CrPC will not be available when he is brought before the Court;

(iv) If on the rejection of the petition for pre-arrest bail there is no direction for arrest pending under section 24(a) NAO, nor is one subsequently issued under section 24(c) NAO, the situation is the same as at serial (i) above with the same consequences.

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