ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI.

Date	Order with signature of Judge

Present:
Mr. Justice Muhammad Iqbal Kalhoro J.
Mr. Justice Shamsuddin Abbasi, J.

C.P.No.D-1752 of 2021

Dr. Kishore Kumar ..... Vs..... NAB & others

C.P.No.D-4351 of 2021

Noor Muhammad Leghari .....Vs..... NAB

M/s Mian Ali Ashfaque & Ahmed Mujtaba, advocates for petitioner in C.P.No.D-1752/2021.
Mr. Raj Ali Wahid, advocate for petitioner in C.P.No.D-4351/2021.
Mr. Shahbaz Sahotra, Special Prosecutor NAB a/w Hameedullah I.O. NAB.
Mr. Irfan Ali Memon, DAG.

Date of hearing: 16.09.2021 and 29.09.2021.
Date of order: 04.10.2021.

O R D E R

MUHAMMAD IQBAL KALHORO J: In hand are two petitions filed by accused Noor Muhammad Leghari and Dr. Kishore Kumar in reference No.19/2020. Former has sought release from jail alleging his custody to be illegal and, only as an alternate, relief of post-arrest bail; while the later has prayed for post arrest bail in the said reference.

2. In brief, the case against them is that when they were working in Education Department as Secretary and Section Officer respectively, by misusing their authority in collusion with each other and other accused, appointed 294 people illegally against various posts in Special Education Wing in the year 2012-13 through a process wholly illegal containing only walk-in-interview in violation of settled law and thus caused a loss of Rs.250 million to the national exchequer. Role of petitioner Noor Muhammad Leghari, the then Secretary, Education Department, is set out in para 4 of the reference that he in connivance with co-accused made direct appointments against various posts in Special Education Department without a due process. And then in order to draw a veil over

his illegality, he constituted a backdated recruitment committee and got offer letters issued to such appointees. Whereas, Dr. Kishore Kumar, in para 6, is accused of adding and abetting him in the offence and issuing offer letters to 294 appointees without verifying validity or authenticity of the process. Then to gloss over his acts, he together with two other accused caused missing/misplacement of the original record. In departmental enquiry, he alongside the said two co-accused was held responsible for it.

3. Mian Ali Ashfaque, learned counsel for petitioner Dr. Kishore Kumar has argued that he is innocent; has been falsely implicated in the case; at the time of initiation of appointment process by the then Secretary Muhammad Ali Shah, he was not even posted in the Education Department; that petitioner joined the education department on deputation basis much after, and as the section officer had issued offer letters in compliance of direction of the Secretary, co-accused Noor Muhammad Leghari, who had forwarded a list of 294 candidates duly signed by him for such purpose, as such he did not commit any illegality. Regarding second allegation i.e. his hand in causing disappearance of original record of the appointment process, he submitted that there is absolutely no evidence indicating that said record was ever entrusted to him or he in his capacity as the section officer was its keeper or even had come to possess it formally or informally; that as both the allegations against the petitioner are *prima facie* without any substance, his case requires further enquiry and he is entitled to concession of bail.

4. Mr. Raj Ali Wahid, learned counsel for petitioner Noor Muhammad Leghari has submitted that during investigation of the case warrant of arrest was not issued against the petitioner. However, on dismissal of his petition for pre arrest bail vide order dated 26.02.2021, he was arrested by NAB and sent to judicial custody. The warrant of arrest u/s 24(a) of NAO, 1999 was issued later on 25.11.2020 by the Chairman NAB after filing of the reference is unlawful. As under the said provision, the Chairman NAB has authority to issue warrant only in enquiry or investigation. After filing of the reference, he can issue such direction only u/s 24(c) NAO, 1999, as has been held by a larger bench of this court, but only when there is chance of abscondence of the accused. Learned counsel next submitted that even if the impugned warrant of arrest is deemed to have been issued u/s 24(c), it still is not warranted because there is no evidence that the petitioner wanted to abscond and avoid the trial. Since no ground exists to justify custody of the accused in jail, the warrant of arrest is illegal, and incarceration of the petitioner

unsustainable. He has relied upon the case law reported in PLD 2001 SC 607, PLD 2006 Kar 678, PLD 2015 SC 77,PLD 1986 SC 698, PLD 2019 Islamabad 566, PLD 2008 Kar 38, PLD 2018 SC 189, 2014 YLR 2644, 2012 YLR 251 and 2020 P Cr. L J 454.

5. On the other hand, learned Special Prosecutor NAB and I.O. have opposed the relief to the petitioners contending that there is sufficient evidence against them. Issuance of warrant of arrest against petitioner Noor Muhammad Leghari was recommended by the IO much prior to filing of the reference and its actual issuance after the reference is nothing but a mere technicality. Per them a wrong mention of provision of law will not make an action taken thereunder as unlawful. They also referred to Government of Sindh Manual of Secretariat Instructions, 2014 to highlight that failure of petitioner Kishor Kumar to perform his role and responsibilities as the section officer thereunder connects him inexorably with the alleged offence.

6. We have perused the record and have considered respective pleas of the parties including the case law cited at the bar. First we would like to discuss case of petitioner Kishor Kumar. There is material which shows that although he was a medical doctor but got himself posted in the education department as section officer. While working there with the secretary Noor Muhammad Leghari, a co-accused, he issued offer letters with his signature to 294 illegal appointees. His counsel did not deny it, nonetheless in order to justify the same urged that he did so innocuously only in the line of his duty and was not otherwise part or aware of any illegalities in the appointment process. This argument we do not find convincing. There was an apparent bizarreness in the list of candidates, each one was shown with 99 marks. Plus there was no record to support even their candidacy, let alone each one having earned same marks. Yet, instead of getting alarmed and playing his part with due caution expected of a public officer in such circumstances he went ahead and issued the offer orders. Manual of Secretariat Instructions shows that he as the section officer was, among others, being in charge of the section, responsible for its proper working and maintenance of record in addition to disposing of the case of his section in the light of precedents, which required his attentive diligence towards his duty and not being blindsided by a letter from his superior. Therefore the petitioner’s stance that he had no option but to issue offer letters to obey order of his secretary is shorn of legal value and acceptable.

7. Other than above, he and co-accused Naz Parveen allegedly issued 38 extra offer letters to the people who were not even cited in the list. Furthermore, he has been held responsible for causing disappearance of the record to gloss over illegalities committed in the recruitment process. Learned defense counsel's contention that evidence of entrustment of the record to the petitioner is not available is beside the point. For it is not the case of prosecution that he was keeper of the record or it was legally entrusted to him. The allegation is that he and others like him in order to cover up their illegal acts ensured disappearance of the record. This fact not only the witness in their statements have supported. But it was established in the departmental enquiry by a committee formed for this purpose. All these pieces of evidence *prima facie* connect the petitioner in this alleged offence and we therefore do not find him entitled to relief of bail.

8. Petitioner Noor Muhammad Legahari has questioned his custody on the ground that after filing of the reference the Chairman NAB has left with no authority to issue warrant of arrest against him u/s 24(a) of NAO, 1999. And that if at all a warrant needed to be issued against him, it was to be u/s 24(c) and that too only when there was apprehension of his abscondence. Before giving a comment on legality of this proposition, we take the liberty to say that finding *prima facie* sufficient evidence against the petitioner, we dismissed his bail application vide an order dated 26.02.202. At that time warrant of arrest dated 25.11.2020 against him was already in field and issued because, as noted by this court, there was sufficient material available to believe that he had committed the alleged offence. This inference i.e. sufficient evidence against an accused, seemingly congruous with exception **"except or save in accordance with law"** provided under Article 9 of the Constitution allowing departure from otherwise inalienable protection or a right to liberty held out to an individual thereunder, shall warrant issuance of a warrant against the accused. Therefore, we do not see any illegality in the impugned warrant or resultant arrest of the petitioner when there was sufficient evidence and reasonable grounds to believe his involvement in the alleged offense.

9. As to the point that warrant would be issued only when there is likelihood of abscondence of the accused is not legally correct. In a recent judgment dated 16.06.2021 in **civil petitions No.3637 & 3638 of 2019**, the Honorable Supreme Court in para No.5 has held that Article 9 of the constitution is a cherished fundamental right of a person, which, inter alia, guarantees right to liberty, which may be curtailed "save in accordance with law." The phrase "save in accordance with law" implies

that not only should the procedural requirements of the law be fully met but also its substantive content i.e. there must be sufficient material/evidence on the record that can justify the application of such a law. Therefore, material/evidence must be sufficient enough to persuade the constitutional court to deprive an individual of his fundamental right. In another case reported in **PLD 2018 SC 40,** it has been laid down that an accused can obtain post arrest bail on a tentative assessment of material if he is able to show that there are no reasonable grounds for believing that he has committed a non-bailable offence, and secondly there are sufficient grounds for further inquiry into his guilt. Meaning thereby that in presence of sufficient material/evidence and reasonable grounds to believe that an accused has committed the offence, his fundamental right to liberty enshrined in Article 9 can be curtailed and he can be taken into custody. Seen in this horizon, the contention that a warrant would be issued only when there is likelihood of abscondence of accused is not legally sustainable.

10. Further, when we look at this question from a different angle in the light of ratio laid down by a larger bench of this court in the judgment dated 26.04.2021 in C.P.D-No.1914 of 2020 and others. We realize that it was for the first time the power of the Chairman NAB to issue warrant of arrest u/s 24(c) of NAO, 1999 against an accused even after filing of the reference was judicially recognized. Previously, the view, being followed, was that the Chairman NAB had no such power after the reference. So when the impugned warrant of arrest dated 25.11.2020 was issued, no judicial pronouncement pontificating a precedent that the Chairman NAB can issue a warrant of arrest u/s 24(c) of NAO, 1999 was in the field. But the statutory authority under the same provision of law, albeit under a different clause, to act as such was provided to him and there was no impediment legal or otherwise restraining him from exercising such authority. When under such a situation, the impugned warrant was issued in view of presence of reasonable grounds to believe his involvement in the alleged offence, as confirmed by this court, neither its issuance nor arrest of petitioner in terms thereof would be deemed as null, void or illegal setting all ensuing developments at naught. For it is settled that a wrong reference to a particular provision of law under which either an act or omission has been done would not make such act or omission illegal, if otherwise the power to act or omit to act is available under the law to the authority concerned. In the circumstances, the question that the warrant should have been u/s 24(c) of NAO, 1999 and not u/s 24(a) of NAO, 1999 is immaterial and of no legal consequence.

11. As to his credentials to the bail sought by him as an alternate relief, we may point out that he was the relevant Secretary when the offence was committed. He forwarded a list, with his signature of 294 persons, replacing the original ones who had appeared in the test to the section officer for issuing offer letters to them for appointment. This fact has been confirmed not only from the documents collected in the investigation but by some of the witnesses who were part of the committee which had conducted interviews of the original candidates. Then through another committee without even a formal process or advertisement he succeeded in making 38 extra appointments. The material available *prima facie* point out to his role in this delinquency and in presence of such prima facie evidence, we are of a view that he is not entitled to relief of post arrest bail either.

12. Accordingly, in view of above discussion, the petitions in hand merit no consideration and are dismissed along with pending applications, if any. Needless to mention that the observations made hereinabove are tentative in nature and shall not prejudice the case of either party on merits before the trial court.

JUDGE

JUDGE

A.K.