

**2019 M L D 581**

**[Sindh]**

**Before Muhammad Iqbal Kalhoro and Mohammed Karim Khan Agha, JJ**

**Syed MANZAR ABBAS---Petitioner**

**Versus**

**NATIONAL ACCOUNTABILITY BUREAU, through Director General---Respondent**

C.Ps. Nos.D-4279, D-4797 of 2017 and D-748 of 2016, decided on 20th April, 2018.

**National Accountability Ordinance (XVIII of 1999)---**

---Ss. 9 & 16---Constitution of Pakistan, Art. 199---Constitutional petition---Corruption and corrupt practices---Bail, grant of---Ground of delay---Scope---Around three years had passed since arrest of the petitioners/accused yet trial had not concluded---Petitioners (three in number) contended that they were entitled for the concession of bail as there was no fault on their part in conclusion of trial while as many as 36 witnesses were still to be examined---National Accountability Bureau contended that delay was occasioned due to petitioners or their counsel and that only 6 witnesses were left to be examined to conclude the trial---Validity---Diary sheets revealed that only on about a handful of occasions could it be said that the proceedings were delayed on sole account of petitioners---High Court, over a year ago while rejecting bail of one of the petitioners had given direction that the Trial Court would hear the case on day to day basis and decide the same within 6 months of the said order and there were apparently around 13 prosecution witnesses to be examined at that time (as some were to be given-up by the prosecution and that with only 7 witnesses left, it was reasonable to assume that the trial would be completed within a period of 6 months---Direction of the High Court had expired (6 months ago) whereas list of prosecution witnesses on record showed that no prosecution witness had been given-up---Petitioners had spent around 3 years in jail and the delay in completing the trial was largely due to no fault of petitioners and that realistically the trial would not be completed in the near future---High Court observed that NAB cases were not completed within time frame of 30 days while proceeding on day to day basis as envisaged under S.16(a) of National Accountability Ordinance, 1999 which was also contrary to the intent and spirit of the legislature---Bail was allowed to the petitioners, in circumstances.

Shahid Umer v. Chairman NAB SBLR 2018 Sindh 357; Hamood ur Rehman Qazi v. Government of Sindh in Civil Petition No.3381 of 2017 and Chaudhary Mohammed Asharaff v. Federation of Pakistan C.P. No.D-7083 of 2016 ref.

Raj Ali Wahid Kanwar for Petitioner (in C.P. No.D-4279 of 2017).

Zakir Laghari for Petitioner (in C.P. No.D-748 of 2016).

Muhammad Jameel for Petitioner (in C.P. No.D-4797 of 2017).

Muhammad Altaf, Special Prosecutor, NAB for Respondents.

Date of hearing: 11th April, 2018.

**ORDER**

**MOHAMMED KARIM KHAN AGHA, J.**---These petitions have been filed by Syed Manzar Abbas, Agha Ghulam Mohiuddin and Ishrat Ahmed (the petitioners) for grant of post arrest bail on hardship grounds in National Accountability Bureau (NAB) References Nos.36 and 37

of 2016 The State v. Manzar Abbas and others which were filed by the NAB at Karachi and are proceeding in Accountability Court No.III Karachi by way of consolidated References 13, 29, 30 and 39 of 2015 (4 references were consolidated since they revolved around similar subject matter/offense) on account of the petitioner's and other co-accused's involvement in corruption and corrupt practices under the National Accountability Ordinance, 1999 (NAO) in connection with a Housing scam involving millions of Rupees.

2. At the outset learned counsel for all the petitioners made it clear that they were only pressing their petitions for bail on the ground of hardship. Petitioner Manzar Abbas submitted that he was arrested on 25-06-2015 (around 2 years and 10 months ago), petitioner Agha Ghulam Mohiuddin submitted that he was arrested on 21-01-2015 (over 3 years ago) and petitioner Ishrat Ahmed submitted that he was arrested in the month of February, 2015 (over 3 years ago) yet their trial had still not been concluded for no fault of theirs or anyone acting on their behalf and as such all the petitioners were entitled to bail on hardship grounds. In support of their contention they placed reliance on the order sheets of the Accountability Court where the case was proceeding.

3. On the other hand learned special prosecutor NAB opposed the grant of bail on the ground of hardship to all the petitioners as according to him the petitioners had through either themselves or their counsel caused the delay in the trial and as such they were not entitled to relief on hardship grounds.

4. We have considered the submissions of learned counsel for the parties, perused the record and considered the relevant law.

5. As this case involves bail on hardship grounds only which is a distinct category of bail based mainly on delay in concluding the trial we do not intend to go into the merits of the case although we are aware that the alleged offense has caused a huge loss to the exchequer, the petitioners are some of the main accused in the case and petitioner Manzar Abbass' petition for post arrest bail was dismissed by this Court on merits by order dated 05-10-2015. The petitioner challenged the aforesaid order before the Hon'ble Supreme Court which by order dated 19-01-2016 was dismissed as not pressed. He had also moved a petition before this court on the grounds of statutory delay which was dismissed vide order dated 19-01-2017.

6. We have carefully reviewed the diary sheets with the able assistance of learned counsel for the petitioners and special prosecutor NAB and it appears that only on about a handful of occasions could it be said that the proceedings were delayed on the sole account of the petitioners as opposed to the PO being on leave, absence of PW's, lawyers strikes, the matter being adjourned due to want of time etc.

7. We also note that when the petitioner Manzar Abbass' last petition for statutory bail was rejected by this court vide order dated 19-01-2017 (over a year ago) this court gave a direction that the trial court hear the case on a day to day basis and decide the same within 6 months of the order. One of the factors which led to that order was the fact that there was only around 13 PW's (as apparently some were to be given up by the prosecution) to be examined at that time and that with only 7 accused left it was reasonable to assume that the trial would be completed within a period of 6 months. It is significant that our direction expired 6 months ago and that

according to the defense there are still 36 PW's to be examined as a number of PW's who were supposed to have been given up were not. Today the NAB Prosecutor has informed us that only 6 PW's remain to be examined however this is contradicted by the list of PW's which is on record as it appears that since our last order no PW was in fact given up by the prosecutor at trial (as opposed to the NAB Prosecutor appearing before us)

8. In the case of *Shahid Umer v. Chairman NAB* (SBLR 2018 Sindh 357) this court considered in detail the law on hardship grounds in NAB cases and found as under at para's 28 to 33

"28. Once again however following *NAB v. Bakhat Zameen's* case (Supra) the Supreme Court seems to have now turned to a broader interpretation of granting bail in NAB cases on the grounds of hardship based on factors which are more in line with *Attah Abbass Zaidi's* case (Supra) as opposed to the traditional ground of many years in jail having been served and there being no prospect of the trial concluding in the near future.

29. For example, in the following orders;

ORDER 03.03.2017 by a 2 member bench of the Supreme Court.

"Petitioner who is facing Reference No.31 of 2016 in Accountability Court-III, Lahore when failed to get the concession of bail from the lower forum sought indulgence of this Court therefore on the ground that none of the assets is disproportionate to his known means but unfortunately none of the documents explaining them has been read in its correct perspective and that he has been in jail for one year yet the Reference awaits conclusion.

2. The learned Special Prosecutor appearing on behalf of NAB contended that as many as eight witnesses have been examined and that if a month or so is given to the NAB, the trial will stand concluded. He, however, seriously disputed the assertion of learned ASC for the petitioner that the assets of the petitioner are not in disproportionate to his known assets.

3. We have gone through the record carefully and considered the submissions of learned ASC for the petitioner as well as the learned Special Prosecutor, NAB.

4. Without entering into the merits of the case lest it prejudices the stance of either of the parties, the very fact that the petitioner has been in jail for one year yet his trial has not been concluded despite there being no lapse on his part. Needless to say speedy trial is an indefeasible right of the accused particularly in the cases of NAB when Section 16 of the NAO provides that trial shall be concluded within 30 days. (bold added)

For the reasons discussed above, we convert this petition into appeal, allow it and direct release of the petitioner on bail if he furnishes bail bonds in the sum of rupees five million with two sureties to the satisfaction of the trial Court.

30. As mentioned earlier and relied upon by the petitioner unreported order of a 3 member bench of the Supreme Court in Civil Petition 17/17 *Syed Rashid Hussain Rizvi v. Chairman NAB* dated 12-7-2017 where at Para 5 it held as under:

"A look at para-8 and para-9 of the reference would reveal that role assigned to the petitioner is not much different from the one assigned to his co-accused who has since been

released on bail. We thus, see no strong reason to treat the petitioner differently. The fact that the petitioner has been in jail for two years yet the conclusion of his trial is not in sight would tilt in favour of grant rather than refusal of bail" (bold added)

31. ..

32. Perhaps this change in approach is guided by Article 10 (A)'s requirement of an expeditious trial, the fact that the NAO is special law whose object is speedy disposal of cases within fixed timeframes and the realization that the ground reality is that in NAB cases due to their complexity, there being so many accused (often upwards of 10) each with a separate right of cross-examination of usually many witnesses often through separate advocates such trials can often take 5 or more years to complete with a maximum sentence of 14 years and the object of the criminal law primarily being to allow persons to face the trial against them and not to let them rot in jail for years on end in cases where they may be acquitted at the end. Thus, since there is no statutory grounds of bail in NAB cases in terms of hardship the Supreme Court may be turning towards a more lenient and humane approach in determining hardship cases in NAB cases based on the ground realities that these cases even after several years often realistically have no hope in sight of being completed in the near future due to some of the factors mentioned above and as such the Court is taking a more human approach in NAB cases bearing in mind that it is for the prosecution to expeditiously prosecute its case and for the trial court to manage the smooth running and fast and efficient disposal of NAB cases in accordance with the NAO provided that the accused or his representative has not been at fault in delaying the trial. Corruption may be a heinous crime which is eating away at the fabric of society and hindering economic development but it should not permit the State to lock accused up in jail for years on end without determining their guilt, time which the accused cannot recover. A balance needs to be struck between the heinousness of the offense and the liberty of the accused who cannot be detained indefinitely as was held in the classic case of Riasat Ali v. Ghulam Muhammad (PLD 1968 SC 353) which seems to have been one of the foundational cases on the grounds of hardship. Such intervention by the courts in such NAB hardship cases may even be perceived as the court's acting in their discretionary constitutional jurisdiction to safe guard/ protect the fundamental rights of a citizen who has been in prolonged detention pending completion of his trial due to no fault of his own against the failure of the State to expeditiously prosecute him. If such NAB trials are taking so long to complete due to no fault of the accused it is not for the accused to be made to suffer prolonged incarceration due to the fault of the State in any civilized society but for that State to sort out the short comings in the criminal justice system so that the accused is not unnecessarily made to suffer due to the State's failure. In such cases for example by creating more accountability courts to deal with the heavy work load so that cases can be heard more frequently and decided more speedily as was the intention of the legislature which is made abundantly apparent through both the preamble and S.16 (a) NAO requiring trials to be heard on a day to day basis and decided within 30 days. Every thing of course, however, in a hardship cases will turn on the particular facts and circumstances of each case and as such the Atta Abbas Zaidi (Supra) considerations/factors may prove to be useful in making such determinations.
33. Thus, it would almost seem that we are back to the Atta Abbas Zaidi (Supra) considerations/factors in NAB cases for the grant of bail on hardship grounds the main

ones being the length of time spent in jail, whether any delay has been caused by the fault of the petitioner and based on the particular facts and circumstances of the case realistically how much longer is the trial likely to conclude and whether a direction to complete the within 6 months would enable the trial to conclude."

9. It would seem that the Hon'ble Supreme Court is continuing with such an approach in NAB cases vis-a-vis bail on hardship grounds as can be seen by its order dated 17-11-2017 in the case of Hamood Ur Reham Qazi v. Government of Sindh (unreported) in Civil Petition 3381/17 which is set out below for ease of reference:--

1. Petitioner who is facing Reference No.42/2015 before the Accountability Court No.II at Karachi when failed to get the concession of bail from the High Court, in the second round, asked for indulgence of this Court mainly on the ground that more than two years have passed yet conclusion of his trial is not in sight.
2. Learned Special Prosecutor appearing on behalf of NAB contended that where connivance and complicity of the petitioner is patent and palpable from the record grant of bail would amount to encouraging the commission of such crime and that five witnesses have already been examined and those who are left would be examined in a few months.
3. We have gone through the record carefully and considered the submissions of the learned ASC for the petitioner as well as learned Special Prosecutor, NAB.
4. Petitioner on merits may not have a case for grant of bail but the fact is that he has been in jail for two years and two months yet conclusion of his trial is not in sight. In the circumstances, the petitioner cannot be kept on tenterhooks for an indefinite period of time. We thus, convert this petition into appeal, allow it and admit the petitioner to bail if he furnishes bail bonds in the sum of Rs.10,00,000/- (Rupees Ten Millions) alongwith two sureties in the like amount to the satisfaction of the Accountability Court. (bold added)

10. In the case in hand we find that the petitioners have spent 2 years and 10 months and over 3 years in jail respectively. The delay in completing the trial is largely due to no fault of their own and that realistically the trial will not be completed in the near future even if we give another direction to the trial court to complete the trial. As it appears that 36 PW's still remain on the list of witnesses and even other wise hardly any progress has been made in the trial since the last bail order in respect of the same reference was dismissed by this court over a year ago and as such the completion of the trial cannot realistically be said to be close to completion.

11. We have also taken into consideration the fact that the State has little interest in expediting the trial of accused in NAB cases by creating more NAB courts so that cases could be heard more expeditiously. In the case of Chaudhry Mohammed Asharaff v. Federation of Pakistan in CP.D 7083/2016 which concerned whether S.16 (a) NAO was directory or mandatory in nature i.e. the obligation for NAB cases to proceed on a day to day basis and be completed within 30 days vide our order dated 14-12-2017 we noted that hardly any NAB cases were completed within this time frame contrary to the intent and spirit of the legislature

and although we found that S.16 (a) was directory in nature as opposed to mandatory we held as under at Para's 29 to 32.

29. In making this finding we would like to emphasize that it in no way detracts from the NAB and the accountability courts obligation to complete the trial of the accused under the NAO as expeditiously as possible and that in appropriate cases of delay bail may be granted.
  30. We would also observe that since hardly any NAB trial proceeds on a day to day basis or is completed within 30 days in order to give effect to the intent and spirit of the NAO which specifically provides for expeditious trials it is incumbent upon the Federal Government to establish sufficient accountability courts in each province to ensure that such NAB trials are completed within the shortest possible time rather than be left to drag on for years on end, which is very often the case in trials under the NAO, due to a lack of accountability courts and judges especially as statutory bail on the grounds of delay are not available in such cases.
  31. We accept that such delay is caused by a number of factors such as the criminal justice system itself whereby if an absconder is later arrested the charge has to be reframed and all the evidence again recorded from scratch which leads to inordinate delay; the prosecution not producing PW's or documents in a timely manner and adding too many accused in the reference and too many PW's and documents which makes the trial almost unmanageable and unnecessarily long especially as each of the accused will have a separate right of cross examination of each PW through a different counsel. (In this respect in some cases under the NAO as many as 50 accused have been placed in the reference and the average appears to be at least 10 to 15) and the defense counsel seeking adjournments on account of seniors being busy before superior courts, counsel on general adjournments, lawyers strikes, illness, deaths in the family, absence of accused etc. However, the accused should not be made to suffer and rot in jail for years on end due to such short comings/failures which are often not caused by him. Ultimately, it is the obligation of the State as envisaged under the NAO to provide an expeditious trial to the accused.
  32. As such the Federal Law Secretary is hereby directed to establish within 3 months of the date of this order three more fully functioning accountability courts in Karachi complete with office space, judges, all other ancillary staff and necessary equipment so that the back log of accountability cases in Sindh can be reduced and meaningful efforts made to complete such trials expeditiously so that accused do not languish in jails for years on end which was not contemplated under the NAO which provides for speedy trials".
12. Rather than being sympathetic to the plight of the accused in NAB cases who are on occasion left to rot in jail for years on end due to the slowness of trial and the lack of bail on the grounds of statutory delay the Federation moved the Supreme Court to suspend this court's direction in para 32 above to establish 3 more accountability courts in Karachi in order to speed up trials on the grounds that there was a meager pendency of NAB cases before the

accountability courts in Karachi. Perhaps this observation was on account of a lack of understanding of NAB cases by the Federation where there are

complex issues involved, countless accused (each of whom usually engage a separate counsel for cross-examination of each witness), PW's, documents etc. and the fact that the number of cases in each court has over the last number of years arisen from approx. 20 to 50 per court owing to NAB filing more references in recent times and especially when accountability court V was shifted to Sukkur leaving only 4 accountability courts for the whole of Karachi. The Hon'ble Supreme Court suspended the above direction and asked for certain information to be provided to it in respect of NAB proceedings

in Karachi which case still remains pending before the Hon'ble Supreme Court. Thus, we have also kept in view this attitude of the Federal Government which prima facie seems to be in contradiction to its constitutional obligation under A.10(A) to ensure speedy

trials to the citizens of this country and the Preamble to the NAO and S.16(a) NAO.

13. As such the petitioner's Manzar Abbass, Agha Ghulam Mohiuddin and Ishrat Ahmed are granted post arrest bail on hardship grounds in each reference concerning Benazir Housing cell including the aforesaid consolidated reference subject to them each furnishing 2 solvent sureties in the sum of Rs 2.5 million (25 lacs) each and PR bond in the like amount to the satisfaction of the Nazir of this court. The secretary ministry of interior is directed to place the names of all three petitioners on the ECL forthwith.

14. It is made clear that if the petitioners fail to attend the trial proceedings or if any delay in completion of the trial is caused on the part of any one of them then the NAB may move this court for the cancellation of the bail which has been granted by this order to the petitioner who is causing the delay. A copy of this order shall be transmitted to Secretary Ministry of interior for information and compliance in terms of placing the names of the three petitioners on the ECL.

15. The petitions stand disposed of in the above terms.  
MQ/M-122/Sindh Bail granted.