

Present: Umar Ata Bandial and Syed Mansoor Ali Shah, JJ

Syed KHURSHEED AHMED SHAH---Petitioner

Versus

The STATE---Respondent

Civil Petition No. 4387 of 2021, decided on 21st October, 2021.

(On appeal from the judgment/order dated 27.07.2021 of the High Court of Sindh, Karachi passed in C.P. No.D-4048/2021).

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

---Ss. 9 & 10---Constitution of Pakistan, Arts. 9, 10, 10A, 14(1) & 185(3)---Criminal Procedure Code (V of 1898), S. 497---Person accused of an offence under the National Accountability Ordinance, 1999 (NAB Ordinance)---Bail---Tentative assessment of the material available on record to decide whether there is, or is not, available on record such incriminating material which provides reasonable grounds for believing that the accused is guilty of the alleged offence---Scope---Said standard of making tentative assessment of the material available on record for deciding the question of detaining an accused in prison, or releasing him on bail, during his trial for the alleged offence under the NAB Ordinance is not borrowed from S.497, Cr.P.C. rather, it emanates from the fundamental rights to liberty, dignity, fair trial and protection against arbitrary detention guaranteed by the Constitution and from the operational scheme of the NAB Ordinance--Said Constitutional standard of reasonable grounds for depriving a person from his said fundamental rights is to be read in all laws dealing or interfering with his liberty---Material on which tentative assessment is to be made by the court includes material both for and against the accused collected during investigation.

Muhammad Iqbal Khan Noori v. National Accountability Bureau PLD 2021 SC 916 and Khalid Javed v. State PLD 1978 SC 256 ref.

(b) Criminal Procedure Code (V of 1898)---

---S. 497---National Accountability Ordinance (XVIII of 1999), S. 9(a)(v)---Constitution of Pakistan, Art. 185(3)---Benami assets disproportionate to known sources of income of the accused---Bail, grant of---No sufficient incriminating material was available to show that the properties held by the persons who are not the family members of the accused, but are alleged to be his benamidar, are actually of the accused---National Accountability Bureau (the Bureau) failed to point out any material, which could reasonably show that the properties alleged to be held by the accused, in name of other persons, as his benamidar, are in his actual or constructive possession and/or he receives the profits of those properties---So far as the value of the assets/properties in names of the accused and of his family members are concerned, the Bureau has determined the same by rejecting their value mentioned in the registered sale deeds without any solid lawful basis, to make a case that their assets are disproportionate to their known sources of income---Further it has not been specified whether the value determined by the Bureau is that of the time when the said properties were purchased by the petitioner and his family members, or the same is their current value--As for the transactions of amount credited and debited in the Bank accounts of the accused and his family members, the accused has taken the stance that all the said accounts are disclosed and accounted for in their annual income tax returns and declarations of assets, and the Bureau has not pointed out any material available on record to rebut that stance of the accused---Thus no tangible, sufficient incriminating material was available on record of the case against the accused which would lead to inference of his guilt for commission of the offence alleged against him; there are, therefore, at present stage no reasonable grounds for believing that the accused is guilty of the alleged offence---Petition for leave to appeal was converted into appeal and allowed, and the accused was released on bail with the observations that in a case where the Bureau has been unable to show sufficient incriminating material to the Court to justify the detention

of the accused, depriving the accused of his liberty and freedom even for a single day is, to say the least, unconscionable and below human dignity.

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

---S. 9(a)(v)---Benami transaction---Proof---Factors to be considered by court---Number of factors were to be considered to determine the question whether a particular transaction is benami in character but perhaps the most crucial factors, in the criminal law context are, first, who is in actual possession, or control of possession, of the property, and second, who receives the profits arising out of the property.

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

---S. 9(a)(v)---Assets disproportionate to known sources of income---Comparison with income of accused---Scope---Value of the property at the time of its purchase is to be compared with the known sources of income of the purchaser at the time of that purchase for determining whether or not the purchase of that property is disproportionate to his sources of income.

(e) Criminal Procedure Code (V of 1898)---

---S. 497---National Accountability Ordinance (XVIII of 1999), S. 9(a)(v)---Constitution of Pakistan, Art. 185(3)---Benami assets disproportionate to known sources of income of the accused---Bail, grant of---Inordinate and unconscionable delay in conclusion of trial---Accused was arrested in the present case on 18-09-2019 and facing trial on an interim reference---Since his arrest a period of more than two years has lapsed but the National Accountability Bureau (the Bureau) is yet to file the final reference, thus, the conclusion of the trial is not in sight for no fault of the accused---Such a long delay does constitute inordinate and unconscionable delay , justifying the release on bail of the accused pending his trial---Petition for leave to appeal was converted into appeal and allowed, and accused was released on bail.

Talat Ishaq v. NAB PLD 2019 SC 112 ref.

M. Makhdoom Ali Khan, Senior Advocate Supreme Court and Mohsin Shahwani, Advocate Supreme Court for Petitioner.

Sattar Awan, Spl. Prosecutor and Kashan, I.O. for Respondent.

Date of hearing: 21st October, 2021.

ORDER

SYED MANSOOR ALI SHAH, J.---The petitioner seeks leave to appeal against the order dated 27.07.2021 passed by the High Court of Sindh on his constitutional petition filed under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution"), whereby the post arrest bail has been denied to him in NAB Reference No. 17 of 2019 pending trial in the Accountability Court, Sukkur for the alleged offence of corruption and corrupt practices, as defined in section 9 and punishable under Section 10 of the National Accountability Ordinance 1999 ("NAB Ordinance").

2. Briefly stated, the allegation against the petitioner, who, having remained a Provincial Minister as well as a Federal Minister, was a "holder of public office" as defined in the NAB Ordinance, is that he, his dependents, i.e., his wives and sons, and his other benamidar own and possess assets that are disproportionate to his known sources of income and which he cannot reasonably account for. The petitioner's stance, mainly, is that all his income and assets, and that of his dependents and independent family members, are duly accounted for in their annual tax returns and declarations of assets, that the value of their assets shown by the NAB is baseless and exorbitant, and that the properties of his alleged benamidar are not his. The petitioner also relies upon the closure of earlier investigation on the same allegations by the then Chairman, NAB and approval of that closure by the High Court in the case reported as Syed Khursheed Ahmad Shah v. National Accountability Bureau (SBLR 2014 Sindh 821).

3. The High Court has declined grant of the relief prayed for to the petitioner with the findings that the incriminating material available on record is "sufficient to connect the petitioner, prima facie, with the alleged offence", and that the delay in conclusion of the trial is "attributable to the petitioner and other co-accused."

4. The learned counsel for the petitioner has submitted that the said findings of the High Court are against the material available on record of the case and are thus perverse and arbitrary - legally not

sustainable. On the other hand, the learned counsel for the respondents/NAB has made submissions supporting the impugned order.

5. We have considered the arguments of the learned counsel for the parties, read the case law cited and perused the record of the case. We are only to make a tentative assessment of the material available on record to decide whether there is, or is not, available on record such incriminating material which provides reasonable grounds for believing that the petitioner (accused) is guilty of the alleged offence. This standard of making tentative assessment of the material available on record for deciding the question of detaining an accused in prison, or releasing him on bail, during his trial for the alleged offence under the NAB Ordinance is not borrowed from section 497, Cr.P.C. rather, as held by this Court in the recently decided case of *Muhammad Iqbal Khan Noori v. National Accountability Bureau* (PLD 2021 SC 916), it emanates from the fundamental rights to liberty, dignity, fair trial and protection against arbitrary detention guaranteed by the Constitution and from the operational scheme of the NAB Ordinance. Needless to mention that this constitutional standard of "reasonable grounds" for depriving a person from his said fundamental rights is to be read in all laws dealing or interfering with his liberty. The material on which tentative assessment is to be made by the court includes material both for and against the accused collected during investigation: see *Khalid Javed v. State* (PLD 1978 SC 256).

6. Although the NAB has not referred to the substantial material as to the assets of the petitioner and his family members and their sources of income which has now been collected and was not available with the NAB in the earlier investigation, still we have made a fresh tentative assessment of the material available on record of the case, in the interest of justice, to satisfy ourselves whether there is incriminating material available on record which provides reasonable grounds for believing that the petitioner is guilty of the alleged offence. Having done so, we find that there is no sufficient incriminating material to show that the properties held by the persons who are not the family members of the petitioner, but are alleged to be his benamidar, are actually of the petitioner. Although, as held by the constitutional courts of the country that a number of factors are to be considered to determine the question whether a particular transaction is benami in character yet perhaps the most crucial factors, in the criminal law context are: (i) who is in actual possession, or control of possession, of the property, and (ii) who receives the profits arising out of the property. The NAB has failed to deal with these factors nor has pointed out to us, any material, which could reasonably show that the properties alleged to be held by the petitioner, in name of other persons, as his benamidar, are in his actual or constructive possession and/or he receives the profits of those properties.

7. So far as the value of the assets/properties in names of the petitioner and of his family members are concerned, we find that the NAB has determined the same by rejecting their value mentioned in the registered sale deeds without any solid lawful basis, to make a case that their assets are disproportionate to their known sources of income. What is more disturbing is that it has not been specified whether the value determined by the NAB is that of the time when the said properties were purchased by the petitioner and his family members, or the same is their current value. Needless to mention that it is the value of the property at the time of its purchase which is to be compared with the known sources of income of the purchaser at the time of that purchase for determining whether or not the purchase of that property is disproportionate to his sources of income. Further, the NAB has not estimated the agricultural income of the petitioner in accordance with the provisions of rule 3 of the West Pakistan Land Revenue Assessment Rules 1968, nor has included the same in his known sources of the income. As for the transactions of amount credited and debited in the bank accounts of the petitioner and his family members, the petitioner has taken the stance that all the said accounts are disclosed and accounted for in their annual income tax returns and declarations of assets, and the NAB has not pointed out any material available on record to rebut that stance of the petitioner. There is thus no such tangible, sufficient incriminating material available on record of the case against the petitioner which would lead to inference of the guilt of the petitioner for commission of the offence alleged against him; there are, therefore, at this stage no reasonable grounds for believing that the petitioner is guilty of the alleged offence.

8. While the petitioner is found entitled to the grant of bail on merits as discussed above, even as to the delay in conclusion of the trial he cannot be blamed therefor. The petitioner was arrested in the present case on 18.09.2019 and facing trial on an interim reference. Since his arrest a period of more than two years has lapsed but the NAB is yet to file the final reference, thus, the conclusion of the trial is not in sight for no fault of the petitioner. Such a long delay does constitute "inordinate and unconscionable delay", as held in *Talat Ishaq v. National Accountability Bureau* (PLD 2019 SC 112), justifying the release on bail of the petitioner pending his trial even on this ground as well. It must be remembered that in criminal law, everybody including the co-accused is liable only for his own acts and omissions, not of others. Even otherwise, in a case where the NAB has been unable to show sufficient incriminating material to the Court to justify the detention of the accused, depriving the accused of his liberty and freedom even for a single day is, to say the least, unconscionable and below human dignity.

9. In view of the above tentative findings, we are of the considered view that the further detention of the petitioner in the present case would be without lawful authority and in breach of his fundamental rights, and that it was a fit case for exercise of constitutional jurisdiction by the High Court, under Article 199 of the Constitution, to make an order for release of the petitioner on bail till decision of the case. The High Court has not exercised its discretion judiciously and reasonably. We, therefore, convert this petition into appeal and allow the same. We set aside the impugned order, accept the constitutional petition of the petitioner and make order that the petitioner shall be released on bail subject to his furnishing bail bond in the sum of Rs.10 million with one surety in the like amount to the satisfaction of the Trial Court. Needless to say that the observations made in this order are tentative and shall not influence the trial court while concluding the case after recording evidence.

10. Foregoing are the reasons for our short order dated 21.10.2021, which is reproduced hereunder for completion of record.

"For reasons to be recorded later, this petition is converted into appeal and allowed. The petitioner is granted bail on the merits of the case subject to his furnishing bail bonds in the sum of Rs.10/- million with one surety in the like amount to the satisfaction of the learned Trial Court. The name of the petitioner shall be placed on the ECL subject to appropriate relief that may be granted by the learned Accountability Court on account of exigencies in his case."

MWA/K-3/SC Bail granted.