

Present: Umar Ata Bandial, C.J., Syed Mansoor Ali Shah and Ayesha A. Malik, JJ
CHAIRMAN, NATIONAL ACCOUNTABILITY BUREAU through P.G., NAB---Petitioner

Versus

NISAR AHMED PATHAN and others---Respondents

Civil Petitions Nos. 1628 to 1636 of 2020, decided on 22nd February, 2022.

(Against the order dated 22.04.2020 of the High Court of Sindh, Sukkur Bench, passed in Constitutional Petitions Nos. D-1850, D-111, D-113, D-103, D-110, D-107, D-106, D-104 and D-108 of 2020 respectively).

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

----S. 497(5)---Constitution of Pakistan, Art. 185(3)---Petition for cancellation of bail---Invoking the appellate jurisdiction of the Supreme Court for cancellation of bail granted by the High Court---Principles---In its appellate jurisdiction, the Supreme Court usually interferes on two grounds; first, when the impugned order is perverse on the face of it, or, second, when the impugned order has been made in clear disregard of some principle of the law of bail---Perverse order is the one that has been passed against the weight of the material on the record or by ignoring such material or without giving reasons---Such order is also termed as arbitrary, whimsical and capricious.

Zaro v. State 1974 SCMR 11 and Sidra Abbas v. State 2020 SCMR 2089 ref.

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

----Ss. 497 & 498---Constitution of Pakistan, Art. 185(3)---Bail---Appreciation of material/evidence on record---Principles---Courts are not to indulge in the exercise of a deeper appreciation of material available on record at the bail stage and are only to determine tentatively, by looking at such material, whether or not there exist any "reasonable grounds" for believing that the accused person is guilty of the alleged offence.

Farid v. Ghulam Hussan 1968 SCMR 924 and Khalid Saigol v. State PLD 1962 SC 495 ref.

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

----Ss. 497 & 498---National Accountability Ordinance (XVIII of 1999), Ss. 9 & 10---Constitution of Pakistan, Arts. 9, 10, 10A, 14 & 199---National Accountability Bureau Reference---Bail---Constitutional petition before the High Court seeking grant of bail---Principles---In NAB cases, the standard of "reasonable grounds" for making a tentative assessment of the material available on record to decide in constitutional jurisdiction under Article 199 of the Constitution, the question of detaining an accused in prison, or admitting him to bail, during his trial for the alleged offence under the National Accountability Ordinance, 1999 ('the Ordinance') is not borrowed from section 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 under Articles 9, 10, 10-A & 14 and from the operational scheme of the Ordinance.

Iqbal Noori v. National Accountability Bureau PLD 2021 SC 916 ref.

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

----Ss. 497 & 498---National Accountability Ordinance (XVIII of 1999), Ss. 9 & 10---Constitution of Pakistan, Arts. 9, 10, 10A, 14 & 199---National Accountability Bureau Reference---Bail---Two plausible opinions---Where two opinions can reasonably be formed on the basis of the same material, the courts should prefer and act upon that which favours the accused person and actualizes his fundamental rights to liberty, dignity, fair trial and protection against arbitrary detention---To err in granting bail is better than to err in declining; for the ultimate conviction and sentence of a guilty person can repair the wrong caused by a mistaken relief of bail, but no satisfactory reparation can be offered to an innocent person on his acquittal for his unjustified imprisonment during the trial.

Zaigham Ashraf v. State 2016 SCMR 18 and Tariq Bashir v. State PLD 1995 SC 34 ref.

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

---S. 497(5)---National Accountability Ordinance (XVIII of 1999), Ss. 9 & 10---Constitution of Pakistan, Art. 185(3)---Petitions for cancellation of bail, dismissal of---Main accused already granted bail--- Allegation against the accused persons was that they had abetted the "main accused" in the commission of the alleged offence of corruption and corrupt practices, being his benamidars and ostensibly owning certain properties, while the co-accused persons were alleged to have offered illegal gratification/kickbacks to the main accused---High Court granted the relief of post and pre arrest bails to the accused and co-accused persons by considering the alleged role attributed to each of them and the material collected during investigation in support thereof---As to the accused persons who were alleged to be the benamidars of the main accused, the High Court had correctly observed that whether they were benamidars of the main accused or had purchased the properties from their own sources would be determined after recording evidence in the trial---No sufficient material was available on record, at present stage, as to the necessary elements of benami transactions---Further, the accused persons who were the family members of the main accused were not alleged to have played any role in the offence of corrupt practices allegedly committed by the main accused, nor were they alleged to have knowledge of his such alleged corrupt practices--- About the co-accused persons who were alleged to have offered illegal gratification/kickbacks to the main accused, the High Court had rightly observed that the real purpose of making payment of certain amounts by them to the main accused could be determined only after recording evidence in the trial---Lastly, but most importantly, the National Accountability Bureau was not able to show sufficient incriminating material on the record of the case to connect the main accused with the commission of offence of corruption and corrupt practices, and therefore he was granted post arrest bail by the Supreme Court---Where the main accused had been granted bail, there remained little justification to decline the same relief to the accused and co-accused persons who were alleged to have merely abetted him in the commission of the offence, as the case against such accused and co-accused persons was at a lower rung than that against the main accused---Petitions for leave to appeal seeking cancellation of bail were dismissed.

Sattar Awan, Spl. Prosecutor National Accountability Bureau and M. Sharif Janjua, Advocate-on-Record for Petitioner (in all cases).

Syed Qalb-e-Hassan, Advocate Supreme Court along with Ch. Akhtar Ali, Advocate-on-Record for Respondents (in C.Ps. Nos. 1628-1929 of 2020).

Raja Amir Abbas, Advocate Supreme Court along with Abdul Razak Bahrani in person for Respondents (in C.P. No. 1630 of 2020).

Mukesh Kumar G. Karara, Advocate Supreme Court along with Kassim Mirjat, Advocate-on-Record along with Akram Khan along with Syed Zareekh Shah along with Syed Khalid Hussain Shah for Respondents (in C.Ps. Nos.1631, 1634 and 1636 of 2020).

Amer Raza Naqvi, Advocate Supreme Court for Respondents (in C.Ps. Nos.1632-1633 of 2020).

Muneer A. Malik, Advocate Supreme Court (video-link Karachi) along with Syed Awais Qadir Shah for Respondents (in C.P. No. 1635 of 2020).

Date of hearing: 22nd February, 2022.

ORDER

SYED MANSOOR ALI SHAH, J.---By this order, we shall decide all the above-captioned petitions as they arise out of the same order of the High Court of Sindh.

2. The Chairman, National Accountability Bureau ("NAB"), through these petitions, seeks leave to appeal against the order dated 22.04.2020 passed by the High Court of Sindh on the constitutional petitions filed by the respondents under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution"), whereby the post and pre arrest bails have been granted to them 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").

3. Briefly stated, the allegation against some of the respondents is that they have abetted the co-accused, Syed Khursheed Ahmad Shah, a former public office holder, ("main accused") in the commission of the alleged offence of corruption and corrupt practices, being his benamidars and ostensibly owning certain properties, while some respondents are alleged to have offered illegal gratification/ kickbacks to the main accused. The High Court has granted them bail mainly on the ground that the material available on record is not sufficient to connect them with the commission of the alleged offence and the case against them is one of further inquiry.

4. We have considered the arguments of the learned counsel for the parties, read the case-law cited and perused the record of the case.

5. The petitioner has invoked the appellate jurisdiction of this Court for the cancellation of bail granted by the High Court to the respondents. The scope of the interference to be made by this Court in its appellate jurisdiction, in such like matters, is well settled and hardly needs reiteration. This Court usually interferes on

two grounds: (i) when the impugned order is perverse on the face of it, or (ii) when the impugned order has been made in clear disregard of some principle of the law of bail.¹ A perverse order is the one that has been passed against the weight of the material on the record or by ignoring such material or without giving reasons;² such

order is also termed as arbitrary, whimsical and capricious. While it is one of the elementary principles of the law of bail that courts are not to indulge in the exercise of a deeper appreciation of material available on record at the bail stage and are only to determine tentatively, by looking at such material, whether or not there exist any "reasonable grounds" for believing that the accused person is guilty of the alleged offence.³

¹ *Zaro v. State* 1974 SCMR 11.

² *Sidra Abbas v. State* 2020 SCMR 2089.

³ *Farid v. Ghulam Hussan* 1968 SCMR 924 and *Khalid Saigol v. State* PLD 1962 SC 495.

6. Needless to mention that in NAB cases, the standard of "reasonable grounds" for making a tentative assessment of the material available on record to decide in constitutional jurisdiction under Article 199 of the Constitution, the question of detaining an accused in prison, or admitting him to bail, during his trial for the alleged offence under the NAB Ordinance is not borrowed from section 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 under Articles 9, 10, 10-A and 14 and from the operational scheme of the NAB Ordinance.⁴

7. The arguments of the learned counsel for the petitioner, when considered in the light of the above principles, are found deficient to convince the Court for interfering with and setting aside the impugned order. The whole emphasis of the learned counsel was on the point that the opinion of the High Court regarding the insufficiency of the incriminating material to connect the respondents with the commission of alleged offence and the case being one of further inquiry is not plausible in view of the material available on the record of the case. In this regard, the distinction between a less plausible opinion and a perverse opinion must not be lost sight of. When two opinions can reasonably be formed on the basis of the same material, both pass as a plausible opinion; while it can be argued that one opinion is more or less plausible than the other, none of them can be termed as a perverse opinion. A perverse opinion is the one which no prudent person can reasonably form on the basis of the material available on record.

8. Where two opinions can reasonably be formed on the basis of the same material, the courts should prefer and act upon that which favours the accused person and actualizes his fundamental rights to liberty, dignity, fair trial and protection against arbitrary detention. To err in granting bail is better than to err in declining; for the ultimate conviction and sentence of a guilty person can repair the wrong caused by a mistaken relief of bail, but no satisfactory reparation can be offered to an innocent person on his acquittal for his unjustified imprisonment during the trial.⁵

9. In the present case, the High Court has granted the relief of post and pre arrest bails to the respondents, by considering the alleged role attributed to each of them and the material collected during investigation in support thereof. As to the respondents who are alleged to be the benamidars of the main accused, the High Court has observed that whether they were benamidars of the main accused or had purchased the properties from their own sources would be determined after recording evidence in the trial. We find this observation of the High Court quite reasonable, for there is no sufficient material available on record, at this stage, as to the necessary elements of benami transactions. Further, the respondents who are the family members of the main accused are not alleged to have played any role in the offence of corrupt practices allegedly committed by the main accused, nor are they alleged to have knowledge of his such alleged corrupt practices. About the respondents who are alleged to have offered illegal gratification/kickbacks to the main accused, the High Court has observed by making a tentative assessment of their version in the light of the material available on record that the real purpose of making payment of certain amounts by them to the main accused can be determined only after recording evidence in the trial. We find this observation of the High Court, also in accordance with, and not against, the weight of the material available on the record of the case. Lastly, but most importantly, the NAB was not able to show sufficient incriminating material on the record of the case to connect the main accused with the commission of offence of corruption and corrupt practices, and therefore he was granted post arrest bail by this Court vide order dated 21.10.2021 passed in C.P. No.4387 of 2021 (titled Syed Khursheed Ahmed Shah v. The State)⁶. Where the main accused has been granted bail, there remains little justification to decline the same relief to his co-accused who are alleged to have merely abetted him in the commission of the offence, as the case against such co-accused is at a lower rung than that against the main accused.

4 Iqbal Noori v. NAB PLD 2021 SC 916.

5 Zaigham Ashraf v. State 2016 SCMR 18 and Tariq Bashir v. State PLD 1995 SC 34.

10. The learned counsel for the petitioner has thus not been able to show that the impugned order is either perverse or against any settled principle of the law of bail, warranting interference by this Court. The petitions for leave to appeal are found meritless; they are therefore dismissed and leave to appeal declined.

MWA/C-13/SC Petitions dismissed.