

Present: Umar Ata Bandial, C.J., Syed Mansoor Ali Shah and Ayesha A. Malik, JJ

CHAIRMAN, NAB through P.G., Accountability---Petitioner

Versus

NASAR ULLAH and 5 others---Respondents

Civil Petitions Nos. 1809 to 1814 of 2020, decided on 19th April, 2022.

(Against the judgment of Lahore High Court, Lahore dated 10.03.2020, Passed in W.P. No.10586 of 2019 and other connected matters)

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

---S. 497---National Accountability Ordinance (XVIII of 1999), Ss. 9, 10 & 16(a)---Constitution of Pakistan, Arts. 4, 9, 10A & 199---National Accountability Bureau Reference---Bail---Grounds---Delay in conclusion of trial---Whether grant of bail on the ground of delay in the conclusion of the trial was permissible under the National Accountability Ordinance, 1999 ('the NAB Ordinance')---Held, that inordinate or long delay in the conclusion of the trial for no fault of the accused and his protracted detention without determination of his guilt, amount to harassment and abuse of the process of law---Such delay can therefore be a valid ground for releasing the accused on bail and restoring his fundamental right to life and liberty---Inordinate delay in conclusion of the trial of an accused, for no fault on his part, being not envisaged by the National Accountability Ordinance, 1999 ('the NAB Ordinance') would inevitably attract the constitutional protections under Articles 4, 9 & 10A of the Constitution---In such a situation, it is just, fair and equitable that the prosecution (NAB) should not oppose bail, and if it does so, the courts would consider the opposition as unreasonable and grant bail, enforcing the fundamental rights of the accused.

"Delay" in the conclusion of a criminal trial is antithetic to the very concept of a "fair trial" and "due process" guaranteed by Article 10A of the Constitution. The right to a fair trial is a cardinal requirement of the rule of law. Conclusion of trial within a reasonable time is an essential component of the right to a fair trial. The prolonged pre-trial detention of the accused also defies the presumption of innocence, another essential element of the right to a fair trial, for an accused is presumed innocent until he is proven guilty by proof beyond reasonable doubt.

The European Convention on Human Rights, Article 6 ref.

The National Accountability Ordinance, 1999 ('the NAB Ordinance') though does not provide for the release of an accused on bail pending his trial but ensures the expeditious conclusion of the trial, and thereby eliminates the possibility of protracted detention of the accused before his conviction. Under Section 16(a) of the NAB Ordinance, the trial is to proceed on a day-to-day basis and to be concluded within thirty days. The bar on granting bail to the accused under the NAB Ordinance is equitably balanced by providing for the trial to proceed on a day-to-day basis and its conclusion within thirty days. This statutory balance between the bar to grant bail and the expeditious conclusion of the trial would be rendered meaningless if an under-trial accused is detained for a long unexplained and unjustified period without determination of his guilt. While Section 16(a) of the NAB Ordinance that provides for concluding the trial within a period of thirty days is not to be construed strictly and applied rigidly, it manifests clearly the legislative intent for expeditious conclusion of the trial. The Legislature cannot be presumed to have intended an inordinate delay in conclusion of the trial and a prolonged detention of an under-trial accused, as a reasonable intention must always be attributed to the Legislature. Therefore, when the provision of NAB Ordinance requiring conclusion of trial within thirty days is not implemented, the corresponding provision barring grant of bail to the accused would also become proportionally pliant.

Tallat Ishaq v. National Accountability Bureau PLD 2019 SC 112 ref.

Inordinate delay in conclusion of the trial of an accused, for no fault on his part, being not envisaged by the NAB Ordinance would inevitably attract the constitutional protections under Articles 4, 9 and 10A of the Constitution. In such a situation, it is just, fair and equitable that the prosecution (NAB) should not oppose bail, and if it does so, the courts would consider the opposition as unreasonable and grant bail, enforcing the fundamental rights of the accused.

Inordinate or long delay in the conclusion of the trial for no fault of the accused and his protracted detention without determination of his guilt, amount to harassment and abuse of the process of law. Such delay can therefore be a valid ground for releasing the accused on bail and restoring his fundamental right to life and liberty.

Riasat Ali v. Ghulam Muhammad PLD 1968 SC 353 ref.

The case reported as Tallat Ishaq v. National Accountability Bureau PLD 2019 SC 112. ('Tallat Ishaq') also recognizes the ground of "shocking, unconscionable and inordinate delay" in the conclusion of the trial as a ground for granting the accused the relief of bail. Said case, however, does not specify what period of delay would be considered as "shocking, unconscionable and inordinate". It has left to the discretion of the courts to determine it in the peculiar facts and circumstances of each case. Such a discretion must be structured equitably and exercised uniformly. In this regard, the courts can borrow guidance from, and act upon, the legislative wisdom codified in the general criminal law balancing the public interest with the individual rights, and can accordingly give effect to the scheme of the NAB Ordinance and enforce the fundamental rights of the accused to life, liberty, fair trial and due process guaranteed under Articles 9 and 10A of the Constitution.

(b) Constitution of Pakistan---

---Art. 10A---Right to a fair trial and due process---Liberal and progressive interpretation---Incorporation of the right to a fair trial and due process by Article 10-A in the Constitution as an independent fundamental right underscores the constitutional significance of fair trial and due process and like other fundamental rights, it is to receive a liberal and progressive interpretation and enforcement.

(c) National Judicial (Policy Making) Committee Ordinance (LXXI of 2002)---

---Ss. 4(a) & 6---Police Order (No.22 of 2002), Arts. 109 & 111---Inordinate or long delay in the conclusion of trials---General directions issued by the Supreme Court to eradicate the issue of delay in conclusion of trials stated.

Inordinate and endless delay in the conclusion of a criminal trial is the singular most important challenge faced by the criminal justice system and has a devastating effect on the credibility, transparency, public confidence and health of the justice system. To meet this challenge coordinated efforts of all the organs of the Government; the Legislature, the Executive and the Judiciary, are required. One immediate solution is to activate the Provincial Justice Committees constituted under the National Judicial (Policy Making) Committee Ordinance 2002. The Chief Justices of the High Courts, who are the Chairpersons of these Committees, must convene and hold meetings of these Committees at least on quarterly basis. The Vice Chairpersons of the Provincial Bar Councils may also be invited to attend and participate in meetings of these Committees, as the Bar is an important stakeholder in the justice system. Similarly, the District Criminal Justice Coordination Committees established under the Police Order 2002 should also be revitalized for reviewing and improving the operation of the criminal justice system.

Additionally, the High Courts should take up and address, on priority basis, the issues relating to appointments of judges in the District Judiciary against the available vacant posts and consider the creation of new posts, to reduce and rationalize the heavy dockets of cases before the general and special courts.

Ch. Mumtaz Yousaf, D.P.G. for Petitioners. (In all cases).

Nemo for Respondents.

Date of hearing: 19th April, 2022.

ORDER

SYED MANSOOR ALI SHAH, J.---The Chairman, National Accountability Bureau ("NAB"), seeks leave to appeal against the judgment dated 10.03.2020 passed by the Lahore High Court, on the writ petitions filed by the respondents under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution"), whereby post-arrest bail has been granted to the respondents in NAB Reference No.17/2018 ("Reference") dated 02.10.2018 for offences under Section 9 (a) (iii), (iv), (vi) and (xii) of the National Accountability Ordinance, 1999 ("NAB Ordinance")

2. Briefly stated, the Reference alleges that the respondents facilitated in making fake appointments in the Education Department and thereby embezzled and misappropriated funds from public exchequer by paying salaries, allowances, etc., to ghost/bogus employees.

3. Learned counsel for the petitioner contends that the respondents have been granted bail by the High Court, primarily on the ground of delay in the conclusion of the trial, which is not permissible under the NAB Ordinance. In support of his argument, he places reliance on Tallat Ishaq¹.

4. We have heard the learned counsel for the petitioner and have gone through the record of the case, as well as, the cited case law.

5. Perusal of the record shows insufficiency of incriminating material to prima facie establish that the appointments made in the Education Department were fake or that the respondents had gained any monetary benefits as a result thereof. There are thus no reasonable grounds for believing that the respondents are guilty of the alleged offences, hence they were entitled to post arrest bail on this ground alone.

6. So far as the ground of delay in conclusion of the trial is concerned, the High Court has rightly considered the delay unjustifiable and inordinate, thus enlarging the respondents on bail. We also have noticed the long delay in conclusion of the trial, with great concern. The Reference was filed in the year 2018, and the respondents were arrested in the same year. However, till date after lapse of a period of almost four years, the trial has yet not even commenced and no plausible explanation has been put forth by the NAB, in this regard.

7. "Delay" in the conclusion of a criminal trial is antithetic to the very concept of a "fair trial" and "due process" guaranteed by Article 10A of the Constitution. The right to a fair trial is a cardinal requirement of the rule of law. If an accused cannot be tried fairly for an offence, he should not be tried for it at all.² Conclusion of trial within a reasonable time is an essential component of the right to a fair trial.³ The prolonged pre-trial detention of the accused also defies the presumption of innocence, another essential element of the right to a fair trial, for an accused is presumed innocent until he is proven guilty by proof beyond reasonable doubt.⁴ Even before the addition of Article 10A in the Constitution, the right to a fair trial and due process was well-entrenched in our jurisprudence and considered to be a part of the right of access to justice enshrined in the constitutional right to be dealt with in accordance with law guaranteed by Article 4 and the fundamental right to life and liberty guaranteed by Article 9 of the Constitution.⁵ The incorporation of the right to a fair trial and due process by Article 10-A in the Constitution as an independent fundamental right underscores the constitutional significance of fair trial and due process and like other fundamental rights, it is to receive a liberal and progressive interpretation and enforcement.

8. The NAB Ordinance⁶ though does not provide for the release of an accused on bail pending his trial but ensures the expeditious conclusion of the trial, and thereby eliminates the possibility of protracted detention of the accused before his conviction. Under Section 16(a) of the NAB Ordinance, the trial is to proceed on a day-to-day basis and to be concluded within thirty days. The bar on granting bail to the accused under the NAB Ordinance is equitably balanced by providing for the trial to proceed on a day-to-day basis and its conclusion within thirty days. This statutory balance between the bar to grant bail and the expeditious conclusion of the trial would be rendered meaningless if an under-trial accused is detained for a long unexplained and unjustified period without determination of his guilt. While Section 16(a) of the NAB Ordinance that provides for concluding the trial within a period of thirty days is not to be construed strictly and applied rigidly as held in Tallat Ishaq, it manifests clearly the legislative intent for expeditious conclusion of the trial. The Legislature cannot be presumed to have intended an inordinate delay in conclusion of the trial and a prolonged detention of an under-trial accused, as a reasonable intention must always be attributed to the Legislature. Therefore, when the provision of NAB Ordinance requiring conclusion of trial within thirty days is not implemented, the corresponding provision barring grant of bail to the accused would also become proportionally plaint. If the scheme of a law in regard to a vital part fails, the sanctity of the other part, as observed by Salahuddin, J. in Zahur Ilahi⁷, must of necessity be affected and what appears to be rigid must give way to flexibility. Inordinate delay in conclusion of the

trial of an accused, for no fault on his part, being not envisaged by the NAB Ordinance would inevitably attract the constitutional protections under Articles 4, 9 and 10A of the Constitution. In such a situation, it is just, fair and equitable that the prosecution (NAB) should not oppose bail, and if it does so, the courts would consider the opposition as unreasonable and grant bail,⁸ enforcing the fundamental rights of the accused.

9. Inordinate or long delay in the conclusion of the trial for no fault of the accused and his protracted detention without determination of his guilt, as held by this Court in *Riasat Ali*⁹, amount to harassment and abuse of the process of law. Such delay can therefore be a valid ground for releasing the accused on bail and restoring his fundamental right to life and liberty. No doubt, the right to life and liberty guaranteed by Article 9 of the Constitution is "subject to law" but the law, which can curtail this right, means a law that promotes larger public interest and not a law that impedes "fair trial" and limits "due process". The general criminal law¹⁰ has balanced the public interest and individual rights to life and liberty by recognizing the right of an accused to be released on bail, in case the trial against him is not concluded, for no fault on his part, within a specified period from the date of his detention, that is, one year for offences not punishable with death and two years for offences punishable with death. *Tallat Ishaq* relied upon by the learned counsel for the petitioner also recognizes the ground of "shocking, unconscionable and inordinate delay" in the conclusion of the trial as a ground for granting the accused the relief of bail. *Tallat Ishaq*, however, does not specify what period of delay would be considered as "shocking, unconscionable and inordinate". It has left to the discretion of the courts to determine it in the peculiar facts and circumstances of each case. Such a discretion must be structured equitably and exercised uniformly. In this regard, the courts can borrow guidance from, and act upon, the legislative wisdom codified in the general criminal law¹¹ balancing the public interest with the individual rights, and can accordingly give effect to the scheme of the NAB Ordinance and enforce the fundamental rights of the accused to life, liberty, fair trial and due process guaranteed under Articles 9 and 10A of the Constitution.

10. The impugned judgment, when viewed in the light of the above principles of law, is found to be in accord therewith. This Court usually interferes in its appellate jurisdiction in such like matters, 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. None of these grounds is available to the petitioner in the present case. The petitions for leave to appeal are found meritless; they are therefore dismissed and leave to appeal declined.

General directions to eradicate the evil of delay in conclusion of trials.

11. Inordinate and endless delay in the conclusion of a criminal trial is the singular most important challenge faced by our criminal justice system and has a devastating effect on the credibility, transparency, public confidence and health of our justice system. To meet this challenge coordinated efforts of all the organs of the Government; the Legislature, the Executive and the Judiciary, are required. One immediate solution is to activate the Provincial Justice Committees constituted under the National Judicial (Policy Making) Committee Ordinance, 2002. The Chief Justices of the High Courts, who are the Chairpersons of these Committees, must convene and hold meetings of these Committees at least on quarterly basis. The Vice-Chairpersons of the Provincial Bar Councils may also be invited to attend and participate in meetings of these Committees, as the Bar is an important stakeholder in the justice system. Similarly, the District Criminal Justice Coordination Committees established under the Police Order 2002 should also be revitalized for reviewing and improving the operation of the criminal justice system.

12. Additionally, the High Courts should take up and address, on priority basis, the issues relating to appointments of judges in the District Judiciary against the available vacant posts and consider the creation of new posts, to reduce and rationalize the heavy dockets of cases before the general and special courts. Needless to reiterate that the High Courts have the constitutional mandate, under Article 203 of the Constitution, to supervise and control all courts, whether of general or special jurisdiction, established by law as per Article 175(1) of the Constitution, within their respective jurisdiction.

13. Office shall send copies of this order to the Registrars of all the High Courts and to the Secretaries of all the Federal and Provincial Law Ministries/Departments.

MWA/C-15/SC Petition dismissed.