

Form No.HCJD/C-121
ORDER SHEET
LAHORE HIGH COURT
RAWALPINDI BENCH, RAWALPINDI
JUDICIAL DEPARTMENT

W.P.No.2366 of 2023

GHULAM QADIR KHAN

VS.

NATIONAL ACCOUNTABILITY BUREAU, ETC.

<i>S.No. of order/ proceeding</i>	<i>Date of order/ Proceeding</i>	<i>Order with signature of Judge and that of parties or counsel, where necessary</i>
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23.11.2023 Syed Zulfiqar Abbas Naqvi, Advocate for the petitioner.
M/s Hasnain Khurshid and Raja Muhammad Ali, Special Prosecutors for NAB with Rooh-ul-Amin, Deputy Director/Investigating Officer NAB.

The petitioner namely Ghulam Qadir Khan is amongst the accused in Accountability Reference No.6 of 2014 facing trial before the learned District & Sessions Judge/ Judge Accountability Court No.III, Rawalpindi. Through instant petition, he is seeking his release on post-arrest bail.

2. *The precise allegations against the petitioner are that he fraudulently/dishonestly signed Musharkat agreements with the intention to defraud the public at large while stating that he is running different businesses in Pakistan as well as abroad alongwith his co-accused. It is alleged against the petitioner that during investigation he admitted that actually there was no business on ground. As per opinion of the Investigating Officer, the petitioner in connivance with the other accused persons deprived the general public of their hard-earned money.*

3. *We have heard learned counsel for the petitioner and the learned Prosecutor for National Accountability Bureau and perused the record.*

4. *The prosecution in this case was set into motion on receiving of several complaints by launching an inquiry against Asif Javed (alias Molvi Ibrahim), Director M/s Elixir Group and others on 6th January, 2014, which was later on upgraded into investigation on 18th April, 2014. On completion of investigation, reference No.6 of 2014 was filed against 12 accused persons whereas 09 were declared as proclaimed offenders and trial was conducted against three persons namely Asif Javed alias Maulvi Ibrahim, Shahid Aziz and Yasir Aziz. The said accused were then convicted by the Accountability Court No.III, Rawalpindi through judgment dated 30th June, 2016. The petitioner was arrested on 8th November, 2021 and he remained on physical remand till 8th December, 2021.*

5. *As per prosecution's own case, initially petitioner was not implicated in the alleged offence, however, after his arrest 116 claimants came forward and got recorded their statements disclosing some incriminating material against the petitioner. The petitioner was sent to face the trial before the Accountability Court. He was charged under sections 9 (a)(iii), (iv), (ix) and (xii) read with section 10 of the National Accountability Ordinance, 1999 (hereinafter referred to as "Ordinance") on 24th November, 2022.*

6. *We have noticed that initially the petitioner sought his release through W.P.No.725 of 2023, which was disposed of with the following observations: -*

"Learned counsel for the petitioner does not press this petition provided a direction may be issued to the learned trial court to conclude the trial expeditiously, which is disposed of as such. However, learned trial court is directed to conclude the trial within a period of 04-weeks from the date of receipt of certified copy of this order even on day-to-day basis under intimation to Additional Registrar (Judl.) of this Court. Otherwise, the petitioner would be at liberty to move a fresh petition on

the same ground before this Court if delay in conclusion of trial is not attributed to him.”

7. *The petitioner is now seeking his release on bail firstly on the ground that despite lapse of considerable period, his trial has not been concluded and secondly there is no incriminating material against him. As already observed the petitioner was arrested on 8th November, 2021 and since his arrest he is behind the bars for last about two years. We have been apprised by the learned Prosecutor for NAB that so far 120 witnesses have been recorded but he remained unable to give any definite time for the conclusion of the trial. Admittedly there are hundreds of claimants.*

8. *Section 16 of the “Ordinance” as amended by Act No.XI of 2022 dated 22nd June, 2022 mandates that the trial of accused under the “Ordinance” shall be completed within one year. Previously in the first writ petition, trial Court was directed to conclude the trial within period of four weeks from the date of receipt of copy of order even on day to day basis. There is no cavil that failure to comply the order on the direction of Court would not vest a right upon the accused to claim bail but at the same time, expeditious trial is an inalienable right of every accused. Early trial, in the circumstances, is not in sight in near future. The petitioner cannot be left at the mercy of the prosecution to be rotten in jail for an indefinite period. It is an admitted fact that the petitioner has not attributed to the delay in conclusion of trial. Needless to observe that delay in prosecution of accused amounts to abuse the process of law. Guidance in this respect can be sought from CHAIRMAN, NAB through P.G., v. NASAR ULLAH and 5 others (PLD 2022 Supreme Court 497). The relevant extract from the same is reproduced below:-*

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. 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. 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. 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 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 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 Ilahi*, 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, 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, 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 law 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 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.

Reference to this effect can also be made to MUHAMMAD NADEEM ANWAR and another v NATIONAL ACCOUNTABILITY BUREAU and others (PLD 2008 SC 645), ANWARUL HAQ QURESHI v. NATIONAL ACCOUNTABILITY BUREAU and another (2008 SCMR 1135), MUHAMMAD JAMEEL RAHI v. D.G. NAB and others (2012 SCMR 552) and HIMESH KHAN v. The NATIONAL ACCOUNTABILITY BUREAU (NAB), LAHORE and others (2015 SCMR 1092).

9. *After having an overview of the principles laid down hereinabove, we are of the considered opinion that it is an*

inalienable right of every accused to have expeditious and fair trial, which right is even guaranteed under Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973.

10. *Adverting to the merits of the case, we have noticed that so far 122 witnesses have been examined by the prosecution out of which most of them and more specifically PW-36 Muhammad Tahir Saleem, PW-37 Khan Bahadar and PW-38 Gohar Arman etc. did not implicate the petitioner directly in the alleged offence. Mere allegation of a heinous offence is no ground to keep the petitioner behind the gallows.*

11. *It is well settled principle that the Superior Courts have the power to grant bail under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 independent of any statutory source of jurisdiction such as 497 of the Code of Criminal Procedure, 1898 (hereinafter referred to as “Cr.P.C”). We are well aware that initially by virtue of section 9(b) of the “Ordinance”, the jurisdiction under sections 426, 491, 497, 498 & 561-A “Cr.P.C” of all the Courts including the High Court to grant bail to any person accused of an offence under the “Ordinance” was curtailed but while examining the vires of the “Ordinance” in KHAN ASFANDYAR WALI and others v. FEDERATION OF PAKISTAN through Cabinet Division, Islamabad and others (PLD 2001 Supreme Court 607) the Supreme Court of Pakistan held as under:-*

197. It was held in the case of Zafar Ali Shah (*supra*) that the powers of the superior Courts under Article 199 of the Constitution “remain available to their full extent.... Notwithstanding anything contained in any legislative instrument enacted by the Chief Executive.” Whereas, section 9(b) of the NAB Ordinance purports to deny to all Courts, including the High Courts, the jurisdiction under sections 426, 491, 497, 498 and 561A or any other provision of the Code of Criminal Procedure or any other law for the time being in force, to grant bail to any person accused of an offence under the NAB Ordinance. It is well settled that the Superior Courts have the power to grant bail under Article 199 of the

Constitution, independent or any statutory source of jurisdiction such as section 497 of the Criminal Procedure Code, section 9(b) of the NAB Ordinance to that extent is ultra vires the Constitution. Accordingly, the same be amended suitably.

12. *There is no cavil to the proposition that at bail stage, only tentative assessment of the material available is to be made for forming an opinion as to whether reasonable grounds exist against the accused for the commission of alleged offence. After having cursory glance of the available material, we are of the considered opinion that in view of circumstances narrated herein above, the involvement of the petitioner in the alleged offence is not free from doubt and his case clearly falls within the ambit of further inquiry as per contemplation of Section 497 (2) of "Cr.P.C". The petitioner has, thus, successfully made out his case for his release pending trial.*

13. *Resultantly, we are inclined to allow this petition and enlarge the petitioner namely **Ghulam Qadir Khan** on bail subject to his furnishing bail bonds in the sum of Rs.10,00,000/- (rupees ten lac) with two sureties each in the like amount to the satisfaction of the trial Court.*

14. *Needless to observe that the observations made hereinabove are only tentative in their nature and are strictly confined to the extent of grant of instant bail.*

(**Ch. Abdul Aziz**)
JUDGE

(**Mirza Viqas Rauf**)
JUDGE

Approved for reporting.

JUDGE

JUDGE