

Form No: HCJD/C-121

ORDER SHEET.
ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Writ Petition No. 1701 of 2021

Hussain Lawai

Vs.

The State, etc.

S.No. of order/ proceeding	Date of order/ proceeding	Order with signature of Judge and that of parties or counsel where necessary.
(06)	08.06.2021	Syed Hamid Ali Shah, Advocate for the petitioner. Barrister Rizwan Ahmed, Special Prosecutor N.A.B.

TARIQ MEHMOOD JAHANGIRI, J.-

Through the instant petition, the petitioner seeks post arrest bail in pending Reference No. 13/2019, U/s 9(a)(iii)(iv)(vi) & (xii) of NAO, 1999 and entry at S. No. 5 of its Schedule read with Sections 3 & 4 of Anti Money Laundering Act, 2010.

2. Brief facts referred in the writ petition No. 421/2020 are that petitioner Hussain Lawai played a key role as President of Arif Habib Bank Limited (Now Summit Bank) lead the bank in preparation of fraudulent proposal, in the approval of loan facility for the company M/s Parthenon (Pvt.) Ltd. in line

with the plan of the then President of Pakistan Asif Ali Zardari. Approval of the projected proposal was given by the then Arif Habib Bank and was also shared with NBP which was owned by Government of Pakistan and a public sector bank and Arif Habib Bank being an agent/partner bank transmitted false and fictitious information and allowed the withdrawal of equity. Petitioner/accused has also taken illegal gratification for the purchase of a house in the name of his wife namely Mrs. Sabira Lawai.

3. The petitioner/accused filed a petition for bail after arrest vide Writ Petition No. 422 of 2020 which was dismissed by this Court vide order dated 20.04.2020; then he filed C.P No. 2012/2020 in the Hon'ble Supreme Court of Pakistan in connected matters, the Hon'ble Supreme Court has passed order dated 12.04.2021 which is reproduced as under:

"We noted that sufficient time has been lapsed since the arrest of the accused, it is expected that the learned High Court shall consider the cases of the petitioners on all grounds available to them under the law, including the grounds of hardship and medical, and shall proceed with the matter

to decide the same expeditiously but not more than three months from date of filing of such applications/petitions.

These petitions are disposed of in the terms noted above."

Now this is the second writ petition for bail after arrest mainly on grounds of hardship.

4. Learned counsel for the petitioner contends that the petitioner/accused was arrested in Reference No. 02/2018 on 23.06.2018, and warrants of arrest in the instant Reference were executed on 13.05.2019; the Reference bearing No. 13 of 2019 was filed on 12.07.2019 and charge was framed on 10.08.2020; there are ninety three (93) prosecution witnesses and only statements of two witnesses have been recorded and the petitioner is behind the bars for the last about three (03) years; there is no chance of conclusion of trial in near future; he is 76 years of age, suffering from multiple medical issues including cardiac disease, prostrate and osteoporosis. Whilst incarcerated in Landhi Jail, he was brought to the hospital and remained admitted there for

about 06 weeks owing to a heart ailment; the petitioner had fallen in Adyala jail in the first week of March and suffered from acute pain and agony; he was taken to PIMS Hospital where he got treatment and then shifted to Shifa International Hospital. Learned counsel further contends that the reports of X-ray, MRI etc. are enclosed with bail petition for ready reference. All the arrested co-accused of the Reference have been released on bail after arrest; investigation in the case has been completed; he is no more required for further investigation, hence, he is also entitled for grant of bail after arrest on the principle of consistency.

5. Conversely, learned Special Prosecutor NAB along with Investigating Officer states that the petitioner/accused caused huge loss to the national exchequer in the processing of consortium loan worth Rs. 1.5 billion; there is sufficient evidence available against him; he has got benefit against his illegal services by way of awarding house in the name of his wife, in this regard amount was paid from the loan disbursed by the bank and he is directly

involved in the commission of alleged offence, therefore, he is not entitled for concession of post arrest bail.

6. We have heard the arguments advanced by learned counsel for the petitioner, learned Special Prosecutor for NAB and perused the record with their able assistance.

7. It is an admitted fact that petitioner/accused is 76 years of age; he is behind the bars for the last about 03 years; Reference No.13/2019 was filed on 13.07.2019 and the charge was framed on 10.08.2020 i.e after delay of one (01) year of filing of the reference; the petitioner/accused is suffering from multiple health issues; his X-ray & MRI reports show that he had vertebral body fracture with retropulsion of vertebral body into spinal cord, CT scan of chest, abdomen and pelvis show compression fracture of T 12 vertebral body.

8. The petitioner/accused had a fall in first week of March, suffered from acute pain and agony; the learned Accountability Court passed orders to take the petitioner/accused to hospital, so he was taken to Pakistan

Institute of Medical Sciences (PIMS) on 02.04.2021, where he was examined and the X-ray report shows that he has Orthopedic Fracture in the Spinal Cord.

9. The facility of MRI was not available in PIMS. Application was again filed before the learned Accountability Court for treatment in a private hospital where required facilities were available. The prayer was allowed and the petitioner/accused was taken to Shifa International Hospital where the prognosis report revealed that petitioner required surgery (Decompression and spinal fixing). The X-ray and MRI reports show that the petitioner/accused had vertebral body fracture with retropulsion of vertebral body into spinal cord. CT Scan of chest, abdomen and pelvis show compression fracture of T-12 Vertebral body.

10. The main accused of the case namely Mr. Asif Ali Zardari and Abdul Ghani Majeed alongwith co-accused Taha Raza and all other accused arrested in the reference have been released on bail after arrest, hence the petitioner/accused is also entitled for grant of

post arrest bail on the principle of consistency.

11. While allowing the bail after arrest of the accused facing trial in the NAB, Hon'ble Supreme Court of Pakistan in a recent judgment titled as "***DINSHAW HOSHANG ANKLESARIA Vs. NATIONAL ACCOUNTABILITY BUREAU (NAB) THROUGH CHAIRMAN and others***" (**2021 SCMR 699**) has held that:

"It has been brought to our notice that the petitioner was taken into custody on 23.04.2019 and since then he is behind the bars. Though Reference has been filed but there are 86 witnesses whose testimony is to be recorded before the Trial Court. Rest of the evidence is in the possession of the prosecution, which is in the documentary form and there is no likelihood of any tampering or manipulation. The petitioner has already suffered 20 months of incarceration without even commencement of trial, which clearly reflects that the conclusion of the same is not in sight in near future. Even otherwise, it has been informed that there are 27 accused in all and the majority of the same including the co-accused are enjoying liberty and free life."

12. It has been held by the Hon'ble Supreme Court of Pakistan in a judgment

reported as **PLD 2019 SC 11** (***Talat Ishaq Vs. NAB***) that:

(d) In an appropriate case through exercise of its jurisdiction under Article 199 of the Constitution a High Court may grant bail to an accused person arrested in connection with an offence under the National Accountability Ordinance, 1999 and section 9(b) of the said Ordinance does not affect the jurisdiction of a High Court conferred upon it by the Constitution. The constitutional jurisdiction of a High Court is, however, an extraordinary jurisdiction meant to be exercised in extraordinary circumstances and not in run of the mill cases or as a matter of course.

(f) Ordinarily bail is allowed to an accused person on the ground of delay only where the delay in the trial or the period of custody of the accused person is shocking, unconscionable or inordinate and not otherwise. The primary consideration for grant of bail on the ground of such delay is undue hardship and more often than not prima facie merits of the case against the accused person are also looked into before admitting him to bail on the ground of delay.

13. It has been held by the Hon'ble Supreme Court of Pakistan in a case titled as ***"Muhammad Jahangir Badar Vs. The State and others"*** (**PLD 2003 SC 525**)

that:

"There is no cavil with the proposition that the State machinery has a right- to arrest the culprits and put them to trial, for the

purpose of establishing guilt against them but it has not been bestowed with an authority to play with the liberty and life of an accused under detention because no one can be allowed to remain in custody for an indefinite period without trial as it is a fundamental right of an accused that his case should be concluded as early as could be possible particularly in those cases where law has prescribed a period for the completion of the trial. As in the instant case under section 16(a) of the Ordinance the Court is bound to dispose of the case within 30 days. It may be noted that inordinate delay in the prosecution case if not explained, can be considered a ground for bailing out an accused person depending on the nature and circumstances on account of which delay has been caused."

14. In the above case, the august Supreme Court after examining the earlier judgments held as follows:

"In the above noted case bail was granted to Zulfiqar Ali petitioner because he remained in custody for 27 months and the delay in the conclusion of trial was attributed to both the parties. Against the above prevailing consistent view only one exceptional principle can be pressed into service namely that if the trial of the case has commenced then instead of releasing the accused on bail direction should be made for expeditious disposal of the case

by adopting certain modalities to ensure that the accused, is not detained further for an indefinite period. Reference in this behalf is made to the case of (i) Allah Ditta and others v. The State (1990 SCMR 307) and (ii) Iftikhar Ahmad v. The State (1990 SCMR 607)."

15. It has been held by Hon'ble Supreme Court of Pakistan in the reported judgment **2015 SCMR 1092** titled as ***"Himesh Khan Vs. The National Accountability Bureau (NAB), Lahore and others"*** that:

"The Court cannot ignore shocking delay in conclusion of the trial. In such circumstances, the accused cannot be left at the mercy of the prosecution to rot in jail. As the real beneficiaries were granted bail, it makes it a fit case for grant of bail to the Petitioner."

16. It has been held by the Hon'ble Supreme Court of Pakistan in case titled as ***"Khawaja Anwer Majid Vs. National Accountability Bureau through Chairman NAB and another"*** (**PLD 2020 SC 635**)

that:

"Condition of the Petitioner, ever since the rejection of the previous bail application, has deteriorated alarmingly. Cardiac physicians have suggested surgery

involving intensive procedure. Such procedure needs to be undertaken free from custodial stresses. Concession of bail was extended.”

Reliance is also placed on cases **2017 SCMR 1194**, **2002 SCMR 282** and **2016 SCMR 1225**.

17. It is admitted at all ends that the co-accused placed at higher rung has been released on bail, hence the present petitioner/accused is also entitled for grant of bail on the principle of consistency. Reliance is placed on a case titled as **"Ghulab Khan V. Chairman N.A.B and another" (2020 SCMR 285)**. The same principle has been laid down in cases titled as ***"Muhammad Daud and another V. The State and another" (2008 SCMR 173)***, ***"Sheraz V. The State" (2021 MLD 292)*** and ***"Muhammad Azam V. The State" (2008 SCMR 249)***.

18. As the entire case depends on documentary evidence, which has been collected by the NAB / Investigating Agency, in this regard guidance be taken from a case *titled as "Saeed Ahmed VS. The State"*

(1996 SCMR 1132) that:

"The case entirely depends upon documentary evidence which seems to be in possession of the prosecution and challan has already been submitted. It has further been held that as there is no possibility of tampering with the evidence, which is entirely documentary in nature and in possession of the prosecution". Reliance is also placed upon a case titled as *"Muhammad Shabbir V. The State and others"* (2020 YLR Note 22).

19. It is important to remember that bail is not to be withheld as a punishment. There is no legal or moral compulsion to keep the people in jail merely on the allegation that they have committed offences punishable with death or transportation, unless reasonable grounds exist to disclose their complicity. The ultimate conviction and incarceration of a guilty person can repair the wrong caused by a mistaken relief of bail after arrest granted to him, but no satisfactory reparation can be offered to an innocent man for his unjustified incarceration at any stage of the case albeit his acquittal in the long run. Reliance is placed on a case reported as **"Manzoor and 4**

others Vs. The State” (PLD 1972 SC 81)”.

20. It has been held in a case titled as ***"Zaigham Ashraf v. The State and others"*** **(2016 SCMR 18)** that:

"9. To curtail the liberty of a person is a serious step in law, therefore, the Judges shall apply judicial mind with deep thought for reaching at a fair and proper conclusion albeit tentatively however, this exercise shall not to be carried out in vacuum or in a flimsy or causal manner as that will defeat the ends of justice because if the accused charge, is ultimately acquitted at the trial then no reparation or compensation can be awarded to him for the long incarceration, as the provisions of Criminal Procedure Code and the scheme of law on the subject do not provide for such arrangements to repair the loss, caused to an accused person, detaining him in jail without just cause and reasonable ground."

21. The Hon'ble Supreme Court of Pakistan has granted bails to the accused facing investigation / trial of NAB in the cases titled as ***"Muhammad Saeed Mehdi Vs. The State and 2 others"*** **(2002 SCMR 282)**, ***"Himesh Khan Vs. The National Accountability Bureau (NAB), Lahore and others"*** **(2015 SCMR 1092)**, **"Ghulab Khan**

Vs. Chairman N.A.B and another” (2020 SCMR 285), “Khawaja Salman Rafique and another Vs. National Accountability Bureau through Chairman and others” (PLD 2020 SC 456), “Nazir Ahmed Shaikh and others Vs. National Accountability Bureau and others” (2020 SCMR 297), and “Muhammad Jawed Hanif Khan and anothers Vs. National Accountability Bureau Sindh and others” (2020 SCMR 185).

22. In the light of the above law enunciated by the august Supreme Court of Pakistan, we are of the opinion that the petitioner is entitled to the relief, particularly in view of the principles and law laid down in the cases of ***DINSHAW HOSHANG ANKLESARIA Vs. NATIONAL ACCOUNTABILITY BUREAU (NAB) THROUGH CHAIRMAN and others”*** and ***“Muhammad Jehangir Badar V. The State and others”*** supra. The prosecution has not been able to satisfy us that the inordinate delay in conclusion of trial is not partly attributed to it.

23. For what has been discussed above, instant writ petition is hereby **allowed** and the petitioner/accused is admitted to post arrest bail subject to furnishing of bail bonds in the sum of Rs. 10,00,000/- (Rupees One Million only) with one surety in the like amount to the satisfaction of the learned trial Court.

24. The above detailed reasons be read as part and parcel of our short order of even date which is reproduced hereunder:

"For the reasons to be recorded later, the instant writ petition is allowed and the petitioner is enlarged on bail in Reference No. 13/2019 subject to furnishing bail bonds in the sum of Rs. 10,00,000/- (Rupees one million only) with one surety in the like amount to the satisfaction of the learned trial Court."

(AAMER FAROOQ)
JUDGE

(TARIQ MEHMOOD JAHANGIRI)
JUDGE

Ahmed Sheikh

Approved for Reporting