

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No.1477/2021

Agha Wasif Abbas

versus

Chairman, National Accountability Bureau, etc.

Petitioner by: Mian Ali Ashfaq and Raja Abdul Qadeer
Janjua, Advocates along with petitioner.

Respondents by: Barrister Rizwan Ahmad, Special Prosecutor,
NAB.
Hammad Kamal, I.O. NAB.

Date of Decision: 31.05.2021.

JUDGMENT

MOHSIN AKHTAR KAYANI, J:- Through this writ petition, Agha Wasif Abbas (*petitioner*) has prayed for his pre-arrest bail in Reference No.1/2020 (The State vs. Khurshid Anwar Jamali, etc.) pending before the learned Accountability Court, Islamabad.

2. Succinctly, in pursuance of order of the apex Court, dated 07.01.2019, a JIT was constituted, which passed the direction for initiation of inquiry against the public office holders, legal persons and others involved in fake bank account scams regarding extending illegal favour to Technomen Kinetics (Pvt.) Ltd. (*TKL*) and other projects of Sindh Nooriabad Power Company (Pvt.) Ltd. (*SNPC*) and Sindh Transmission & Dispatch Company (Pvt.) Ltd. (*STDC*), as such, the inquiry was subsequently converted into investigation on 02.07.2019, whereafter it was unearthed that one Abdul Ghani Majeed created a systematic process of whitening black money through Government partnered 250 MW Power Projects at

Nooriabad (Sindh) having been established in the Public Private Partnership (**PPP**) mode in the names of Sindh Nooriabad Power Company (Pvt.) Ltd. (**SNPC**) and Sindh Nooriabad Power Company (Pvt.) Ltd.-II (**SNPC-II**). The said accused Abdul Ghani Majeed (Accused No.3 in Reference) through TKL and Khurshid Anwar Jamali / Consultant of Government of Sindh (Accused No.1 in Reference) for SNPC and SNPC-II pedaled their interests of acquiring illegal benefits and money laundering. In this crime, Syed Murad Ali Shah being the Authority / Minister Incharge / Head of Energy and Finance Department (Accused No.4 in Reference) was also involved and by misusing his authority rendered illegal benefits through his directions / orders, as such, he played a key role at policy level by taking way costly and un-freezable action of the projects. However, the present petitioner was the then Secretary Energy during the approval of the said projects and has neither settled the technical concerns of the projects nor supervised the projects diligently, per se, he has not suggested any measure when the power generation company i.e. Hyderabad Electric Supply Company (**HESCO**) has cancelled the Letter of Intent (**LOI**), whereafter he suggested to opt for the offer of K-Electric, as a result whereof, laying of 132 KV Double Circuit Transmission Line between SNPC and K-Electric Grid caused extra burden to national ex-chequer and, as such, he misused his authority and failed to exercise his duties being Secretary Energy by providing cover to all other accused persons. In this case, two of the accused persons namely Syed Asif Mahmood and Syed Arif Ali, Directors of TKL, accepted their guilt in

terms of Section 25(b) of the NAO, 1999, returned the illegal gains amounting to Rs.2.134 Billion acquired in consequence of offence committed by them. The NAB authorities filed Reference No.1/2020 before the Accountability Court, Islamabad, whereby the case was fixed for framing of charge. The NAB authorities have issued call up notices and then issued warrant of arrest of the petitioner, as a result whereof the petitioner has filed the instant writ petition seeking his pre-arrest bail in the pending reference.

3. Learned counsel for petitioner contends that undeniably the petitioner being the then Secretary Energy in the relevant period has neither been charged with any allegation of corruption and corrupt practices nor is there any allegation of misappropriation or illegal gains in the entire project, rather he was just a person representing the Government of Sindh in the said project, as such, he has joined the investigation and recorded his statement, per se, there is nothing incriminating available against the petitioner; that principal accused Khurshid Anwar Jamali has already been granted post arrest bail by this Court, vide order dated 20.04.2020, passed in W.P. No.269/2020; that the NAB authorities have not issued any warrant of arrest qua 16 other accused persons in this reference, except the present petitioner, who is facing harassment at the hands of NAB only on the ground that petitioner was out of country when inquiry was initiated, which resulted into issuance of warrant of arrest; that the investigation has already been completed and the matter has been placed before the Accountability Court, even necessary documents have been

disbursed and the matter is now fixed for framing of charge, as such, there is no legal justification to arrest the petitioner as he has already joined investigation and provided complete insight of his point of view on the basis of record; that the case is based on documentary evidence, which has already been produced in the learned trial Court and, as such, there is no chance of tempering with the evidence, therefore, the pre-arrest bail of the petitioner be confirmed, otherwise he will face humiliation at the hands of NAB authorities.

4. Conversely, learned Special Prosecutor NAB contends that the petitioner was the then Secretary, Government of Sindh when SNPC was conceived in process, as such, the inquiry / investigation has been initiated against the accused persons, who in collusion with each other have disguised their evil designs with eventual motive to invest the unexplained money of Omni Group through TKL in a prearranged manipulated manner, per se, the Directors of TKL connived with other co-accused in committing fraud of acquiring partnership to the extent of 51% of share of 2x50 MW Power Plants Project initiated through PPP through collusive practice, which also involved false disclosure of their consortium to attain financial worth for qualification; that in order to initiate the project the accused persons obtained loans from banks beside aiding equity by Government of Sindh, additional favors have been received through collateral of National Bank of Pakistan; that the present petitioner being the then Secretary, Government of Sindh has misguided the competent authority qua the false claim that HESCO had shown its inability to the

power developers that it requires 24 months to construct the connecting bays at Nooriabad Grid for intake of electricity from SNPC and SNPC-II but, surprisingly the petitioner did not suggest any measure to opt for fresh LOI from HESCO, which could have been the easiest solution considering the already issued LOI and understanding with HESCO, as such, in case of connectivity with HESCO, the total cost of transmission line would have been Rs.125 Million only as against the occurred cost of Rs.1.9 billion paid to TKL for STDC Transmission Line Project; that the petitioner is required for the purpose of investigation, therefore, instant writ petition be dismissed.

5. Arguments heard, record perused.

6. Tentatively, the petitioner has been arrayed as Accused No.6 in Reference No.1/2020 (The State v. Khurshid Anwar Jamali, etc.) pending before the Accountability Court, Islamabad, whereby the documents / statements have been distributed to the accused persons and case was fixed for framing of charge, however warrant of arrest of petitioner has been issued by the NAB authorities, as a result whereof, he opted to file instant writ petition seeking his pre-arrest bail.

7. While going through the reference filed by the NAB authorities against the petitioner and other co-accused persons, allegations referred in Para-16 of the reference are as under:

That the accused No.6 was Secretary Energy, GoS, during his tenure from 01-08-2013 to 02.07.2018 as Secretary Energy, GoS, despite the knowledge of the risk involved and concerns raised in Cabinet Meeting regarding project, he did not apply judicious mind and turned a blind eye to the observations / concerns of

HESCO and to the fact that SNPC/TKL not fulfilling the terms and conditions of HESCO's LOI and with his assent, under his watchful eye accused No.1 made negotiations with K-Electric. The accused No.6 also initiated and got approved (without any proper estimate / feasibility study) the summary for amounting to Rs.1300 (Million) for STDC Transmission line which later extended to 1.9 (Billion). The accused No.6, based on false statements and concealments of facts, instead of suggesting any measures to fulfill the requirements of HESCO and narrating any specific reasons for the cancellation of LOI by the HESCO and the probability of achieving the milestones required by the HESCO, suggested to opt the offer of K-Electric. The accused No.6 also aided and abetted by giving official cover to the execution of work "Laying of 132 KV Double Circuit Transmission Line between SNPC and K-Electric Grid" already started by M/s TKL prior to initiation of tender process by constituting STDC Procurement committee of hand pick member i.e. accused No.13 (who was also Member BoD of SNPC and SNPC-II along with accused No.1 and Deemed Convicted Directors of M/s TKL) and accused No.16 who was already in coordination and connivance with accused No.2 and Amjad Hussain (Approver) for STDC project tender manipulation. In this way he by misusing authority and deliberately fail to exercise his duties committed the offence of corruption and corrupt practices and also aided Director of M/s TKL (Deemed Convicted through PB), accused No.1, 3 and 4 extend undue favour and benefits from SNPC, SNPC-II and STDC Transmission Line Project.

8. The above mentioned role of the petitioner being the then Secretary Energy, Government of Sindh, during the approval of the project reveals that the petitioner had not applied his judicious mind and turned blind eye to the observations / concerns of the HESCO, as a result whereof the cost of the project has been increased, as such, in case of connectivity with

HESCO the total cost of transmission line would have been Rs.125 Million but, the amount of 1.9 billion has been paid to TKL for STDC Transmission Line Project.

9. While considering the above role and the allegations leveled against the petitioner, it has been observed that the petitioner being the then Secretary Energy, Government of Sindh had never been a part of SNPC, TKL and STDC, rather he had no concern with the said three (03) legal entities, who were beneficiaries of the project, even the petitioner has never awarded any contract on behalf of SNPC, TKL and STDC, neither approved any payment in favour of said companies nor has any concern with the management or Board of Directors of the said companies, therefore, the allegation qua aiding and abetting to these juristic personalities to provide official cover for execution of work i.e. laying of 132 KV Double Circuit Transmission Line between SNPC and K-Electric Grid is not attributed to the petitioner, especially when the said work had already been started by TKL prior to initiation of tender process by constituting STDC Procurement Committee by Accused No.13, who was also member of Board of Directors of SNPC and SNPC-II with principal Accused No.1, who has now been convicted on the basis of plea bargain.

10. The second part of the allegation is relating to the approval of summary to the extent of amount of Rs.1300 million for STDC Transmission Line, which later on has been extended to Rs.1.9 billion without proper estimate / feasibility study, as such, when this aspect of the case has also been scanned with the able assistance of learned counsel for

the parties, we have observed that petitioner being the then Secretary Energy simply moved summary for capitalization of STDC, which being a separate legal entity has independently designed and constructed 132 KV transmission line followed by submission of tariff application feasibility study to the NEPRA, therefore, it was not assigned role of petitioner being the then Secretary Energy to approach the NEPRA being regulator to assess the status of HESCO, even otherwise, NEPRA, vide order dated 13.07.2015, has passed the decision on the application of SNPC filed for grant of generation of license.

(iii). In this regard, the Authority has come across certain issues including (a). Reluctance of HESCO to purchase power from SNPCPL; (b) Lack of interest of NTDC and HECO to wheel Electric Power from SNPCPL; and (c). Setting Up of the Sindh Transmission and Dispatch Company Limited (STDCL) for the Grant of Transmission Licence in the Province of Sindh. The findings of the Authority on the said observations are elaborated in the subsequent paragraphs.

(iv). Reluctance of HESCO to purchase power from SNPCPL: The Authority has considered the matter in light of the provisions of the NEPRA Act and the relevant rules and regulations framed thereunder. The Authority has observed that under Section 21 of the NEPRA Act, a Distribution Company / Licensee has exclusive right in providing distribution services in its service territory. In order to provide the distribution services to its consumers, the Distribution Companies / Licensees are obligated to arrange electric power from different sources offered. In this regard, the Authority observes that HESCO in the particular case of SNPCPL has not acted pragmatically at all by denying the offered Natural Gas based electric power by SNPCPL. In its comments HESCO submitted that it terminated the LoI issued to SNPCPL as it failed to comply with the terms and conditions of the same

however, no exact details of the violation of SNPCPL was provided to the Authority. Another justification provided by HESCO in not purchasing electric power from SNPCPL is that due to large number of prospective power plants, planned to be installed in its service territory, it will have surplus generation as compared to its demand. The Authority considers that the position taken by HESCO is contrary to the Policies of Government of Pakistan (GoP), to attract the private investors to the Power Sector. The Authority is well aware of the fact that in order to meet the current power deficit, even small captive power plants are being pursued to supply any surplus power available to utilities including HESCO. The discouraging attitude of HESCO has forced SNPCPL to change its plan and approach KEL for supplying electric power from its prospective Generation Facility thereby, denying the cheap electricity to its consumers. However, in consideration of the fact that the SNPCPL has been able to arrange another Power Purchaser (i.e. KEL), the Authority does not consider it prudent to indulge itself in any further debate on the issue. However, the Authority directs HESCO to be careful in future in such matters and not to decline the offered electric power from any prospective investor without any cogent / lawful justification.

11. In view of above, the NEPRA authorities' analysis has clarified the situation that HESCO have terminated the LOI issued to SNPC as they have failed to comply with terms and conditions, as such, it was the decision of the HESCO, which was independent and such decision could not be linked with the role of Secretary, Energy.

12. In order to verify the observations of the NAB authorities qua the role of the petitioner, whereby it was alleged that the petitioner being the then Secretary Energy was not mindful of the fact that HESCO has cancelled their LOI, as a result whereof K-Electric being alternative has

been allowed to proceed qua the transmission line, as such, the petitioner has further been held responsible that he kept mum in the cabinet meeting and has not performed his duty diligently qua the qualification / eligibility of HESCO, though the learned counsel for petitioner referred a letter issued by Chief Engineer, PND, HESCO, Hyderabad, dated 24.07.2013, and categorically referred the following:

“During the meeting it was also observed that HESCO have not expertise to work and handle 2x50 MW power project under the small independent project (SIPP) (Annexure-C), which neither allow the escrow account arrangement nor any PEPCO / CPPA Policy allowed the escrow account management as well.

However as per telephone conversation, with the Hon’ble Advisor Finance to Chief Minister of Sindh the case is sent herewith for your scrutiny of documents and further valuable advise, that the case of 2x50 MW power project may be entertained in HESCO or otherwise?

13. On the other hand, in response to the above referred letter of HESCO, the National Transmission and Dispatch Company Ltd. (NTDC), vide their letter dated 27.07.2013, referred their point of view in the following manner:

“The said policy does not allow providing any form of guarantee including escrow account to the sponsor. HESCO would therefore, be well advised not to take the risk.

The Government of Sindh may therefore, be requested either design the project according to SIPP Policy or proceed under Power Policy 2002.

As far your observation that HESCO does not have the expertise to handle such a project under the SIPP Policy, you can consider hiring a consultant for the required processing of the case.

14. We have also been apprised with the Minutes of the Cabinet Meeting, held on 20.08.2013, in Committee Room, Chief Minister Secretariat, Karachi, chaired by Syed Qaim Ali Shah, Chief Minister Sindh and attended by the Advisor Finance, representative of SNGPP, Secretary Energy (present petitioner), representative of HESCO, Law Secretary Government of Sindh, Chief Secretary Government of Sindh, Khurshid Anwar Jamali (Consultant), Minister for Works and Services, Minister for Local Government, Minister for Livestock and Fisheries, Minister for Revenue and Rehabilitation and Senior Minister Education, whereby the Nooriabad Gas Based Power Projects 2x50 MWs has been taken up at Agenda No.1, whereby the petitioner being the then Secretary Energy has given a detailed presentation and his point of view has been recorded as under:

2.2 Secretary Energy gave a detailed presentation about Nooriabad Gas Based Power Projects (2X50 MWs) placed at Annex-B. He highlighted all the salient features of the projects including the history, contents of the project agreements (shareholders agreement, implementation agreement, power purchase agreement, and gas supply agreement).

2.3 Secretary Energy enumerated that as part of PPP Policy, GoS is underwriting risk of non-payments by HESCO in favour of power seller (SNPC-I and II). He also explained the current status of the project and that Letter of Intent (LOI) has not yet been issued by HESCO despite several meetings. Observations of OGRA about GSA were also explained i.e. "20 MMCFD gas was allocated to GoS instead of two parcels of 10MMCFD each". GSA is under revision and according to SSGC it will soon be sent again to GORA for approval.

2.4 Continuing with the presentation, Secretary Energy conveyed that private Partner of GoS i.e. Technoman Kinetics has requested for "establishment of L.Cs to import plant & machinery at the earliest in order to avoid cost escalation"

2.5 While highlighting risks for Government of Sindh, he contended that in case approvals are not received from the regulators (OGRA and NEPRA), GoS will be assuming a financial risk of PKR 9 billion. It will be difficult to resale the plant as it only operates on gas and is not dual fuel enabled. Besides, superior courts may also take notice of expenditure on unapproved projects.

2.6 While putting options before the cabinet, Secretary Energy recommended that before establishing letter of credit (LCs), guaranteed by GoS, matter may be vigorously pursued with the Federal Government and regulators (OGRA & NEPRA) so that potential risk of PKR 9 billion to Government of Sindh may be avoided.

2.7 Advisor Finance explained that the ECC approved 20MMCFD from the existing sources which are available in Sindh by SSGCL and also allowed use of additional gas from other sources. The Govt. of Sindh approached SSGC for the supply of allowed gas on 27.03.2013 and in the meantime the Govt. completed its tenure and the process delayed. Projects were started in Sept / October, 2012 and we manage to continue this process till June, 2013 but our efforts could not bear fruit. He informed that PPA with HESCO is pending finalization which is being pursued on fast track.

2.8 He has also added that several meetings with IESCO were held. Initial, HESCO agreed to issue Letter of Intent (LOI) to GoS for two projects of 50 MMCFD each but subsequently, HESCO wrote a letter to WPPO that the projects is for 100 MWs Power Plant. This attitude of HESCO caused confusion.

2.9 He requested the cabinet to proceed immediately even without regulatory approvals by OGRA/NEPRA as this project

was started with good intentions and Sindh Province will not only take lead in power generation but people of Sindh will also prosper.

2.10 The C.M. Sindh asked the Law Secretary to describe the legal implications in the matter. Secretary Law replied that Article 167 of the Constitution governs the subject matter. The guarantee can be furnished under Article 167(4) only on the surety of provincial consolidated fund within such limits and conditions as may be specified by the NEC and after approval of project by the OGRA and NEPRA. Since there is no approval yet from the concerned departments, it will be premature to furnish guarantee by the Sindh Government.

15. Pursuant to the presentation relating to Nooriabad Gas Based Power Project (2X50MWs), the matter was finally concluded by the Cabinet vide the following decision:

"Cabinet approved the proposal that the Nooriabad Power Project be continued on fast track and simultaneously federal Government and the regulators (OGRA and NEPRA) as well as PPA with HESCO being the pre-requisite of the Project be pursued for expeditious approvals within fifteen (15) days. The cabinet further decided that GoS shall proceed further even if the approvals are delayed."

16. The above referred minutes of the Cabinet Meeting, dated 20.08.2013, reveal that petitioner being the then Secretary Energy has explained all the pros and cons of the case to the Cabinet and, as such, the NAB authorities have alleged that petitioner by misusing his authority and deliberately failed to exercise his duties, made false statement and concealed facts as instead of suggesting any measure to fulfill the requirements of HESCO or narrating any specific reason for cancellation of LOI by the HESCO, the petitioner's suggestion to opt the offer of K-Electric

is not warranted from the details of minutes, rather it *prima facie* appears that the petitioner has performed his duty, even put up the entire matter before the Cabinet highlighting all the issues, whereafter the Cabinet has taken a unanimous decision to continue with the project with different solution, as such, the decision making authority has used their collective wisdom to avoid further losses, per se, it amounts to administrative decision, which was required at that time and same was done by the Cabinet, therefore, no factor of misconduct or misuse of authority is apparent on the part of petitioner.

17. We have time and again confronted the Investigating Officer to highlight any factor, material of corruption or illegal gains by the petitioner being the then Secretary Energy, Government of Sindh, during the approval of the 2x50 MW Power Projects but, he failed to point out any misdemeanor nor remotely suggested anything against the petitioner, as such, we are of the confirmed view that no incriminating material has been discovered on record against the petitioner or collected by the NAB authorities during the course of investigation to prove that the petitioner has gained illegal gratification or received any benefit while posted as Secretary Energy, therefore, the question of misconduct, misuse of authority and applicability of Section 9(a)(vi) of the NAO, 1999 is to be seen in the light of evidence after the completion of trial, hence, the present state of affairs demonstrate the case of further inquiry, in such eventuality any attempt to arrest the petitioner is considered to be indication of harassment and calls for concession of pre-arrest bail as held in 2017 CLD

1101 (Alamdar Hussain vs. National Accountability Bureau). It is trite law that when case of further inquiry comes on record, pre-arrest bail, which is an extraordinary relief, is available only to those cases of accused where malafide on the part of complainant or investigation agency is reflected on record, though the malafide is often difficult to prove and could be inferred from the facts and circumstances of the particular case as held in 2019 YLR 1865 (Aftab Ahmad Memon v. Chairman, NAB) and 2017 PLD 730 SC (Khalil Ahmad Soomro vs. The State).

18. We are also sanguine of the fact that there is no allegation of corruption against the petitioner, he has performed his duties with due diligence and has not concealed any material fact from the Cabinet before the final decision, therefore, we have confronted the Investigating Officer as to why warrant of arrest has been issued against the petitioner, whereby he contends that the petitioner remained on Ex-Pakistan Leave for two years starting from December, 2018 till April, 2021 and he has not joined the inquiry at initial stage, which prevailed the NAB authorities to issue warrant of arrest. Such reason given by the Investigating Officer is not justiciable, especially when the petitioner after his medical treatment in foreign country came back to Pakistan knowing this fact that an inquiry against him has been initiated by the NAB, as such, he has not willfully absconded or avoided the process of investigation, when 15 other co-accused persons are facing similar allegations but, no warrant of arrest has been issued against any of them, except against one accused namely Khurshid Anwar Jamali, who was taken into custody and was granted post

arrest bail by this Court vide order dated 23.04.2020, passed in Writ Petition No.269/2020 and Writ Petition No.1042/2020, hence the malafide of prosecution agency appears on record, therefore, the petitioner is entitled for concession of bail as he could potentially face humiliation at the hands of NAB authorities. In such eventuality, we are guided by PLD 2009 SC 427 (Rana Muhammad Irshad v. Muhammad Rafique), 2019 P.Cr.LJ 475 Karachi (Jameel Akhtar v. Chairman, NAB) and 2019 YLR 650 Karachi (Mustafa Jamal Kazi v. National Accountability Bureau).

19. Even otherwise, no useful purpose is likely to be served if bail of accused is cancelled on any technical ground, especially when the principal accused has already been granted post arrest bail and petitioner's role being the then Secretary Energy in the entire scam has not been of any incriminating nature through which any liability could be fixed at this stage, per se, this aspect of the matter further persuaded our mind to confirm the pre-arrest bail while considering the analogy drawn from case reported as 1986 SCMR 1380 (Muhammad Ramzan v. Zafar Ullah).

20. We are also mindful of the fact that the liberty of person and freedom of movement are the rights, which are linked to human dignity and Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973 guarantees every person that he or she shall not be deprived of liberty save in accordance with law, such aspect has particularly been discussed by apex Court in PLD 1999 Supreme Court 1026 (FoP v. Shaukat Ali Mian), as such, the State is under obligation to provide the atmosphere

based on honesty by providing equal protection of law to every citizen, who must be treated equally and dignity of human being should be maintained in terms of Articles 9, 14 and 25 of the Constitution as held in 2009 SCMR 1279 (Commissioner of Income Tax v. Eli Lilly Pakistan (Pvt.) Ltd.), therefore, at this stage the foundational principle of structuring of discretion has to be exercised in order to protect the life, liberty and reputation of a person, who is accused in this case but, when no *prima facie* incriminating material been disclosed regarding his involvement by the NAB authorities, it further strengthens our point of view to confirm his pre-arrest bail, especially when, *prima facie*, no element of corruption or illegal gains has been attributed to the petitioner through any incriminating evidence, therefore, he is entitled for pre-arrest bail.

21. Keeping in view the above circumstances, the instant writ petition is hereby ALLOWED, the pre-arrest bail granted to the petitioner, vide order dated 21.04.2021, is CONFIRMED subject to furnishing of bail bonds in the sum of Rs.1 Million with two sureties each, in the like amount to the satisfaction of the learned Trial Court. However, the petitioner's name shall remain on ECL till final decision of the case / reference.

(BABAR SATTAR)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Khalid Z.