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JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No. 2605 of 2016

Saif Ullah.

Vs

The State, etc.

DATE OF HEARINGS : 08-12-2016, 11.01.2017 and 24.01.2017.

PETITIONERS BY : Mr Laiq Khan Swati and Mr Ehtesham Turk, Advocates for the in W.P. No. 2605 of 2016.

Barrister Sajjad Ahmad Satti, Advocate for the petitioner Irfan Ullah Khan in W.P. No. 3049 of 2016.

Mr Muhammad Amjad Iqbal Qureshi, Advocate for the petitioners Mohammad Nouman Qureshi, Mohammad Ejaz and Hafiz Muhammad Nawaz in W.P. Nos. 3198 of 2016, 2855 & 3030 of 2016.

RESPONDENTS BY : Sardar Muzaffar Ahmad Khan, ADPG, NAB.
Mr Adnan Tahir Prosecutor, NAB.
Mr Umair Naeem Bajwa, A.D. I.O. NAB.
Mr M. Raza, Deputy A.D. NAB.
Mr Raza Bashir, Special Prosecutor NAB.
Mr Mubasshar Kareem, A.D. /I.O. NAB.

ATHAR MINALLAH, J;- Through this consolidated order, we shall decide the instant writ petition along with W.P. No. 3049 of 2016 (Irfan Ullah Khan vs. NAB, etc), W.P. No. 3198 of 2016 (Mohammad Nouman Qureshi vs. Chairman NAB), W.P. No. 2855 of 2016 (Muhammad Ejaz vs. Chairman NAB)and W.P. No. 3030 of 2016 (Hafiz Muhammad Nawaz vs. The State, etc). In all these petitions a common question is involved i.e. the scope of granting bail on the ground of delay in relation to the proceedings under the National Accountability Ordinance, 1999 (hereinafter referred to as the ***"Ordinance of 1999"***) and whether it can be claimed as of right in terms of the third proviso to section 497 of the Criminal Procedure Code (hereinafter referred to as "Cr.P.C"). Moreover, whether a second petition seeking bail will be competent when an earlier petition has been dismissed, wherein one of the grounds taken was regarding delay in the conclusion of the trial.

2. The facts in each case are briefly stated as follows;-

W.P. Nos. 3198 of 2016 and 2855 of 2016.

3. The petitioner in W.P. No. 3198 of 2016 (Mohammad Nouman Qureshi) was arrested on 28.08.2014; whereas the petitioner in W.P. No. 2855 of 2016 (Muhammad Ejaz) was arrested on 27.05.2015. Both the petitioners were

arrested in connection with the Supplementary Reference no.5 of 2015, filed by the NAB and relating to the alleged involvement of the petitioners in the business of Mudaraba. It is alleged that the petitioners and other accused, in connivance with each other, had made false representations to the general public so as to induce them to invest in the business of a partnership firm namely 'NE Associate'. The inquiry was authorized on 08.05.2014, and later it was converted into investigations by the competent authority vide order dated 02.12.2014. NAB had received more than 150 complaints from members of the general public involving an alleged amount of Rs.871 million. Two of the accused had offered to return the alleged amount to their extent and the competent authority had accepted the said offer of Voluntary Return. Two other accused have been declared as proclaimed offenders by the competent Court. It is alleged that both the petitioners were actively involved in running the business of the firm and had executed a general power of attorney in favour of one Sardar Mohammad Ali regarding the sale of a poultry control shed situated in Patoki. It is alleged that the petitioner, namely Muhammad Ejaz, was instrumental in the transfer of a lease of mines situated in District Mansehra in his and in the name of the partnership firm. It is further alleged that the payment for this purpose was made by Muhammad Nauman Qureshi. The charge was framed against Muhammad Ejaz on 09.10.2015. Out of 176 witnesses 106 have been examined so far and, therefore, more than 50 witnesses are yet to enter the witness

box. The petitioner in W.P. No. 2855 of 2016, namely, Muhammad Ejaz has filed the petition seeking bail on the ground of delay for the first time. The petitioner in W.P. No. 3198 of 2016 had earlier filed W.P. No. 110 of 2015, seeking bail on merits and the same was dismissed vide order dated 30.06.2015. The petitioner in the said petition had also taken the ground of delay and this Court, while dismissing his petition, had held that the latter was not entitled to bail on the statutory ground of delay. The order of this Court was upheld since the august Supreme Court, vide order dated 17.09.2015 passed in C.P. No. 2240 of 2015, had refused to grant leave. Perusal of the order passed by the august Supreme Court, dated 17.09.2015, clearly shows that the ground of delay had been specifically raised but it did not find favour with a Division Bench of this Court. It is noted, therefore, that in the case of Muhammad Nauman Qureshi, the ground of delay had been taken in the earlier petition and the same was considered but yet the bail was refused. However, the case of Muhammad Ejaz is distinguishable since W.P. No. 2855 of 2016 is the first bail petition seeking bail on the sole ground of delay in the conclusion of the trial.

W.P. No. 2605 of 2016.

4. The petitioner, namely Saif Ullah, was arrested on 17.12.2014. The supplementary Reference was filed in October, 2015. It is alleged that NAB had received more than

910 complaints against one Mufti Ahsan-ul-Haq, who was the Chief Executive of a juridical person namely, M/S Fayazi Gujranwala Industries Pvt. Ltd. It is alleged that the latter, in connivance with other accused, had falsely represented to the general public and had induced them to invest in the business of the company under the Mudaraba concept of investment. It is further alleged that while doing so the accused persons had collected and thus misappropriated an amount of Rs.8.5 billion. The inquiry was authorized on 16.04.2013. The main accused, namely Mufti Ahsan-ul-Haq, offered to return the alleged amount by way of Voluntary Return as contemplated under the Ordinance of 1999. The competent authority accepted the offer and approved the same on 18.06.2013. The main accused was, therefore, released pursuant to partial payment made against the approved Voluntary Return. The said Voluntary Return was subsequently cancelled pursuant to the decision of the Board in its meeting held on 25.09.2013. It is alleged that more than 24 complaints from the general public were received against the present petitioner, alleging his involvement to the extent of Rs.7.750 million. The petitioner had earlier filed a petition seeking bail and the same was dismissed by this Court vide order dated 11.01.2016. Perusal of the dismissed memo of the petition i.e. W.P.No. 3076 of 2015, shows that the ground of delay had been raised therein and the same did not find favour with this Court. It is therefore obvious that the earlier petition was dismissed on merits and that the grounds included delay in

the conclusion of the trial. There are 1100 witnesses who are yet to be examined and the charge has not yet been framed.

W.P. N0. 3049 of 2016.

5. The petitioner, namely Irfan Ullah Khan, was arrested on 24.02.2015, in connection with Reference No. 10 of 2011. The petitioner at the relevant time was a serving civil servant. He was proceeded against on the basis of allegations of being involved in corruption and corrupt practices while posted as the Incharge of the project known as 'Tawana Pakistan'. The said project was under the administrative control of the Ministry of *Social Welfare and Special Education.* The petitioner had earlier filed W.P. No. 1556 of 2015 and W.P. No. 3799 of 2015. The latter petition had been filed seeking bail on medical grounds while the former on merits. Both these petitions were dismissed by a Division Bench of this Court vide order dated 12.01.2016. It is noted that while dismissing the petitions this Court had directed the competent Court to conclude the trial within six months from the date of receipt of the order. Since the trial could not be concluded pursuant to the direction of this Court, therefore, the instant petition has been filed seeking bail on the sole ground of delay. It is the case of the petitioner that delay in concluding the trial is not due to his act nor that of his counsel.

W.P. No. 3030 of 2016.

6. The petitioner, namely Hafiz Muhammad Nawaz, was arrested on 28-01-2014. This is his third petition filed under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973, seeking bail on the sole ground of delay. The first bail petition i.e. W.P.No. 2018/2014 was dismissed vide order dated 23-07-2014. In the said petition he had taken the ground of delay but the same did not find favour with a learned Division Bench of this Court. The second bail petition i.e. W.P.No. 102 of 2015 was also dismissed vide order dated 11-01-2016. Perusal of the memo of the third petition also shows that the ground of delay was taken by the petitioner. In this case out of 1100 witnesses only four have been examined till date. The learned counsel has stressed that delay in the conclusion of the trial cannot be attributed to the petitioner.

7. In all these petitions the petitioners are seeking bail on the sole ground of delay. As noted above, in three cases the petitioners had filed petitions earlier and the same were dismissed. Two of the petitioners had taken the ground of delay in their bail petitions but the same did not find favour with this Court and the august Supreme Court.

8. The learned counsels appearing on behalf of the petitioners have contended that; the petitioners are entitled to be released on bail and that a right has accrued in their

favour on the basis of the third proviso of section 497 of the Cr.P.C; the delay has not been caused due to the acts or omissions of the petitioners nor their counsels; it is a case of hardship; since the delay cannot be attributed to the petitioners and they have remained incarcerated for a period of more than one year from the date of their arrest, therefore, they are entitled to be released on bail as of right; in all the cases a large number of witnesses are yet to be examined and, therefore, the petitioners cannot be denied bail or incarcerated for an indefinite period. Reliance has been placed on the cases titled *"Himesh Khan versus The National Accountability Bureau (NAB), Lahore and others" [2015 SCMR 1092], "Syed Mansoor Ali and others versus Chairman, NAB and others" [PLD 2016 Sindh 41] and "Abdullah versus The State and another" [1985 SCMR 1509].*

9. The learned ADPG appeared along with the Investigation Officers in the respective cases and has argued that; the petitioners cannot claim that they be released on bail as of right in the context of statutory delay since the provisions of the Criminal Procedure Code, particularly section 497 Cr.P.C, are not attracted; the Ordinance of 1999 is a special law and, therefore, its provisions will prevail; to the extent of the petitioners who had earlier sought bail and their petitions had been dismissed, a second bail petition is not competent and reliance in this regard has been placed on an unreported judgment of the august Supreme Court dated 30-03-2016

passed in the case titled Malik Naveed Khan versus Director General National Accountability Bureau and others in Civil Petition No. 3068 of 2015. The learned ADPG has vociferously argued that dismissal of a petition seeking bail on the ground of delay would be a bar in seeking the same relief through a second petition.

10. The learned counsels for the petitioners and the learned ADPG have been heard and the record perused with their able assistance.

11. Admittedly, the petitioners in all the five petitions are seeking bail on the sole ground of delay in the conclusion of trial. In all these cases the petitioners have remained incarcerated for more than one year. In each case either a Reference or a Supplementary Reference has been filed. Muhammad Nauman Qureshi, Hafiz Mohammad Nawaz and Saif Ullah had earlier filed petitions seeking bail on various grounds, which also included delay in the conclusion of trial. The instant petitions are definitely second petitions filed by them, seeking bail on the ground of delay and since the dismissal of their earlier petitions a considerable time has elapsed but the trial has not been concluded. In the case of petitioner Irfan Ullah, despite the direction given by a Division Bench of this Court, the trial could not be concluded within six months and, therefore, the latter is seeking bail on the ground of delay. Muhammad Ejaz is seeking bail for the first time on

the sole ground of delay. The learned ADPG has strongly contested the petitions on the basis of the recent judgment passed by the apex Court in the case of Malik Naveed (supra). Moreover, the learned ADPG has strenuously argued that the ground of statutory delay provided under section 497 of Cr.P.C. is not available to those who are proceeded against under the Ordinance of 1999 because the said provisions have been expressly ousted by the legislature under section 9 (b) ibid. The questions which emerged for our consideration are, the scope of this Court in entertaining a constitutional petition seeking bail on the ground of delay in relation to a person who has been proceeded against under the Ordinance of 1999, and whether such a person would be entitled to invoke the jurisdiction of this Court under Article 199 successively, when an earlier petition has been dismissed wherein the ground of delay was taken. In order to answer these questions, it would be beneficial to examine the provisions of the Ordinance of 1999 and the principles and law enunciated in this regard in the precedent law.

12. The Ordinance of 1999 was enacted with the object and purpose of providing effective measures for the detection, investigation, prosecution and speedy disposal of cases involving corruption, corrupt practices, misappropriation of property, kickbacks, commissions and for matters connected and ancillary or incidental thereto. Section 3 gives an overriding effect to the provisions of the Ordinance of 1999

and provides that, notwithstanding anything contained in any other law, the provisions ibid shall have effect. Clause (g) of section 5 defines a 'Court' as meaning an Accountability Court. Likewise, clause (f) defines 'Code' as meaning the Code of Criminal Procedure, 1898. The National Accountability Bureau has been constituted under section 6. Section 9 (a) describes various offences. Clause (b) of section 9 provides that the offences under the Ordinance of 1999 shall be non-bailable and expressly bars the jurisdiction of the Court, inter alia, under section 497 of the Cr.P.C. to grant bail to any person accused of any offence under the Ordinance of 1999. The said provision was amended through Ordinance No. IV of 2000, dated 03.02.2000, whereby the words 'including the High Court' were inserted after the expression Court. However, the said words were later omitted through Ordinance No. XXXV of 2000, dated 10.08.2001. The effect of the latter amendment was obviously to exclude a High Court from the mischief of section 9(b). Section 12 empowers the freezing of property and provides for the procedure in this regard. Section 16 relates to trial of offences and clause (a) thereof, which starts with a non-obstante clause in the context of anything contained in any other law, mandates that an accused shall be prosecuted for an offence under the Ordinance of 1999 in the Court i.e the exclusive court defined under section 5(g) and that the case shall be heard daily and disposed of within thirty days. Section 16 (d) empowers the Chairman NAB to file a Reference, having regard to the facts and circumstances of the case, before any

Court established anywhere in Pakistan. Section 18(a) explicitly provides that the Court shall not take cognizance except on a Reference made by the Chairman or an officer authorised in this regard. Section 17 contemplates the extent to which the provisions of the Cr.P.C. shall apply to the proceedings under the Ordinance of 1999. Clauses (c),(d),(e) and (f) of section 18 describe the powers vested in the authorities of NAB relating to an inquiry and investigation. A plain reading of section 18 as a whole shows that the legislature in its wisdom has divided the proceedings into various stages i.e. (i) formation of an opinion by the Chairman or an officer authorised by him is a precondition for initiating proceedings against any person, (ii) pursuant to forming an opinion the competent person refers the matter for inquiry or investigation, (iii) the powers in relation to conducting an enquiry and investigation are expansive, (iv) after conclusion of the inquiry and investigation, the material and evidence collected is required to be placed before the Chairman or such officer authorised in this behalf and the latter decides whether or not it would be proper and just to proceed further, and lastly, (v) the test for proceeding further has been expressly provided i.e. subjecting the filing of a Reference to sufficiency of material, which would justify doing so. The legislature in its wisdom has expressly used the expression 'expeditiously' in relation to the completion of an inquiry or investigation. Section 24 provides that, notwithstanding anything contained in the Cr.P.C. if a person is arrested then, as soon as possible, NAB shall inform him of the

grounds and substance on the basis of which he has been arrested and produce him before the Court within a period of twenty four hours of arrest, excluding the time of the journey from the place of arrest to the Court. Moreover, it is provided in clear language that a person who has been arrested shall be liable to be detained in the custody of NAB for the purpose of inquiry and investigation for a period not exceeding ninety days. The legislature in its wisdom has further made it mandatory for the Court to ensure that a person is remanded to custody for a period not exceeding 15 days at a time, and every subsequent remand is subject to the said restriction and recording of reasons. Section 31 and 31-A have obviously been inserted with the intent that the proceedings and trial are concluded rapidly, efficiently and with speed.

13. A plain reading of the Ordinance of 1999 as a whole, particularly the provisions highlighted above, unambiguously shows that the legislature has intended that the proceedings i.e. forming of an opinion regarding the initiation of the proceedings, inquiry, investigation and trial are conducted and completed expeditiously and without delay. A person arrested under the Ordinance of 1999 cannot be detained in custody by the NAB authorities for more than ninety days. Even during the time when an accused is in the custody of NAB, it is mandatory that he is produced before the Court and the remand cannot be given for a period exceeding 15 days after recording reasons in this regard. Likewise, it is the clear intent of the legislature that the Court trying an

offence proceeds day to day and concludes the trial within thirty days. In relation to the completion of each stage of the proceedings, whether inquiry, investigation or trial, the legislature has explicitly used the expression 'expeditiously' or has prescribed a timeframe with regard thereto. This legislative intent of completing each stage expeditiously and efficiently is affirmed by excluding the provisions of section 497 of the Cr.P.C. from the jurisdiction and powers of the Court. The ouster of section 497 Cr.P.C. essentially is of significance in the light the scheme of the Ordinance of 1999, which is a self contained and complete statute dealing with the offences defined therein.

14. A bare reading of the Ordinance of 1999 as a whole, particularly the provisions highlighted above, manifests that the legislature has intended to provide for a comprehensive and self contained statute. The National Accountability Bureau has expansive and exclusive powers to achieve the object and purposes of the Ordinance of 1999 i.e to detect, investigate and prosecute corruption, corrupt practices, misuse or abuse of power or authority etc. Exclusive Courts have been established throughout the country solely for conducting trials of persons proceeded against under the Ordinance of 1999. 'Speedy disposal of cases' is a crucial and fundamental object of the legislation. Wide powers vested in NAB or its Chairman affirms the intent of ensuring that there is no unreasonable delay in the proceedings till conclusion of trial.

The legislature was indeed mindful of the importance of liberty of the person against whom proceedings are initiated. At every stage of the proceedings various safeguards have been prescribed to ensure that liberty of a person alleged to have committed an offence under the Ordinance of 1999 is not restrained or interfered with arbitrarily. The formation of an opinion regarding initiation of proceedings is premised on the existence of sufficient material and application of mind.

15. The legislature has explicitly used the expressions 'expeditiously' as may be practical and feasible, in relation to the completion of an inquiry or investigation. A person accused of having committed an offence may be arrested but stringent safeguards have been prescribed in this regard. It is important to note that the Court cannot take cognizance except upon filing of a reference. After filing of a reference the Court has been expressly mandated to hear the case day to day and dispose it within thirty days. Expeditious and efficient conclusion of the proceedings is evident. Delay, therefore, is inevitably the antithesis of the legislative intent, particularly after an accused has been deprived of his liberty as a result of his arrest. The scheme of the Ordinance of 1999 has prescribed timelines for the period during which an accused may be kept in custody by NAB and the conclusion of trial. Though no timeframe has been expressly provided for filing a reference but an unreasonable delay, depending on the facts and circumstances in each case, would definitely be inversed to

the legislative intent. A person arrested would be justified in having a legitimate expectation that the latter will not be deprived of his right to freedom and liberty for an unreasonable period, particularly if the Court has taken cognizance. This legitimate expectation stems from the express language and scheme of the Ordinance of 1999. When such legitimate expectation is frustrated, it would give the affected person a valid ground to seek judicial review despite the ouster of section 497 of the Cr.P.C. Unreasonable delay in conclusion of the proceedings would tantamount to defeating the object and purposes of the Ordinance of 1999, particularly when it cannot be attributed to the person deprived of liberty. The august Supreme Court, in a series of judgments, has recognised the doctrine of legitimate expectation, both procedural as well as substantive. Reference may be made to "Pakistan Telecommunication Employees Trust and others versus Muhammad Arif and others" [2015 SCMR 1472], "Secretry, Govt. Of Punjab, Finance Department and others versus M. Ismail Jayer and others" [2014 SCMR 1336], "Syed Mubashir Raza Jaffri and others versus EOBI and others" [2014 SCMR 949], "Nadeem Ahmed, advocate versus FOP" [2013 SCMR 1062], "Application by Abdul Rehman Farooq Pirzada" [PLD 2013 SC 829], "Govt. Of Sindh through Secretary, Home Department and others versus Abdul Jabbar and others" [2004 SCMR 639], "Shafique Ahmad and others verus Govt. Of Punjab and others" [PLD 2004 SC 168], "Govt. Of Sindh through Secretary, Home Department and others versus Abdul

Jabbar and others" [2004 PLC (CS) 99] and "Govt. Of Pakistan through Ministry of Finance and Economic Affairs and another versus Facto Belarus Tractors Ltd." [2000 SCMR 112]. After the arrest of a person, delay in completing an inquiry or investigation, filing of a reference and concluding the trial would be a negation of a fair trial.

16. There is yet another crucial aspect in the context of delay in the proceedings, and that is the powers vested in NAB under section 25 of the Ordinance of 1999 to refer a case to the Court for approval of plea bargain. This unique feature is not provided in other penal statutes. Though the language of section 25(b) subjects this eventuality to making an offer by an accused voluntarily, but an unreasonable delay in conclusion of trial may have consequences viz a viz free consent, and thus may tantamount to coercion or undue influence. The legislature obviously has intended the offer to be out of free consent and without coercion or under influence. This provision when examined in light of the scheme of the Ordinance of 1999 reaffirms that delay in proceedings, particularly the trial would lead to defeating the legislative intent. Deprivation of liberty of a citizen for an indefinite period, would definitely encourage the NAB authorities to concentrate more on ending the matter on the basis of plea bargain rather than carrying out fair, efficient and professional

investigations aimed at achieving a conviction. Delay is, therefore, definitely obverse to the unambiguous intent of the legislature in enacting the Ordinance of 1999. We will now advert to the precedent law in the context of granting bail in proceedings under the Ordinance of 1999.

17. The vires of the Ordinance of 1999 were challenged before the august Supreme Court and judgment was rendered in the case titled *"Khan Asfandyar Wali and others versus FOP, through Cabinet Division, Islamabad and others" [PLD 2001 S.C. 607]*. The apex Court, inter alia, examined the scope of section 9(b) of the Ordinance of 1999 in the context of extending the concession of bail. In paragraph number 197 of the said judgment the august Supreme Court has held and observed as follows;-

> *"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, 497, 498*

and 561-A 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 of 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."

18. It was pursuant to the above enunciation of law that the legislature amended section 9(b) and excluded the words 'including *the* High Courts' through Ordinance No. XXXV of 2001 dated 10.08.2001. In two other judgments i.e in the cases titled *"Mrs. Shahida Faisal and others versus FOP and others" [2001 SCMR 294] and "Anwar Saifullah Khan versus The State and 03 others" [2001 SCMR 1040],* the august Supreme Court held that since section 9(b) did not include the apex Court, therefore, its jurisdiction was not barred under section 9(b) of the Ordinance of 1999. As a corollary, after omission of the words "including the High Courts" from section 9 (b) through the Ordinance No. XXXV of 2001, dated 10.08.2001,

the legislature clearly gave effect to the judgment rendered in the case of Asfandyar Wali supra, consequently recognizing that a High Court was empowered to grant bail in the exercise of jurisdiction vested in Article 199 of the Constitution. The august Supreme Court in the case titled *"Muhammad Saeed Mehdi versus The state and 02 others" [2002 SCMR 282],* reaffirmed its earlier exposition of law by holding that the jurisdiction vested in a High Court under Article 199 of the Constitution to grant bail to a person accused of an offence under the Ordinance of 1999 in an appropriate case is not barred, as powers under Article 199 cannot be taken away through a legislative enactment. It was further observed that the constitutional jurisdiction can also be exercised on the well noted principle of Ubi jus ibi remedium i.e. 'where there is a right there is a remedy'. In the same judgment, the august Supreme Court acknowledged the object of the Ordinance of 1999, i.e. to provide expeditious trial within the shortest possible time by specifically referring to section 16, which postulates for day to day trial of a case and its conclusion within thirty days. Failure to meet this threshold was, therefore, recognized as a valid ground for considering the release of a person on bail. In the case titled *"Muhammad Jahangir Badar versus The State and others" [PLD 2003 S.C. 525],* the august Supreme Court observed and held as follows;-

> *"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."

19. 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 trail 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 ror an indefinite period. Reference in this behaif 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)."

20. It was on the basis of the above enunciation of principles of law that the august Supreme Court had directed the Accountability Court to hold the hearing of the cases on a day to day basis without granting undue adjournments, and that if the trial was not concluded within the stipulated period, the petitioner was ordered to be released on bail, subject to furnishing of surety stipulated therein. The above principles

were reaffirmed in the cases titled *"Haji Ghulam Ali versus The State through A.G. NWFP, Peshawar and another" [2003 SCMR 597], "Chairman, National Accountability Bureau, Islamabad and another versus Asif Baig Muhammad and others" [2004 SCMR 91] and "Rafiq Haji Usman versus Chairman, NAB and another" [2015 SCMR 1575].* The august Supreme Court in the judgment titled "Himesh Khan versus The National Accountability Bureau (NAB), Lahore and others" [2015 SCMR 1092], besides reaffirming the law laid down by the august Supreme Court in Khan Asfandyar Wali case (supra), observed and held as follows;-

> *"Pakistan is a welfare State where liberty of individual has been guaranteed by the Constitution beside the fact that speedy trial is inalienable right of every accused person, therefore, even if the provision of section 497, Cr.P.C. in ordinary course is not applicable, the broader principle of the same can be pressed into service in hardship cases to provide relief to a deserving accused person incarcerated in jail for a shocking long period. This principle may be vigorously pressed into service in cases of this nature if the objects and purposes of mandatory*

provision of section 16 of the National Accountability Ordinance, 1999 is kept in view."

"An accused person cannot be left at the mercy of the prosecution to rotten in jail for an indefinite period. The inordinate delay in the conclusion of trail of detained prisoners cannot be lightly ignored provided it was not caused due to any act or omission of accused."

"There is also a long chain of authorities and dicta of this Court where bail has been granted on account of shocking delay in the conclusion of trial in cases falling under the NAB laws."

21. In the context of granting bail on medical grounds, the august Supreme Court in the case titled *"The State versus Haji Kabeer Khan" [PLD 2005 S.C. 364],* has elucidated the principles and law to the effect that an accused would not be entitled to the grant of bail if he or she is getting proper treatment either in hospital or in jail and if that was not the case, then the concession of bail could be extended. However, the prosecution would be entitled to seek cancellation of bail after improvement of health of the accused. Reference may also be made to the cases titled *"NAB versus Khalid Masood and*

another" [2005 SCMR 1291] and "Shahbazuddin Chaudhry and another versus The State" [PLD 2004 S.C. 785].

22. The learned ADPG has heavily relied on the recent unreported judgment of the august Supreme Court titled Malik Naveed Khan supra in support of his contention that once a ground of delay for seeking bail has been taken and dismissed, then a second petition would not be competent. The relevant portion of the judgment of the august Supreme Court is reproduced as follows;-

> *"The said order clearly indicates that on the said date, this Court was not inclined to grant bail to the petitioner even on the ground of delay and that was the reason that with consent of the learned counsel of the petitioner instead of granting bail, the trial Court was directed to conclude the trial without four months. The impugned judgment indicates that in the Reference, there are many accused and trial is being adjourned on one pretext or other, although the witnesses are appearing in the Court. As earlier bail on the ground of delay was disposed of by this Court, so this petition on the same ground is not entertainable in view of the judgments of this Court in the cases of* "Nazir Ahmed and

another versus The State and others" [PLD 2014 S.C. 241] and "The State through Advocate-General, N.W.F.P. versus Zubair and 04 others" [PLD 1986 S.C. 173].

23. In another recent judgment rendered by a Bench consisting of two Hon'ble Judges, dated 21.12.2016, passed in C.P. No. 3341 of 2016 and CMA No. 6948 of 2016 titled "Mir Shah Jehan Khan Khetran versus the National accountability Bureau and others", the august Supreme Court extended the concession of bail despite the earlier petition having been dismissed on the same grounds. However, since the judgment in the case of Malik Naveed supra has been delivered by a larger Bench, therefore, the same is binding on us to follow.

24. The principles and law succinctly laid down by the august Supreme Court in the above referred judgments may be summarized as follows;-

(i) A High Court is vested with the jurisdiction to grant bail under Article 199 of the Constitution, independent of any statutory source of jurisdiction such as section 497 of the Cr.P.C.

(ii) The provisions of section 497 of the Cr.P.C, including the third proviso thereto, are not attracted in proceedings under the Ordinance of 1999. The right to claim bail on the statutory ground of delay is, therefore, not available to an accused incarcerated in proceedings under the Ordinance of 1999.

(iii) The liberty of an individual has been guaranteed by the Constitution and speedy trial is an inalienable right even if the provisions of section 497 Cr.P.C are not attracted.

(iv) An accused cannot be deprived of liberty for an indefinite period without trial.

(v) If the trial has commenced then instead of releasing the accused on bail, and as long as the delay is not unreasonable or shocking, direction for the expeditious disposal of the case can be given.

(vi) If the trial has not been concluded in the manner and within the time prescribed under section 16 of the Ordinance of 1999 then an accused may be entitled to be released on bail depending on the facts and circumstances in each case due to which delay has been caused.

(vii) While exercising powers under Article 199 of the Constitution in cases wherein bail has been sought in proceedings under the Ordinance of 1999, the broader principles of section 497 Cr.P.C. can be pressed in hardship cases to provide relief to an accused person who has been incarcerated for a period which appears in the facts and circumstances of a particular case as unreasonable. As a corollary, the broad principles of the third proviso to section 497 Cr.P.C. and the exceptions provided therein may be taken into consideration.

(viii) The inordinate delay in conclusion of the trial of a detained person cannot be ignored, provided it was not caused by an act or omission on the part of the latter.

(ix) If a petition seeking bail, wherein one of the grounds taken was delay, then a subsequent petition on said ground would not be entertained and the principles and law laid down in the case of Nazir Ahmed and another versus the State and others supra, will be attracted.

(x) The High Court may refuse to exercise the extraordinary discretionary jurisdiction under Article 199 of the Constitution on the basis of the conduct of the petitioner or the exceptions mentioned in the third proviso to section 497 Cr.P.C e.g. the petitioner having remained a fugitive from law without a plausible explanation or having admitted the allegations by making an offer of voluntary return.

25. We would now advert to the facts and circumstances in each case and examine the same in the light of the above principles and law.

W.P. NO. 2855 OF 2016 (MUHAMMAD EJAZ)

26. The petitioner was arrested on 27.05.2015 and has, therefore, remained incarcerated for almost 18 months. Perusal of the order sheets of the learned trial Court shows that on six occasions adjournments are attributable to the petitioner or his counsel. It is an admitted position that 108 witnesses have been examined, while more than 50 are yet to enter the witness box. No time frame could be given by the learned ADPG, NAB for the expected conclusion of the trial. The petitioner obviously cannot be kept behind bars for an indefinite period, particularly when the Ordinance of 1999 expressly

provides that the proceedings shall be held day to day and are to be concluded within thirty days. We are, therefore, of the opinion that the petitioner is entitled to the relief in the light of the principles and law laid down by the august Supreme Court in the case titled *"Muhammad Jahangir Badar versus The State and others" [PLD 2003 S.C. 525].* We expect that the learned trial Court would complete the trial of the case within thirty days from the date of receipt of this order by holding the hearings on day to day basis without granting an adjournment. In case the trial is not concluded within the stipulated period i.e. thirty days, from the date of receipt of this order, then the petitioner shall be released on bail by the learned trial Court, subject to furnishing surety bond in the sum of Rs.10 million and PR bond in the like amount to the satisfaction of the learned trial Court.

W.P. No. 3198 of 2016 (MUHAMMAD NAUMAN QURESHI)

27. The petitioner was arrested on 28.08.2014 and has, therefore, remained incarcerated for more than two years. More than 100 witnesses have been examined and it is not certain as to how much more time would be consumed in examining the remaining sixty witnesses. It indeed appears to be a case of hardship but the petition cannot be entertained in the light of the observations made by the august Supreme Court in case of Malik Naveed (supra) which are binding on us. In the earlier petition, the petitioner had raised the ground of delay but it had not found favour either with this Court or the apex

Court. After dismissal of his earlier petition by this Court vide order dated 30.06.2015, passed in W.P. No. 110 of 2015, and refusal of leave by the august Supreme Court vide order dated 17.09.2015, passed in C.P. No. 2240 of 2015, the trial could not be concluded as envisaged under section 16 of the Ordinance of 1999. The further delay could have been treated as a fresh ground but since the judgment and observations of the august Supreme Court are binding on us. We, therefore, dismiss the petition.

W.P. No. 2605 of 2016 (SAIFULLAH)

28. The petitioner was arrested on 17.12.2014. Admittedly, the charge has not been framed and there are more than 1100 witnesses, who are expected to be examined during the trial. The petitioner has been incarcerated for more than two years and the conclusion of trial is not in sight. The delay of more than two years cannot be attributed to the petitioner and, therefore, it appears to be a case of hardship. In the earlier petition, the petitioner had taken the plea of delay as is evident from the grounds mentioned in the memo of petition. However, in the light of the judgment of the august Supreme Court in the case of Malik Naveed (supra), the instant petition is not competent and is, therefore, accordingly dismissed.

W.P. No. 3049 of 2016 (IRFAN ULLAH KHAN)

29. An inquiry was conducted by the Federal Investigation Agency, which led to the registration of FIR No. 03 of 2010, on 26.07.2010. The case was transferred to the Accountability Court on 03.02.2011. The petitioner was a civil servant and was in service when the proceedings had been initiated. There were other accused who faced the trial. One of the accused, namely Ms Shazia Moghees, was acquitted by the learned trial Court vide order dated 14.01.2011. Other accused were convicted and sentenced under the Ordinance of 1999. However, the petitioner remained a fugitive from law and was arrested on 24.02.2015 pursuant to execution of perpetual warrants of arrest, which were issued by the learned Accountability Court no.2 Rawalpindi / Islamabad. The petitioner had been declared as proclaimed offender vide order dated 09.05.2011. Earlier the petitioner had filed a petition seeking bail through W.P. No. 1556 of 2015. A Division Bench of this Court, vide order dated 12.01.2016, dismissed the petition and directed the learned Accountability Court to conclude the trial within six months from the date of receipt of the order. Perusal of the order sheets show that after his bail petition was dismissed the petitioner, on one pretext or another, delayed the trial. On 03.07.2016, the learned counsel for the petitioner was not available and, therefore, the case was adjourned. On 24.02.2016, an adjournment was sought by the learned counsel for the petitioner. On 16.03.2016, the case was adjourned for the reason that the petitioner was not well. On 03.05.2016, request for adjournment was again made by the learned

counsel for the petitioner. Same was the case on 12.05.2016, 17.05.2016 and 23.06.2016. On 17.05.2016, besides the learned counsel for the petitioner not being present, the latter requested the learned trial Court to refer him to the hospital for conducting MRI. On 26.05.2016, the petitioner requested the learned trial Court to direct the jail authorities for making arrangement of funds out of the Bait-ul-Mal, so that the fee for MRI could be paid. From 09.06.2016 till 12.07.2016, the trial was adjourned on each date so that the arrangement could be made for payment of the fee. This conduct of the petitioner does not appear to be bonafide but rather a pretext to avoid and delay concession of trial. We are afraid that the trial has obviously been delayed due to the conduct of the petitioner, firstly by remaining a fugitive from law and secondly, demanding that the fee of MRI be arranged for him. We are satisfied that the conduct of the petitioner does not entitle him to the concession of bail, even on the ground of delay. The learned counsel for the petitioner could not give any plausible reason for the petitioner to have remained an absconder for a considerable time despite the fact that he was a civil servant. Moreover, after a Division Bench of this Court had directed the conclusion of trial within six months, the delay is distinctly attributable to the petitioner. The conduct of an accused for the purposes of seeking bail is of immense importance. In this case, the delay in conclusion of trial is attributable to the petitioner. We, therefore, are not inclined to grant bail to the petitioner and accordingly dismiss the petition.

*W.P. No. 3030 of 2016 (**Hafiz Muhammad Nawaz**)*

30. Perusal of the order sheets shows that delay cannot be attributed to the petitioner. The latter has been incarcerated since 28.01.2014. In the light of the broad principles of the third proviso to section 497 Cr.P.C. and the judgment of the august Supreme Court rendered in the case of *"Mir Shah Jehan Khan Khetran" supra*, a case is made out in favour of releasing the petitioner on bail. However, the case of Malik Naveed Khan (supra) having been rendered by a larger Bench is binding on us. In the earlier petitions, the petitioner had taken the ground of delay. His petition is, therefore, dismissed.

31. As a sequel to the above the petitions are decided as follows:-

*W.P. NO. 2855 OF 2016 **(MUHAMMAD EJAZ).***

The petition is allowed in the terms as mentioned in paragraph-26 above.

*W.P. NO. 2605 OF 2016 **(SAIFULLAH).***

The petition is dismissed.

*W.P. NO. 3049 OF 2016 **(IRFANULLAH KHAN).***

The petition is dismissed.

W.P. NO. 3198 OF 2016 ***(MOHAMMAD NAUMAN QURESHI).***

The petition is dismissed.

W.P. NO. 3030 OF 2016 ***(HAFIZ MUHAMMAD NAWAZ).***

The petition is dismissed.

(MIANGUL HASSAN AURANGZEB)
JUDGE

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on 27th February, 2017.

JUDGE

JUDGE

Asad/*

Approved for reporting