

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT
ISLAMABAD

CASE NO. : W.P. NO.1053-Q-2020

Subah Sadiq

Vs.

National Accountability Bureau through its Chairman, Islamabad & Another

CASE NO. : W.P. NO.1067-Q-2020

Khurshid Anwar Bhinder

Vs.

National Accountability Bureau through Chairman & Another

CASE NO. : W.P. NO.1085-Q-2020

Mirza Muhammad Shafique

Vs.

National Accountability Bureau through its Chairman, Islamabad & Another

Petitioners by	:	Mr. Muhammad Amjad Iqbal Qureshi, Advocate Ch. Khurshid Anwar Bhinder, Advocate Mr. Muhammad Arshad Tabrez, Advocate
Respondents by	:	Mr. Jahanzeb Khan Bharwana, Additional Prosecutor General, NAB Sardar Muzaffar Khan Abbasi, Deputy Prosecutor General, NAB Syed Jalal Hussain, Special Prosecutor General, NAB. Mian Nadeem Ahmad Shahid, Additional Director, IO, NAB
Date of hearing	:	21.10.2020

AAMER FAROOQ J. This judgment shall decide instant petition as well as W.P. No.1067-Q-2020 & W.P. No.1085-Q-2020, as common questions of law and facts, are involved.

2. The petitioners are ex-employees of National Accountability Bureau (NAB). In this behalf, the petitioner in W.P. No.1053-Q-2020 was appointed as Director General, National Accountability Bureau on 04.04.2012, when inquiry against Khalid Rashid and another was already pending. Inquiry was ordered to be converted into investigation. Eventually, after completion of investigation, in the meeting of Executive Board of National Accountability Bureau, it was decided to file a Reference which was duly filed. The petitioner in W.P. No.1067-2020 was appointed as Director General, NAB Punjab on 21.10.2011 and was assigned an additional charge of D.G. NAB, Rawalpindi on

15.11.2011. While working in said capacity, he received a complaint by one Baqir Raza Kazmi, General Manager, Petrotrade containing serious allegations of fraud and corruption by one Khalid Rashid; the petitioner ordered requisition of relevant record of Anti-Corruption proceedings from Punjab and for placement of the matter before the competent authority. After examination of record, inquiry against Khalid Rashid was converted into investigation and accordingly Reference, against the said person, was filed. In this behalf, Inquiry Officer in the case was Mirza Muhammad Shafique, who is petitioner in W.P. No.1085-Q-2020. Reference filed against Khalid Rashid was assigned number as Reference No.03-2013. The referred accused filed applications under section 265K Cr.P.C., which eventually succeeded. After acquittal, Khalid Rashid moved application against the staff of NAB including the petitioners before the Hon'ble Supreme Court of Pakistan. The matter was taken up by the august Apex Court on 24.03.2015, upon which, NAB constituted a Committee for submitting report regarding filing of Reference No.03-2013. The proceedings before the Hon'ble Supreme Court of Pakistan were adjourned vide order dated 27.05.2015 in light of the report of the Committee, so constituted (CM No.1556-2015 in CP No.2133-2014). The matter was taken up again on 11.06.2015 and on the assurance that NAB will do the needful, the same was disposed of. Pursuant thereto, NAB filed reference against the petitioners (Reference No.07-2016) for alleged misuse of authority. During course of trial, petitioners moved applications under section 265K Cr.P.C. primarily on the ground that amendment has been made in National Accountability Ordinance, 1999 (the Ordinance) by way of adding explanation to section 9(a)(vi) of the Ordinance. The amendment was made through National Accountability (2nd Amendment) Ordinance, 2019. It was agitated in the referred application that by way of explanation, legislature has elaborated that misuse of authority of holder of public office would only constitute an offence, if there is corroborative evidence of accumulation asset or monetary benefit which is disproportionate to his known sources of income of the accused. The referred applications by the petitioners were dismissed by the Judge, Accountability Court-II,

Islamabad (respondent No.2) vide impugned orders dated 18.03.2020, hence the petitions.

3. Learned counsel for the petitioner in W.P. No.1053-Q-2020 *inter alia* contended that role of petitioner, as mentioned in Reference No.07-2016, is that he misused his authority in filing of Reference in violation of Standard Operating Procedures (SOPs) of NAB against Col. Khalid Rashid, hence committed an offence. It was submitted that no case, against the petitioner, is made out; that the petitioner is former employee of NAB and cannot be prosecuted for the act committed by him in 'good faith'. It was further submitted that there is nothing on record, which establishes that any action, taken by his client, was not in 'good faith'. It was further contended that the charge, against the petitioner, is that despite information allowing for withdrawal of the Reference, he refused to do the same. It was contended that in the facts and circumstances, there is no allegation of corruption and corrupt practices against the petitioner. It was further submitted that amendment, made in the National Accountability Bureau Ordinance, would also apply to the case of petitioner inasmuch as explanation operates retrospectively, as case of the petitioner has yet not been concluded or decided finally.

4. The petitioner, in person, in W.P. No.1067-Q-2020 *inter alia* contended that there was specific direction by the then Chairman, NAB to clear the backlog and in the referred backdrop, he had given direction to his staff to proceed with all the inquiries and matters expeditiously. It was contended that even section 18 of the Ordinance provides for the same and the he did not violate any Standard Operating Procedures (SOPs) of NAB. It was further contended that what was done by the petitioner, was to call for record from Anti-Corruption, Punjab, which again NAB is empowered under section 19 *ibid*. It was further contended that petitioner has been proceeded with in the Reference on the basis that he exceeded his authority and tried to facilitate Petrotrade by providing benefit to it, whereas decision to proceed in the matter of Khalid Rashid, was taken in the meeting of Executive Board of NAB, whereas others Members of the Board have not been made accused in the Reference. It was contended that there is no question of any favour to Petrotrade by the petitioner and even-otherwise, in the array of

witnesses, no official of Petrotrade has been included as a witness to substantiate claim of prosecution. It was submitted that petitioner is entitled to the benefit of amendment made in the Ordinance. It was further contended that offence is committed where there is *actus reus* and *mens rea*, which is as such, is missing in the instant case.

5. Learned counsel for the petitioner in W.P. No.1085-Q-2020 adopted the arguments by other learned counsel and added that in the facts and circumstances, no offence against the petitioner, is made out. It was submitted that Mirza Muhammad Shafique was the Investigation Officer in the case of Khalid Rashid and according to his opinion, Reference against him, was made out. It was further contended that no allegation of corruption and corrupt practices exists against the petitioner and there is nothing on record that any benefit was provided either by the petitioner or the co-accused to M/s Petrotrade.

6. Learned Additional Prosecutor General, NAB *inter alia* contended that instant petitions, which seek quashment of Reference, are not maintainable. In this behalf, it was contended that generally, High Courts do not entertain petitions for quashing of proceedings, where trial is at an advanced stage. In support of contentions, he placed reliance on cases reported as 'Dr. Ghulam Mustafa Vs. The State' (2008 SCMR 76), 'Muhammad Mansha Vs. Station House Officer, Police City Chiniot District Jhang and others' (PLD 2006 SC 598), 'The State Vs. Tariq Nouman and another' (PLD 2013 Baluchistan 138), 'Sikandar A. Kareem Vs. The State' (2011 MLD 313), 'Muhammad Khalid Mukhtar Vs. The State' (PLD 1997 SC 275) and 'Pakcom Limited and others Vs. Federation of Pakistan' (PLD 2011 SC 44). It was contended that petitioners cannot avail the benefit of amendment made in NAB Ordinance inasmuch as it does not have retrospective operation. In this behalf, reliance was placed on cases reported as 'The State Vs. Sultan Ahmed and others' (PLD 2007 SC 48), 'Member (taxes) Board of Revenue Punjab Vs. Qaiser Abbas and others' (2019 SCMR 446), 'Shahida Bibi and others Vs. Habib Bank Limited and others' (PLD 2016 SC 995) and 'Air League of PIAC Employees through President Vs. Federation of Pakistan' (2011 SCMR 1254). It was further contended that elements, as provided in section 9(a)(vi) of NAB Ordinance, are

duly attracted, as actions of the petitioners were purely to provide benefit to M/s Petrotrade; he placed reliance on cases reported as ‘Malik Din Vs. Chairman, NAB’ (2019 SCMR 372), ‘The State Vs. Anwar Saif Ullah Khan’ (PLD 2016 SC 276) and ‘Suo Moto Case No.18 of 2010’ (2014 SCMR 585).

7. Arguments advanced by learned counsel for the parties have been heard and the documents, placed on record, examined with their able assistance.

8. The background, leading to filing of above mentioned writ petitions, has already been mentioned in preceding paragraphs, hence need not be reproduced.

9. The petitioners are aggrieved of dismissal of their applications filed under section 265K Cr.P.C. seeking their discharge from the Reference in question.

10. As noted above, the petitioners are accused in Reference No.07-2016. The primary allegation, against them, is that they misused their authority in order to provide benefit to M/s Petrotrade in filing of Reference No.03-2013 against Khalid Rashid, which eventually, was dismissed due to lack of evidence.

11. An objection was taken by NAB that at an advanced stage of trial, criminal proceedings cannot be quashed under section 561-A Cr.P.C. The referred objection of NAB is without substance inasmuch as instant petitions have arisen out of the orders passed by the Judge, Accountability Court-II, Islamabad, whereby applications under section 265K Cr.P.C. filed by the petitioners, were dismissed. In this behalf, under section 265K, a Court, at any stage of the case, after hearing prosecution and the accused and for the reasons to be recorded, if considers that there is no possibility of the accused being convicted of any offence, can acquit him.

12. There is no cavil with the principles laid down in the case law relied upon by learned Additional Prosecutor General, NAB, but the same are not applicable in the facts and circumstances because, as noted above, under section 265K Cr.P.C., which is a procedural provision, and is applicable to the proceedings under National Accountability Bureau

Ordinance, 1999, order for acquittal can be passed at any stage, if trial court so considers.

13. It is an admitted position that petitioners have remained in employment of NAB; under section 36 of the Ordinance, no prosecution can be filed against any member of National Accountability Bureau for the acts done in performance of any function under the Ordinance or the rules made there-under, if done in 'good faith'. In the Reference in question i.e. Reference No.07-2016 and the charges framed by learned trial court, there is no allegation against the petitioners that they did not act in 'good faith', which is *sine qua non* for filing of Reference against an employee of National Accountability Bureau.

14. The primary charge, against all the petitioners, is that they misused their authority for providing benefit to M/s Petrotrade, hence offence attracted in the facts and circumstances, is one of corruption and corrupt practices as provided in section 9(a)(vi) of the Ordinance. For the sake of brevity, relevant offence/section is reproduced below:

"9. Corruption and corrupt practices:

- (a) **A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices-**
- (i)
 - (ii)
 - (iii)
 - (iv)
 - (v)
 - (vi) **if he misuses his authority so as to gain any benefit or favour for himself or any other person, or renders or attempts to render or willfully fails to exercise his authority to prevent the grant, or rendition of any undue benefit or favour which he could have prevented by exercising his authority;**

The dissection of above offence/section shows that main elements of offence are misuse of authority so as to gain benefit or favour for himself or any other person; or renders or attempts to render or willfully fails to exercise his authority to prevent the grant, or rendition of any undue benefit or favour which he could have prevented by exercising his authority.

15. The charge, against the petitioners, is that they misused their authority for providing benefit to M/s Petrotrade and willfully rendered undue benefit or favour, which could have been prevented by exercise of

the authority. It is pertinent to observe that Reference and the charge, as such, are silent as to what benefit was provided to M/s Petrotrade or even what benefit did the petitioners gain by filing of Reference against Khalid Rashid and proceeded with the matter expeditiously, even if, it is assumed that the same was done without following SOPs of NAB.

16. Section 9(a)(vi) of the Ordinance has been the subject matter of judicial consideration in a large number of cases. In case reported as 'Mansur-ul-Haq Vs. Government of Pakistan' (PLD 2008 Supreme Court 166), it was observed that there has to be an intention of committing an offence under section 9(a)(vi) of the Ordinance and element of gain either for one self or others and in the facts of the case, no offence is made out. Likewise, in case reported as 'Fazal Ullah Siddiqui Vs. The State' (2006 SCMR 1334), the Hon'ble Supreme Court of Pakistan reiterated the position as mentioned above. In case reported as 'The State and others Vs. M. Idrees Ghauri and others' (2008 SCMR 1118), the Hon'ble Supreme Court observed that act of grant of proprietary rights of land without having power of Collector by itself and without proof of essential ingredients of illegal gain and undue favour would not constitute an offence of corruption and corrupt practices within the meaning of section 9(a)(vi) of National Accountability Bureau Ordinance, 1999. It was also observed that prosecution has to discharge the initial burden that elements of section 9(a)(vi) are attracted and upon successful discharge of such burden, the accused has the burden of rebutting the same. In case reported as 'Muhammad Siddiqui Farooq Vs. The State' (2010 SCMR 198), it was again observed that holder of a public office or any other person is said to commit the offence of corruption and corrupt practices, if he misuses his authority in order to gain any benefit or favour for himself. In case reported as 'Syed Zahir Shah and others Vs. National Accountability Bureau and others' (2010 SCMR 713), similar observations were made. In case reported as 'Malik Din Vs. Chairman National Accountability Bureau and another' (2019 SCMR 372), august Apex Court observed that offence of corruption or corrupt practices under section 9(a)(vi) of National Accountability Ordinance included even an attempt to misuse the authority just to gain

any benefit for himself or any other person and it need not necessarily result in any personal gain to the accused.

17. The detailed analysis of the provision [section 9(a)(vi)] of the Ordinance was made in case reported as 'The State Vs. Anwar Saif Ullah Khan' (PLD 2016 SC 276). The majority judgment for the Court was authored by Mr. Justice Asif Saeed Khosa and while concluding with respect to section 9(a)(vi) of the Ordinance, it was observed as follows: -

“10. With reference to the precedent cases mention above the law appears to be settled by now that in a case involving a charge under section 9(a)(vi) of the National Accountability Bureau Ordinance, 1999 the prosecution has to make out a reasonable case against the accused person first and then the burden of proof shifts to the accused person to rebut the presumption of guilt in terms of section 14(d) of the said Ordinance. It is also apparent from the same precedent cases that a mere procedural irregularity in the exercise of jurisdiction may not amount to misuse of authority so as to constitute an offence under section 9(a)(vi) of the National Accountability Bureau Ordinance, 1999 and that a charge of misuse of authority under that law may be attracted where there is a wrong and improper exercise of authority for a purpose not intended by the law, where there is wrong and improper exercise of authority for a purpose not intended by the law, where a person in authority acts in disregard of the law with the conscious knowledge that his act is without the authority of law, where there is a conscious misuse of authority for an illegal gain or an undue benefit and where the act is done with intent to obtain or give some advantage inconsistent with the law. The said precedent cases also show that misuse of authority means the use of authority or power in a manner contrary to law or reflecting an unreasonable departure from known precedents or custom and also that mens rea or guilty mind, in the context of misuse of authority, would require that the accused person had the knowledge that he had no authority to act in the manner he acted or that it was against the law or practice in vogue but despite that he issued the relevant instruction or passed the offending order”.

18. In Suo-Moto Case No.18 of 2010 reported as 2014 SCMR 585, it was observed that common intention/abetment by public servant covered crime committed with common intention as well as abetment. It was also observed that public servants who abetted the commission of corruption by allowing acts which it was their duty to stop should be proceeded against under section 9(a)(vi) of National Accountability Ordinance, 1999.

19. The main allegation against the petitioners generally and in particular against Mr. Khurshid Anwar Bhinder is that while acting as

Director General, NAB Rawalpindi, he with undue haste, proceeded with inquiry against Khalid Rashid and in filing the Reference accordingly. It was also alleged against him that he flouted the Standard Operating Procedures (SOPs) of NAB. The Hon'ble Supreme Court of Pakistan in case reported as 'The State Vs. Anwar Saif Ullah Khan' (PLD 2016 SC 276) observed that misuse of authority would tantamount where an accused person acts in violation of law or common practice, but the same is not an offence under section 9(a)(vi) *per se* in absence of other elements of the offence. In this behalf, it is the allegation against the petitioners that they did not follow the SOPs of NAB, which did not have any status of law and are only for internal consumption of National Accountability Bureau.

20. Moreover, the fact that the matter of inquiry was concluded expeditiously, also is within the mandate of National Accountability Bureau, which envisages expeditious conclusion of inquiry as well as investigation.

21. Lastly, amendment was made in National Accountability Bureau Ordinance, by virtue of which, 2nd Amendment in the Ordinance was promulgated through National Accountability Bureau (2nd Amendment) Ordinance, 2019 and an explanation was added to section 9(a)(vi) of the Ordinance, which is as follows: -

"For the purposes of this clause, nothing shall be construed as misuse of authority by a holder of public office unless there is corroborative evidence of accumulation of any monetary benefit or asset, which is disproportionate to his known sources of income or which cannot be reasonably accounted for".

The said Ordinance has lapsed, but its effect and consequence of lapse was not considered by learned trial court. The effect of the Ordinance was considered in detail by this Court in case reported as 'Muhammad Bilal Sheikh Vs. National Accountability Bureau through its Chairman, Islamabad and Another' (2020 P.Cr.LJ 671) and it was observed as follows: -

13. It is stance of the petitioner that explanation added to section 9(a)(vi) of the Ordinance is attracted in the facts and circumstances of instant case as referred amendment takes effect retrospectively. To substantiate the referred argument, Mirza Mahmood Ahmad, Advocate Supreme Court placed reliance on cases reported as 'Kohinoor Sugar Mills Vs. Federation of

Pakistan and others’ (2018 PTD 821), ‘The Commissioner of Income Tax, Lahore Vs. Messrs Chaudhry Dairies Ltd.’ (2019 PTD 452), ‘Commissioner Inland Revenue, RTO, Rawalpindi Vs. Messrs Trillium Pakistan Pvt. Ltd. Rawalpindi and others’ (2019 SCMR 1643), ‘M/s Dreamland Cinema, Multan Vs. Commissioner of Income Tax, Lahore’ (PLD 1977 Lahore 292) & ‘Syed Tahir Hussain and others Vs. Chairman, National Accountability Bureau and Another’ (2019 YLR 788). The ratio of referred judgments is instructive, as it has been categorically held that where any explanation added is for clarification of the provision and shall take effect retrospectively. Even in the instant case, no new offence has been created but only misuse of authority has been explained in the following terms:-

“Explanation:- For the purposes of this clause nothing shall be construed as misuse of authority by a holder of public office unless there is corroborative evidence of accumulation of any monetary benefit or asset which is disproportionate to his known sources of income or which cannot be reasonably accounted for;”

The prosecution has not made out a case for disproportionate assets or accumulation of any monetary benefit in the Reference. Nowhere in the Reference, it has been mentioned that the authority was exercised for any monetary benefit or was done so to grant monetary benefit to another with the intention of doing so and in an unprofessional manner. Since nothing is on record regarding accumulation of monetary benefit on part of petitioner or his assets are disproportionate to his known sources of income or that cannot be reasonably accounted for, the case against the petitioner, is one of further inquiry”.

22. Learned Accountability Court-II, Islamabad, while disposing of the applications of the petitioners, did not take into account the relevant law and the effect of explanation inserted in National Accountability Bureau Ordinance, 1999, in its true perspective; moreover, the effect of section 36 of the Ordinance was also not considered. In view of above, the orders impugned in all the writ petitions, are not tenable and merit setting aside. The learned trial court ought to have considered the effect of section 36 *ibid*, especially while framing charges. The charges against the petitioners are silent *viz-a-viz* section 36 of the Ordinance. In the facts and circumstances, it is appropriate that learned trial court revisit the issues raised in the applications filed by the petitioners as well as absence of any allegation of lack of ‘good faith’ by prosecution in the Reference filed by it against the petitioners.

23. For the above reasons, above mentioned writ petitions are allowed and the impugned orders dated 18.03.2020 are set aside; consequently,

W.P. No.1053-Q-2020 etc.

applications filed by the petitioners under section 265K Cr.P.C., shall be deemed to be pending and decided in light of relevant facts, law and observations made hereinabove.

(CHIEF JUSTICE)

**(AAMER FAROOQ)
JUDGE**

Announced in Open Court on 19.01.2021

JUDGE

JUDGE

Approved for Reporting

Zawar