

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

MR. JUSTICE DOST MUHAMMAD KHAN

MR. JUSTICE QAZI FAEZ ISA

MR. JUSTICE MAQBOOL BAQAR

Civil Petition No. 3912 of 2016

(Against the judgment dated
1.12.2016 of the High Court of
Balochistan, Quetta passed in
C.P.No.760/2016)

Khalid Humayun ... Petitioner(s)

Versus

The NAB through its D.G. Quetta and others ... Respondent(s)

For the Petitioner: Mr. Farooq H. Naek, Sr. ASC
a/w Ch. Riaz Ahmed, ASC
Syed Rifaqat Hussain Shah, AOR

For the Respondents: Mr. Qamar-uz-Zaman, Chairman, NAB
Mr. Waqas Qadeer Dar, P.G., NAB
Ch. Fareed-ul-Hassan,
Special Prosecutor, NAB
Maj (R) Tariq, D.G. NAB, Balochistan
Shoaib Sheikh, I.O., NAB

Date of hearing: February 14, 2017

JUDGMENT

Qazi Faez Isa, J. Through this petition leave is sought against the judgment dated December 1, 2016 of a Divisional Bench of the High Court of Balochistan which dismissed the constitutional petition through which the petitioner sought bail.

2. This case first came before us on January 24, 2017 when Mr. Farooq H. Naek, the learned senior counsel representing the petitioner, stated, that the Chairman of the National Accountability Bureau ("**the Chairman**" and "**NAB**" respectively) had accepted the plea bargain of the co-accused and that no reference had been filed against the petitioner till date. We, therefore, directed NAB's Chairman, its Director General and

the person in-charge of the investigation to attend with the, "*complete record of the case*". However, since the relevant documents were not available the Chairman was directed to file a concise statement, and subsequently this was filed (CMA No. 571/2017). The Prosecutor General Accountability of NAB ("**PGA**") informed us that the plea bargain filed in the Accountability Court-I, Balochistan, Quetta under section 25 (b) of the National Accountability Ordinance, 1999 ("**the NAB Ordinance**") had not as yet been approved by the Court.

3. Mr. Farooq Naek contended that on May 6, 2016 a raid was conducted at the official residence of Mr. Mushtaq Ahmad Raisani, who was the Secretary Finance of the Government of Balochistan, from where an amount of Rs.658,550,424 was recovered. NAB then issued a warrant of arrest and the petitioner was arrested on May 25, 2016 and after remaining in NAB's custody for two and a half months was remanded to judicial custody, but throughout this period NAB did not recover any ill-gotten money or property from him or unearth it, the learned counsel added. It was next contended that the allegation that the petitioner had violated the applicable procedure was not correct as the responsibility rests on the Secretary Finance under 8 and 9 of the Balochistan Government Rules of Business, 2012. The documents, attached with the concise statement filed by NAB, according to the learned counsel, neither disclose that the petitioner had committed any offence under the NAB Ordinance nor did the co-accused implicate him. NAB must file the reference within a reasonable time and cannot keep it pending indefinitely, the learned counsel next contended, and, by referring to clause (d) of section 24 of the NAB Ordinance, stated that a reference must be filed within ninety days, which is the period for which a person can be detained for the purpose of inquiry and investigation. The learned senior counsel further stated that NAB entered into a plea bargain with

Mushtaq Ahmad Raisani, Secretary Finance, Saleem Shah, Town Municipal Officer and Sohail Majeed Shah, Contractor, and Saleem Shah has been made an approver against the petitioner together with Syed Asad Shah and Nadeem Iqbal; however, none of these persons had implicated the petitioner. Reliance was also placed upon the case of Khan Asfandyar Wali v Federation of Pakistan (PLD 2001 SC 607) to contend that this Court jealously safeguards the liberty of citizens (paragraph 252 at page 928) and that the petitioner's indefinite incarceration violates this principle since he has been in custody for approximately nine months without a reference filed against him, which would also confirm that there is no material against him and that under these circumstances bail cannot be withheld as a punishment. He also pointed out that despite serious allegations made against Saleem Shah he had been appointed as the Town Municipal Officer of Gadani. The learned senior counsel urged that the petitioner is also entitled to bail on medical grounds in view of his serious illness; and referred to the medical opinion dated October 1, 2016 of the 'Balochistan Provincial Standing Medical Board'. He stated that Dr. Muhammad Nasir Khan had examined the petitioner in the "VVIP Room" on February 9, 2017 and his hand written notes reiterate the Medical Board's opinion.

4. Mr. Waqas Qadeer Dar, the learned PGA, stated that the petitioner was the Finance Advisor to the Government of Balochistan and was exercising powers of the Finance Minister, as the Government of Balochistan does not have a Finance Minister. In addition the petitioner was also the Chairman of the Local Councils Grants Committee and moneys of the municipal committees, including those of Khaliqabad, had been defalcated. He further stated that the petitioner had himself recommended that the village of Khaliqabad, having a small population, be raised to the status of municipal committee, and then earmarked

astronomical amounts for it himself and other municipal committees, approved the same and then defalcated the same. The learned PGA also referred to the statements of the co-accused recorded under section 164 of the Code of Criminal Procedure which had implicated the petitioner and it was further stated by the co-accused that the petitioner's share in the defalcated amount was 50%. Reference was also made to the Chapter VIII of the Balochistan Local Government Act, 2010 which sets out the procedure for "Development Planning in Local Councils", and it was stated that this procedure had been violated by the petitioner. Mushtaq Ahmad Raisani was appointed Secretary Finance on the petitioner's recommendation, was the petitioner's front man and had facilitated massive misappropriation from the public exchequer, the learned PGA concluded.

5. This petition is in essence a bail application therefore it will not be appropriate to undertake a detailed examination of the facts, particularly when the reference under the NAB Ordinance has still not been filed. However, there is sufficient *prima facie* material on record to suggest that the petitioner had exercised his authority to enrich himself and a number of persons have also implicated him as the principal beneficiary of the defalcated amounts, but we do not want to make any further observations in this regard as it may prejudice the case of either party. As regards extending bail on medical grounds, which was strongly urged by Mr. Naek, we have noted that neither the Medical Board nor Dr. Muhammad Nasir Khan have opined that the petitioner's continued incarceration would prove detrimental to his life or health. The Medical Board had noted that the dorso-lumbar spine of the petitioner had developed "mild diffuse bulging" of two discs and had recommended further examination through a dexta scan machine, however, as this machine was not available in the province the Medical Board had suggested that he be referred to the Agha Khan University Hospital,

Karachi for this purpose. We have been told that the petitioner is 40 years old, at which age generally a person does not have serious ailments; and there is nothing on record to show his pre-incarceration ailment. As regards the examination by a dexa (dual energy x-ray absorptiometry) scan which is used to measure bone mineral density, the petitioner, if so advised, could move an application to the trial court and the trial court could make suitable arrangements for his transportation to Karachi where he could be taken for a few days for such examination and then returned to Quetta. The High Court had declined bail on merits as well as on medical grounds and we have not been persuaded to take a different view, consequently, this petition for leave to appeal is dismissed and leave is refused.

6. That since Mr. Naek had highlighted the Chairman's acceptance of the plea bargain of the co-accused in the case and that, despite the lapse of nine months, the Chairman had not filed a reference against the petitioner we had issued notice to the Chairman and the PGA and on February 2, 2017 formulated the following questions:

- “1. Whether plea bargain under section 25 (b) the ordinance can be entered into when money and assets are seized by NAB as opposed to ill gotten assets or gains voluntarily offered to be returned by the accused?
2. Why the Chairman, NAB has not taken any decision himself with regard to the matter?
3. Whether the decision under section 25(b) of the ordinance, the Chairman must take into consideration “the facts and circumstances of the case” and what were these in the present case?
4. The reason, if any, for not submitting a Reference?”

The Supreme Court can exercise powers under Article 187 (1) of the Constitution of Pakistan “for doing complete justice in any case or matter pending before it” and issue appropriate directions, orders or

decrees. In a number of precedents reference has been made to these powers and the Supreme Court has also exercised them (see: Sabir Shah v Shad Muhammad Khan, PLD 1995 Supreme Court 66, Unichem Corporation (Pvt) Limited v Khursheed Ismail, 2000 SCMR 456, Muhammad Shafi v Muhammad Usman, 2001 SCMR 827, Badshah Begum v Additional Commissioner, 2003 SCMR 629, Amatul Begum v Muhammad Ibrahim Shaikh, 2004 SCMR 1934 and Dr. Mobashir Hassan v Federation of Pakistan, PLD 2010 Supreme Court 265).

7. The questions formulated above require an examination of section 25 (b) of the NAB Ordinance, which is reproduced:

"25(b) Where any time after the authorization of investigation, before or after the commencement of the trial or during the pendency of an appeal, **the accused offers to return to the NAB the assets or gains acquired or made by him** in the course, or as a consequence, of any offence under this Ordinance, **the Chairman, NAB, may, in his discretion, after taking into consideration the facts and circumstances of the case, accept the offer on such terms and conditions as he may consider necessary**, and if the accused agrees to return to **the NAB the amount determined by the Chairman, NAB**, the Chairman, NAB, shall refer the case for the approval of the Court, or as the case may be, the Appellate Court and for the release of the accused." *[emphasis has been added]*

The National Accountability (Amendment) Ordinance, 2017 was recently promulgated by the President of Pakistan (Ordinance II of 2017 published in the 'Extraordinary' part of the Gazette of Pakistan on January 9, 2017) and it substituted section 25 of the NAB Ordinance. The new sub-sections (1) and (2) of section 25, which deal with the same matter as dealt with in section 25 (b) of the Ordinance, are reproduced:

"25. Voluntary return.-

(1) Notwithstanding anything contained in any other law for the time being in force or section 18, a holder of public office or other person, before or after authorization of investigation against him or filing of the Reference or commencement of the trial or during pendency of an appeal, **voluntarily offers to return** to the NAB the illegal gain received, acquired or made by him, plus capital gain thereon and profit at the bank

rate from the date of its illegal receipt, acquisition, or making till deposit, **the NAB may, after taking into consideration the facts and circumstances of the case**, accept such offer, subject to approval of the concerned Court or Appellate Court as the case may be." [*emphasis has been added*]

(2) The holder of public office or other person shall deposit with the NAB the amount of the illegal gain plus capital gain thereon and profit as determined by the Court or Appellate Court and comply with such other terms and conditions as the Court may consider appropriate, whereupon the case shall stand closed and such holder of public office or other person if in custody shall be released."

Mr. Qamar-uz-Zaman, the Chairman NAB, had accepted the plea bargain application of the co-accused when the un-amended section 25 (b) of the NAB Ordinance was in place, therefore, the abovementioned questions will be attended to by considering section 25 (b) of the NAB Ordinance before its substitution. However, the following observations equally apply to the substituted provision. Before we proceed to examine the questions that had been posed a few of the undisputed facts of this case need to be mentioned.

8. A raid was conducted at the official residence of the Secretary Finance and an enormous cache of monies, prize bonds and gold was recovered: (i) Three hundred forty seven million, seventy seven thousand and five hundred rupees (Rs.347,077,500), (ii) prize bonds of a value of fifty three million, three hundred and twenty thousand rupees (Rs.53,320,000), (iii) two million, three hundred sixty seven thousand, five hundred and forty three United States dollars (US \$ 2,367,543, which was calculated to be equivalent to Rs.255,694,644), (iv) fifteen thousand pound sterling (UK £ 15,000 which was calculated to be equivalent to Rs.2,010,000), (v) sixteen thousand and ten Saudi Arabian Riyals (S.A.R. 16,010 which was calculated to be equivalent to Rs.448,280) and (vi) gold jewelry and pure gold weighing about three and

a half kilograms and the value of the gold alone has been assessed at eleven million, four hundred seventeen thousand, three hundred and thirty four rupees (Rs.11,417,334) (hereinafter collectively referred to as "**the said cache**"). The total amount of the said cache is six hundred sixty nine million, nine hundred sixty seven thousand, seven hundred and fifty eight rupees (Rs.669,967,758). The Chairman informed us that the said cache was the biggest seizure of misappropriated monies in Pakistan's history.

9. Section 25 (b) of the NAB Ordinance sets out the methodology of plea bargain, its acceptance by the Chairman NAB and approval by the Court. First, the accused "*offers*" to return assets or gains made by him, then the Chairman "*in his discretion*" but after considering the "*facts and circumstances of the case*" may accept the offer on "*such terms and conditions as he may consider necessary*". After the offer has been accepted by the Chairman the plea bargain is submitted to the Court for its approval. Let us examine the facts of this case, how the offer was processed and the Chairman's decision.

The Offer

Mushtaq Ahmad Raisani wrote an application (dated August 6, 2016) to the Chairman stating that, "I surrendered cash as well as gold recovered from my home during search by NAB" and the two houses and vehicles "held by me in the names of *benamidars* have already been surrendered by them". The said cache was seized during a raid conducted on the official residence of the accused who was apprehended red-handed. The said cache could not possibly be the savings of the accused during his bureaucratic career nor did he put forward such an unbelievable plea. The only additional assets that Mushtaq Ahmad Raisani offered were two houses and two vehicles which had been kept in the names of his wife,

nephew, brother-in-law and nephew respectively with a view to prevent their detection (*benami*).

Internal Processing by NAB of the Offer of Plea Bargain

A three page document titled "Approval of Plea Bargain" was prepared by NAB that briefly sets out the facts and then records the "recommendations" of the different functionaries of NAB. Under serial 6 of this document NAB Balochistan, "*Recommended for approval of Plea Bargain of Mushtaq Ahmad Raisani and Sohail Majeed Shah*"; under serial 7, the section titled "Recommendations of High Level Committee (HLC) (if any)", was left blank; under serial 8 the Operations Division states, "*PB [plea bargain] of both accused persons may be accepted as it will insure recovery of huge money and a strong case against the rest of accused persons*"; under serial 9 the PGA states, "*Approval of PB of accused Mushtaq Ahmad Raisani is supported as he is ready to surrender to NAB 650 million cash / foreign currencies, 3306 gram gold and all immovable properties, vehicles which are presently in the custody of NAB (B) and PB of accused Sohail Majeed is supported on established amount of Rs.960 M and he is ready to pay an amount of Rs.460 M immediately and remaining amount of Rs.540 M through instalments [sic] as per law.*"; and under serial 10, where the "Recommendations by Dy Chairman" should be mentioned, was left blank.

Acceptance of Offer by the Chairman

The Chairman reproduced the views of NAB Balochistan, the Director General Operations and the Prosecutor General Accountability and then wrote, "*On the recommendations of the DG (Ops) and PGA, I hereby approve the Plea Bargain as requested by DG NAB (B)*". This one line can hardly be categorized as a *decision* arrived at after independently considering the *facts and circumstances of the case*. The said cache had been seized from the official residence of the accused, however, NAB

amazingly stated that the accused was "*ready to surrender [it] to NAB*", as if he had an option. The Chairman accepted the purported *offer* of the said cache and, the only properties which may be categorized as having been offered were, the two houses and two vehicles.

10. The *discretion* vested in the Chairman under section 25 (b) of the NAB Ordinance is structured; it is neither absolute, nor unfettered nor arbitrary. The Chairman and PGA are statutory functionaries and they cannot be removed from office except on the grounds of removal of a Judge of Supreme Court of Pakistan (section 6(b)(i) and section 8(a)(iv) respectively of the NAB Ordinance). The extraordinary protection accorded to them insulates them from outside pressures and to ensure their complete impartiality and independence; the necessary corollary is for them to act strictly in accordance with law. Let us see how they acted.

11. The Chairman simply followed the recommendations of the DG (Operations) and DG Balochistan, two of his subordinates, and the recommendation of the PGA and accepted the *offer* of the plea bargain. The law is very clear, the Chairman must exercise *his discretion* after taking into consideration *the facts and circumstances of the case*, as stipulated in section 25 (b) of the NAB Ordinance, but he did not do so. The said cache constituted the largest seizure of embezzled public exchequer funds however this self evident fact was disregarded. The DG Balochistan and the DG (Operations) recommended the acceptance of the plea bargain application without investigating, let alone determining, whether the accumulated treasure trove of the said cache was a one time attempt at defalcation by the accused or if they had siphoned off monies from the public exchequer in the past as well. No mention is made of investigating the financial history / income tax returns / bank accounts / properties of the accused to uncover their past practices despite the

extraordinary powers vesting in NAB to do so; NAB can call for information from any person, bank or financial institution under section 19 of the NAB Ordinance. The Chairman too remained remiss of his responsibility to ensure that his subordinates had fully investigated the case and if their recommendations were well founded. The PGA is required to give advice on legal matters (clause (b) of section 8 of the NAB Ordinance) but he did not render any legal advice (as can be seen from his noting on the "Approval of Plea Bargain" document mentioned above).

12. The NAB Ordinance, as has been discussed above, does not give the Chairman absolute discretion to accept a plea bargain, however, even if section 25 (b) of the NAB Ordinance had not curtailed *his discretion*, by making it dependent on the *facts and circumstances of the case*, then too the Chairman's discretion would be circumscribed by section 24A of the General Clauses Act, 1897, which stipulates:

"24A. Exercise of power under enactments.

(1) Where, by or under any enactment, a power to make any order or give any direction is conferred on any authority, office or person such power shall be exercised reasonably, fairly, justly and for the advancement of the purposes of the enactment.

(2) The authority, office or person making any order or issuing any direction under the powers conferred by or under any enactment shall, so far as necessary or appropriate, give reasons for making the order or, as the case may be for issuing the direction and shall provide a copy of the order or as the case may be, the direction to the person affected prejudicially."

In the case of Muhammad Amin Muhammad Bashir Ltd. v Government of Pakistan (2015 SCMR 630) Mian Saqib Nisar, J (as his lordship then was) had held:

"Section 24A of the General Clauses Act, 1897, reiterates the principle that statutory power is to be exercised '*reasonably, fairly, justly and for the advancement of the purposes of the enactment*' and further clarifies that an executive authority must give reasons for its decision. Any action by an executive authority which is violative of these

principles is liable to be struck down. No other view is permissible." (page 638F)

13. The raid was conducted on May 6, 2016 but till the hearing of this case, on February 14, 2017, the Chairman had not filed the requisite reference. According to the Chairman, Mr. Qamar-uz-Zaman, the reason for the delay was because the plea bargain application was not approved by the Accountability Court; but, when we called upon him to justify his response with reference to any provision of the NAB Ordinance, he was rendered speechless. The Chairman did not put forward any other reason to justify the delay in filing the reference. Such inordinate delay in filing the reference raise legitimate concerns, particularly in a case of this magnitude, and above all when the objective of the NAB Ordinance is kept in mind.

14. The introduction to the NAB Ordinance elucidates that it has been enacted to "eradicate corruption and corrupt practices and hold accountable all those persons accused of such practices". The person who was supposed to safeguard public funds and ensure their proper utilization was himself caught red-handed with an astronomical amount. Under such circumstances the acceptance of the plea bargain by the Chairman runs counter to the stated object to *eradicate corruption* and to *hold accountable all those persons accused of such practices*; instead, the message that emanates from NAB is that, if one surrenders only the amount which was seized he will be let off. The rising tide of insidious corruption devastates lives; this Court has repeatedly noted and warned about it, but it seems to no avail.

15. In the case of Abdul Aziz Memon v State (PLD 2013 Supreme Court) Asif Saeed Khan Khosa, J writing for the Court observed, that:

“The perils of corruption in a society are far greater than the hazards of narcotics and, thus, the observations made above in the context of the Control of Narcotic Substances Act, 1997 are attracted with a greater force in the context of the National Accountability Ordinance, 1999.” (page 640)

The observations that had been cited with approval were taken from the case of Nazar Hussain v The State (2002 PCr.LJ 440), a portion whereof is reproduced:

“...the menace that it purports to curb is not commonplace and the criminals who indulge in it are not of the normal type. The mischief sought to be suppressed by this law is not just a crime against a human being but a crime against the humanity and, therefore, a response to the same has to be aggressive and punitive rather than benign and curative. It may be true that an individual subjected to the rigours of this law may sometimes suffer disproportionately but the greater good of the society emerging from stringent application of this law may make this approach worth its while.”

In Muhammad Nawaz Sharif v President of Pakistan (PLD 1993 Supreme Court 473) this Court held that corruption has “far-reaching effects on society, Government and the people” (page 837). A seventeen member bench of this Court in the case of Dr. Mobashir Hassan v Federation of Pakistan (PLD 2010 Supreme Court 265) had struck down the National Reconciliation Ordinance, 2007 (“**NRO**”) as it sought to condone corruption. The NRO “met the fate it richly deserved as a black law created and prolonged by the corrupt and malevolent hands of a military dictator” (paragraph 11, page 481). The Chairman cannot be permitted to exercise his discretion under the NAB Ordinance in a manner which effectively revives the spirit of the NRO and engenders corruption.

In the recent case of State v Anwar Saif Ullah Khan (PLD 2016 Supreme Court 276) this Court was unimpressed by the respondent’s acquittal by the High Court on the ground that “criminal intent” may have been missing and held that liability under the NAB Ordinance is

established when there, "was a clear case of misuse of authority by the respondent, a case of wrong and improper exercise of authority for a purpose not intended by the law, a case of a person in authority acting in disregard of the law...". NAB's Chairman, its PGA and officers would be well advised to bear this in mind when they themselves exercise authority under the NAB Ordinance.

16. NAB is sustained by the taxpayers of this country and is ultimately accountable to them; if the provisions of the NAB Ordinance are not strictly observed its credibility and repute is tarnished and it becomes another moribund organization. The officers of NAB must remind themselves of the reason for which NAB was set up. The Chairman and the PGA have designated roles under the NAB Ordinance and it is imperative that they act in accordance therewith. We therefore order and direct that the provisions of the NAB Ordinance must be adhered to; the provisions which have been considered by us above must be strictly abided by the Chairman and Prosecutor General Accountability of NAB.

17. Copies of this judgment should be sent to the Chairman, Deputy Chairman, Prosecutor General Accountability and all provincial heads of NAB and to all Accountability Courts set up under the National Accountability Ordinance, 1999.

Judge

Judge

Judge

Bench-V
Islamabad
February _____, 2017
(Farrukh)

Approved for Reporting