

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Maqbool Baqar

Mr. Justice Mazhar Alam Khan Miankhel

Civil Petitions No.2243-L and 2986-L of 2019

(Against the Order dated 18.06.2019
passed by the Lahore High Court, Lahore in
W.Ps. No. 9726 & 9729 of 2019)

Khawaja Salman Rafique(in C.P. 2243/19)
Khawaja Saad Rafique(in C.P. 2986/19)

Petitioner(s)

Versus

*National Accountability Bureau
through its Chairman, etc*

Respondent(s)

For the Petitioner(s) : Mr.Ashtar Ausaf Ali, ASC
Mr.M. Azam Nazir Tarar, ASC
Mr.Muhammad Amjad Pervaiz,
ASC assisted by Muhammad Adil
Chattha

For the Respondent(s) : Mr. Jehanzeb Khan Bharwana,
Addl. P.G.
Mr. Naeem Tariq, Spl Prosecutor
(NAB)
Mr. Zawar Manzoor Waraich, Dy.
Dir, (NAB)

Date of Hearing : 17.03.2020

Maqbool Baqar, J.-,

*“A state which dwarfs its men, in order that they
may be more docile instruments in its hands even
for beneficial purposes--- will find that with small
men no great thing can really be accomplished”*

- John Stuart Mill

The prosecution case, as set out in the Reference, is that it was in pursuance of various complaints received from "Members of Public at Large" that an investigation was authorized by the Competent Authority on 6.11.2018.

2. It is alleged that the petitioners, Khawaja Saad Rafique and Khawaja Salman Rafique, the accused Nos. 2 and 3, in connivance with accused No.1, 4 and 5, namely Nadeem Zia Pirzada, Umar Zia and Farhan Ali, and Qaiser Amin Butt ("**QAB**"), the accused turned approver, launched a housing scheme through a private limited company, namely Paragon City Private Limited, (the Company), by the name of Paragon City, and started collecting money towards booking of plots therein. It is further alleged that though, through letters dated 10.09.2014 and 04.09.2016, Lahore Development Authority ("**LDA**"), had informed its Town Planning department, the Revenue department Punjab, and the various utility companies/agencies, that the scheme/project has been launched without any approval from LDA, and had requested its Director Planning to take action against the ongoing development work in the scheme, and had also requested the Revenue department to impose a ban on issuance of "Fard-e-Malkiat",

pertaining to the scheme, however, the accused continued with the project and the booking/sale of plots therein.

3. It is stated that Paragon City, spread over an area of 7002 Kanals of land, was approved by TMA Aziz Bhatti Town, Lahore on 18.01.2005, but the said approval was obtained by the accused on the basis of forged documents, as the accused, at the relevant time owned only 1085 Kanals of land.

4. It is further alleged that the paragon City illegally possessed State/Shaalamat lands comprising a total of 39 Kanal and 13 Marlas in different Mauzas of Tehsil Cantt, Lahore, converted the said lands into residential plots; and sold the same.

5. It is also alleged that the Petitioner Khawaja Saad Rafique, in connivance with Nadeem Zia Pirzada, the accused No.1, illegally occupied 31 Kanals and 80 Kanals of lands owned by some Shahid Butt and Haji Rafique, respectively, converted the said two parcels of land into plots, and sold the said plots as part of Paragon City.

6. It is further alleged that the petitioners acquired 40 Kanals of land in Paragon City in exchange for land

measuring 50 Kanals and 3 Marlas. The two are also accused of obtaining 20 plots, measuring 2 Kanals each. It is claimed that though the record shows that the "cost of land of said plots was fully paid but no payment was made to Paragon City (Pvt.) Ltd pertaining to cost of said plots".

7. It is claimed that the Petitioners are the beneficial owners of the Company, who alongwith Nadeem Zia Pirzada, the accused No.1, in fact hold 93.6% shares therein, whereas, the remaining 7.4% shares are held by the approver, QAB. The affairs of the Company, as per the prosecution, were being managed by the Petitioner, the accused No. 1, and QAB.

8. It is further alleged that amounts in the sum of Rs.6.2 Million and Rs.12 Million were received by the petitioners from the Company, in their respective bank accounts, receipts of which they failed to justify.

9. The Petitioners have also been accused of receiving amounts of Rs.58 Million and Rs.39 Million, from M/s. Executive Builders, which is a partnership concern of accused No.4 and 5, and as per the prosecution, is, under some arrangement with the Company engaged in constructing and selling housing units in Paragon City. It

is stated that the said amounts were purportedly received by the petitioners by way of professional fee and consultancy charges, through their proprietary concern namely M/s. Saadian Associates and M/s. KSR Associates, respectively. It is claimed that the firm Executive Builders a "proxy" of the Company and the same, and so also the above business concerns of the Petitioners, have been created and deployed as a mechanism and a ruse, to camouflage the money trail by layering the receipts. The above payment by the Executive Builders, and those also from the Company to the Petitioners, have been described by the prosecution as "illegitimate pecuniary benefits" and "illegal gains". It is stated that during the last few years an amount of Rs.480 Million has been transferred from the various bank accounts of the Executive Builders to the bank accounts of the Company. It is pointed out that out of the two partners of Executive Builders, one being accused No.4, is the real brother of the accused No.1, and the other, being accused No.5, is the brother-in-law of the Petitioner Khawaja Salman Rafique.

10. It is stated that the Bureau has received complaints from 68 different persons from whom the Company received payments towards allotment of plots, however,

neither have the plots been delivered nor is the money being refunded to them.

11. Though the facts contained in the instant paragraph do not seem to be of much relevance, but, having been narrated in the Reference, are for the sake of completeness, also being mentioned herein. It is stated that in the past also the Petitioners and accused No.1, alongwith QAB, have jointly ventured into real estate development business. The Petitioner Khawaja Salman Rafique has so ventured directly, whereas, the Petitioner Khawaja Saad Rafique has participated therein through his wife Ghazala Saad Rafique. It is thus stated that the Petitioner Khawaja Salman Rafique, alongwith Ghazala Saad Rafique, Shama Nadeem (wife of accused No.1), and two others, namely Ziauddin Pirzada, and Haji Muhammad Amin Butt, established a private limited company by the name of M/s. Debonair (Pvt.) Ltd., which was so registered with SECP on 18.09.1997. The Company purchased lands in Mauzas Jaspal, Malik Pur and Jughian in Lahore, and on 11.04.2000 obtained an NOC from Military Estate Officer Lahore Cantonment for developing a housing scheme thereon under the name and style of Air Avenue Housing Scheme, However, the scheme was not launched and the land was instead sold

to M/s. Arban Developers and Eden Development (Pvt.) Ltd.,

It is alleged that the proceeds of the above sale were received by M/s. Debonair (Pvt.) Ltd., in its three bank accounts which were being operated by Qaiser Amin Butt, Khawaja Salman Rafique, Shama Nadeem and Nadeem Zia.

It is further stated that the same set of persons, who were directors in M/s. Debonair (Pvt.) Ltd. with the substitution of Haji Muhammad Amin Butt, by his wife, Safia Begum, entered into a partnership, which firm was registered with the Registrar Division by the name of M/s. Debonair (AOB) on 30.06.2000, however, nothing more is said about the said firm.

12. The two amongst the above Directors/partners, namely Nadeem Zia and QAB, on 25.06.2003, established a private limited company, which was registered with the SECP on 25.06.2003 by the name of Air Avenue (Pvt.) Ltd and it was on 11.08.2003 that the name of the Company was changed to Paragon City (Pvt.) Ltd, the company.

13. Admittedly, the record reveals that it is only Nadeem Zia Pirzada, the accused No.1, and QAB, the purported

approver, who are the directors of the Company. The prosecution has not drawn our attention to any document or material that establishes the petitioners' control of or any direct relation with the company. Indeed, as noted above, certain payments by the Company and its so called "proxy", M/s. Executive Builders, have been made to the Petitioners, the relevance, effects and implications whereof shall be discussed in the latter part of this judgment. The linchpin of the prosecution case, so far the alleged connectivity of the Petitioners with the affairs of the Company, and their direct financial interest therein, which may tend to make them liable for any malfeasances or misfeasance of the Company, is concerned, is the purported statement of QAB, that he allegedly made under Section 26 of the NAO, 1999 and Section 164 of the Cr.P.C. on 06.12.2018.

14. The intrinsic value of the purported statement, examination and analysis of its contents, and the facts leading to the recording of the statement, alongwith the circumstances and the manner in which it was purportedly recorded, shall be made and discussed in a while. We may, however, observe here that the gist of the statement is that the petitioners are the major

shareholders in the company, and that the company is in fact being managed by them through Nadeem Zia, the accused No.1, who has been working for and with them since 1997, which is also the year since which QAB also has been their associate.

15. Before examining and analysing the contents of the purported statement and evaluating its intrinsic value, we cannot resist expressing our shock and dismay over the facts leading to the recording of the statement, the circumstances and manner in which it was recorded. The whole episode lays bare the prosecution's conduct and is a clear manifestation of their scant regard for the mandate of the law and the principles of fairness, equity and propriety. Before we proceed to record the events culminating in the recording of the purported statement dated 06.12.2018, it may, for a better appreciation of the matter, be noted that the aforesaid statement is not the only statement that QAB purportedly recorded under Section 26 of the NAO. In fact earlier too, a statement under the above provision was recorded by QAB before a Magistrate. It appears, however, that since the same did not inculcate the petitioners in the so-called, alleged or perceived offence, the pardon tendered to him on 23.11.2018 was withdrawn.

16. In order to have a full view of the matter, it may be noted here that QAB was arrested from Sukkur on 14.11.2018. His transitory remand was obtained from an Accountability Court up to 19.11.2018, on which date he was produced before the Administrative Judge, Accountability Court, Lahore, where QAB's physical remand was granted upto 04.12.2018. On 20.11.2018 QAB purportedly submitted to the Chairman NAB ("the Chairman") an application seeking pardon under Section 26 of the NAO. Through order dated 23.11.2018, the Chairman was pleased to approve tender of pardon to QAB, subject to his making disclosure in terms of Section 26 of the NAO. Resultantly on 26.11.2018, QAB purportedly recorded his statement before a Magistrate. As noted in his second application dated 30.11.2016 (in pursuance whereof QAB recorded the statement dated 06.12.2018, referred to herein before), however, "due to disturbing situation created by the gathering of various unidentified lawyers and private persons he could not disclose full and true facts" within "his knowledge relevant to the offence", as per his statement before the Chairman NAB. Consequently, the Chairman through order dated 26.11.2018, withdrew the pardon tendered by him to QAB on 23.11.2018.

17. It was through the aforementioned application dated 30.11.2018 that the latter once again offered to record his statement and enclosed therewith a copy of a detailed statement purportedly recorded by him before the Investigation Officer the same day. QAB also undertook to make a statement in terms of Section 26, NAO before a Magistrate after being tendered full pardon in the case. However, it was only on 04.12.2018, the day the physical remand of QAB was expiring, that the prosecution filed an application for transitory remand of QAB for producing him before the Chairman for pardon. The application dated 04.12.2018, however, made no mention of QAB's earlier statement under Section 26 NAO, the grant of pardon and its subsequent withdrawal. Through another application filed alongwith the above application, **the prosecution also sought 15 days' physical remand of QAB.** The remands, as requested, were granted by the Court the same day.

18. Through a written statement dated 05.12.2018, signed by QAB and counter signed by the Chairman, QAB undertook to give statement, as an approver before the Magistrate as offered by him. By an order of even date, the Chairman, whilst, tendering pardon to QAB,

subject to his making full disclosure, observed that **“if pardon is granted to the accused Qaiser Ameen Butt, more confidence inspiring evidence will come on record, strengthening the prosecution case against his co-accused persons, which evidence was not directly available against the accused”**. Through application dated 06.12.2018, the prosecution requested the Judicial Magistrate, Lahore to record the statement of QAB under Section 26 of the NAO. Nevertheless, there was no mention of such statement previously made by QAB. The Magistrate granted the application and proceeded to record the statement the same day, **without any notice to the petitioners and the other co-accused**, thus depriving them of their right to cross examine the witness, which is a flagrant violation of the essential requirement of the provision of subsection (1-A) of Section 164 Cr. P.C. It has also not been claimed the approver was informed by the Magistrate that upon conclusion of his statement, his custody shall not be remitted back to the prosecution. The statement thus, also failed to meet the criteria prescribed by the provisions of Section 265-J, Cr.P.C., for it to be admitted as evidence, even if it had fulfilled the other requirements of admissibility. The statement in these circumstances

failed to conform to the principles enunciated by the superior courts, also.

In the case titled as *NAB v Hudaibya Paper Mills* **2018 PLD 296** it was observed by this Court:

"To enable a statement recorded under section 164 of the Code to be used against an accused, it must be recorded 'in the presence of the accused, and the accused given an opportunity of cross-examining the witness making the statement."

In the case *Azeem Khan v Mujahid Khan* **2016 SCMR 274** while discussing the intent and purpose of Section 164 the court observed as following:

"...all signs of fear inculcated by the investigating Agency in the mind of the accused are to be shedded out and he is to be provided full assurance that in case he is not guilty or is not making a confession voluntarily then in that case, he would not be handed over back to the police. Thereafter, sufficient time for reflection is to be given after the first warning is administered. At the expiry of that time, Recording Magistrate has to administer the second warning and the accused shall be assured that now he was in the safe hands. All police officials whether in uniform or otherwise, including Naib Court attached to the Court must be kept outside the Court and beyond the view of the accused. After observing all these legal requirements if the accused person is willing to confess, then all

required questions formulated by the High Court Rules should be put to him and the answers given, be recorded in the words spoken by him”.

In *Abdul Sattar v The State* **PLD 1976 SC 404** it was pointed out:

*“As to how far the evidence of the approver can be accepted to substantiate the prosecution case, it may be conceded at once that he is a competent witness (section 133 of the Evidence Act). But the Courts have invariably in such cases followed the rule of common prudence enshrined in illustration (b) to section 114 of the Act and insist on independent corroboration of the evidence of an approver in material particulars. This rule though a rule of practice has acquired the rigidity of law. See *Abdul Qadir v. The State* (P L D 1956 S C (Pak.) 407 J) which followed *R. v. Baskerville* ((1916) 2 K B 658).”*

Similarly, in the case of *Federation of Pakistan v Muhammad Shafi Muhammadi* **1994 SCMR 932**, the following principles were enunciated:

“The rule of prudence that the testimony of an approver or accomplice is to be corroborated in material particulars by independent evidence has almost hardened into a rule of law with the passage of time and because of the invariable insistence of the Superior Courts to have corroboration.”

"An accomplice who takes part in the commission of the offence for which his co-accused is charged with falls within the category of a wicked person in terms of the above verse of the Holy Qur'an and, therefore, before acting upon his testimony, the truthfulness of it is to be verified by corroborative pieces of evidence on material particulars."

QAB's statement, thus, insofar as he was not informed that he would not be returned to the custody of the Bureau and also for the reasons that neither any notice of his recording the statement was issued to the petitioners, nor were they otherwise provided any opportunity to cross examine him, render his statement irrelevant. Additionally, keeping in view that it otherwise finds no corroboration by any means whatsoever, QAB's statement has absolutely no bearing on the case.

However, far more devastating is the fact, as noted earlier, that it was through the second attempt only, that the prosecution was able to procure the purported statement dated 06.12.2018, having failed to secure a statement inculcating the petitioners in the alleged/perceived offences, and/or even attributing to them any shareholding in the company, and/or establishing their control over its affairs. Even, more

alarming is the fact that the Judicial Magistrate, Lahore after recording statement of QAB on 26.11.2018, instead of sending him to judicial custody had delivered his physical custody to the prosecution, which is against all norms of justice, fair play and propriety. It appears that the prosecution sought QAB's physical remand in addition to his transitory remand, for a period longer than fifteen days with a two-pronged strategy: On the one hand it was able to exert pressure on QAB when he recorded his statement. In the event he would have failed to inculcate the petitioners, the prosecution could have continued to hold him and, thus, coerce him into submitting to their will and command by recording any statement they desired. However, a perusal of the statement, the gist whereof has been noted herein earlier, and its complete summary is annexed hereto as Annexure 'A', would show that all the efforts made by the prosecution in procuring the same have gone in vain, since it hardly contains anything which lends credence to the prosecution case or furthers their endeavour to lay blame for any alleged or perceived infraction by the Company on the petitioners.

19. The Statement is completely bereft of necessary particulars and much of its contents are absolutely

irrelevant. QAB's claim of petitioners' shareholding in the company and their control over it is wholly contrary to the record. No details, particulars, document and/or material, either official, financial, personal or relating to any business deal, transaction, undertaking, or arrangement, or any kind of correspondence in support of such claim, has even been referred to in the statement. Additionally, the prosecution has not been able to refer to or rely upon anything to substantiate the statement, or the allegations contained therein, nor has it mentioned of any other witness who supports QAB's purported stance. No question was put to the petitioners with respect to their alleged shareholding in or control of the company through the call up notices placed before us. However, even if the relevant contents of the purported statements are presumed to be true and correct, the same also do not, by themselves, constitute any offence or wrong doing on the part of the accused, attracting the provisions of NAO, 1999.

20. Reverting to the various allegations contained in the Reference, which according to the prosecution, constitute acts of corruption and corrupt practices within the meaning of Section 9 of NAO, 1999, we may first deal with the allegation that although LDA, had through its letters

dated 10.09.2014 and 04.01.2016, informed its director Town Planning, the Collector Revenue department, Punjab, Lahore, and the various utility companies/agencies, that the sponsors of Paragon City have launched the said scheme within the controlled area of LDA, without prior permission from the competent authority, and are carrying out construction and development work, and sale/purchase of plots therein, without the requisite approvals and also asked its directors to take legal action against such development and requested the Collector Revenue not to issue Fard-e-Malkiyat and register, or attest any document pertaining to the scheme. The LDA also requested the utility providers to stop/discontinue such provisions, but the accused persons continued with the development of the scheme and booking/selling of plots therein. In this regard it may be noted that the scheme, as noted in the Reference itself, was approved by TMA Aziz Bhatti, Lahore way back in January, 2005 and as mentioned by QAB in his statement under Section 26 of the NAO, (relied upon by the prosecution for roping in the petitioners in this case,) was launched the same year, i.e. the year 2005. The prosecution and/or the LDA has thus far not mentioned/disclosed, since when, or under what

law, notification, or scheme, to what extent, and in what manner, the area in which Paragon City is situated, fell within the jurisdiction of the LDA. It is also not submitted as to why and to what extent did the scheme require an approval from the LDA to begin with. It was not even claimed that the LDA ever sought any such submission or regularization from the company. It has also not been submitted as to what could be the consequences of noncompliance with the provisions, if any, in that regard, and whether such non-compliance triggers any penal action, and if so, under what circumstances. We have also not been apprised regarding the nature of these penal consequences to initiate such action, and whether any warnings were issued by the LDA or any other relevant department before proceeding in that regard. It is also worth asking if the public at large were cautioned regarding the violation of any law, rule or regulation by the company in relation to Paragon City. Little was offered by the prosecution in the way of details about the extent of the scheme's development and as to how many plots/properties have been sold by the time Paragon City allegedly fell within the jurisdiction, control and competence of LDA. NAB has not even claimed putting any question to the petitioners, regarding

the permission, either through their call up notices or otherwise, nor have they implicated any public functionary in this regard. There is absolutely no allegation that any buyer/purchaser in Paragon City was deprived of his accrued/vested rights, on account of the alleged lack of permission and/or approval. It has been admitted that out of 8,000 purchasers, NAB received complaints only from 68 though the Petitioners have been operating the Scheme since last 16 years. 62 of these complaints have admittedly been settled, affidavits of the complainants in this regard duly verified by the NAB have been placed before us. How in the above backdrop could the alleged development work and sale then fall within the ambit of Section 9 of the NAO, 1999. In any event, and as noted earlier too, since the prosecution has thus far not been able to connect the petitioners with the company in the manner so that they may be held liable for its acts, deeds and conduct, the allegations dealt through the instant paragraph, in so far as the petitioners are concerned, are wholly irrelevant and inconsequential.

21. Secondly, it is alleged that while the approval for Paragon City was obtained by the accused from TMA Aziz Bhatti, Lahore in 2005 for an area of 7002 Kanals, they

only held 1085 Kanals of land at that time. It is thus alleged that the approval, to the extent of the remaining land was based on forged documents. However, no documents were referred to in this regard, nor were any particulars mentioned. It is also not claimed that the TMA or any other department, took cognizance of the alleged fraud, or whether any action was ever initiated against anyone including the functionaries of the TMA, who could have been responsible for the same. It is also not alleged that any portion of the land comprising Paragon City, except the purported Shaamalat lands, or those which allegedly belonged to Shahid Butt and Haji Muhammad Rafique (the allegations regarding which three lands shall be dealt with in a while) did not belong to the company at the time of development and sale of the plots/properties in Paragon City, and/or that any of the company's buyers/customers were deprived of their purchase, or of any of their rights in relation thereto, on account of above alleged fraud. With regard to the instant allegation too, no witnesses were mentioned, nor was any question put to the petitioners. No public functionary has been implicated in relation to the instant allegation either.

22. As regards the State/Shaamalat lands, it may be noted that neither any notification nor any map or documents establishing the size thereof as claimed (39 Kanals) existed in the area, over which the Paragon City has been developed. In any event, there is absolutely no allegation of any violation of the permission granted by the TMA in relation to the scheme. It is also not clarified as to how much of the 39 Kanals of land comprised Shaamalat and how much of it was of other nature/category. It may be relevant to note here that Shaamalat lands belong to the village proprietary body and are used by the village community as a common village facility, whereas after purchase of the land/area, wherein Shaamalat existed, from its various owners/villagers, the company, after obtaining permission from the relevant TMA, has developed it into a housing scheme. It is also relevant to note here that Paragon City is spread over vast area of 7002 Kanals, and it has not been alleged that the scheme does not contain any common facilities for the community it houses, and certainly there is no concept of a housing scheme without roads, streets, parks, playgrounds, walkways, open spaces and other public facilities/utilities essentially required for a modern day

living. In any case this is a matter, which, as presented before us, can only be thrashed out after a detailed factual enquiry.

23. With regard to the State land, which possibly comprised abandoned parks, passages and water courses or ponds, which may be falling within the area of Paragon City, the learned counsel for the petitioners has submitted before us, a copy of a Gazette Notification dated 13.09.2019, issued by the Government of Punjab, Colonization Department, Board of Revenue, under Section 109 of the Colonization of Government Land (Punjab), Act, 1912, which contains a statement of conditions, for disposal of abandoned parks, passages and water courses or ponds falling within a private housing scheme through exchange with the land of the said scheme, in terms whereof the housing scheme wherein lies the above said facilities/lands, shall provide in exchange thereof, an accessible equal piece of land in a compact block within the said scheme. It also provides that the "State land utilized by a private housing scheme shall be dealt with on the above analogy". Learned counsel also placed before us a photocopy of a notice dated 29.01.2020, issued by Additional Deputy Commissioner (Revenue) Lahore, whereby the company

has been required to submit a proposal for exchange in terms of the above notification within 10 days. Learned counsel submitted that in view of the foregoing, there was no occasion for invoking the provisions of NAO with regard to the instant issue and the company may be allowed to respond to the notice in accordance with law. We found the contention to be just, fair and lawful.

24. The allegation of illegal occupation of Shahid Butt's land, also are as tenuous are the other allegations dealt with herein before. Neither any survey number or any other description of the land, or its location is given, nor is it explained as to, how, under what circumstances, or when, the land was occupied. Contrary to what has been attempted to be portrayed, it was not a matter of simple occupation of any land, but a business dispute between the parties pertaining to a joint venture, in terms whereof Shahid Butt handed over certain land to the company for developing it as a separate block of Paragon City, and to construct housing units therein, and as evident from the various documents placed before us, being (i) agreement dated 10.10.2015, executed between Paragon City (Pvt) Limited (through its chief Executive, the accused No.1), and Imperial Developers (through its Chairman Shahid Butt)(pages 348 to 350, CPLA 2243), (ii) the plaint in a

suit filed by Shahid Butt against Paragon City (Pvt) Limited for declaration and injunction before a Senior Civil Judge, Lahore on 17.01.2016 (pages 87 to 92, CPLA No.1168/2020), (iii) the plaint in a suit filed by Paragon City (Pvt) Limited for recovery of money, declaration and injunction, before a Senior Civil Judge, Lahore on 08.09.2018 (pages 101 to 111, CPLA 2243/2019) and (iv) the application/statement dated 20.11.2019, filed by Shahid Butt before Senior Civil Judge, Lahore for withdrawal of his above suit, the dispute between Shahid Butt and Paragon City (Pvt) Limited was purely of a civil nature, involving commercial, financial and business disputes pertaining to the development of a housing project, reimbursement of certain investment, and sharing of profit between them. The afore-noted agreement dated 10.10.2015, thus reflects that there was some money dispute, accounting issue pertaining to the development charges of a housing project, namely Imperial Garden, and that attempt to settle and resolve the same as agreed between the parties through a third party intervention earlier, hit snags because of varied/divergent perceptions of the parties, and it was in terms of the said agreement that they agreed to remove

the same through a facilitator named therein, and to finalize the accounts in terms of the earlier agreement.

25. Whereas through his above suit, it appears, that Shahid Butt sought to revive/protect his purported title in respect of certain lands, in all measuring about 3 Kanals and 8 Marlas, that he allegedly purchased in the year 2017, and sought cancellation of mutation thereof in favour of the company. Shahid Butt claimed that after purchasing the said land he merged the same into a housing scheme namely, "Paragon Homes", constructed houses thereon, and sold the same to different parties, and **that various families are living therein**. It was further alleged that the company on the basis of false and bogus sale deed claimed to have purchased 1 Kanal and 12 Marlas and 5 Kanals and 3 Marlas land in the years 2003 and 2008 respectively, and successfully sought mutation of the land so purchased by them, after cancellation of the mutation of the portion of such land that was earlier affected in favour of Shahid Butt. Shahid Butt sought a declaration that he was the owner of the land as claimed by him and that the purported sale deeds in favour of the company have no bearing on his above title. He also prayed for a decree, ordering cancellation of the above mentioned mutations **and for**

permanent injunction, restraining the company from disturbing his possession of the said land.

26. Whereas the case of the company, as set out in its above plaint, was that under an agreement dated 28.11.2006, executed between the company and Shahid Butt, the latter delivered to the former, possession of his land measuring 1067 Kanals and 8 Marlas for developing the same into a housing scheme. It was claimed that the agreement stipulated that the company shall finance build and develop the scheme and that amounts at the rate of Rs.800,000/- per Kanal shall be reimbursed to the company by way of development and construction charges and that the company shall be entitled to 60% share in the profits earned from the scheme. It was alleged that though the reimbursement as agreed was made but the amount of profit remained unpaid. It was further claimed that in addition to developing, building and financing the scheme, the company also contributed its land for the scheme, and that, in lieu thereof the company was to be given plots consisting of 55 Kanals in the "Imperial Garden". As per the plaint, the company's share in the profits was mutually calculated at Rs.340,006,448/-. It was further averred that Shahid Butt also acknowledged that he has occupied the 55

Kanals land agreed to be given to the company, and promised to pay an amount of Rs.970 (m) towards the price of the said land. He, however, delivered to the company, 94 housing units only. It was also claimed that after mutual accounts taking Shahid Butt's liability was determined at Rs.84(m), which liability he acknowledged and undertook to liquidate by appending his signature on the statement/document drawn in this regard, but resiled from his commitment and avoided payment on one pretext or the other. The matter was thus submitted to arbitration. Shahid Butt failed/avoided even to honour the arbitral award/settlement. It was further alleged that Shahid Butt also occupied 22 housing units, which he delivered to the company towards partial settlement of his liability. The company prayed for a declaration that it was a shareholder in the Imperial Gardens block/project and is entitled to all the 94 housing units built therein and for payment of Rs.84(m) from Shahid Butt.

27. The position that emerges from the foregoing, and as also acknowledged by Shahid Butt, in very clear and categorical terms, in his aforementioned application/statement whereby he withdrew his suit, is that the dispute between the parties was purely of a civil nature, arising out of a business/commercial

undertaking and a joint venture, mainly involving and pertaining to settlement of accounts. In his aforesaid statement/application Shahid Butt has clearly stated that the dispute between him and the company stems from the business relationship between him and the company. He acknowledged that it was under and in terms of a collaboration agreement dated 01.11.2006 that a housing block / scheme by the name of Imperial Gardens was developed under the umbrella of Paragon City (Pvt) Limited. However, issues in relation to the operation, execution and accounts pertaining to the project arose between the parties from time to time, resulting in litigation, which have been settled amicably and, therefore, he be allowed to withdraw the suit. The suit was thus dismissed as withdrawn. It may be interesting to note here that even the statement made by Shahid Butt before the Investigating Officer in this case, which forms the very basis of the present allegation, also very clearly depicts the nature and the substance of the dispute between the parties as discuss above.

28. The allegation of occupying Haji Muhammad Rafique's land is also equally weak and sketchy. However, in that regard, it may be noted that, as can be seen from (i) the agreement dated 26.08.2006, executed

between Haji Muhammad Rafique and co-accused No.1, as Chief Executive of the company, to refer their dispute to arbitration, (ii) the declaration of Award dated 31.01.2019, and (iii) the order dated 05.11.2015, in terms whereof a learned Senior Civil Judge, Lahore made the said Award a Rule of the Court (pages 351 to 355 and 365 to 370 respectively of CPLA No.2243/2019), several issues and disputes pertaining to sharing of expenses towards certain development/amenities, in respect of their respective housing scheme, and in relation to certain land purchase transactions entered into by each of them with different parties separately, resulting into both of them claiming their right/interest over the same lands, and also in respect of exchange of certain lands, arose between them, and that it was through the above noted agreement dated 06.08.2006, that the parties agreed to refer the said disputes/issues to an arbitral panel, who upon conclusion of the proceedings before them made an Award in the matter on 26.08.2006.

The Award, inter alia, unanimously provided that:

“(viii) the Arbitrators have unanimously held that Haji Muhammad Rafique shall deliver the vacant possession of the land measuring 163 Kanals and 17 Marlas situated at Dogra-e-Khurd, Tehsil Cant, District Lahore, to M/s.

Paragon City (Pvt) Ltd, in lieu of land measuring 163 kanals 17 marlas of village Kalaas Marri, Tehsil Cannt, District Lahore, (the detailed description of the land is appended herewith and will constitute an integral part of this Award). This exchange shall be accomplished by both the parties strictly in accordance with the measurement described in the appended details. As per relevant revenue record, Paragon City will hand over the vacant possession of the above mentioned land measuring 163 Kanals and 17 Marlas in Klass Mari to Haji Rafiq.

29. The above Award was submitted before Civil Judge, Lahore. The learned Judge after considering the objections, filed by Haji Muhammad Rafique under Section 30 of the Arbitration Act, 1940, and hearing the parties, made the Award a Rule of the Court. The said Award/Rule has however been challenged by Haji Muhammad Rafique before the Lahore High Court through FAO No.365 of 2015, which is pending.

30. The reference also set out two different allegations regarding land transactions between the Petitioner and the company, one specifies exchange of certain lands and the other accuse the petitioners of wrongfully acquiring 20 plot of land without any payment. As regards the

exchange of land it was alleged that the Petitioners exchanged their 39 Kanals and 19 Marlas and 10 Kanal and 4 Marlas lands with the company's lands measuring 32 Kanals and 8 Marlas, and as regard the alleged wrongful acquisition of the plots, it was stated that the Petitioners "wrongfully acquired 20 plots of 2 Kanal each from Paragon City (Pvt) Ltd. The files record shows that cost of land of said plots was fully paid but no payment is made to Paragon City (Pvt) Ltd". However, subsequently, through its summary of the case, submitted before us, NAB changed its stance. The new version shows that the land measuring 32 kanals and 8 marlas, which the petitioners received from the company in exchange for their above land was in fact so received in the shape of the said twenty (20) plots and that the acquisition of the said plots, was not a separate or additional transaction. The above factual position was known to NAB since the very inception, as in response to their call up notices the petitioners through their respective letter dated 29.03.2018, 28.03.2018 and 05.04.2018, provided to NAB complete details regarding the subject transaction. Not only did they repeatedly furnish to NAB the area/measurement of the lands exchanged, their locations, the designated number of the twenty (20) plots

situated in the land received in exchange; but also provided to them a detailed lay out plan highlighting the exact location of the said twenty (20) plots. The petitioners through the above letters also informed NAB that in terms of the exchange transaction they are also required to pay to the company, development charges in the sum of Rs.15,000,000/- in respect of the said plot, and have already paid to the company an amount of Rs.26,47,060/- on that account. Thereafter, despite a long que of call up notices NAB neither raised any query, nor conveyed any objection with regard to the exchange in question, however, during his argument before us the learned DPG NAB submitted that the Petitioners have unduly enriched themselves by getting developed plots in exchange for their undeveloped land. In this regard, it may be noted that in the first place the petitioners have parted with a substantially large piece of land, most of which is situated in the same mauza as are the subject plots, secondly, in addition to the said land, and as noted above, the Petitioner are also paying to the company charges for the development of the land converted into plots, thus the weight of the development probably goes off the scale. In any event despite having all the required information and details, NAB has failed to place before us

any material to show, or to otherwise persuade us to believe that the exchange was unfair and/or that the petitioners have through the said transaction illegally enriched themselves at the cost of the company. In any view of the matter, since the transaction was between private individuals / entities, who were free agents, and has/had no bearing on any public or governmental interest, no exception to the same could have possibly been taken by NAB.

31. As regards the allegation of receiving amounts approximately in the sum of Rs. 6.2 Million and Rs.12 Million by the Petitioners from the company, it may be noted that through their earliest letters, as placed before us, which are dated 20.03.2018 and 23.03.2018, the prosecution has, inter alia, sought from the petitioners details of "services/financial transactions executed between them and the company, and the benefits drawn against such services/transactions, if any". In response, the petitioners under cover of their letters dated 28.03.2018, 29.03.2018 and 05.04.2018, and through annexure "C" thereto, have furnished to NAB the relevant information and details, wherein the amount of commission received by the petitioners from the company for the services rendered by them for purchase of lands

by the company from its various owners during the year 2010 to 2013 have been mentioned year-wise. The statements also specify the amount of income tax withheld by the company. It is also mentioned that such payments were made by the company through cross cheques, and have been duly declared in the respective income tax returns of the petitioners for the corresponding years. However, such information was again sought by the combined investigation team of NAB during the interrogation, conducted by it on 29.03.2018. The information was thus once again submitted through a similar statement, as an annexure to their letters dated 05.04.2018. Through letters dated 24.04.2016, the NAB sought from the petitioners "details/ bank document of commission received by you against lands provided to M/s. Paragon City (Pvt) Ltd. till date". In response the petitioners, under cover of their respective letters dated 30.04.2018, submitted to the NAB a statement, being annexure "B" thereto showing the amount of commission received from the years 2010 to 2013, year-wise, the date of such payments, the amounts of income tax withheld, the cheque numbers through which the payments were made, and the name of the bank whereon the cheques were drawn. Though NAB has since thereafter sent

numerous call up notices to the petitioners and also interrogated them personally, however, neither was any query made by it regarding the above payments, nor have they objected to or expressed any dissatisfaction regarding the replies / information, submitted by the petitioners. Here it may be relevant also to note that in response to the numerous subsequent call up notices, the petitioners have also furnished to the NAB complete details of their bank accounts, the source of the deposits held therein, and also the income tax returns alongwith the wealth tax statement, not only for the relevant years, but for the other periods as sought by the NAB. The petitioner also duly filled and furnished to the NAB the assets declaration proforma as required by them. However, the NAB neither through any of these notices and/or at the time of the argument, raised any objection regarding the Petitioner's responses, and/or the material and information submitted by the latter, nor did they point out any discrepancy, inconsistency, inaccuracy, lacuna or inadequacy in the various responses, information, and documents mentioned above.

32. As regards the payments of Rs.58 Million and Rs.39 Million to the petitioner by M/s. Executive Builders towards professional fee and consultancy charges, which

services were provided by the two through their respective business concerns namely, M/s. Saadian Associates and M/s. KSR Associates, it may be noted that the petitioners through their various replies have furnished to the NAB all the information, details and documents required by them through their various call up notices in this regard, from time to time. The petitioners thus provided to the NAB the respective agreements between their business concerns/proprietorships, and M/s. Executive Builders, which contains the relevant details and the terms and conditions of the business engagements between those concerns and M/s. Executive Builders. The petitioners have also furnished to the NAB the details of various amounts received by them from M/s. Executive Builders by way of commission and consultancy fee from the years 2013 upto the year 2018 respectively, and the amounts of tax paid thereon. As evident from the record, when asked the petitioners also disclosed the total number of housing units constructed by M/s. Executive Builders in Paragon City, and as to how many of them were marketed/sold by them, and in respect of how many such units they provided consultancy, the Petitioners also provided particulars and details, such as the

designated numbers of those units, their respective categories, the buyer names, the amounts of commission and/or consultancy fee received by them, the dates of such payment cheques, the name of the banks on which such cheques were drawn, numbers of units sold each year, number of units in respect whereof consultancy was provided each year, the nature of the consultancy services provided. It was also submitted that the price of the units sold were received directly in the bank accounts of M/s. Executive Builders only.

33. Since the prosecution was left with no relevant fair and justified query and has nothing to object to, they virtually started repeating their earlier queries and making wholly irrelevant and inconsequential questions, through their notice subsequent to the responses received as above.

34. Neither the investigation report nor the Reference specifies any discrepancy or inadequacy in the responses received as above, nor has the learned Additional Prosecutor NAB pointed out any lacuna in the transactions in question. Even otherwise, the transactions/business relationship between the company, M/s. Executive Builders and the petitioners,

and the various payments received by the petitioners through their said two concerns, were/are matters purely between private concerns and individuals. Neither has it been alleged that any loss has been suffered by any Government, nor has it been pleaded that any member of the public has in any manner suffered on account of above and/or it was because of such payments that the purported claimants/complainants were allegedly deprived of possession of their promised plots.

35. It is not clear as to what in fact brought the NAB into action in the present case. Whether it were some complaints regarding non-delivery of plots, or was it some investigation, conducted against the accused persons, revealing that the company has denied possession of plots to its customers (in which later case again it is not known as to what occasioned such investigation) that triggered NAB against the petitioners and the other accused in this case, as on the one hand, the reference reveals that it was "in pursuance of complaints received from the members of public at large", that "an investigation was authorized by the competent authority", and so also, the chronological summary of the case, submitted in pursuance of our directions, described receipt of complaints "from members of public at large"

against the management of Paragon City on 26.11.2017, as the opening event, followed by complaint verification on 12.01.2018 and authorization of enquiry on 06.03.2018 and then by an investigation authorized on 06.12.2018, which summary also reiterated the above, by stating that it was "in pursuance of the complaints received from the public at large that an investigation was authorized on 06.12.2018". Whereas on the other hand, the investigation report dated 20.05.2019 (pages 14 to 31, CMA 2174/2020) states that it was as a result of investigation conducted against the accused persons that NAB came to know that "members of public at large were looted in a mechanical and systematic fashion, therefore, NAB Lahore published advertisement in daily newspapers and uploaded application forms on website of NAB to facilitate the general public for submission of their claims without visiting the NAB's office", and that it was in response to the above notice that 96 complaints/claims were received against the company alleging that the complainants, who paid for the plots in Paragon City were neither given possession of the plots, nor are their amounts being refunded. So it is really not known as to what in fact prompted the NAB into action in this case. Furthermore, there is a serious inconsistency

between what is said about those complaints in the reference and that stated in the investigation report, according to which report the complaints did not simply allege denial of possession and/or non-refund of the amounts but, that "the accused persons illegally and arbitrarily cancelled the plots of public and changed their location from front block to tale blocks and misappropriated the same". Neither were any copies of the many purported claims/complaints, placed, nor were any details thereof submitted before us. It is also not claimed that any of the complainants filed any complaint/claim before any appropriate relevant authority earlier or filed any suit/proceedings, challenging the alleged cancellation and/or non-delivery of possession, and/or change of location and misappropriation. No correspondence by any of the purported complainant/claimant has been referred to. Although as per the investigation report the issue "is lurking since 3 to 13 years". NAB has, therefore, not been able to demonstrate and explain the real nature of the disputes or the issues that arose between the company and the purported claimants, and has failed to explain, as to whether the conduct of the management of the company in the matter would attract the provisions of

NAO, to enable the NAB to even initiate an enquiry in that regard. In any event, as discussed in detail earlier, NAB having miserably failed to establish any control of the petitioners over the management of the company despite all their endeavours, so far, and they having not even claimed that any of the complainants/claimants alleged any role or concern of the petitioners in the alleged non-delivery of possession of their claimed plots and/or non-refund of their money paid for the said plots. It is intriguing as to how the names of the petitioners cropped up in the episode and as to how they came into picture. It is also crucial to note that in none of the so many call up notices sent by NAB to the Petitioners during a long period of March 2018 to October 2018, was there the slightest mention of any allotment of land, or any plot /property in Paragon City to any member of public, though as per the investigation report, the triggering issue and the gist of the allegations is "non-delivery of possession of plots in Paragon City, however, it was not even put to the petitioners that any complaint in this regard has been received by the NAB.

36. The position that emerges from the facts and circumstances of the case narrated and the material placed before us, is that it remains a mystery as to what

prompted the NAB into action in this case. It seems that except for what QAB may have allegedly told the NAB after his arrest on 14.11.2018, there was absolutely no word or material attributing to the petitioners any control over the affairs/management of the company. In fact, as noted earlier, the Chairman in his order dated 05.12.2018, whilst tendering pardon to QAB, clearly acknowledged that no evidence against the petitioners was available with the NAB. Yet, the NAB embarked upon a roving inquiry against the Petitioners, as early as in March 2018, call up notice dated 20.03.2018 being the first in the series placed before us, and as noted earlier absolutely, no question was put to the Petitioners in relation to the allotment / sale of any plot/property by the company to its customers. The pattern of the questions put to the Petitioners, their vagueness, frivolity and irrelevance would show that the NAB had no inkling in the matter. NAB could not even build upon information and record provided by the Petitioners in response to their queries, and also did not find any lacuna, fault, inaccuracy, inconsistency or inadequacy in such information. They also could not raise any formidable objection regarding the conduct of the Petitioners in the matter. In none of the call up notices,

far from any infraction that could fall within the mischief of Section 9 or of any other provision of NAO, 1999, could the NAB allege any impropriety regarding the conduct or affairs of the petitioners in the matter. In any event, all those allegations which are specific to the Petitioners relate to business/commercial transactions between private individuals/entities, nature and consequence whereof have absolutely no adverse bearing on any public or governmental interest. Even purely civil dispute of financial/commercial nature between the company and private individual, pending before the civil courts, are made the subject matter of the reference, portraying those, as cases of illegal occupation of lands.

37. This country has been achieved through the enormous sacrifices and relentless struggle of our forefathers, with a will, a clear vision, and a conviction for an independent democratic state, "wherein the principle of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed" and "wherein the State shall exercise its powers and authority through the chosen representative of the people", as a sacred trust, "wherein shall be guaranteed fundamental rights including equality of status, of opportunity and before law, social, economic

and political justice, and freedom of thought, expression, belief, faith, worship and association”, “wherein, independence of judiciary shall be fully secured”. “So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity”. The above vision, conviction and commitment find expression in the shape of the preamble to the Constitution of the Islamic Republic of Pakistan, 1973 (“the Constitution”), the constitution, that we achieved through unremitting struggle of the people of this country, after years of the disillusionment and failures, has provided to us a complete scheme and an immaculate and robust mechanism for realizing the above dream and to translate the vision and aspirations of our founding fathers and the toiling millions of this country.

38. Through its Article 4 the Constitution declared that to enjoy the protection of law, and to be treated in accordance with law is the inalienable right of every citizen, and that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. And in terms of Article 5

declared obedience to the Constitution and law to be inviolable obligation of every citizen. Article 9 of the Constitution guarantees that no person shall be deprived of life or liberty save in accordance with law. The dignity of man has been protected as an inviolable right. Equality of all citizens before the law, and their entitlement to equal protection of law has been guaranteed through article 25.

39. The Courts in Pakistan have jealously protected the fundamental rights conferred by the constitution. In the case of *Pakistan Broadcasters Association* **PLD 2016 SC 692**, the Court reiterated the oft repeated constitutional principle as follows:-

"Undoubtedly no one can be deprived of his fundamental rights. Such rights being incapable of being divested or abridged. The legislative powers conferred on the State functionaries can be exercised only to regulate these rights through reasonable restrictions and that too as may be mandated by law and not otherwise. The authority wielding statutory powers conferred on it must act reasonably (emphasis supplied) and within the scope of the powers so conferred."

40. In the case of *District Bar Association*, reported as **PLD 2015 SC 401**, a bench consisting of the Full Court

pronounced that Prominent characteristics, which defined the Constitution and were its Salient Features included Democracy, Federalism, Parliamentary Form of Government blended with the Islamic Provisions, Independence of Judiciary, Fundamental rights, Equality, Justice and Fair Play, Protection and preservation of the rights of minorities, both as equal citizens of Pakistan and as minorities etc.

In *Watan Party Case*, reported as **PLD 2011 SC 997** this Court cited with approval, its earlier pronouncement in the case of *Eli Lilly Pakistan 2009 SCMR 127* which reads:-

"It is the duty and obligation of the State on account of the various provisions of the Constitution to provide the atmosphere based on honesty by providing equal protection of law. Every citizen must be treated equally, dignity of human being life should be maintained, and liberty of life and honour must be guaranteed as envisaged in the Articles 9, 14 and 25 of the "Constitution."

41. The significance of protecting liberty has also been highlighted by this Court in the case of *Federation of Pakistan and others vs. Shaukat Ali Mian PLD 1999 SC 1026* in the following words:-

"The perusal of the above quoted Article indicates that every citizen and every other person for the time being in Pakistan is guaranteed as his inalienable right to enjoy the protection of law and to be treated in accordance with law wherever he may be and in particular no action detrimental to the life, liberty, body, reputation or property of any person can be taken except in accordance with law."

42. The liberty and dignity of man have always remained sacrosanct and have been placed atop the fundamental/human rights pedestal. Islam has conferred upon human beings the highest level of dignity amongst all of Allah's creation and secured and protected for them complete liberty within the prescribed limits.

43. It was way back in the year 1212 that the Magna Carta impregnably secured the liberty, freedom, property and customs, for the people, and protected them from being banished or ruined, in the following words:-

"No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgement of his peers or by the law of the land. To no-one will we sell or deny or delay right or justice."

Whereas, Article (9) (1) of the International Covenant on Civil and Political Rights declared:

"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".

Similarly, Article 9 of the Universal Declaration of Human Rights provides:-

"No one shall be subjected to arbitrary arrest, detention or exile".

44. The renowned English Philosopher John Locke in his central philosophy believes in a government that provides, what he claims to be basic and natural given rights for its citizens, being the right to life, liberty, and property.

45. Ronald Dworkin has coined the term 'rights as trumps' which posits that rights should, generally, trump other interests. While this is not to say that an individual's fundamental rights may never be curtailed, it means that rights are not merely aspirations that may be trumped at the altar of expediency. Rather, that rights represent the contract between a State and its citizens and that rights may not be curtailed **arbitrarily**.

46. XXIV Amendment to the Constitution of the United States, places a restraint on enforcing any law which may abridge the privileges or immunities of the citizens of that country, or deprive them of life, liberty, or property, without due process of law, or deny to them equality or protection of laws in the following words:-

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person, of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

In the words of an Indian Supreme Court Judge:-

"Life and personal liberty are the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilized society."

Chambers' Twentieth Century Dictionary defines "liberty" as "Freedom to do as one pleases, the unrestrained employment of natural rights, power of free chance, privileges, exemption, relaxation of restraint, the bounds within which certain privileges are enjoyed, freedom of speech and action beyond ordinary civility...."

Dicey in his treatise on Constitutional Law observed that, "Personal liberty, as understood in England, means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification..."

Eminent English Judge Lord Alfred Denning expounded the concept of liberty in the following words:

"By personal freedom I mean freedom of every law abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasion without hindrance from any person... It must be matched, of course, with social security by which I mean the peace and good order of the community in which we live..."

The concept has been textualized in *Siddharam Satlingappa Mhetre AIR 2011 SC 312* as follows-

"Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. This is why "liberty" is called the very quintessence of a civilized existence..."

47. Unfortunately, however, even after 72 years since the creation of our country, and despite 47 years since the adoption of the Constitution, we have not been able

to realize the spirit and essence of the ideals set out therein. To the contrary, we have even failed to adhere to some of its most basic commands and prescriptions. The people of this country are frequently denied their constitutionally guaranteed rights. Principles of equality, fairness, tolerance and respect for democratic norms are flouted with impunity. Dogmatism, intolerance, nepotism, cronyism, incompetence, regression, deception, false pretence, self-projection, misplaced sense of superiority, different biases, and prejudices, and corruption have seeped into our society and have now inundated it. Efforts, whenever made for the supremacy of the constitution, and the rule of law have been thwarted with full force. The principle of trichotomy of power and the concept of devolution have been trampled with contempt. Arrogance, self-righteousness and apathy are ruling the roost. We have come to this unfortunate pass, in most part, because of the repeated direct unconstitutional interventions, and manipulations by undemocratic forces. Lust of power, desire to capture, and rule, and pursuit of self-aggrandization, have resulted in violation of the prescribed jurisdictional limits and ceding of political space in governance. Aggravating this is the denial of grass root representation of the

people in the local government, which again is against our constitutional ethos, and violates the true essence and spirit of democracy. Public welfare and poverty alleviation are at the lowest rung of our priorities. The wide spread suppression of dissent is another anathema to our democracy. An egalitarian order remains a distant dream.

اب تلک تو دیکھنا پائے، دیکھنا ہم جو چاہتے تھے

48. The present case is a classic example of trampling fundamental rights, unlawful deprivation of freedom, and liberty and the complete disregard for human dignity as guaranteed by the Constitution. NAB's conduct throughout this case is a clear manifestation of their utter disregard for law, fair play, equity and propriety. Indeed, curbing loot, plunder and combating corruption is a noble cause. Nonetheless, the means, process and mechanism employed therefor should be within the parameters as prescribed and mandated by the law and not in derogation thereof.

49. As per the preamble of the National Accountability Ordinance, 1999 ("NAO") the bureau has been set up to eradicate corruption and corrupt practices and hold

accountable all those persons, accused of such practices and matters ancillary thereto.

50. Section 22 of NAO confers jurisdiction on the Chairman NAB ("Chairman"), and grants him power to inquire into and investigate any suspected offence which appears to him **on reasonable grounds** to be an offence under the ordinance, whereas, clause (n) of Section 5 of NAO defines "offence", as the offence of corruption and corrupt practices and other offences as defined in the said ordinance, including those as specified in the schedule thereto.

51. Section 9 of NAO, through its 12 sub clauses describes various instances of corruption and corrupt practices.

52. Section 17 of NAO, provides that the provisions of the Code of Criminal Procedure, 1898, shall, except those which may be inconsistent with any provision of the NAO, shall mutatis mutandis, apply to the proceedings under the NAO.

53. In terms of Section 18 (c) proceedings under NAO against any person can be initiated where the Chairman or any officer authorized by him, **forms an opinion** that

so is necessary, and where they find it appropriate to initiate proceedings against any person, they shall refer the matter for inquiry or investigation.

54. Section 24 of NAO prescribes that reference submitted to the Court shall contain the substance of the offence alleged to have been committed by the accused.

55. The schedule referred to in Section 9 of NAO through its Item 3 prescribes rigorous imprisonment upto 10 years for an investigator of the NAB for giving false information or fabricating false evidence during inquiry into or investigation of an offence by the NAB.

56. As discussed in detail earlier, the basis on which Chairman NAB decided to proceed in the matter remain unknown. If the purported complaints were the basis, it is not shown as to what exactly was alleged therein, and what information and material was placed before the NAB for it to decide that the nature and conduct of the management of the company fell within the ambit of Section 9 of NAO. Secondly, there was absolutely nothing before the NAB connecting the petitioners with the company so as to hold them responsible for any misconduct, malfeasance and misfeasance of the

company, and to prompt NAB to initiate an inquiry or investigation against them.

57. The reference contains five (5) different allegations against the company: the first being of operating the scheme and proceedings with the subject project without permission from the LDA, the second being of obtaining approval from the TMA on the basis of forged documents, the third is of merging state /shaamlat lands into Paragon City, and selling away the same, the fourth is of cheating members of the public at large, and the fifth and the last is of occupying lands of two private individuals. Not a single question regarding any of the above, was put to the petitioners by the NAB, though they interrogated the petitioners for long durations several times, and sent them many call up notices, commencing at least from March 2018 and continuing earliest upto October 2018.

58. The queries raised through the call up notices by the NAB to the petitioners, in relation to the company were only in respect of certain payments that they received from the company and regarding certain land transaction between them and the company. For the sake of clarity, we may observe here that certain queries were also raised by NAB regarding the payment the petitioners

received from the Executive builder, whom they dubbed as a proxy of the company. As noted by us earlier, NAB has not been able to show any illegality in the aforesaid transactions and or that the petitioners have dishonestly and unlawfully enriched themselves by way of the same. In any event, as observed earlier, the transactions exclusively being between private individuals/entities and the same have had no adverse bearing on any public or governmental interest, neither was it the cause of the alleged non delivery of plots and or the non-refund of the payment to the purported complainant customers of the company, are wholly irrelevant and inconsequential, and could not provide any cause to the NAB, to initiate any proceeding in that regard.

59. We have already observed that the dispute between the two individuals namely, Shahid Butt and Haji Muhammad Rafiq and the company, which have been portrayed as illegal occupation of their lands by the company, through accused No.1 and the Petitioner/accused No.3, were purely of a civil and commercial nature. These disputes were/are pending before the civil court, also could not have justifiably been made part of the Reference.

60. Prima facie there seems no reasonable ground to believe that the petitioners are or have been involved in the commission of any offence triable under the NAO, so that they could have been labelled or treated as "accused" within the meaning of Section 5(a) of NAO.

61. NAB, as yet, has not been able to connect the Petitioners either as members, partners or directors of the company and/or even, for that they promoted, established or operated the same.

62. NAB so far has also not been able to show that the conduct of the Petitioners as has emerged before us in relation to the company constitute any offence within the meaning of Section 9 of NAO.

63. The object, purpose and reason behind the initiation of the purported inquiry and investigation and the arrest of the accused and keeping them incarcerated for a long period of fifteen months, prima facie do not appear to be in consonance with, and/or in conformity with the NAO.

64. The Constitution requires our state to ensure that its citizen and all those living therein, are not deprived of their constitutionally guaranteed rights and that their dignity, honour, liberty, freedom and property, is fully

secured and protected. It also commands the state to promote and ensure a just and fair democratic dispensation, as prescribed thereby, without any tampering or perversion. Undoubtedly, preventing and fighting graft and corruption is also an important obligation/function of the state, but unfortunately the manner in which this objective has been pursued, particularly over the political spectrum, is a sad affair. Almost right from our very inception we have had one law after the other, though at times with some gaps, providing for debarring or disqualifying our politician/holder of public offices, and/or putting them on trial. The first in the series was the "Public and Representative Offices (Disqualification) Act, 1949 (PRODA) was passed by the Legislature which became effective from 15th August, 1947. This Act provided for debarring from public life for a suitable period of persons judicially found guilty of misconduct in any public office. It was repealed on 21st September, 1954. On 7th August, 1958 while the country was under the Martial Law, Elective Bodies (Disqualification) Order, 1959 (EBDO) was promulgated which remained enforced only until 31st December, 1960 (EBDO provided for disqualifications of certain categories of persons from being a member or a

candidate for the membership of any elective body until 31st December, 1966. On 9th January, 1977, Holders of Representative Offices (Prevention of Misconduct) Act IV of 1976 and Parliament and Provincial Assemblies (Disqualification from Membership) Act V of 1976 were passed which provided for trial of offences of misconduct of holders of public offices. On 13th November, 1977 Holders of Representative Offices (Punishment for Misconduct) Order (President's Post Proclamation) Order No.16 of 1977 (P.P.P.O. 16) and Parliament and Provincial Assemblies (Disqualification for Membership) Order (President's Post Proclamation Order 17 of 1977 (P.P.P.O. 17) were promulgated. P.P.P.Os. 16 and 17 of 1977, however, did not repeal Holders of Representative Offices (Prevention of Misconduct) Act, 1976 and Parliament and provincial Assemblies (Disqualification for Membership) Act, 1976 with the result from 13-11-1977 onwards we had on the Statue Books Act IV of 1976, Act V of 1976, P.P.P.O. 16 of 1977 and P.P.P.O. 17 of 1977, all dealing with punishment for misconduct and disqualification of the holders of public offices. Holders of Representative Offices (Prevention of Misconduct) Act, 1976 and Parliament and Provincial Assemblies (Disqualification for Membership) Act, 1976 were finally

repealed by Parliament and Provincial Assemblies (Disqualification for Membership) (Amendment) Act, 1991 which was assented to by the President on 28-4-1991. P.P.P.O. 16 of 1977 was amended through P.P.P.O. 5 of 1978 dated 17-1-1978 and President's Order 1 of 1981. Similarly, P.P.P.O. 17 was also amended by Ordinance IX of 1990 dated 15-10-1990 and Act VII of 1991 dated 28-4-1991.

65. On 18th November, 1996, Ehtesab Ordinance CXI of 1996 was promulgated which repealed P.P.P.O 16 and P.P.P.O 17 of 1997, Ordinance CXI was amended by Ordinance CXXIII of 1996, Ordinance VII of 1997 and Ordinance XI of 1997. Ordinance CXI amended as aforesaid was repealed and replaced by Ordinance XX of 1997. Ordinance XX was repealed by Act IX of 1997. Act IX of 1997 was amended through Ordinance II of 1998 on 4th February, 1998 but this Ordinance stood repealed on 3rd June, 1998 as it was not passed by the Parliament."

66. Rather than doing any good to the country or our body politic and cleansing the fountainheads of governance, these laws and the manner in which they were enforced, caused further degeneration and created chaos, since the same were framed and applied with an oblique motive of arm twisting and pressurizing political

opponents into submission, subjugation and compliance, or remove them from the electoral scene at least temporarily. These laws were successfully employed as tools to change political loyalties, for splintering and fracturing political parties. Pygmies were selected, nurtured, promoted, and brought to prominence and power. People with notorious backgrounds and criminal credentials were thrust to rule us in various capacities with predictable results. Similarly, those, who caused death, destruction and mayhem in our society were trained, financed, protected, promoted and eulogized, thus, turning them into Frankensteins. Meanwhile corruption, misconduct and malpractice in governance kept growing at exponential rates and became all pervading. None of the state institutions whichsoever remained free from this morass.

67. The NAO was promulgated by the Military regime of General Pervaiz Musharaf on 16.11.1999, repealing the previously enacted Ehtesab Act, 1997. The NAB Ordinance from its very inception became increasingly controversial, its image has come under cloud and there is a wide spread perception of it being employed as a tool for oppression and victimization of political opponents by those in power. It is frequently alleged that the Bureau is

being flagrantly used for political engineering. Discriminatory approach of NAB also is affecting its image and has shaken the faith of the people in its credibility and impartiality. The bureau seems reluctant in proceeding against people on one side of the political divide even in respect of financial scams of massive proportion while those on the other side are being arrested and incarcerated for months and years without providing any sufficient cause even when the law mandates investigations to be concluded expeditiously and trial to be concluded within 30 days. Nonetheless, investigation is often not concluded for months and cases remain pending for years. It is because of lack of professionalism, expertise and sincerity of cause that the conviction rate in NAB cases is abysmally low. The above is certainly not serving the national interest, rather causing irretrievable harm to the country, nation and society in multiple ways. It was in view of the above distressful situation that the former Chief Justice Asif Saeed Khan Khosa, speaking for this Court during the opening ceremony of the Judicial Year 2019-20 observed as follows:-

*"We as a relevant Organ of the State also feel that the growing perception that the **process of***

accountability being pursued in the country at present is lopsided and is a part of political engineering is a dangerous perception and some remedial steps need to be taken urgently so that the process does not lose credibility. Recovery of stolen wealth of the citizenry is a noble cause and it must be legitimately and legally pursued where it is due but if in the process the constitutional and legal morality of the society and the recognized standards of fairness and impartiality are compromised then retrieval of the lost constitutional and legal morality may pose an even bigger challenge to the society at large in the days to come”.

68. It is in the context of such highhandedness and brazen disregard for human dignity that the Bureau has attracted ignominy and notoriety beyond our frontiers too. In a recent review, the European Commission also highlighted NAB’s partisan conduct and urged the government to give it more autonomy so as to allow it to function independently. The Commission observed that there was a serious deterioration of freedom in Pakistan, thus, raising concerns about the NAB’s role as a tool to muzzle dissent.

69. It is the duty and obligation of the State to ensure that the Constitution reigns supreme and the rule of law

is all pervading so as to create an environment conducive to the expression of diverse ideas. The State is obliged to ensure that every citizen is treated equally and that his life, dignity, honour and property is fully secured.

70. This Court in the case of *Ismaeel Vs. The State (2010 SCMR 27)* observed as follows:

“Our Constitution is based on the concept of welfare State wherein the principle of democracy, freedom, equality tolerance and social justice as enunciated by Islam, should fully be observed. The mandate of the Constitution envisages that every person has to obey the Constitution as it demands loyalty and obedience. Constitution is a social binding contract between the State and the people. Every organ of the State should act within its parameters as defined by the Constitution without meddling into the matters of the other organs. Media who acts as a fourth and equally important pillar of the State, needs to highlight the character of the Founder of Pakistan so that people can adopt his teachings to get rid of evils like greed and lust and toil for the welfare of the State and people of Pakistan”.

71. In exercising its power and authority, NAB should not lose sight of the well-entrenched legal principle that no power conferred upon executive or public authority is

unfettered. Every executive act has to be founded in law and has to be exercised as prescribed thereby, particularly, where the exercise of such power, tends to intrude into the constitutionally guaranteed rights. This is even more pertinent when such action violates the liberty of a person, or is likely to hurt his honour, and dignity. The bureau should remain mindful of the fact that the power to arrest, as conferred by Section 18 (e) read with Section 24 of the NAO, is always subject to review by the constitutional courts on the ground of fairness, proportionality, reasonableness, and necessity. It hardly needs any emphasis that all powers in a democratic state governed under a Constitution, are to be exercised justly, fairly and for the public good only. No authority or state institution, howsoever mighty can unlawfully curtail the rights guaranteed by the Constitution.

72. Arrest of any person is a grave matter. Capricious exercise of the power to arrest has deleterious consequences, thus highlighting the need to exercise it with care, caution and sensitivity. Arrest of a person has to be justified not only by referring to prima facie evidence and adequate actionable material sufficiently connecting the person with the offence/crime complained

of, but also by showing that in the given circumstances, there were no other less intrusive or restrictive means available. The power of arrest should not be deployed as a tool of oppression and harassment.

73. This Court, after exhaustively examining the provisions of Cr.P.C. in the case titled "*Muhammad Bashir v. Station House Officer, Okara*" [PLD 2007 SC 539] held that arrest of an accused by a police officer would not be justified on the sole ground that an FIR was registered and because the latter was nominated therein. There must be sufficient incriminating material to justify deprivation of liberty. The august Supreme Court has explicitly declared arbitrary exercise of power to arrest as 'abuse of authority'. The above view was recently reaffirmed by a larger Bench of the august Supreme Court in the case titled "*Mst. Sughran v. The State*" [PLD 2018 SC 595] by observing;

"Ordinarily no person is to be arrested straightaway only because he has been nominated as an accused person in an FIR or in any other version of the incident brought to the notice of the investigating officer by any person until the investigating officer feels satisfied that sufficient justification exists for his arrest and for such justification he is to be guided by the

relevant provisions of the Code of Criminal Procedure, 1898 and the Police Rules, 1934. According to the relevant provisions of the said Code and the Rules a suspect is not to be arrested straightaway or as a matter of course and, unless the situation on the ground so warrants, the arrest is to be deferred till such time that sufficient material or evidence becomes available on the record of investigation prima facie satisfying the investigating officer regarding correctness of the allegations levelled against such suspect or regarding his involvement in the crime in issue."

74. In a judgment of the House of Lords titled "*Liversidge v. Anderson*" reported as **[1941] 3 All E.R 338**, Lord Atkin, in the context of an action for false imprisonment, has highlighted the importance of liberty as follows. -

"The plaintiff's right to particulars, however, is based upon a much broader ground, and on a principle which again is one of the pillars of liberty, in that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act. The only exception is in respect of imprisonment ordered by a judge, who from the nature of his office cannot be sued, and the validity of whose judicial decisions cannot, in such proceedings as the present, be questioned."

75. While dealing with the cases pertaining to the liberty of a person, we should not lose sight of a fundamental principle of criminal jurisprudence that a person is presumed to be innocent until proven guilty. This principle stems from a general rule that burden of proof in a criminal case is on the prosecution to establish the guilt of an accused beyond reasonable doubt. The justification for the above principle is that the outcome a wrongful conviction is far worse than that of a wrongful acquittal. We should also remain mindful of the fact that the public interest in ensuring that no innocent person is incarcerated, subject to humiliation and convicted, greatly overwhelms the public interest in securing conviction of the guilty. Thus, the concept of the presumption of innocence is imperative, not only to protect an accused on trial, but to secure and maintain public confidence in the fairness, impartiality, integrity and security of the criminal justice system.

76. In the case of *Rajiv Singh v. The State of Bihar & Another*, decided on **16 December, 2015** the **Supreme Court of India** dilated upon the above theme as follows: -

“In his treatise, The Law of Evidence, Professor Ian Dennis while dwelling on the theme of allocation of burden in criminal cases, elaborated on the significance and purport of presumption of innocence and the general rule of the burden of proof. While reiterating the fundamental notion of criminal jurisprudence, that a person is presumed to be innocent until proven guilty and that the burden of proof in a criminal case is on the prosecution to establish the guilt of accused beyond reasonable doubt, the author underlined that the acknowledged justification of such presumption is that the outcome of a wrong conviction is regarded as a significantly worse harm than wrongful acquittal.

Viewed from the moral and political perspectives, it has been observed that in liberal states, the rule about the burden of proof has been elevated to the status of fundamental human right encompassing the assurance of liberty, dignity and privacy of the individual and from this standpoint it is essential that the state should justify fully its invasion of the individuals interest by proving that he had committed an offence, thereby abusing the freedom of action accorded to him or her by the liberal state. The significance of such presumption finds insightful expression in the following extract of State vs. Coetzee [1997] 2 L.R.C. 593, South African Constitutional Court

in the words of Sachs, J.: There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences massively outweighs the public interest in ensuring that a particular criminal is brought to book. Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in

the most trivial of cases. The quintessence of the philosophy embedded in the above extract is that the presumption of innocence serves not only to protect a particular individual on trial but to maintain public confidence in the enduring integrity and security of the legal system."

77. There is only one fundamental right in the Constitution of 1973, which is unconditional, inviolable and cannot be circumscribed under any circumstances. This is the dignity of man and one of the grave consequences of pre-arrest confinement, is the humiliation and disgrace resulting from such arrest, for not only the accused but also his family and persons attached to him. Arrest causes irreparable harm to a person's reputation and standing in society, often subjecting him to hate, vitriol, and infamy. In today's age of a robust print and electronic media, arresting an accused and levelling allegations against him gives rise to a vicious campaign of whispers and murmurs where the accused and his family are subjected to humiliation, embarrassment, and agony. It, thus, irrevocably jeopardises a person's dignity, subjecting him to physical and psychological repercussions concomitant with life in prison. Often a person in custody loses his job and is

also prevented from preparing his defence. The burden of his detention frequently falls heavily on the innocent members of his family. More often than not people do not differentiate between arrest before conviction and that after conviction. This sentiment was also shared by the Indian Supreme Court in the case of **Arnesh Kumar v. State of Bihar and another (AIR 2014 SC 2756 at 2758)** where it observed that:

“Arrest brings humiliation, curtails freedom and cast scars forever. Law makers know it so also the police. There is a battle between the law makers and the police and it seems that police has not learnt its lesson; the lesson implicit and embodied in the Cr.PC. It has not come out of its colonial image despite six decades of independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive.

Law Commissions, Police Commissions and this Court in a large number of judgments emphasized the need to maintain a balance between individual liberty and societal order while exercising the power of arrest. Police officers make arrest as they believe that they possess the power to do so. As the arrest curtails freedom, brings humiliation and casts scars forever, we feel differently. We believe that no arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from power to arrest, the police officers must be able to justify the reasons thereof. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation..."

78. The Indian Supreme Court also had the occasion to dilate upon this aspect in *Moti Ram and Ors. V. State of Madhya Pradesh (AIR 1978 SC 1594)* where it held:

“The consequences of pre-trial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family”.

79. In the case of *Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors* (**AIR 2011 SC 312 at 330**)

it was observed as follows:

“A great ignominy, humiliation and disgrace is attached to the arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage.”

80. While dealing with the question of whether or not bail is to be granted to an accused, it has to be kept in mind that the object of bail is to secure the attendance of the accused at the trial. The object is neither punitive nor preventive. Imprisonment of a person and deprivation of

his liberty, cannot be described other than, being a punishment, unless no less restrictive alternative is available to ensure that the accused will stand his trial when called upon to do so. All civilized societies recognise the principle that punishment comes only after conviction, and the presumption of innocence subsist with the accused, till he is handed down punishment after trial. It hardly needs any reiteration that the detention either pre-trial or during trial causes great hardship.

81. In the case of *Sanja Chandra v. Central Bureau of Investigation* (**AIR 2012 SC 830 at 837-838**) the Court has dilated upon the issue as follows:

"In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at this trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earliest times, it was appreciated that detention

in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."

82. It hardly needs any mention that the constitutional jurisdiction has been conferred on the High Court to advance the cause of justice and not to frustrate or defeat the intent of law. In the case of *National Accountability*

Bureau through Chairman Vs. Murad Arshad and others (PLD 2019 SC 250), this Court has cited with approval the above as expressed in the case of *Hema Misra* as follows:-

“the Constitution has to be exercised with circumspection and caution as extraordinary jurisdiction is invoked and exercised to advance the cause of justice and not to frustrate it or to defeat the intent of law. The jurisdiction under Article, 199 of the Constitution, 1973 are therefore to be exercised to prevent miscarriage of justice and abuse of NAO, 1999”.

83. As observed in the case of *Ismail Vs. The State* (2010 SCMR 27), the interest of this country can only be secured and served when the executive and judicial machinery, while performing their functions and exercising their duties adhere to law. The state organs should remain particularly sensitive towards the mandate of the constitution and the prescription of law, when it comes to fundamental rights. Under no circumstances should the courts, thus, condone highhandedness or look the other way as the State deprive citizens of their liberty in derogation of the law and the Constitution.

84. In matters where curtailment of liberty is in issue, judges should apply their mind, fully realizing the sensitivity of the matter and should not allow the authorities to treat constitutional guarantees flippantly. It may here be beneficial to refer to the case of *Zaigham Ashraf Vs. The State* (**2016 SCMR 18**), where this Court has made the following observation:-

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

85. In the case of *Federation of Pakistan Vs. Ibrahim Textile Mills Ltd and others* (**1992 SCMR 1898**), it has been held as under:-

“As regards his contention that discretionary relief should not have been granted to the respondents by the High Court, it needs be said that discretion is not desire of the Judge but regulated by law. Discretion comes into play to choose one of the two or more alternatives, all of which are lawful. It is not proper exercise of discretion to refuse relief to a party to which it is entitled under law.”

86. In cases where the question of liberty and dignity of an individual is involved, strict scrutiny of the prosecution's case is required by the courts, as in the words of John Marshall the great Chief Justice of the US Supreme Court “we should never forget that it is a *Constitution* we are expounding (*McCulloch v. Maryland*, **17 U.S. 4 Wheat. 316 (1819)**)”.

87. In the case of *Tariq Bashir Vs. The State* (**PLD 1995 SC 34**), it has been held as under: -

“As regards the first category of offences (punishable with death, or imprisonment for life, or with ten years' imprisonment) the provisions of section 497(1) are not punitive in nature. There is no concept of punishment before judgment in the criminal law of the land. The question of grant/refusal of bail is to be determined judiciously having regard to the facts and circumstances of each case. Where the prosecution satisfies the Court, that there are

reasonable grounds to believe that the accused has committed the crime falling in the first category the Court must refuse bail. On the other hand where the accused satisfies the Court that there are not reasonable grounds to believe that he is guilty of such offence, then the Court must release him on' bail. For arriving at the conclusion as to whether or not there are reasonable, grounds to believe that the accused is guilty of offence punishable with death, imprisonment for life or with ten years' imprisonment, the Court will not conduct a preliminary trial/inquiry but will only make tentative assessment, i.e. will look at the material collected by the police for and against the accused and be prima facie satisfied that some tangible evidence can be offered which, if left unrebutted, may lead to the inference of guilt. Deeper appreciation of the, evidence and circumstances appearing in the case is neither desirable nor permissible at bail stage. So, the Court will not minutely examine the merits of the case or plea of defence at that stage.

88. Courts while dealing with the grant of bail and the justifiable exercise of power of arrest have to maintain a balance between two fundamental but conflicting demands of personal liberty of the accused on one hand and the investigational right of the police on the other hand. Or between Individual rights versus societal interests. This balancing act has been described in the

case of *Vaman Narain Ghiya v. State of Rajasthan* ((2009) 2 SCC 281 at 287) in the following terms:

*“Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on the one hand the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz. the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restraint, the more restraint on others to keep off from us, the more liberty we have. (See *A.K. Gopalan v. State of Madras*)”*

89. In the words of Aharon Barak the constitutional rights of a person can only be curtailed when there exists a proper purpose, a rational connection and necessary

means, and further that proper relation between the benefit gained by realizing the proper purpose, and the harm caused to the constitutional right. According to Barak this principle of proportionality is applied to achieve a balance between the benefit gained and the resultant prejudice that is caused to the rights.

90. Thus, any deprivation of liberty or curtailment of rights guaranteed by the constitution has to be adequately justified on the touchstone of the principle of proportionality, unreasonableness and necessity. The limitation must be for proper purpose rational and necessary and the prejudice caused to the constitutional rights thereby must be proportional to the benefit achieved. In the case of '*R. v. Oakes*' [(1986) 1 S.C.R. 103] the Supreme Court of Canada has elucidated the principle as follows;

"To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R. v. Big M Drug Mart Ltd., supra, at p. 352. The

standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R. v. Big M Drug Mart Ltd., supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd., supra, at p. 352. Third, there must be a proportionality between the

effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

91. Discretion has been granted to the constitutional courts in order to widen the scope of their power and competence, albeit within the prescribed parameters. The constitutional courts are the guardian of the constitution, and thus required to ensure that the executive refrain from violating the constitutional mandate, and to stop such violation when it occurs. The Court has to review the executive actions and the conduct of the public authorities on the touchstone of fairness, reasonableness and proportionality. They should not hesitate in performing their constitutional duty objectively, particularly, when it comes to the matter of rights that have been guaranteed by the constitution, we should remain mindful of the sensitivity of such issues, as unless the constitutionally guaranteed rights protections and privileges are respected and safeguarded the situation shall inevitably degenerate into chaos and anarchy. People wielding power should not lose sight of the fact that the constitutionally guaranteed rights have

been obtained and secured by the people of this country through a social contract in the shape of the constitution.

92. Before parting, it is worth recalling Antonio Gramsci's exhortation to civil society to be intellectually pessimistic but with a will that is optimistic. Legal protections, however sacrosanct, are inadequate to preserve liberties in a society that values outcomes over due process and is happy to sacrifice procedural safeguards at the altar of expediency. Until we value the ideals of democracy and liberty, we shall forever remain shackled not only deprived of the rights afforded to us by the Constitution but also unable to gain our rightful place in the comity of nations. As Thucydides wisely proclaimed "the strong will continue to do what they can and the weak shall continue to suffer what they must." Our salvation, thus, lies not in suppressing ideas we disagree with but in demanding freedom of thought, conscience, and expression for those whom we most vociferously disagree with. Until we create a culture of transparency, liberty, civility, and democratic values, our desire for peace and order shall continue to elude us. To borrow from Habib Jalib:

ظلم رہے اور امن بھی ہو
کیا ممکن ہے تم ہی کہو

93. In the end, we may observe that the observations hereinabove are merely tentative in nature and shall have no bearing on the outcome of the reference.

Above are the reasons for our short order dated 17.03.2020.

Judge

Judge

Islamabad the
17th March 2020

Approved for reporting