

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Writ Petition No.2624-P/2016

Date of hearing:- 15.02.2017

Petitioner(s):- Arshad Khan by Qazi Muhammad Anwar and
Barrister Waqar.

Respondent (s):-Chairman National Accountability Bureau (NAB)
etc by Mr. Umar Farooq, ADPG.

ORDER

ROOH-UL-AMIN KHAN, J:- By invoking the constitutional jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, **(Constitution)**, accused-petitioner Arshad Khan Ex-Director General FATA Disaster Management Authority (FDMA), who is behind the bars since 02.04.2015 in NAB Reference for corruption and corrupt practices under section 9 (a) National Accountability Ordinance, 1999 **(Ordinance)** and schedule thereto and whose plea for bail on merit has already been turned down by this Court vide order dated 17.06.2015 in W.P. No.1442-P/2015, seeks his release on bail on fresh ground of delay in conclusion of his trial. Allegations against him are that he being the Director General (FDMA), in connivance with crony accused by misusing his authority, engineered/processed/ gave approval and forwarded fake and bogus claims of 161 persons and thereby misappropriated/ embezzled colossal

loss of Rs.59600000/- to FDMA rehabilitation grants which was to be distributed as compensation amongst affectees for the damage caused to their houses due to security operations in Mohmand Agency.

2. Learned counsel for the petitioner argued that petitioner is languishing in Jail since his arrest on 02.04.2015 till date, but in spite of mandate of section 16-A of the Ordinance, 1999, his trial has not been concluded so far; that after dismissal of his plea for bail on merits by this Court vide order dated 17.06.2015, in W.P. No.1442-P/2015, petitioner approached the Hon'ble apex Court by filing C.P. No.1418 of 2015, which was dismissed on the commitment of Senior Prosecutor NAB that trial shall be concluded within 90 days; that in the meantime, in utter shock and dismay of the petitioner, another warrant of arrest was issued against him in another reference, split up from the same offence, therefore, petitioner filed W.P. No.3075-P/2015 before this Court for joinder of charges in both the references and asked for stay of proceedings before the learned Trial Court in the reference till the disposal of the writ petition. Through interim order dated 0.09.2015, the proceedings were stayed in the reference till 10.12.2015, when the writ petition was ultimately allowed and both the references were ordered to be tried jointly. Learned counsel contended that though some progress was made in the trial of the petitioner but

joinder of the charges took the matter to denovo trial and now after framing fresh charge, only one PW out of 99 witnesses of the two reference, has been examined and the remaining are yet to be examined which will take further indefinite period of time keeping in view the lethargic conduct of the prosecution. He submitted that speedy trial is the right of every accused and petitioner cannot be detained in jail for indefinite period at the whims and wishes of the prosecution. He lastly submitted that keeping in view the above facts and circumstances, it is a hardship case which entitles the petitioner for bail.

3. Conversely, learned ADPG for NAB contended that petitioner cannot claim bail as a right on statutory ground as the provisions of section 497 Cr.P.C. are not applicable for the purpose of grant of bail to an accused facing charges under the Ordinance, except in hardship cases; that petitioner has failed to make out a hardship case as the delay caused in the trial is by his own conduct, who approached this Court for bail on merit, then the august apex Court on merits, and then again this Court for joinder of the charges by filing writ petitions; that he stayed the proceedings reference and caused delay in conclusion of trial, hence, he is not entitled to concession of bail.

4. We have heard the exhaustive arguments of learned counsel for the parties and perused the record with their able assistance.

5. Since the plea of bail on merit has already been turned down by this Court, therefore, there is no need to re-dilate upon the merits of the case. So far as the question of delay in conclusion of trial is concerned it is true that the provisions of Section 497 Cr.P.C. are not applicable for grant of bail to accused persons facing charges in cases under the Ordinance, but as held by the Hon'ble Supreme Court in cases titled "**Hamish Khan Vs the NAB Lahore and others**" (2015 SCMR 1092), "**Muhammad Jameel Rahi Vs DG NAB and others** (2012 SCMR 552), "**Muhammad Nadeem Anwar Vs NAB**" (PLD 2008 Supreme Court of Pakistan 645), and "**Anwar ul Haq Qureshi Vs National Accountability Bureau** (2008 SCMR 1135), the boarder principle of section 497 Cr.P.C. can be pressed into service in hardship cases to provide relief to a deserving accused person incarcerating in Jail for a shockingly long period.

6. Taking the case in hand at the touchstone of the principle laid down by the august apex Court in the cases (supra), the only question for determination before us would be as to whether the case of the petitioner falls within the ambit of "**hardship cases**"? Though, "hardship cases" has not been specifically

defined by the apex Court, however, from the crux of the judgments referred above, a hardship case can be termed a case of shocking delay on the part of the prosecution in conclusion of trial. A look over the record would show that the petitioner was arrested on 02.04.2015 and reference against him was filed on 22.07.2015. During interregnum, he approached this Court through WP No.1442-P/2015 for his release on bail on merit, but his request was turned down on 17.06.2015. He then rushed to the Hon'ble Apex Court through CP No.1418 for the same relief, where his application was dismissed on the commitment of the Senior Prosecutor NAB that trial of the petitioner shall be concluded within 90 days. In the meantime, another reference was initiated by the NAB against the petitioner regarding accumulation of assets in which warrant of arrest was issued against him on 13.08.2015. For joinder of the charge in both the references, petitioner filed W.P. No.3075-P/2015 before this Court invoking the provisions of section 17 (d) of the Ordinance read with sections 234 and 239 Cr.P.C. and asked for stay of proceedings before the learned Trial Court in the instant reference. The proceedings were accordingly stayed vide order dated 09.09.2015 and ultimately, the writ petition was

allowed on 10.12.2015, resultantly, both the references were ordered to be tried jointly. It is to be noted that the number of the PWs in the instant reference is 45 and that of the other reference is 54, making a total of 99 witnesses. The joinder of the charges of the two references had led to denovo trial. At present fresh charge has been framed against the petitioner and only one PW has been examined so far while rest of the 98 witnesses are yet to be examined. Keeping in view the lethargic conduct of the prosecution who at first instance in long period of about two years did not conclude the trial of the petitioner wherein they were supposed to examine forty-five witnesses, hence, it can be expected that they would be in a position to examine ninety-nine witnesses in near future. The conclusion of trial after rejoinder of charges will definitely take more, rather, indefinite and shockingly long period, which would be sufficient to bring the case of petitioner in ambit of "hardship case". Admittedly, investigation in the case is complete and petitioner is no more required for further interrogation. He is languishing in Jail for approximately last two years. We do not see anything material to show that it was the petitioner who occasioned delay in conclusion of trial. So far as his approach before this Court for joinder of

charges and stay of proceedings for three months is concerned, the same was his legal right, therefore, this delay of 3 months cannot be considered against him. Speedy trial has also been re-assured in S.16 of the Ordinance, laying down criteria for day to day trial and its conclusion within thirty day, but such object does not appear likely be achieved anywhere in the near future in the instant case. In the circumstances, keeping the petitioner behind the bars would serve no useful purpose rather would be against the principle of justice and the principles laid down by the august apex Court in the cases (supra).

7. For the reasons discussed above, the case of the petitioner falling within the ambit of a hardship case, this petition is allowed. He is admitted to bail, provided he furnishes bail bonds in the sum of Rupees five millions with two local, reliable and resourceful sureties each in the like amount to the satisfaction of the learned Accountability Court, Peshawar.

Announced:

15.02.2017

M.Siraj Afridi PS

JUDGE

JUDGE