

IN THE HIGH COURT OF SINDH, KARACHI.

Before:
Mr. Justice Mohammed Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi,

C.P.No.D-5009 of 2019

Sheikh Muhammad Asghar.....Petitioner

VERSUS

NAB & othersRespondents

C.P.No.D-1158 of 2019

Nazir Ahmed Tony.....Petitioner

VERSUS

The D.G NABRespondent

Date of hearing: 20.05.2020
Date of Judgment: 29.05.2020.

Mr. Muhammad Farooq, Advocate for the
appellant in
C.P.No.D-5009/2019.

Mr. Muhammad Anwar Tariq, Advocate for the
appellant in
C.P.No.D-1158/2019.

Mr. R.D. Kalhoro, Special Prosecutor NAB.

ORDER

ZULFIQAR ALI SANGI, J.

Through instant Constitution

petitions the petitioners named above are seeking their suspension of sentences handed down to them by the Accountability Court No. IV Sindh Karachi whereby the Learned Accountability court on evaluation of whole evidence found that the accused/petitioner Sheikh Muhammad Asghar and accused/Petitioner Nazir Ahmed Toni being holder of public office in collusion and connivance with each other and other absconding accused and convicted accused

persons had fraudulently and dishonestly opened fake Account No.3799-9 in the name of M/s. Ever Trading Overseas with the abbreviation of ETO and have committed forgery in payment of 617 pay orders and misappropriated an amount of Rs.30.747 million by causing colossal loss to the Government exchequer, which comes within the definition of corruption and corrupt practices as envisaged under clauses (iii) (iv) (ix) & (xii) of Section 9(a) of National Accountability Ordinance punishable U/s 10(a) of National Accountability Ordinance, 1999. Therefore they were convicted and sentenced as under:-

Accused Sheikh Muhammad Asghar S/o. Sheikh Muhammad Akbar was convicted U/s.265-H(ii) Cr.P.C r/w Section 10(a) of NAO, 1999 to suffer R.I. for Five (05) years and pay fine of Rs.15 million and accused Nazir Ahmed Toni S/o.Abdul Majeed Toni was convicted U/s.265-H(ii) Cr.P.C r/w Section 10(a) of NAO, 1999 to suffer R.I. for Five (05) years and pay fine of Rs.10 million. The fine shall be recoverable as arrears of land revenue in terms of Section 33-E of Ordinance ibid. In case of default in payment of fine, they shall suffer further R.I for one (01) year each. The benefit of Section 382-B Cr.P.C was also extended to them.

Both the petitioners were also ordered to stand disqualified in terms of Section 15 of National Accountability Ordinance, 1999 for a period of ten years each to be reckoned from the date of release after serving out sentence awarded to them and also from seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body or any statutory or local authority or in service of Pakistan or any Province and also they shall not be allowed to obtain any financial facility in the form of loan or advances from any financial institutions controlled by Government for the period of ten years.

2. The brief facts of the case as per the aforesaid reference are that accused Ejaz Ahmed, Muhammad Afzal and Nasir Hussain Jaffery while acting as outdoor clerk used to collect the pay orders from clearing and forwarding agents and after obtaining share used to pass on the pay orders to co-accused Shaikh Muhammad Asghar who used to deposit the same in his fake bank account and in collusion, connivance and collaboration with accused Nazir Ahmed Toni and Zaheeruddin Babar used to encash the same and caused loss to the public exchequer to the tune of Rs.30.747 million. The accused Nazir Ahmed Toni and Zaheeruddin Babar being holder of public office in collusion, connivance and collaboration with each other along with co-accused namely (1) Shaikh Muhammad Asghar (2) Muhammad Nadeem (3) Dilber Shah (4) Manzar Alam Jaffery (5) Ejaz Ahmed and (6) Muhammad Sardar Khan and absconding accused Faheem and Aamir have committed forgery in 617 pay orders and misappropriated an amount of Rs.30.747 million. They have caused loss to the public exchequer in the sum of Rs.30.747 million and thus by corrupt, dishonest, illegal and fraudulent means obtained for themselves pecuniary advantages and corresponding loss to the public exchequer.

3. Initially an FIR bearing No.06 of 2000 was lodged at P.S. FIA/CBC, Karachi on 01.03.2000 for having committed the offence of fraud, tampering with instruments, embezzlement and misappropriation of public money under Sections 409/420/468/471/477-A/109/34 PPC read with Section 5 (2) of Act-II of 1947. After registration of FIR, three separate challans were submitted before the learned Special Judge (Offences in

Banks) Karachi on 04.04.2002 against accused (1) Shaikh Muhammad Asghar (2) Dilber Shah (3) Muhammad Nadeem (4) Nazir Ahmed Toni (complainant) (5) Muhammad Saleem Akhtar and absconding accused (6) Faheem and (7) Amir for committing the offences of criminal breach of trust, fraud and forgery.

4. After receipt of challans, 3 separate criminal cases i.e. (i) Case No.25/2000, FIR No.06/2000 FIA CBC, Karachi State v. Shaikh Muhammad Asghar and others (ii) Case No.43/2002, FIR No.06/2000 FIA CBC, Karachi, State vs. Shaikh Muhammad Asghar and others and (iii) Case No.44/2002, FIR No.06/2000 FIA CBC, Karachi State vs. Shaikh Muhammad Asghar & others were registered in the Court of learned Special Judge (Offences in Banks) Karachi. An application under Section 16-A (a) of National Accountability Ordinance, 1999 was filed by Chairman NAB on 10.08.2007 in the Court of learned Special Judge (Offences in Banks) Karachi for transfer of these cases. The learned Special Judge (Offences in Banks) Karachi vide order dated 24.09.2007 transferred the said cases to the Administrative Judge, Accountability Courts, Karachi. On 09.10.2007 R & Ps of above criminal cases were received by the Administrative Judge, Accountability Courts Karachi and were assigned new number being References No.65, 66 and 67 of 2007 and the same were transferred to the learned Accountability Court No.III Karachi on 04.12.2007.

5. Thereafter NAB has conducted investigation in the matter and filed Reference No.16 of 2009 against the accused (1) Nazir Ahmed Toni (2) Zaheeruddin Babar (3) Shaikh Muhammad

Asghar (4) Ejaz Ahmed (5) Muhammad Afzal (6) Nisar Hussain Jaffery (7) Muhammad Sardar Khan and (8) Muhammad Moinuddin. All the references were amalgamated/consolidated by the Learned Accountability Court under the order of this court dated: 02-11-2010 Reference No: 65 of 2007 and later on vide order dated 09-03-2013 passed by this court the case was transferred to Accountability Court No.IV Sindh Karachi and was decided by the same court vide judgment dated:-16-01-2019, both the petitioners filed their appeals bearing Accountability Appeals No. 4 and 5 of 2019 which are pending before this court.

6. Learned counsel for the petitioner Shaikh Muhammad Asghar contended that there is no evidence in respect of account opening against the petitioner; that only PW-1 deposed against the petitioner and his evidence is not reliable; that the sentence is short one and the petitioner has already serve out the sentence for about 16 months; that the main appeal will take considerable time in disposal and the petitioner is aged about 50 years therefore in the interest of justice his petition may be allowed and he may be released on bail during pendency of his appeal. He relied upon the cases of **Nazir Ahmed Soomro V. The State** (2017 P.Cr.L.J Note 220), **Muhammad Irfan and others V. The state through NAB, and others** (2019 YLR 1606), **Khan Muhammad Mahar V. The State** (2003 SCMR 22) and **Rehmatullah Baig Alvi V. The State** (2004 Cr.L.J 316).

7. Learned counsel for the petitioner Nazeer Ahmed Toni contended that the petitioner is innocent; that he was manager of the branch where fake account was opened; that at the

time of opening the account petitioner was on leave and the operational manager namely Zaheer Babar (deceased) was incharge and he opened the account; that petitioner made the complaint to the FIA about the scam and on his complaint the FIR was registered by the FIA; that PW bank officials have not deposed against the petitioner; that the sentence of 05 years is short sentence; that the petitioner has remained in jail for a considerable period after the judgment and his appeal is pending for disposal; that in the circumstance petitioner may be enlarged on bail pending disposal of the appeal. He relied upon the case of **Rahim Bux Soomro V. The State through Director General (NAB)** (2019 MLD 358) and an un-reported order dated: 24-12-2018 passed by this court in CP.No.D-8669 of 2018 (**Syed Hur Riahi Gardezi V. NAB & others**).

8. Learned Special prosecutor for the NAB has contended that prosecution has proved its case against both the petitioners by producing reliable and trustworthy evidence; that huge amount is involved in the case and the petitioner has misappropriated the same; that he is ready to argue the main appeal; that there is no hard and fast rule that all the accused be released on bail while suspending the sentence and each and every case has its own facts and circumstances. He took our attention towards paragraph 92 to 96 of the judgment of the trial court and contended that the trial court has given cogent reasons while convicting the petitioners and appreciated the entire evidence and the same cannot be disturbed at the time of plea for suspension of the sentence. Lastly, he prayed that the petitions of both the petitioners may be dismissed.

9. We have heard the arguments of the learned counsel for the petitioners and learned Special Prosecutor NAB and perused the material available on record with their able assistance and the relevant law so also cited at the bar.

10. We have gone through the evidence of the prosecution witnesses available on record so also the impugned judgment passed by the Accountability Court tentatively. Besides the other witnesses we examined the evidence of PW's Muhammad Sadiq, Hakeemuddin, Fawad Ahmed, Syed Abdul Hameed, Muhammad Shaheedullah, Waseem Parvez, Khawaja Mohioddin, Sohail Saeed Khan, Abdul Naseem Sufi, Muhammad Faheem and Naseemuddin tentatively, who related to the Banks and deposed against the petitioners that the petitioners in collusion with each other opened the **fake account No.3799-9** in National Bank of Pakistan Dockyard Branch, Karachi in the name and style of **Ever Trading Overseas** with the abbreviation of **ETO** and being shareholders in the forgery and fraud committed by petitioner Muhammad Asghar in the name of **ETO** from various banks and as many as 617 pay orders in the sum of Rs.30.747 million were encashed and all the pay orders were in the name of **Excise & Taxation Officer (ETO)** but were deposited in the fake account M/S **Ever Trading Overseas (ETO)** by taking the benefit of abbreviation **ETO**, the witnesses also identified the petitioner Muhammad Asghar being the person who came at the counter and received the money and the petitioner Nazir Ahmed Toni was posted as Manager at the time of scam at that Bank where the fake account was opened and payments were made. The reasons given

by the trial court while awarding the sentence to the petitioners which in our view are not to be interfered while deciding the petition for suspension of sentence and we are also of the view that the deeper appreciation of evidence may prejudice the case of either party at this stage.

11. It is settled principle of law that appellate court in exercise of its power under section 426, Cr.P.C. based on particular facts may in a suitable case, suspend the sentence of a convict and grant him bail during pendency of his appeal and notwithstanding any material difference in the principle governing for grant of bail under sections 497 and 426, Cr.P.C. the consideration for suspension of sentence and grant of bail pending trial may not be the same, therefore, the distinction must be adhered to for exercise of power under the above cited provisions in proper manner. The power of appellate court under section 426(1), Cr.P.C. is not limited and the court may, during pendency of an appeal, suspend the sentence of a convict in an appropriate case in its discretion for good and sufficient reasons but this power of suspension of sentence and grant of bail is not wider than that under section 497, Cr.P.C. and unless it is shown that conviction is based on no evidence or being based on inadmissible evidence and is not ultimately sustainable. Reliance can be placed on the cases of **Makhdoom Javed Hashmi v. The State** (2007 SCMR 246).

12. It is settled by now that the grant of bail under section 426(1), Cr.P.C. with the consideration of ascertaining the question of guilt or innocence on merits through appraisal of

evidence is not justified as the bail either under section 497 or 426(1), Cr.P.C, could be allowed only on the basis of tentative assessment of evidence. In this respect reliance is placed on **Raja Shamshad Hussain v. Gulraiz Akhtar** (PLD 2007 SC 564), **Manzoor Ahmed v. Fazal Ahmed and 3 others** (2013 SCMR 1403) and **Muhammad Saleem V. State** (PLD 2006 SC 483).

13. We have also observed that this is a NAB case and the appellants were convicted under the NAO and as such their crimes are heinous as they are crimes of corruption and cannot be condoned or belittled under any circumstances. The amount of Rs.30.747 million is involved in the scam which was allegedly misappropriated by the petitioners and they were remained on bail during the trial and were taken into custody when the judgment was announced on 16-01-2019 and still not completed the substantial period of their conviction therefore in our view are not entitled to be released on bail during pendency of their appeals as prima facie we find that there is evidence against the petitioners.

14. Thus based on the above reasons the above petitions are hereby dismissed, however the criminal appeals against conviction (04 and 05 of 2019) shall be fixed by the office in the appellate roster of this court hearing final appeals to come up at 11am on 10-08-2020 when the appeals shall be proceeded with and decided on merits.

15. It goes without saying that these observations are only tentative in nature and will have no bearing on the court which hears the main appeals.

16. The above petitions are disposed of in the above terms.

JUDGE

JUDGE