IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
MR. JUSTICE MUSHIR ALAM
MR. JUSTICE QAZI FAEZ ISA
MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL

CIVIL PETITION NO. 3258 OF 2017
(Against the judgment dated 11.03.2014 of the Lahore High Court, Lahore passed in Writ Petition No. 2617/2011)

National Accountability Bureau (NAB) through its Chairman, Islamabad ***...Petitioner***

VERSUS

M/s Hudaibya Paper Mills Limited, Lahore and others. ***...Respondents***

For the Petitioner	:	Mr. Imran-ul-Haq, Special Prosecutor, NAB. Mr. Arshad Qayyum, Special Prosecutor, NAB. Mr. Nasir Mughal, Special Prosecutor, NAB. Ch. Farid-ul-Hassan, Special Prosecutor, NAB. Mr. Ahmed Nawaz Chaudhry, AOR.
For the Respondents	:	Not represented.
Dates of Hearing	:	December, 11, 12 & 15, 2017.

J U D G M E N T

Qazi Faez Isa J This petition assails the judgment of the Lahore High Court, which had allowed Writ Petition No. 2617 of 2011 (hereinafter referred to as "**the writ petition**") filed by respondent Nos. 1 to 9 against the National Accountability Bureau ("**NAB**"), the Federation of Pakistan and the Accountability Court. The writ petition sought quashment of Reference No. 5 of 2000 ("**the Reference**") filed by NAB before the Accountability Court. A learned Division Bench of the Lahore High Court, comprising of Kh. Imtiaz Ahmad and Muhammad Farrukh Irfan Khan JJ

allowed the writ petition and quashed the Reference unanimously. However, Kh. Imtiaz Ahmad J in the ultimate sentence of the judgment "*clarified that the NAB authorities are competent to proceed against the petitioners* [respondent Nos. 1 to 9 herein] *if the investigation is again initiated in accordance with law*"[1]. Muhammad Farrukh Irfan Khan J did not agree with the addition of the said clarification because the observation was uncalled for in the writ petition filed to quash the Reference; it would, "*be mistaken as an express permission by this Court to initiate investigation afresh*"[2]; no argument on the question of reinvestigation was heard; no reinvestigation was done for over twelve years; by allowing reinvestigation it would, "*give premium to the prosecution of their own fault*" and would, "*equip them with better tools for combating/victimizing the petitioners at the hands of NAB authorities*"[3] .

2. In view of the difference of opinion with regard to the matter of reinvestigation or fresh investigation Sardar Muhammad Shamim Khan J was appointed as the Referee Judge who agreed with the opinion of Muhammad Farrukh Irfan Khan J and added that, "*re-investigation of the Reference, after about thirteen years of filing of Reference would be contrary to the scheme of aforesaid law*"[4]; and, NAB during the hearing of the matter did not make, "*any request for allowing them to re-investigate the matter, therefore, there was no reason for making such an*

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1 Hudaibya Paper Mills Ltd. v Federation of Pakistan, PLD 2006 Lahore 667, paragraph 19 at page 692.

2 Hudaibya Paper Mills Ltd. v Federation of Pakistan, PLD 2006 Lahore 667, at page 693Q.

3 Hudaibya Paper Mills Ltd. v Federation of Pakistan, PLD 2006 Lahore 667, at page 698S.

4 Hudaibya Paper Mills Ltd. v Federation of Pakistan, PLD 2006 Lahore 667, at page 682H.

observation"[5]. The petition for leave to appeal has assailed the entire judgment of the learned Division Bench and of the Referee Judge with regard to the quashment of the Reference and the majority view with regard to the matter of reinvestigation.

3. The impugned judgment of the Lahore High Court is dated March 11, 2014 and the same could be challenged by filing a petition, "*within sixty days of the judgment, decree or final order sought to be appealed from*"[6]. The office of this Court records that this petition is "time barred by 1229 days"; which is not denied by the petitioner. In respect of cases mentioned in clause (2) of Article 185 of the Constitution of the Islamic Republic of Pakistan ("**the Constitution**"), an appeal can be filed as of right, however, in respect of "*a judgment, decree, order or sentence of a High Court in a case to which clause (2) does not apply shall lie only if the Supreme Court grants leave to appeal*". Therefore, if a person wants to file an *appeal* he has a right to file it, however, a *petition* is entertained only by *leave* of this Court. It therefore stands to reason that, if an appeal is not filed within the stipulated time and time is sought to be extended it should not be equated with the late filing of a petition wherein too time is sought to be extended.

4. The petitioner has filed, not one but two, applications which seek the delayed filing of the petition to be condoned. Civil Miscellaneous Application ("**CMA**") No. 6381 of 2017, which was filed along with the petition on September 20, 2017, and CMA No. 8664 of 2017, which was

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5 Hudaibya Paper Mills Ltd. v Federation of Pakistan, PLD 2006 Lahore 667, at page 682I.

6 Supreme Court Rules 1980, Order XIII, Rule 1.

filed on November 27, 2017, a day before we first heard this petition. The reason mentioned to condone the belated filing, in the first application, is that, "*NAB has decided to file CPLA*" (civil petition for leave to appeal) because of, "*fresh material collected and submitted by the JIT*" (Joint Investigation Team, mentioned below in paragraph 19). The second application alleges that the "*Respondent No. 02 being the Chief Executive of the Federation, in Power* (sic) *influenced in preventing filing of the petition*", and the "*non serious working of the judges of the High Court*".

5. This Court in the exercise of its constitutional jurisdiction or when it is considering the grant of discretionary relief may decline to extend time if it is inequitable to do so[7]. The conduct of the petitioner may also be examined when considering condoning delay[8]. Therefore, it would be appropriate to reflect on the conduct of NAB, and particularly whether it vigilantly proceeded with the Reference filed by it before the Accountability Court. We also need to examine whether respondent Nos. 1 to 9 employed tactics to procrastinate matters to their advantage and/or had the requisite power or influence to subvert the course of justice.

6. On October 12, 1999, General Pervez Musharraf, who was then serving in the Army as its Chief of Army Staff, ousted the democratic-constitutional order. "Proclamation of Emergency"[9] issued by him on

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7 Raunaq Ali v Chief Settlement Commissioner, PLD 1973 SC 236, at page 258E; and Zameer Ahmad v Bashir Ahmad, 1988 SCMR 516, at page 517A.

8 Karamat Hussain v Muhammad Zaman, PLD 1987 Supreme Court 139, at page 144; Muhammad Shafi v Shamim Khanum, 2007 SCMR 838, at page 842E; and Province of Punjab v Baz Khan, 2012 SCMR 51, at page 53A.

9 Proclamation of Emergency Order, PLD 1999 Central Statutes 448.

October 14, 1999, given retrospective effect from October 12, 1999, stated that "Emergency" had been proclaimed and that General Musharraf had assumed *"the office of the Chief Executive of the Islamic Republic of Pakistan"*, put into "*abeyance*" the Constitution, "*suspended*" the "*National Assembly, the Provincial Assemblies and Senate*", which he later "*dissolved*"[10], dismissed the Prime Minister, all the Governors, Chief Ministers, Federal and Provincial Ministers, and placed Pakistan, "*under the control of the Armed Forces*". The same day General Musharraf also enacted the "Provisional Constitution Order 1 of 1999"[11] ("**PCO**") which, amongst other things, stipulated that, "*the Supreme Court or High Courts and any other Court shall not have the powers to make any order against the Chief Executive*", that is against himself, or to question the Proclamation of Emergency, the PCO or any order issued by him. He also gave himself the power to legislate. In addition to continuing as the Chief of the Army Staff General Musharraf assumed all executive and legislative powers. From the third pillar of the State, the superior judiciary, he extracted an oath of tacit loyalty requiring the judges to abide by the Proclamation of Emergency and the PCO[12]. Those judges who did not take this oath were removed from office. Just a month after assuming power General Musharraf enacted the National Accountability Bureau Ordinance, 1999[13] ("**NAB Ordinance**") and appointed a serving General, Lieutenant General Syed Muhammad Amjad, to head NAB in the capacity of its Chairman.

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10 Chief Executive's Order 2 of 2001, PLD 2001 Central Statutes 391.

11 Provisional Constitution Order 1 of 1999, PLD 1999 Federal Statutes 446.

12 Oath of Office (Judges) Order, 2000, PLD 2000 Central Statutes 86.

13 National Accountability Ordinance 1999, PLD 2000 Federal Statutes 57

7. Lieutenant General Syed Muhammad Amjad, the Chairman NAB, filed a reference on March 27, 2000 pursuant to section 18 (g) of the NAB Ordinance, which was numbered as Reference No. 5 of 2000. Another reference under the same provision of law was filed by the next Chairman of NAB, another serving General, Lieutenant General Khalid Maqbool, on November 16, 2000, which referred to the earlier one as an "interim reference". Mr. Imran-ul-Haq, the learned Special Prosecutor, NAB ("**the Prosecutor**"), refers to the Reference dated March 27, 2000 as the "**Interim Reference**", and the Reference dated November 16, 2000 as the "**Final Reference**", therefore, we shall use the same terminology, even though the Reference dated March 27, 2000 does not state that it is an "Interim Reference". The Interim and Final references collectively shall be referred to as "**the References**". The References stated that they are, "*against M/s Hudaibya Paper Mills Ltd. and its Directors for the commission of the offences under section 9 of the NAB Ordinance*".

8. A little over a year after the filing of the Reference No. 5 of 2000, on April 12, 2001 the Additional Prosecutor General, NAB, "*requested that the reference at present be adjourned sine die. Whenever it is deemed legal that further proceedings be taken in the reference we will move an application in this regard*". The Accountability Court accepted NAB's request and indefinitely adjourned the Reference that is "*adjourned it sine die*". The Reference was adjourned *sine die* by the Court on the very day that the request was made by NAB. Six years later, on August 2, 2007, the Deputy Prosecutor General NAB submitted an application stating that the Reference which had been "*adjourned sine die to be resurrected*" and, "*accordingly prayed that the trial of the Reference be*

ordered to be re-commenced". On August 17, 2007 the Accountability Court announced its order allowing the application, the penultimate paragraph, which contains the *reason* for doing so, is reproduced:

> "I have heard the preliminary arguments from the side of prosecution. Since the reference was adjourned Sine Die therefore there is no illegality in its restoration for purposes of commencement of the trial. The application is allowed accordingly"[14].

The respondents were not given notice of NAB's application nor were they heard by the Accountability Court before granting the Application.

9. The case was then fixed before the Accountability Court on August 25, and then on September 7, 2007 and it was adjourned on both these dates. On September 13, 2007 the Accountability Court noted that NAB had been seeking adjournments, and that if they did so again on the next date of hearing the Reference may be adjourned "*sine die once again*". On the next day, that is October 18, 2007, the case was adjourned to October 19, 2007, when it was again adjourned to November 8, 2007 and then adjourned to November 22, 2007, and further adjourned to December 5, 2007, on which date the Accountability Court directed, the Prosecutor General Accountability of NAB ("**PGA**"), "*the PGA shall appear on the next date to make it clear as to whether Government intends to prosecute accused persons or not*". However, on January 12, 2008 the PGA sought time and the case was adjourned to February 21, 2008, when NAB again sought time and the case was adjourned to March 28, 2008, when once again adjournment was sought by NAB and the case was adjourned to May 8, 2008, however the Accountability Court

[14] CMA 9233/2017 in CPLA 3258/2017, Part 1, at page 105.

observed that, "*long adjournment has been requested from the side of prosecution*". Notwithstanding the long adjournment NAB again sought an adjournment on May 22, 2008, which was the next date, when it was adjourned to June 19, 2008, but NAB again sought adjournment and the case was adjourned to July 31, 2008, continuing the litany of adjournments requested by NAB. The NAB Ordinance mandates that "*the case shall be heard from day to day and disposed of within 30 days*"[15]. On August 21, 2008 the Accountability Court noted, "*this court cannot keep this file pending for purposes of simple adjournments only. The reference is again adjourned Sine Die till an application is moved by Chairman NAB Islamabad for commencement of trial*".

10. Instead of simply complying with the aforesaid order, and the Chairman NAB signing an application himself, PGA filed an application under section 369 of the Code of Criminal Procedure[16] ("**the Code**") stating that the Accountability Court had committed an error in adjourning the Reference *sine die*. On August 23, 2008 the Accountability Court ordered that the application be heard on September 4, 2008, however, the case was adjourned on the said date and on the following dates, October 7, 2008 and November 7, 2008. On November 12, 2008 NAB was not represented before the Accountability Court, consequently, NAB's application was dismissed for non-prosecution. The application was not sought to be restored by NAB.

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15 National Accountability Ordinance 1999, PLD 2000 Federal Statutes 57, section 16, clause (a); see Muhammad Saeed Mehdi v State, 2002 SCMR 282, at page 282F.

16 Code of Criminal Procedure 1898, Act V of 1898.

11. After about fifteen months, on February 17, 2010, NAB submitted another application for the revival/restoration of the case, but this application too was not filed by the Chairman NAB. On February 22, 2010 when the application was listed for hearing the learned Judge was on leave and the matter was adjourned to February 24, 2010 when NAB sought an adjournment and the case was adjourned to March 10, 2010 when NAB filed an authorization, which authorized the Additional Deputy Prosecutor General Accountability to pursue the matter, and the case was adjourned to March 19, 2010 on which date the case was adjourned, because the learned Judge had died. On April 8, 2010 NAB sought an adjournment. On April 9, 2010 NAB again sought an adjournment and the case was adjourned to April 16, 2010 when NAB's application was heard, and April 24, 2010 was fixed as the date for announcing the decision on the said application, but it could not be announced and the case was adjourned to April 26, 2010, on which date for want of time it was also adjourned. On May 3, 2010 the application was disposed of by a three page order which concluded as under:

> "In view of above discussion the application is disposed of with an observation that the NAB is to submit fresh application duly signed by the Chairman in the light of direction contained in the order dated 21.08.2008 passed by the then learned Judge Accountability Court No. IV, Rawalpindi / Islamabad"[17].

12. NAB neither complied with the order of the Accountability Court dated August 21, 2008 nor with the order of May 3, 2010, which reiterated the earlier order, requiring that an application signed by the Chairman NAB be filed. NAB also did not assail either of these orders.

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[17] CMA 9233/2017 in CPLA 3258/2017, Part 1, at page 128.

This took place when General Musharraf was the Chief Executive/President and his nominees were the Chairmen of NAB (details of which are mentioned in paragraph 24 below).

13. On October 17, 2011 respondents Nos. 1 to 9 filed the writ petition. The writ petition, amongst other things, sought the quashment of the Reference. It was alleged in the writ petition, "*that at present the status of the impugned reference is that no progress has been made and the trial has been adjourned sine die to be resurrected at any time at the behest of the government acting through NAB and hangs as the proverbial sword of Damocles on the Petitioners*"[18]. It was further alleged that, "*the fact of the matter is that firstly Musharraf regime and now at the behest of the PPP-P regime, NAB is deliberately holding back this case and waiting for an appropriate time to misuse it against the Petitioners interest with obvious ulterior motives. This fact by itself is sufficient to establish the mala fides involved in the preparation and filing of this Reference. The threat of a criminal trial to be deliberately kept pending, as in a cold storage, for more than ten years clearly infringes the Petitioner's fair trial rights and amounts to a travesty of justice*"[19].

14. On October 18, 2011 a learned Division Bench of the Lahore High Court, comprising of Justice Ijaz ul Ahsan (before his lordship's elevation to this Court) and Justice Abdul Waheed Khan, passed the following order in the writ petition:

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[18] CPLA 3258/2017, Writ Petition No. 2617/2011, page 74 at paragraph 22.

[19] CPLA 3258/2017, Writ Petition No. 2617/2011, page 74, grounds F and G.

"Mr. Muhammad Akram Sheikh, Ms. Natalia Kamal and Mr. Sharjeel Shaheryar, Advocates, for petitioners.
Mr. Baber Ali, Standing Counsel for respondent No. 1, on call.
M/s Mian Hanif Tahir, Incharge Prosecution Division, Ch. Muhammad Riaz, Senior Prosecutor and Barrister Saeed ur Rehman, Special Prosecutor, NAB.

Through this Constitutional Petition, the petitioners seek quashment of a Reference filed against the petitioners by respondent No. 2 on 27.3.2000 before the Accountability Court, Rawalpindi. On 12.4.2001, when the Reference came up for hearing, a request was made by the Additional Prosecutor General NAB to adjourn the same sine die for the reason that some of the accused persons were not available in Pakistan. Subsequently, on 2.8.2007, an application for recommencement of the trial was filed. However, no further proceedings took place. Despite the fact that the petitioners returned to Pakistan on 25.11.2007, the Reference has been kept pending despite lapse of more than eleven years from the date of its filing.

2. The learned counsel for the petitioners submits that the Reference is based on no evidence, is violative of the fundamental rights of the petitioners, has been prepared and submitted without observing due process of law including provisions of the NAB Ordinance and is patently mala fide. He argues that the Reference is being kept pending for use at the appropriate time as a tool for political victimization and arm-twisting, rather than for any bona fide purpose of transparent accountability. Adds that the mala fides of the respondent is evident from the fact that despite lapse of about four years since the petitioners have returned, the matter has deliberately been kept in cold storage to keep a Damocles sword hanging over the heads of the petitioners to gain political leverage. The learned counsel further submits that the concept of sine die adjournment is alien to criminal jurisprudence which envisages separation of trials of accused persons who are available for prosecution and those who are not. He maintains that the right to a fair trial is a fundamental right enshrined in Article 10-A of the Constitution of Islamic Republic of Pakistan. Adds that the said right includes that right to a trial without undue delay. The said right is blatantly being violated. The learned counsel further submits that a bare perusal of the record indicates that the mandatory provisions prescribed for commencing,

> initiating or conducting any inquiry, investigation or proceedings in respect of the alleged offences have not been complied with. Consequently all actions taken by the respondents are illegal and void. It is pointed out that a Full Bench of this Court in its Judgment reported as Hudabiya Engineering (Pvt) Limited Vs. Pakistan through Secretary, Ministry of Interior, Government of Pakistan and six others (PLD 1998 Lahore 90) has already dealt with the core issues raised in the Reference. He finally argues that in the first place filing the aforesaid Reference and then keeping the same adjourned sine die is ex facie mala fide, illegal and gross abuse of the process of law.
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> 3. Let notice be issued to the respondents.
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> 4. At his stage, Mr. Baber Ali, Standing Counsel and Mian Hanif Tahir, Advocate, Incharge Prosecution Division, NAB, have entered appearance. They accept notice on behalf of respondents Nos. 1 and 2. No notice need be issued to them. Let copies of this petition be handed over to the said learned counsels. They seek time to obtain instructions and file comments. With the consent of the learned counsels for the parties, the matter is fixed for hearing on 17.11.2011.
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> 5. In view of the fact that vires of certain provisions of law have been challenged, notice shall also be issued to the Attorney General for Pakistan.
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> C.M.1/2011
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> Exemption sought for is allowed, subject to all just and legal exceptions. C.M. stands disposed of.
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> STAY MATTER
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> Subject to notice for 17.11.2011 and till the next date of hearing, respondent No. 1 shall not proceed with the Reference. However, this order shall not affect any application that may be moved by respondent No. 2 for revival of the Reference"[20].

15. It was only after respondent Nos. 1 to 9 had filed the writ petition that NAB finally complied with the orders of the Accountability Court,

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[20] Lahore High Court Order dated October 18, 2011, CMA 9233/2017 in CPLA 3258/2017, at page 133.

requiring NAB to file an application under the signature of its Chairman. An "Application for Revival/Restoration of the Reference"[21] was filed on July 17, 2012 in the Accountability Court under the signature of the then Chairman NAB, namely, retired Admiral Fasih Bokhari.

16. The learned Prosecutor submits that NAB could not proceed with the Reference on account of the stay order of the High Court. This contention however is contrary to the record because the learned Bench had specifically clarified that the, "*order shall not affect any application that may be moved by respondent No. 2* [NAB] *for revival of the Reference*". The fact that an application signed by Chairman NAB for the restoration of the Reference was filed after the High Court's order was passed also negates the contention.

17. Pursuant to the General Elections held on February 18, 2008 the Pakistan Peoples Party formed the Federal Government and its candidate, Syed Yousaf Raza Gillani became the Prime Minister of Pakistan. On September 5, 2008 the Pakistan Peoples Party's candidate Mr. Asif Ali Zardari became the President of the Pakistan. NAB finally filed the afore-mentioned application, signed by Chairman NAB seeking the revival/restoration of the Reference, on July 17, 2012 when Mr. Asif Ali Zardari was President and Raja Pervaiz Ashraf was the Prime Minister of Pakistan, and Chairman NAB was appointed by the Pakistan Peoples Party government. NAB complied with the order of the Accountability Court, passed almost four years earlier on August 21, 2008, however, it did not have the reference revived/restored.

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[21] CMA 9233/2017 in CPLA 3258/2017, at page 131.

18. We pointedly asked the learned Prosecutor how NAB would proceed with the Reference, even if the impugned judgment of the High Court was set aside, because the Reference had not been revived/restored, to which the learned Prosecutor had no answer. Respondent Nos. 1 to 9 had themselves come forward to remove, what they categorized as the sword of Damocles hanging over their heads. Assuming that the writ petition was dismissed it would make no real difference because the Reference was not revived/restored.

19. In seeking to set aside the impugned judgments the learned Prosecutor contends that this Court, in the case of Imran Ahmad Khan Niazi v Mian Muhammad Nawaz Sharif[22] (popularly referred to as the "**Panama Papers case**"), had directed that an investigation into the Company be conducted by the Joint Investigation Team ("**JIT**"). This Court, according to the learned Prosecutor, had further directed that the judgment of the High Court be assailed as it deserves to be set aside. Let us examine whether these contentions are correct. The judgment of the Panama Papers case is, "*By a majority of 3 to 2 (Asif Saeed Khan Khosa and Gulzar Ahmed JJ) dissenting*"[23]. The majority constituted a six member JIT team, comprising of the representatives of the: Federal Investigation Agency, NAB, Security and Exchange Commission, State Bank of Pakistan, Inter Services Intelligence and Military Intelligence[24] and directed JIT to submit its report with regard to a number of

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22 Imran Ahmad Khan Niazi v Mian Muhammad Nawaz Sharif, PLD 2017 SC 265.

23 Imran Ahmad Khan Niazi v Mian Muhammad Nawaz Sharif, PLD 2017 SC 265, at page 658.

24 Imran Ahmad Khan Niazi v Mian Muhammad Nawaz Sharif, PLD 2017 SC 265, at page 659 to 670.

companies, but which did not include Hudaibya Paper Mills Limited ("**the Company**"). But, be that as it may, JIT delved into the matter of the Company in its report. Subsequently, three learned judges of this Court disposed of the petition filed by Mr. Imran Ahmad Khan Niazi (C.P. No. 29 of 2016) and the connected petitions filed by Sheikh Rasheed Ahmed (C.P. No. 30 of 2016) and Mr. Siraj-ul-Haq (C.P. No. 3 of 2017) through a common judgment dated July 28, 2017[25]. The said judgment records the contention of Mr. Muhammad Nawaz Sharif's counsel: "*Learned Sr. ASC appearing for Respondent No. 1 contended that JIT overstepped its mandate by reopening the case of Hudabiya Paper Mills when it was not so directed by the Court; that another investigation or inquiry shall also be barred by the principle of double jeopardy when the Reference relating to the said Mills was quashed in the case of Hudabiya Paper Mills Limited. v. Federation of Pakistan (PLD 2016 Lahore 667)*"[26]. This Court attended to the said concern and observed that, "*The argument that the JIT overstepped its authority by reopening the case of Hudabiya Paper Mills when Reference No. 5 was quashed by the High Court does not appear to be correct as the JIT has simply made recommendations in this behalf which can better be dealt with by this Court if and when an appeal, before this Court, as has been undertaken by Special Prosecutor, NAB, is filed*"[27]. The judgment of this Court in the Panama Papers case did not issue a direction as contended by the learned Prosecutor. The learned Prosecutor then referred to the judgment of Asif Saeed Khan Khosa J which,

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[25] Imran Ahmed Khan v Muhammad Nawaz Sharif, PLD 2017 SC 692.

[26] Imran Ahmed Khan v Muhammad Nawaz Sharif, PLD 2017 SC 692, page 702 to 703, at paragraph 4.

[27] Imran Ahmed Khan v Muhammad Nawaz Sharif, PLD 2017 SC 692, page 708 to 709, at paragraph 12.

according to him, contains such a direction, however, his Lordship's judgment too does not contain such a direction:

> "The circumstances in which Reference No. 5 of 2000 filed by the National Accountability Bureau had been quashed and reinvestigation of the matter was held by the High Court to be impermissible might have tempted me to issue a direction to the State or the National Accountability Bureau to challenge the said judgment of the High Court before this Court through a time-barred petition/appeal but I have found it to be inappropriate for an appellate court to direct a party to a case to file a petition or an appeal before it in a matter decided by a Court below. Issuance of such a direction can have the effect of compromising the impartiality of the appellate court and clouding its neutrality and, thus, I have restrained myself from issuing the direction prayed for"[28].

20. The learned Prosecutor then proceeded to make a novel submission, that the latent intent of the Panama Papers case judgment required NAB to file this petition and to have the impugned judgment of the High Court set aside. If this contention is accepted it would mean that this petition is not a *petition for leave to appeal* but an *appeal*, and therefore hearing the petition is an exercise in futility. This Court in its judgment in the Panama Papers case had categorically stated that the matter will be attended to when it is brought before this Court, which is exactly what we are doing. Therefore, the submission arises out of a misreading of the Panama Papers case judgment.

21. This petition was filed on September 20, 2017 and is time-barred by 1,229 days. The reasons put forward, to extend time and to condone this extraordinarily long period, are mentioned above (in paragraph 4). We have already dealt with the matter of the purported influence. As to

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[28] Imran Ahmed Khan v Muhammad Nawaz Sharif, PLD 2017 SC 265, page 448 to 449, at paragraph 130.

the purported discovery of *fresh material*, the learned Prosecutor states that additional foreign currency accounts have been unearthed by JIT. If this is so it cannot be categorized as *fresh material*, because such type of evidence was already in NAB's possession. As regards that JIT had "*recommended that the NAB may be ordered to file an appeal*" is worrisome. NAB is a statutory body and is expected to act independently; it should not have foregone its independence to act on the behest of the JIT. With regards to the learned judges' purported "*non serious working*" this cryptic allegation is not supported by a single fact. Therefore, to make such an allegation is utterly inappropriate and verges on contempt. Merely because NAB considers a particular case to be "important", as was repeatedly stated with regard to the Reference by the learned Prosecutor, it should not lose objectivity and abandon propriety.

22. The References were filed against respondent Nos. 1 to 9 in the year 2000, and were based on the opening of the alleged *benami* foreign currency accounts in the year 1992, or earlier, and it was alleged that the monies from such accounts were converted into rupees and then invested into the Company. The purported offence was, therefore, committed over twenty five years ago. Though the petitioner seeks the delay of 1,229 days to be condoned, we can not be unmindful of the preceding seventeen years and the time that the matter was investigated, prosecuted and kept pending by NAB. The "*fair trial and due process*" requirement has been elevated to the status of a Fundamental Right when the Constitution was amended and Article 10A was inserted

through the Constitution (Eighteenth Amendment) Act, 2010[29]. Further guidance may also be had from the Principles of Policy set out in the Constitution which, include the provision of "*expeditious justice*"[30]. It "*is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with those Principles*"[31]. Another Fundamental Right, enshrined in the Constitution is that, "*no person shall be prosecuted or punished for the same offence more than once*"[32]. It is also an inalienable right of every citizen, "*to enjoy the protection of law and to be treated in accordance with law*"[33]. Reading these constitutional provisions together it becomes clear that a person cannot indefinitely await the pleasure of a prosecuting agency to prosecute him. If this is allowed prosecution becomes persecution, "*and persecution* (or oppression) *is worse than death* (or killing)"[34].

23. We may however clarify, and it is an important clarification, that if a person interferes with or hampers the investigation, colludes with the prosecution and/or disrupts the process of the Court he can not complain if his prosecution does not conclude. The record of this case, however, makes it clear that respondent Nos. 1 to 9 were subjected to intensive investigation and by those who would be considered inimical to them. Respondent Nos. 2 and 3, respectively the Prime Minister of

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29 Constitution (Eighteenth Amendment) Act 2010 (10 of 2010), PLD 2010 Federal Statutes 3.

30 The Constitution of the Islamic Republic of Pakistan, Article 37, clause (d).

31 The Constitution of the Islamic Republic of Pakistan, Article 29, clause (1).

32 The Constitution of the Islamic Republic of Pakistan, Article 13, clause (a).

33 The Constitution of the Islamic Republic of Pakistan, Article 4, clause (1).

34 The Holy Quran, *Surah Al-Baqarah* (2), verse 191; The Constitution of the Islamic Republic of Pakistan, Article 227.

Pakistan and the Chief Minister of the Punjab, were deposed and taken into custody and remained incarcerated till their *exile,* and they were not allowed to return to Pakistan. Eventually they managed to get back into the country because of the directions issued by this Court. The animus towards respondent No. 2 can also be gathered from the fact that the sentence of imprisonment for life, awarded to him by the Trial Court in the hijacking case, was sought to be enhanced to death.

24. That since NAB alleges that the respondent No. 2 had influenced NAB we asked the learned Prosecutor to provide the names and tenures of the Chairmen of NAB, and who had appointed them. NAB provided the information[35]. The Chairmen of NAB appointed by General Musharraf were: Lieutenant General Syed Muhammad Amjad who served from November 16, 1999 till September 25, 2000 followed by Lieutenant General Khalid Maqbool who served from September 26, 2000 till October 26, 2001 followed by Lieutenant General Munir Hafeez who served from November 1, 2001 till October 31, 2005, followed by retired Lieutenant General Shahid Aziz who served from November 11, 2005 till July 3, 2007. Those appointed during the tenure of the Pakistan Peoples Party's government were: Mr. Naveed Ahsan, a retired Federal Secretary, who served from July 6, 2007 till June 14, 2010 followed by retired Justice Syed Deedar Hussain Shah who served from October 8, 2010 till March 10, 2011 followed by retired Admiral Fasih Bokhari who served from October 16, 2011 till May 28, 2013. Those appointed during the tenure of the Pakistan Muslim League (Nawaz) government were: retired Major Qamar Zaman, a retired Federal Secretary, who served from

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[35] CMA 9233/2017 in CPLA 3258/2017, part 1, at page 4.

October 11, 2013 till October 10, 2017 followed by retired Justice Javed Iqbal who was appointed on October 11, 2017 and is the present Chairman NAB. The tenure of the Chairman, NAB initially was for a period of three years, which was later increased to four years. The NAB Ordinance stipulates that the Chairman "*shall not be removed except on the grounds of removal of Judge of the Supreme Court of Pakistan*"[36], however, only one of the four Chairmen appointed by General Musharraf completed the stipulated statutory period.

25. The Final Reference also states that the Respondents 2 and 3 "*in order to launder and conceal their ill-gotten wealth*" had "*opened fictitious foreign currency accounts*". It is not clear whether the reference to "*launder*" wealth is an allegation of "money laundering". JIT's report refers to "*money laundering*" that took place in 1991-1992[37]. However, *money laundering* was made an offence in Pakistan when the Anti-Money Laundering Ordinance, 2007[38] was enacted on September 7, 2007. Neither in the years 1991-1992 nor when the References were filed, in the year 2000, did *money laundering* constitute an offence. There is another aspect to consider. The term *money laundering*, as defined in the said Ordinance and then Anti-Money Laundering Act, 2010[39], state that it emanates from "*proceeds of crime*". However, NAB doesn't allege that the monies in the foreign currency accounts were *proceeds of crime*.

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36 National Accountability Ordinance 1999, PLD 2000 Federal Statutes 57, section 6, clause (a), sub-clause (i).

37 Joint Investigation Team Panama Case, Volume VIII-A, page 3, at paragraph 6, sub-paragraph G.

38 Anti-Money Laundering Ordinance, 2007, PLD 2007 Federal Statutes 348.

39 Anti-Money Laundering Act, 2010, PLD 2010 Unreported Statutes 1.

Additionally, a *money laundering* case is to be tried by a Session's Court, and not by an Accountability Court under the NAB Ordinance.

26. A reference filed under the NAB Ordinance should mention the offence and also set out the particulars of the offence allegedly committed; this not only enables the Court to frame a charge in terms thereof but also puts the accused on notice with regard to the allegation he is supposed to defend[40]. Subsection (2) of section 221 of the Code stipulates that if the law describes the offence by a specific name it should be so mentioned, and subsection (4) of section 221 of the Code states that both the law and its particular section is to be mentioned in the charge "*the criminal Courts naturally take the precaution of framing charges with sufficient precision and particularity in order to ensure a fair trial; ... the requirements of procedure are generally intended to subserve the ends of justice*"[41]. Once a formal charge is framed by the Court it calls upon the person accused of the offence to state whether he pleads guilty to the charge or denies it[42]. Thereafter, the trial commences. Section 17 of the NAB Ordinance specifically provides that the provisions of the Code shall apply, unless they are inconsistent with those of the NAB Ordinance. With regard to the present case there is no inconsistency. Therefore, we are quite surprised to learn that no charge was ever framed against respondent Nos. 1 to 9. In addition to this inexplicable transgression of the law the record of the Accountability Court reveals that the said respondents were never produced before the Court,

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40 M. Younus Habib v State, PLD 2006 Supreme Court 153, at page 156A.

41 Chittaranjan Das v State of West Bengal, AIR 1963 Supreme Court 1696, at page 1699, column 2.

42 Code of Criminal Procedure 1898, Act V of 1898, sections 242, 265-D and 265-E.

contrary to the provisions of section 353 of the Code, and there is nothing on record to show that the personal attendance of the accused was dispensed with.

27. There is another matter which is deeply disconcerting. The Accountability Court was set up in Attock Fort, which was under the control of the Military and to which there was no public access. The reason for the unusual choice of venue was mentioned in the Final Reference: "*the personalities involved and the ever present danger to the security of all persons involved in the trial of the accused, it is deemed necessary and appropriate in the interest of justice, fair play, and transparency of proceedings that this Reference be filed in the Hon'ble Court Attock Fort*". Section 352 of the Code mandates "*courts to be open*" to which the public has access. Undoubtedly, the section enables the court to restrict the presence of the public when this is deemed necessary. The location of the Accountability Court in the Attock Fort was determined by the Chairman NAB though he had no power to do so. In the case of Emperor v Md. Ebrahim[43] Derbyshire CJ writing for the Division Bench, took exception to, receiving "*instruction from an outside source*", which "*is open to the gravest objection*"[44]. The Chairman felt that the "*interest of justice, fair play and transparency of proceedings*" required the case to be tried in the inaccessible Attock Fort; even though it deprived the accused of an open trial. A novel concept justified by using cherished words - *interest of justice, fair play and transparency of proceedings*. However, using agreeable words do not transform an

[43] Emperor v Md. Ebrahim, AIR 1942 Cal. 219.
[44] Emperor v Md. Ebrahim, AIR 1942 Cal. 219, at page 22f and 22g.

inaccessible Military Fort into an open courtroom. Justice must not only be done but be seen to be done. Public trial secures the impartial administration of justice. In the case of Ali Nawaz v Mohammad Yusuf[45] a five member Bench of this Court dismissed the request to hold in-camera proceedings. It had been averred that in-camera proceedings would be appropriate because it involved a high officer of the Government who also held military rank. The Court however held the trial should take place in public, and all the more, "*at a time when the country lay under Martial Law, were compelling considerations that favoured an open trial so that justice should not only be done but should manifestly be seen to be done. The learned trial Judge therefore does not appear to have exercised his discretion improperly in ordering an open trial*" (per S. A. Rehman J)[46].

28. The References were based on an anonymous complaint which referred to, "*the balance sheet of the Company for the year ending June 30, 1998*" and alleged that unexplained investments amounting to 642.743 million rupees were made in the Company. The complaint further alleged that amounts drawn from the foreign currency accounts were converted into rupees and injected into the Company and this was done because the directors of the Company did not have sufficient legally declared money. The References reiterated the contents of the complaint and state that the said foreign currency accounts and the monies in it were *benami* which belonged to some of the respondents. We enquired whether respondents Nos. 1 to 9 were called upon to explain the

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[45] Ali Nawaz v Mohammad Yusuf, PLD 1963 SC 51.

[46] Ali Nawaz v Mohammad Yusuf, PLD 1963 SC 51, at page 83AA-84.

allegations and the learned Prosecutor states that there is nothing on record to confirm this. In response to the query, whether opening the said accounts and investing monies from the account into the Company constituted a criminal offence, the learned Prosecutor referred to section 9 (v) and (vi) of the NAB Ordinance. Neither the Interim Reference nor the Final Reference refers to any particular provision of section 9 of the NAB Ordinance, however leaving this aside, let us examine the said provisions:

> "9. Corruption and corrupt practices.
>
> (a) A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices--"
>
> > "(v) if he or any of his dependents or benamidars owns, possesses, or has any right or title in any movable or immovable property or pecuniary resources disproportionate to his known sources of income, which he cannot reasonably account for;"
> >
> > "(vi) misuses his authority so as to gain any benefit or favour for himself or any other person, or to render or attempt to do so;"[47]

The References also do not mention the ingredients which constitute the aforesaid offences; they do not allege that respondent Nos. 2 to 9 had assets "*disproportionate*" to their "*known sources of income*" which they could not "*reasonably account for*" and/or had misused their "*authority to gain any benefit or favour for himself or any other person*".

29. The learned Prosecutor also referred to the statement of Mr. Muhammad Ishaq Dar dated April 25, 2000[48], and placed considerable

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[47] National Accountability Ordinance 1999, PLD 2000 Federal Statutes 57, section 9, clause (v) and (vi).

[48] CMA 9233/2017 in CPLA 3258/2017, part 1, at page 138 to 188.

reliance thereon. Mr. Dar's statement was recorded before a Magistrate of the First Class. We enquired from the learned Prosecutor whether Mr. Dar's statement was under section 164 of the Code because the JIT report refers to it as such[49]. He categorically stated that Mr. Dar's statement was not a statement under section 164 of the Code, but one under 26 of the NAB Ordinance, which provides for the "Tender of Pardon to Accomplice/Plea-Bargaining" and in this regard referred to Mr. Dar's letter[50] addressed to the Chairman, NAB titled "Tender of Pardon" and the order of the Chairman, NAB dated April 21, 2000[51] whereby the Chairman in exercise of powers conferred on him under section 26 of the NAB Ordinance tendered, "*full pardon to Mr. Ishaq Dar*". The learned judges of the High Court in the impugned judgment correctly observed that a Magistrate was not competent to record a statement under section 26 (e) of the NAB Ordinance. Such statement could only be recorded "*before the Chairman, NAB or the Court*"[52]. The NAB Ordinance was later amended on July 5, 2000[53] to enable a statement to be recorded by a Magistrate. Section 26 (e) of the NAB Ordinance when Mr. Dar's statement was recorded and after the amendment made thereto are reproduced hereunder:

Original un-amended section 26 (e) of the NAB Ordinance:

> "(e) Any statement made before the Chairman NAB or the Court by a person who has accepted a tender of

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49 Joint Investigation Team Report, Volume VIII-A, page 3 and 4, at paragraph 6, sub-paragraph (a) and (f).

50 CMA 9233/2017 in CPLA 3258/2017, part 1, at page 143; Joint Investigation Team Report, Volume VIII-A, Appendix I, page 4.

51 CMA 9233/2017 in CPLA 3258/2017, part 1, at page 142; Joint Investigation Team Report, Volume VIII-A, Appendix I, page 3.

52 National Accountability Ordinance 1999, PLD 2000 Federal Statutes 57, section 26, clause (e).

53 National Accountability Bureau (Second Amendment) Ordinance No. XXIV of 2000, dated July 5, 2000.

> pardon may be given in evidence against him at such trial"[54].

Amended section 26 (e) of the NAB Ordinance:

> "(e) Any statement made before a Magistrate by a person who has accepted a tender of pardon may be given in evidence against him at the trial"[55].

30. In view of the aforesaid legal position and the order of the Chairman it is quite clear that the statement attributed to Mr. Dar could not be categorized as one made under section 164 of the Code. And, as it was not recorded before the Chairman NAB nor before the Accountability Court it can also not be categorized as one under section 26 (e) of the NAB Ordinance. Moreover, if a section 164 statement is a confessional statement it, "*must either admit in terms of the offence or at any rate substantially all the facts which constitute the offence*"[56]. Mr. Dar's statement is also self-exculpatory, he states, "*I have never obtained any illegal personal benefits of these funds*". The Privy Council has held:

> "no statement that contains self exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence" (per Lord Atkin)[57].

31. 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*

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54 National Accountability Ordinance 1999, PLD 2000 Federal Statutes 57, section 26 (e).

55 National Accountability Ordinance 1999, as amended by National Accountability Bureau (Second Amendment) Ordinance No. XXIV of 2000, dated July 5, 2000, PLD 2000 Central Statutes 360.

56 Liaqat Bahadur v State, PLD 1987 FSC 43, at page 49F.

57 Narayana Swami v Emperor, AIR 1939 Privy Council 47, at page 52, column 2.

witness making the statement"[58]. Mr. Dar's statement says that the "*money* [in the foreign currency accounts] *was/is owned by the Sharif family*"[59], therefore, if this statement is to be treated as a statement under section 164 of the Code and sought to be used against the *Sharif family* it should have been recorded in their presence and they should have been given the opportunity to cross-examine Mr. Dar. As this was not done the law does not permit its use against the *Sharif family*.

32. The learned Prosecutor stated that the *exile* was by mutual agreement, and respondent Nos. 2 and 3 did not want to return to Pakistan with a view to avoid prosecution. *Exile* is alien to the laws of Pakistan; lawyers and judges must not give credence to it because we then run the risk of the concept of *exile* gaining traction and causing harm to the administration of the criminal legal system. A purported document, which mentions *exile*, even if reduced into writing, does not constitute an agreement or a contract in law. If such a document is executed with an incarcerated person accused of a crime it would not be entered into with "free consent"[60]. Such an *agreement* will also not be for "*a lawful consideration and with a lawful object"*[61] and it would therefore be void. In any event the State and those who have the physical custody of an accused are responsible to produce him in Court and cannot *exile* him. It is an offence[62] punishable with rigorous imprisonment for up to

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58 Code of Criminal Procedure 1898, section 164 (1-A); *see also* section 265-J; State v Mir Nabi Bakhsh Khan Khoso, 1986 PCr.LJ 1130, at 1141J; Muhammad Ismail v State, 1985 PCr.LJ 713, at 717A; Ghulam Muhammad v State, 1985 PCr.LJ 829, at 833A; Abdul Hakeem v State, PLD 1982 Karachi 975, at 980B.

59 CMA 9233/2017 in CPLA 3258/2017, part 1, at page 188.

60 Contract Act 1872, Act IX of 1872, sections 10 and 14.

61 Contract Act 1872, Act IX of 1872, section 10.

62 NAB Ordinance 1999, PLD 2000 Federal Statutes 57, section 31, sub-section (a).

ten years, if any person compromises, hampers, jeopardizes or defeats any investigation under process before NAB or the Accountability Court. Respondent Nos. 2 and 3 could not *exile* themselves. The person or persons who had *exiled* respondent Nos. 2 and 3 would be deemed to have compromised, hampered, jeopardized and/or defeated the legal process; however, NAB did not launch a prosecution against them.

33. The contention of the learned Prosecutor that respondent Nos. 2 and 3 wanted to remain in *exile* is also contrary to the facts, as they were not allowed to return to Pakistan. Constitutional Petition Nos. 48 and 49 of 2007 were filed and a seven member bench of this Court unanimously declared: "*Their return/entry into country shall not be restrained, hampered or obstructed by the Federal Government or Provincial Government Agencies in any manner*"[63]. However, the order of this Court was violated. A subsequent judgment of this Court in the case of Muhammad Nawaz Sharif v The State[64] sets out what happened next:

> "Pursuant to the said direction, the petitioner embarked on a return journey to Pakistan and took a flight from London to Islamabad. However, after landing at Islamabad, he was not allowed to leave the airport and was sent out of the country. In view of violation of the order of this Court, an application for contempt of Court was filed before this Court. A similar abortive attempt was earlier made in the year 2004 by the petitioner's brother, Mian Muhammad Shahbaz Sharif, and he was not allowed to leave the airport and put on a flight destined for overseas. The above facts clearly demonstrate that the petitioner was prevented from returning to Pakistan."[65]

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63 Pakistan Muslim League (N) v Federation of Pakistan, PLD 2007 Supreme Court 642, at page 680.

64 Muhammad Nawaz Sharif v The State, PLD 2009 Supreme Court 814.

65 Muhammad Nawaz Sharif v The State, PLD 2009 Supreme Court 814, at page 830B.

34. The learned Prosecutor relies upon the aforesaid judgment in support of the applications, which seek to condone the delay in the filing of the petition and states that if eight years delay could be condoned in the filing of the petition by Mr. Muhammad Nawaz Sharif against his conviction in the hijacking case, the delay in filing this petition should also be condoned. The conviction of Mr. Muhammad Nawaz Sharif was unanimously set aside by a five Member Bench of this Court and he was acquitted of all charges. The question of limitation was attended to in the said judgment thus: "*This Court is always slow in dismissing petitions against conviction and sentence on the question of limitation and is more inclined to examine the case on merits in order to prevent grave miscarriage of justice notwithstanding delay. There is no dearth of case law in support of this proposition*", and reference was made to a number of precedents[66]. Rule 4 of Order XXIII of the Supreme Court Rules was also referred to and it was held that, "*the circumstances which prevented the petitioner from filing petition against his conviction and sentences were indeed extraordinary and we consider these to be sufficient cause for extension of time*"[67]. The other case relied upon by the learned Prosecutor is of State v Nazir Ahmad[68]. However, in this case the Additional Advocate General acted unreasonably by extending an undue concession to the accused, and the delay was of sixty three days. The present petition however is not a petition against a conviction in a criminal case and has been field 1,229 days late. The applications also do not disclose

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66 Muhammad Nawaz Sharif v The State, PLD 2009 Supreme Court 814, at page 832, paragraph 18.

67 Muhammad Nawaz Sharif v The State, PLD 2009 Supreme Court 814, at page 833, paragraph 19.

68 State v Nazir Ahmad, 1999 SCMR 610

any reason for the petition's belated filing, let alone showing "sufficient cause" for each and every day's delay.

35. NAB had requested the Accountability Court to adjourn the case *sine die* and the case was so adjourned. The Court has the power to postpone or adjourn proceedings, but this power is circumscribed and is to be utilized when witnesses are absent and for "*other reasonable cause*" as provided in section 344 of the Code. However, neither absence of witnesses nor other reasonable cause was cited by NAB as a reason in seeking adjournments. Section 344 of the Code stipulates that when the "*power to postpone or adjourn proceedings*" is exercised by the Court it must pass an order, "*in writing stating the reasons therefor*". NAB sought (*sine* die) indefinite adjournment, which was granted. Davis CJ in Agha Nazarali v Emperor[69] held that, "*the Criminal Procedure Code does not contemplate adjournments of criminal cases sine die, and that, on the contrary, what the law contemplates is due diligence and impartiality in the prosecution of criminal cases*"[70]. There have however been instances of cases being adjourned *sine die*, but then these have been when civil and criminal cases in respect of the same matter are simultaneously proceeding. In the case of Mohd. Akbar v State[71], a dispute arose regarding a bus, which was the subject matter of both civil and criminal proceedings. The criminal proceedings were adjourned *sine die* till the civil court determined the ownership of the bus. "*In exercising this discretion the guiding principles should be to see as to whether the*

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69 Agha Nazarali v Emperor, AIR 1941 Sind 186.

70 Agha Nazarali v Emperor, AIR 1941 Sind 186, page 187, column 2.

71 Mohd. Akbar v State, PLD 1968 SC 281.

accused is likely to be prejudiced if the criminal proceeding is not stayed"[72] (per Hamoodur Rahman J). The *Shariat* Appellate Bench of this Court in the case of Muhammad Azam v Muhammad Iqbal[73] attended to criminal proceedings for *zina*. Where a defence was taken before the Family Court that there was no zina as a valid marriage subsisted. This Court under such circumstances, considered prudent to "*await the decision of the family court on the issue of valid marriage*"[74]. In this case NAB filed the Reference and then sought its *sine die* adjournment, and for no valid reason. The record reveals that none of the respondents had ever requested that the case be adjourned, let alone, it be adjourned *sine die*. NAB was spurred into action when respondent Nos. 1 to 9 filed the writ petition to remove *the sword of Damocles from over their heads*. A person should not be penalized for approaching the High Court to secure his Fundamental Rights. The comments filed before the High Court by NAB did not state that NAB was now ready, able and willing to pursue the application seeking revival/restoration of the References, let alone, to proceed with them. On the contrary the "para-wise comments" filed by NAB in the High Court on July 2, 2012 state that, "*NAB has no objection for recommencement of the trial before the learned trial court, if this Hon'ble Court directs so*"[75]. The said respondents were in Pakistan for over a year before they were exiled and neither then nor when they returned did NAB proceed with the References.

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72 Mohd. Akbar v State, PLD 1968 SC 281, at page 285C.

73 Muhammad Azam v Muhammad Iqbal, PLD 1984 SC 95.

74 Muhammad Azam v Muhammad Iqbal, PLD 1984 SC 95, at page 156.

75 Writ Petition No. 2617/2011, Para-wise Comments by NAB, page 10, at paragraph D.

36. The criminal justice system requires that a person accused of a crime is brought to justice as speedily as possible, so if he is found guilty he is punished and if he is found to be innocent he is discharged and/or acquitted. The maxim that justice delayed is justice denied comes true when a criminal trial remains pending indefinitely for no reason whatsoever. A procrastinated trial not only adversely affects the prosecution case but may also seriously hamper the defence. In the case of Muhammad Hussain v the State[76] criminal proceedings were quashed and the petitioner acquitted because the case had not progressed for five years. The Court held that, "*the sword of Damocles has been hanging over his head for over six years. The chances of the accused to defend himself after a lapse of so many years must have been seriously affected. If the prosecution does not take care to see that a case against an accused person is proceeded with expeditiously and allows it to linger on inordinately or delays its progress, the fault must lie at its door*"[77]. The Court further observed that, "*The state of affairs discloses utter incompetence and callous disregard of the worry and anxiety of a person who is charged with crime. It is a mockery of law to allow criminal cases to proceed for four or five years without any progress. It is revolting to the conscience of a Judge under any system of law that a criminal case should take so long and still not be decided. The conduct of these cases by the learned Public Prosecutor reflects a lack of interest in the cases. He did not apply his mind to what was needed and he has sought adjournment after adjournment, which should not have been granted. Would an accused person have been given all these adjournments? If not, should the*

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[76] Muhammad Hussain v the State, PLD 1959 (WP) Lahore 322.

[77] Muhammad Hussain v the State, PLD 1959 (WP) Lahore 322, page 329, at paragraph 10.

prosecution have been shown such an indulgence? If the prosecution fails persistently without reasonable cause to produce its witnesses, or seeks adjournments unjustifiably, it is the duty of a Court to proceed to judgment expeditiously and without unnecessary delay. Justice delayed is justice denied for the defence of the accused must suffer by lapse of time and the prosecution may also suffer likewise. A fair and speedy trial is the essence and essential of judicial administration in a civilised country. Protracted proceedings as in this case are a mockery of the law and must be deemed to be an abuse of process of Court"[78]. We completely agree with the well articulated observations of the learned Judge. In support of his decision S. A. Mahmood J also relied upon a number of cases[79].

37. Muhammad Shafi J in the case of Fazal Karim v The State[80], observed:

> "I most regrettably observe that the whole trial has been turned into a complete mockery. 'Justice delayed is justice denied' is an old and surely not an empty maxim and there cannot be a better case than the one now before me to which it can more aptly apply"[81].
>
> "The perusal of the different orders which have been passed by the learned Magistrate in this case and keeping the case pending for five long years without doing anything substantial certainly go to show that there has been an excessive abuse of process of law and denial of justice, which can, under no circumstances, be condoned. I, consequently though with great reluctance, accept the three petitions, and order that the proceedings started on the first

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78 Muhammad Hussain v the State, PLD 1959 (WP) Lahore 322, at page 329 to 330.

79 Fazal Karim v The State. PLD 1957 Lahore 837; Crown v Piru, PLD 1955 Sind 227; Rash Behary Karury v Corporation of Calcutta, AIR 1926 Calcutta 102; Motiram Jasamal v Emperor, AIR 1943 Sind 10; Agha Nazarali v Emperor, AIR 1941 Sind 186; and Emperor v Md. Ebrahim, AIR 1942 Calcutta 219.

80 Fazal Karim v The State, PLD 1957 Lahore 837.

81 Fazal Karim v The State, PLD 1957 Lahore 837, at page 839D.

> information report recorded on the 8th June, 1952, be quashed"[82].

Derbyshire CJ in the case of Emperor v Md. Ebrahim referred to the policy of the criminal law:

> "The policy of the criminal law is to bring persons accused to justice as speedily as possible so that if they are found guilty they may be punished and if they are found innocent they may be acquitted and discharged"[83].

Lord Denning encapsulated the principle of due, or legal, process succinctly:

> "In a civilised society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end"[84].

38. In this case we have come to the painful conclusion that respondents 1 to 9 were denied due process. The legal process was abused, by keeping the Reference pending indefinitely and unreasonably. The said respondents were denied the right to vindicate themselves. The Reference served no purpose but to oppress them. We have also noted with grave concern the lack of commitment and earnestness on part of NAB at the relevant time. NAB did not produce the accused in Court; NAB did not seek to have charges framed against them; NAB did not examine a single witness, and tender evidence; NAB sought innumerable adjournments; NAB sought the Reference to be indefinitely (*sine die*)

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82 Fazal Karim v The State, PLD 1957 Lahore 837, at page 841A.

83 Emperor v Md. Ebrahim, AIR 1942 Calcutta 219, at page 221b.

84 Goldsmith v Sperrings Ltd, (1977) 2 All ER 566, at page 574g.

adjourned. For over four years the Chairman NAB did not submit an application under his signature for the restoration/revival of the Reference. And, when the Chairman did submit such an application it was not pursued. The Reference remained moribund.

39. Therefore, the learned Judges of the High Court were justified to quash the Reference and once it was quashed the question of reinvestigation did not arise. Fortuitously for NAB one learned judge permitted reinvestigation, even though NAB had not requested it; the matter of reinvestigation is mentioned in the very last sentence of his judgment[85]. The learned judge also gave no reason why he permitted reinvestigation. We also agree with the reasons articulated by the learned judge's learned brethren who did not agree with him on the matter of reinvestigation. Under such circumstances, other than to procrastinate still further the agony of respondent Nos. 1 to 9, no purpose will be served to condone the unreasonable and unjustified delayed filing of the petition.

40. During the course of hearings we observed that whilst most of the media acted maturely and fairly reported the proceedings, there were some who violated the parameters of factual reporting and also broadcasted and printed views of persons who were interested in a particular outcome of this case. The media should not dilate on a *sub judice* case, rather should only accurately report the proceedings.

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[85] Hudaibya Paper Mills Ltd. v Federation of Pakistan, PLD 2006 Lahore 667, page 692, at paragraph 19.

However, once a judgment is announced it may be analyzed, evaluated or critiqued.

41. In conclusion we would like to acknowledge the manner in which Mr. Imranul Haq, the learned Special Prosecutor, conducted the case. Though the brief entrusted to him was difficult he remained stoic and tenaciously persevered.

42. We had dismissed this petition and declined leave to appeal on December 15, 2017 for reasons to be recorded later and these are the reasons for doing so.

Judge

Judge

Judge

Bench-IV
Islamabad:
January 5, 2018

Approved for Reporting

(M. Tauseef and Barrister Kabir Hashmi)