ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P.No.2762-2024
Imran Ahmad Khan Niazi
Vs.
National Accountability Bureau (NAB) through Chairman NAB, Islamabad etc.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	07.11.2024	Mr. Zaheer Abbas, Mr. Saadullah Niazi and Mr. Ayesha Khalid, Advocates for petitioner (W.P. No.2762-2024). M/s Muhammad Usman Riaz Gill, Ms. Shahina Shahab-ud-Din, Zaheer Abbas, Khalid Yousaf, Ali Abdullah Niazi, Ayesha Khalid, Sardar Qadeer and Raja Haroon ur Rasheed, Advocates for petitioner (W.P. No.2763-2024) M/s Muhammad Amjad Pervaiz, Special Prosecutor NAB, Muhammad Rafay Maqsood, Special Prosecutor NAB and Muhammad Awais Arshad, Special Prosecutor NAB and Muhammad Nawaz Ch. Advocate for respondents with Mian Umer Nadeem, Deputy Director/IO and Asif Munir, CO, NAB. **AAMER FAROOQ, C.J.** This order shall decide the instant writ petition as well as W.P. No.2763-2024, as they arise out of NAB Reference No.19 of 2023. **2.** The petitioners are the co-accused in Reference No.19-2023 filed by National Accountability Bureau (NAB) against them along with others; they are facing trial and after framing of the charges, the matter proceeded by way of recording of the evidence. At the stage, when the

cross-examination of the Investigating Officer, was underway, an application was filed by Imran Ahmad Khan Niazi (the petitioner in W.P. No.2762-2024) seeking discharge under section 265-K Cr.P.C. on the basis that after amendments in National Accountability Bureau Ordinance, 1999 (the Ordinance), decision taken by the Cabinet is immune and no prosecution can take place under the same and the evidence does not divulge any personal benefit. Similar application was also filed by Bushra Imran Khan (the petitioner in W.P. No.2763-2024) seeking discharge on the basis that she is not a 'public office holder' and has nothing to do with the allegations levelled in the charge sheet. In case of petitioner in W.P. No.2762-2024, learned trial court dismissed the application on the basis that trial is near completion and at this juncture, application under section 265-K Cr.P.C. is not maintainable. In the case of Bushra Imran Khan (the petitioner in W.P. No.2763-2024), learned trial court passed the order that her application shall be kept pending and be decided at the time of final decision, hence writ petitions.

3. Learned counsel for the petitioner in W.P. No.2762-2024 submitted that it is a case of no evidence against the petitioner. In this regard, it was submitted that certain amendments were made in the Ordinance, some of which, were upheld and the others were struck down. It was contended that in September, during court trial,

the Supreme Court decided the issue; by virtue of the same, amendment with respect to the immunity of the decision of the Cabinet and the other Organs, was maintained with the exception that holder of the public office has not received any monetary gain as a result of such decision. It was contended that since there is no evidence for getting monetary gain by the petitioner, application under section 265-K Cr.P.C. was maintainable. Learned counsel sought to take us through the evidence available on record. It was pointed out to him that no finding, as such, has been handed down by trial court, which can be adjudged in a writ of c*ertiorari*. It was confronted that the appropriate action would be that application be decided by trial court on merit.

4. In case of petitioner in W.P. No.2763-2024, there is no decision on the application filed by the petitioner, which is kept pending and learned counsel for the petitioner in the same, also made somewhat same request.

5. Learned Special Prosecutor NAB *inter alia* contended that it is trite law that when the trial is near completion, application under section 265-K Cr.P.C. is not maintainable and the matter is to be decided on the basis of evidence. Reference was made to cases reported as Ghulam Muhammad Vs. Muzamal Khan (PLD 1967 SC 317), Yaqub Ali Vs. The State (1981 P.Cr.LJ 542), SC. Subjally Vs. A. Hamid Khan (1999 MLD 1645), Mohtarma Benazir Bhutto Vs. The

State (PLD 2000 SC 795), Mohtarma Benazir Bhutto Vs. The State (PLD 1999 SC 937), Anwar Saifullah Khan Vs. The State (PLD 2001 SC 7), The State Vs. Raja Abdur Rehman (2005 SCMR 1544), The State Vs. Tariq Nauman etc. (PLD 2013 Balochistan 138), Mumtazul Haq Vs. NAB etc. (2018 P.Cr.LJ 418), Naseer Khan Vs. Chairman NAB etc. (PLD 2020 Peshawar 74), Abbas Haider Naqvi Vs. Federation of Pakistan (2022 P.Cr.LJ 941), Abbas Haider Naqvi Vs. Federation of Pakistan (PLD 2022 SC 562) and Model Custom Collector Vs. Aamir Mumtaz Qureshi (2022 SCMR 1861).

6. Submissions by the parties have been heard and the documents, placed on record, examined with their able assistance.

7. The grievance of the petitioners has been mentioned hereinabove.

8. As noted above, petitioners seek discharge/acquittal under section 265-K Cr.P.C. and out of referred applications, one has been dismissed on the ground that the trial is near completion and the other has been kept pending. Learned trial court, while dismissing application under section 265-K Cr.P.C., has cited various case law, which show that where application for discharge has been filed, when the trial is near completion, same ought not be entertained and the matter be decided on merit. No exception can be taken to the case law cited by learned trial court in its impugned order. Likewise, the case

law cited by learned counsel for the respondents lay down the same position. In case reported as Muhammad Vs. Muzamal Khan (PLD 1967 SC 317), the Supreme Court held as follows:-

> *"It is next contended that, in any event, the reasons given by the High Court for interfering in the matter were not legally sound. In a case where a Court is properly seized of a criminal proceeding and has after examining the evidence taken the view that there is a prima facie case to be tried and framed charges the High Court is not competent to quash the proceedings unless it is satisfied that even if the evidence adduced is left unrebutted no charge can at all be framed. Then and only then can the proceedings be quashed. Here the evidence is, by no means, of that nature and it cannot be said that if it is left unrebutted no case has at all been made out against the respondents. In support of this contention reliance is also placed upon a decision of this Court in the case of M. S. Khawaja v. The State (P L D 1965 S C 287), wherein it has been observed…"*
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> *"If, in fact, an offence had been committed justice required that it should be enquired into and tried. If the respondents are not guilty they have a right to be declared as honourably acquitted by a competent Court. On the other hand, if the evidence against the respondents discloses a prima facie case then justice clearly requires that the trial should proceed according to law…"*
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> *"The inherent jurisdiction given by section 561-A is not an alternative jurisdiction or an additional jurisdiction but it is a jurisdiction preserved in the interest of justice to redress grievances for which no other procedure is available or has been provided by the Code itself. The power given by this section can certainly not be so utilised as to interrupt or divert the ordinary course of criminal procedure as laid down in the procedural statute. The High Court, as has repeatedly been pointed out in a number of decisions, should be extremely reluctant to interfere in a case where a competent Court has, after examining the evidence adduced before it, come to the view that a prima facie case is disclosed and has framed charges or summoned the accused to appear, unless it can be said that the charge on its face or the evidence, even if believed, does not disclose any offence…."*
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> *"If the respondents were aggrieved by the charge they could well have invoked the revisional jurisdiction of the High Court".*

In case reported as Yaqub Ali Vs. The State (1981 P.Cr.LJ 542), the Supreme Court held as follows:-

> *"In the instant case however the applica tion for acquittal was made at a time when even otherwise the prosecution case having been closed the statement of the accused had to be recorded and therefore it would have been conducive to quicker decision if instead of making the application, the matter had been finally argued before the learned Special Judge, enabling him to give a decision".*

In case reported as Mohtarma Benazir Bhutto Vs. The State (PLD 2000 SC 795), the Supreme Court opined as follows:-

> *"On conclusion of the defence evidence as' aforesaid, the arguments on the main case as well as or the applications filed under section 265-K Cr.P.C. may be heard by the Hon'ble Ehtesab Bench simultaneously. However, the consideration of objections raised to the admissibility of documents by the appellants at the time of their production in evidence before the Court, be attended to in precedence to other contentions in the case…"*

In case reported as Mohtarma Benazir Bhutto Vs. The State (PLD 1999 SC 937), the Supreme Court opined as follows:-

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In case reported as Anwar Saifullah Khan Vs. The State (PLD 2001 SC 7), the Supreme Court opined as follows:-

> *" Any interference by this Court by rendering judgment on the merits of the controversy involved herein arising out of the references pending in the Accountability Court, would have the effect of curtailing the remedy of appeal to an aggrieved party before the appellate forum".*

In case reported as The State Vs. Raja Abdur Rehman (2005 SCMR 1544), the Supreme Court opined as follows:-

> *"6. The prosecution again feeling aggrieved and dissatisfied with the order of the High Court filed criminal petition for leave to appeal in this Court. Vide order, dated 24-10-1997, leave was granted as under:---*
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> > *"Leave is granted in the above case to consider whether the acquittal of the respondent, who was one of the accused in a case arising out of F.I.R. No.21 of 1994 was proper on an application under section 249-A, Cr.P.C. at a stage when the A entire prosecution evidence in the case had been completed and the case was fixed for the statement of the accused in the case, especially when there were other accused also in the case against whom the trial is continuing".*
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> *"It is, however, to be noted that though there is no bar for an accused person to file application under section 249-A, Cr.P.C. at any stage of the proceedings of the case yet the facts and circumstances of the prosecution case will have to be kept in mind and considered in deciding the viability or feasibility of filing an application at any particular stage. The special or peculiar facts and circumstances of c a prosecution case may not warrant filing of an application at a stage when the entire prosecution evidence had been recorded and the case was fixed for recording of statement of the accused under section 342, Cr.P.C. This Court in the cases of Bashir Ahmad v. Zafar ul Islam PLD 2004 SC 298 and Muhammad Sharif v. The State and another PLD 1999 SC 1063 (supra) did not approve decision of criminal cases on an application under section 249-A, Cr.P.C. or such allied or similar provisions of law, namely, section 265-K, Cr.P.C. and observed that usually a criminal case should be allowed to be disposed of on merits after recording of the prosecution evidence, statement of the accused D under section 342, Cr.P.C., recording of statement of accused under section 340(2), Cr.P.C."*

In case reported as Abbas Haider Naqvi Vs. Federation of Pakistan (PLD 2022 SC 562), the Supreme Court opined as follows:-

"11. First of all, we would like to state that there can be no cavil to the rule of practice and propriety, referred to by the High Court, that when the trial is near completion, the fate of the case should not ordinarily be decided under Section 265-K of the Cr.P.C.".

"The High Court has, however, failed to appreciate that the said rule has no application to a ground pleaded by an accused for his acquittal under Section 265-K of the Cr.P.C., which does not require appraisal of the prosecution evidence recorded during trial, such as, the ground pleaded by the Petitioners in the present case".

"22. The Petitioners have prayed also for quashment of the NAB Reference in their constitutional petition before the High Court, in addition to challenging the order of the Accountability Court passed on their application under Section 265-K of the Cr.P.C. We have found that no offence cognizable by the NAB and triable by the Accountability Court under the NAB Ordinance is involved in the present case. In this background, Civil Petition No.620/2021 is converted into appeal and allowed. Resultantly, the proceedings pending before the Accountability Court in NAB Reference No.16 of 2018, are hereby quashed being without jurisdiction".

In case reported as Model Custom Collector Vs. Aamir Mumtaz Qureshi (2022 SCMR 1861), the Supreme Court opined as follows:-

"…it is also clear that application under sections 249-A and 265-K, Cr.P.C. can be filed or taken up for adjudication at any stage of proceeding of trial i.e. even before recording of prosecution evidence or during recording of evidence or when recording of evidence is over. Although there is no bar for an accused to file application under the said sections at any stage of proceeding of the trial, yet the fact and circumstance of the prosecution case will have to be kept in mind and if there is slight probability of conviction then of course, instead of deciding the said application should record the evidence and allow the case to be decided on its merit after appraising the evidence available on record."

However, the petitioners' version that law underwent a change during pendency of trial has substance and the same is to be kept in mind while deciding the fate of the Reference inasmuch as by virtue of the decision of the Supreme Court of Pakistan, amendments made in the Ordinance survived and now the decisions of the Cabinet and the Federal Government are immune from prosecution except where there is allegation and proof of personal gain and such aspect of the matter could only be decided after evaluation of the evidence. The

appropriate course of action for the trial court, in the facts and circumstances, was to perhaps keep the matter pending and decide the same at an appropriate stage, keeping in view dicta of the superior courts mentioned above yet also safeguarding the interests and rights of the petitioners.

9. In view of above, W.P. No.2762-2024 is allowed and the impugned order dated 12.09.2024 passed by Judge, Accountability Court-I, Islamabad is set aside; consequently, the application filed by the petitioner shall be decided in accordance with law after appraisal of evidence at an appropriate juncture. Likewise, W.P. No.2763-2024 is also allowed and the impugned order dated 05.09.2024 is also set aside and trial court is directed to decide the application at an appropriate juncture in the proceedings.

(MIANGUL HASSAN AURANGZEB)
JUDGE

(CHIEF JUSTICE)

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