

Retrospective Effect of Explanatory Clauses: Comment on the Islamabad High Court’s Judgment in *Muhammad Bilal Sheikh v National Accountability Bureau* (W.P. No. 4166/2019)

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Details of the Case

The full name of the parties to the case is Muhammad Bilal Sheikh v. National Accountability Bureau through its Chairman, Islamabad & another. The case number is Writ Petition 4166 of 2019. The case was heard by Justices Lubna Saleem Pervez and Aamer Farooq of the Islamabad High Court, and the order was released on 23 Jan 2020.

Facts of the Case

The accused Bilal Sheikh (hereinafter referred to as ‘the accused’), former President of Sindh Bank Ltd., was arrested by the National Accountability Bureau (‘NAB’) for allegedly granting imprudent loans to Omni group of companies, in connection with the fake accounts scam. Under the fake account scam, more than one hundred billion rupees, equivalent to 0.77 billion US dollar, were laundered out of Pakistan in the last few years, through 107 fake bank

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accounts.¹ The granting of the loan to the Omni Group was considered to be a rendition of an undue benefit to the company that the accused had granted through misuse of his authority. The accused was arrested for misusing his authority under Section 9(a)(vi) of the National Accountability Ordinance 1999,² which recites as follows:

(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-

(vi) if he misuses his authority so as to gain any benefit or favour for himself or any other person, or renders or attempts to render or wilfully fails to exercise his authority to prevent the grant, or rendition of any undue benefit or favour which he could have prevented by exercising his authority;³

The accused challenged his arrest and applied for bail through Writ Petition 4166/2019 filed in the Islamabad High Court, the main legal issues of which are explained next.

Legal Issues and Arguments of the Parties

The Counsel for the accused filed a petition for the grant of post-arrest bail in the Islamabad High Court, arguing that the investigation and inquiry itself was against the law as Section 31-D

¹ 'Over 1 Billion Rupees Laundered Through Fake Bank Accounts in Pakistan' *Xinhua* (23 Oct 2018) <http://www.xinhuanet.com/english/asia/pacific/2018-10/23/c_137552876.htm> (accessed on 27 Jan 2020); for more on the fake accounts scam *see also* 'Accused in Fake Bank Accounts Scam Urges SC to Drop Case' *Dawn* (12 Aug 2018) <<https://www.dawn.com/news/1426561/accused-in-fake-bank-accounts-scam-urges-sc-to-drop-case>> (accessed on 27 Jan 2020); 'Fake Bank Accounts' Scam: Case Being Transferred to Islamabad, NAB Tells Court' *Business Recorder* (5 Feb 2019) <<https://fp.brecorder.com/2019/02/20190205444793/>> (accessed on 27 Jan 2020).

² National Accountability Ordinance, 1999 (XXVIII of 1999) (hereinafter referred to as 'the NAB Ordinance').

³ *ibid* Section 9(a)(vi).

of the NAB Ordinance provides that the power to initiate the said proceedings only belongs to the Governor of the State Bank of Pakistan, whereas, in this case, the NAB initiated the proceedings without the required reference from the Governor.⁴ This is a technical issue that will not be discussed in the present note as decision on this point is not going to impact the legal system as a whole.

The other contention of the accused's side is much more significant in terms of the impact it may carry for the legal system as it involved deciding on one of the most important issues of statutory interpretation. It was contended that as per the recent amendment in the NAB Ordinance inserted by the National Accountability (Amendment) Ordinance 2019,⁵ an explanation has been added specifically in Section 9(a)(vi) which recites as follows:

For the purposes of this clause nothing shall be construed as misuse of authority by a holder of public office unless there is corroborative evidence of accumulation of any monetary benefit or asset which is disproportionate to his known sources of income or which cannot be reasonably accounted for.⁶

The legal issue that this explanation gives rise to is with regards to its retrospective applicability. The counsel for the

⁴ National Accountability Ordinance 1999, Section 31-D: 'Notwithstanding any-thing contained in this Ordinance or any other law for the time being in force, no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or rescheduled loans shall be initiated or conducted by the National Accountability Bureau against any person, company or financial institution without reference from Governor, State Bank of Pakistan. Provided that cases pending before any Accountability Court before coming into force of the National Accountability Bureau (Second Amendment) Ordinance, 2000, shall continue to be prosecuted and conducted without reference from the Governor, State Bank of Pakistan.'

⁵ National Accountability (Second Amendment) Ordinance 2019, approved by the cabinet on 26 December 2019.

⁶ *ibid* Section 3(a).

petitioner, contended that since the explanation clarifies the meaning of the provision since the moment it entered into force, it must be applied retrospectively. It does nothing more than explaining the true meaning of a provision, and that meaning is to be followed for all the time the provision existed since it was always meant to mean this and only this. In favour of this interpretation, several cases were quoted. The first one was *Kohinoor Sugar Mills v. Federation of Pakistan*⁷ where the Lahore High Court held that:

As far as the extent and scope of insertion of an explanation by the legislature is concerned, in case there is a doubt about true interpretation of a provision, it is open to the legislature to clarify its intent by introducing amendments in the law which may also be undertaken by adding an explanation. Such explanation is for all intents and purposes clarificatory and declaratory in nature and due effect must be given to it. Further, such clarificatory/declaratory explanation lawfully inserted into a statute may operate retrospectively (emphasis added).⁸

In favour of the argument that clarificatory and declaratory explanations may operate retrospectively, reliance was also made on several other cases by the counsel for the accused.⁹ These clearly show that the retrospective nature of clarificatory and declaratory

⁷ PTD (2018) Lahore 821.

⁸ *ibid* at 840, paragraph 31 (per Justice Ijaz Ul Ahsan).

⁹ See *The Commissioner of Income Tax, Central Zone-R, Karachi v. Messrs Asbestos Cement Industries Limited Karachi* 1993 SCMR 1276, 1281: 'This explanation is not a substantive enactment but declaratory. A declaratory legislation has always a retrospective effect'; *Imtiaz Ahmad Lali v. Ghulam Muhammad Lali* PLD (2007) SC 369: 'There is no cavil with the proposition that the Legislature is empowered to promulgate the law with retrospective effect'; *Yar Muhammad v Secretary Finance Department, Government of Punjab* 2011 SCMR 1537: 'It is settled law that the legislature has the authority to take away, or affect any vested right of a person retrospectively...'

explanations has constantly been upheld by the judiciary, for the last fifty years.

Arguing against this, the prosecution counsel claimed that generally the law should be applied only prospectively and this is true also for explanatory clauses added by the legislator at a later stage. Moreover, the counsel informed the Court that the accused's actions had caused a significant loss to the exchequer.

Judgment and Order of the Court

The Court observed that the provision of Section 31-D of the NAB Ordinance is obligatory, and it is an irregularity on the part of the respondents that they did not follow the mandatory provision of the law. Regarding the retrospective effect of the explanation added to Section 9(a)(vi) of the same ordinance, the Court observed that: 'The ratio of referred judgments is instructive, as it has been categorically held that where any explanation added is for clarification of the provision shall take effect retrospectively. Even in the instant case, no new offence has been created but only misuse of authority has been explained.' The Court granted the post arrest bail on the grounds that: 'NAB failed to adhere to the provision of Section 31-D of the Ordinance which are mandatory in nature...and also no allegation has been levelled against him regarding obtaining any monetary benefit or accumulation of wealth disproportionate to his known sources of income.' The Court concluded the order by quoting the words of the Supreme Court of Pakistan in *Manzoor v The State*¹⁰:

It is important to remember that bail is not to be withheld as a punishment. There is no legal or moral compulsion to keep people in jail merely on the allegation that they have committed offences punishable with death or transportation, unless reasonable grounds appear to exist to disclose their complicity. The ultimate conviction and incarceration of a

¹⁰ PLD 1972 Supreme Court 81

guilty person can repair the wrong caused by a mistaken relief of interim bail granted to him, but no satisfactory reparation can be offered to an innocent man for his unjustified incarceration at any stage of the case albeit his acquittal in the long run.¹¹

Impact of the Judgment

Through this judgment of the Islamabad High Court, restrictions have been placed on the powers of NAB. From now onwards, not everyone can be whimsically tried and arrested: corroborative evidence must be provided that the accused has made some monetary gain or that their assets are disproportionate to the known sources of income, otherwise the offence of misuse of authority cannot be sustained. This provides a breathing space to businessmen and public office holders, which might prove beneficial for the economic conditions of the country, if the amendments to the NAB Ordinance will be extended and maintained in force in the future.¹²

By accepting the contention of the counsel for the accused that the explanation inserted into Section 9(a)(vi) by the National Accountability (Second Amendment) Ordinance, 2019 acts retrospectively, the Court has opened an avenue for relief to persons who are in jail on the basis of ill-founded accusations. This can be useful for those who have been incarcerated for long terms. Moreover, at a general level, it has reinstated the general principle of criminal law that only incriminating provisions do not have retrospective effect, whereas explanatory clauses that clarify the meaning of an already existing incriminating norm, do possess retrospective value if their effect is not to expand the incriminatory scope of the provision.

¹¹ *ibid* at 83.

¹² Malik Asad, 'Law Protecting Business Community from NAB May Be Extended' *Dawn* (28 Jan 2020) 5.

In case of bank loans, the judgment has cleared the ambiguity, if there ever was any, that arresting the banker or taking any steps against the person who issued the loan without fulfilling the requirements of Section 31-D would be called into question as per law. The mere allegation of misuse of authority is no longer sufficient. The provision has been made by the legislature for a reason, to place a due check on the vast powers of the NAB.

Bibliography

Primary Sources

Legislation

1. National Accountability Ordinance, 1999 (XXVIII of 1999)
2. National Accountability (Second Amendment) Ordinance 2019, approved by the cabinet on 26 December 2019

Case Law

3. *Imtiaz Ahmad Lali v. Ghulam Muhammad Lali* PLD (2007) SC 369
4. *Kohinoor Sugar Mills v. Federation of Pakistan* PTD (2018) Lahore 821
5. *Manzoor v The State* PLD 1972 Supreme Court 81
6. *The Commissioner of Income Tax, Central Zone-R, Karachi v. Messrs Asbestos Cement Industries Limited Karachi* 1993 SCMR 1276
7. *Yar Muhammad v Secretary Finance Department, Government of Punjab* 2011 SCMR 1537

Secondary Sources

Newspaper Articles and Online Sources

8. 'Accused in Fake Bank Accounts Scam Urges SC to Drop Case' *Dawn* (12 Aug 2018) <<https://www.dawn.com/news/1426561/accused-in-fake-bank-accounts-scam-urges-sc-to-drop-case>>
9. 'Fake Bank Accounts' Scam: Case Being Transferred to Islamabad - NAB Tells Court *Business Recorder* (5 Feb 2019) <<https://fp.brecorder.com/2019/02/20190205444793/>>
10. Malik A, 'Law Protecting Business Community from NAB May Be Extended' *Dawn* (28 Jan 2020) 5
11. 'Over 1 Billion Rupees Laundered Through Fake Bank Accounts in Pakistan' *Xinhua* (23 Oct 2018) <http://www.xinhuanet.com/english/asiapacific/2018-10/23/c_137552876.htm>