

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No.887 of 2019

Appellant : Muhammad Abid son of Bahadur Khan,
Through Mr. Khuwaja Rauf Ahmed, advocate.

Respondent : The State
Through Mr. Irshad Ali, Asst; Attorney General

Date of short order : 29.05.2025

Date of reasons : 30.05.2025

REASONS

KHALID HUSSAIN SHAHANI, J. – This Criminal Jail Appeal is directed against the impugned judgment dated November 28, 2019, passed by the learned Special Judge (Central-I) Karachi, in Case No.03/2009 arising out of FIR No. 22/2009 registered at P.S. FIA Crime Circle, Karachi, for offence under Sections 409/420 PPC read with Section 5(2) PCA-II, 1947. By virtue of the said judgment, the appellant, Muhammad Abid s/o Bahadur Khan, has been convicted and sentenced as under:

- *Under Section 409 PPC: Rigorous Imprisonment for Two (02) years and a fine of Rs. 1,088,700.25/- (Rupees Ten Lacs Eighty Eight Thousand Seven Hundred and Twenty Five Paisa only). In default of payment of fine, he shall further undergo Simple Imprisonment for Six (06) months.*
- *Under Section 5(2) PCA-II, 1947: Rigorous Imprisonment for Two (02) years. Both sentences were ordered to run concurrently, save for the payment of fine. The benefit of Section 382-B Cr.P.C. was extended to the appellant.*

2. The genesis of the prosecution case lies in a written complaint (No. PC-Sales/2009-4982 dated January 31, 2009) lodged by Mr. Kamal Mustafa, Regional Manager, Utility Stores Corporation of Pakistan (Pvt.) Ltd. (USC), Regional Office, Karachi, addressed to the Director, FIA, Sindh, Karachi. The complaint alleged that the appellant, Muhammad Abid, while serving as Incharge of the USC store at Nagan Chowrangi, Karachi, had caused a shortage of stock/funds amounting to Rs. 1,088,700.25/-, which was detected upon reconciliation of his account on January 22, 2008. This was construed as criminal misconduct, misappropriation, and embezzlement of Government funds/stock. Following an inquiry (No. 35/2009), FIR No. 22/2009 was registered, and a final charge sheet submitted on August 17, 2009, leading to the appellant's trial.

3. During the trial, the prosecution presented numerous witnesses and documentary evidence. The key prosecution witnesses included:

- *PW-1 Kamal Mustafa (Regional Manager, USC): The complainant, who reiterated the contents of the FIR and produced letters to sureties (Ex.4/B & 4/C), recovery letter to accused (Ex.4/D), audit report (Ex.4/E), letter to FIA (Ex.4/F), and departmental enquiry letter (Ex.4/G).*
- *PW-3 Ateeq-ur-Rehman (Accounts Officer/Regional Manager North Karachi, USC): A crucial witness who prepared the report regarding shortage (Ex.6/A) and produced a voluminous seizure memo (Ex.6/B), encompassing various documents such as Stock Taking Sheets (Article 6/B/1), Bank Deposit Slips (Articles 6/B/2-26, 27-30), Price Amendment Lists (Articles 6/B/31-39, 40-42), Stock Credit Notes (Articles 6/B/43-48), Stock Debit Notes (Articles 6/B/49-78), Handing/Taking Over Sheet (Article 6/B/79), Inventory Control Ledgers (Articles 6/B/80, 82, 89, 95, 102, 108), Audit Reports (Articles 6/B/82-88, 89-94, 95-101, 102-107, 108-121), and the Memorandum Register (Article 6/B/81). He also produced the letter for lodging theft FIR (Ex.6/C) and its copy (Ex.6/D).*
- *PW-5 Altaf Hussain (Supervisor, USC): Testified about taking over charge from the appellant and detecting the shortage.*
- *PW-6 Nisar Ahmed (Senior Establishment Officer, USC): Conducted the departmental inquiry and produced his report (Ex.9/A), finding the appellant guilty of embezzlement.*
- *PW-12 Gul Sher Mugheri (I.O./Inspector FIA): Investigated the case, arrested the appellant, seized documents, and submitted the charge sheet. The prosecution maintained that the evidence unequivocally established the appellant's guilt as a public servant who misappropriated Government funds.*

4. In his statement recorded under Section 342 Cr.P.C., the appellant denied the allegations, proclaiming innocence. He asserted that a theft had occurred at the utility store on the intervening night of January 2/3, 2009, for which he had lodged FIR No. 09/2009 at P.S. Sir Syed, Karachi. He produced photocopies of the letter for lodging FIR (Ex.17/A), the FIR itself (Ex.17/B), and a document signed by neighboring shopkeepers acknowledging the theft (Ex.17/C). He, however, neither offered himself as a witness under Section 340(2) Cr.P.C. nor produced any defense evidence.

5. The learned counsel for the appellant, Mr. Munawar Alam Khan, assailed the impugned judgment on various grounds, emphasizing the following key points that the appellant himself, with due diligence, lodged FIR No. 09/2009 concerning a theft incident at the store. This FIR, he submitted, was subsequently disposed of under an "A-Class" report, signifying that the police found the report to be true, but the perpetrators could not be traced. This

fact, he argued, was not given its due weight by the trial court, which merely dismissed it as an "afterthought." He further contended that the subsequent shifting of the investigation from P.S. Sir Syed to FIA Crime Circle after a month, without apparent progress from the initial theft inquiry, raised a serious question mark on the genuineness of the later embezzlement allegations, suggesting a deliberate attempt by the Utility Stores Corporation Management to deflect blame and cover up their own lapses. A pivotal argument advanced was that the appellant, being appointed on a daily wages basis, did not fall within the ambit of "public servant" as defined under Section 21 of the Pakistan Penal Code, 1860. Consequently, if he was not a public servant, the provisions of Section 409 PPC (criminal breach of trust by a public servant) and Section 5(2) of the Prevention of Corruption Act, 1947, would not be applicable, thereby rendering his conviction unsustainable. It was contended that the Investigating Officer failed to produce original documents during the investigation and trial, relying largely on photocopies or unverified material. Furthermore, he highlighted that the appellant was arrested about six months after the alleged incident of misappropriation. The learned counsel argued that there was no proper and transparent "handing over and taking over" report of the utility store, which is fundamentally essential to accurately ascertain the exact stock position and any shortage at the time of charge transfer. He stressed that in the absence of such a meticulously prepared and mutually verified document, the alleged shortage could not be definitively attributed to the appellant. He asserted that the defense was not afforded a fair and adequate opportunity to cross-examine crucial prosecution witnesses, particularly concerning the enquiry committee report prepared by Nisar Ahmed (PW-6) and the extensive documents listed in the seizure memo (Ex.6/B). He submitted that the denial of such opportunity vitiated the evidentiary value of these documents. A significant contradiction highlighted was the testimony of PW-10 Faisal Majeed, a Junior Audit Assistant, who, according to the learned counsel, deposed about a shortage of only Rs. 6,339/-. This figure stands in stark contrast to the colossal amount of Rs. 1,088,700.25/- forming the basis of the charge, thereby creating a substantial doubt as to the actual embezzlement. Finally, it was submitted that numerous contradictions, inconsistencies, and procedural lapses in the prosecution's case cumulatively generated a reasonable doubt, which, by settled law, must always be resolved in favor of the accused.

6. On the conclusion of arguments by the learned counsel for the appellant on May 27, 2025, this Court sought clarification from the learned AAG for the

State on two critical aspects, specifically relating to the appellant's employment status and the rules governing his appointment as Incharge of a Utility Store:

- *(i) Status of Appellant's Employment: Whether the appellant was a permanent employee or truly appointed on a daily wages basis, as contended by the learned counsel for the appellant. The Court required clarification on whether, irrespective of his status (daily wage or permanent), he was duly appointed as Incharge of the Utility Store at Nagan Chowrangi.*
- *(ii) Requirements for Appointment as Incharge: What were the prescribed rules and requirements for appointment as an Incharge of a Utility Store under the relevant service rules of the Utility Stores Corporation.*

7. The learned AAG for the State sought time to furnish a reply to these queries. However, despite being afforded an opportunity, the learned AAG has failed to provide the requested information or relevant documents on the date of this judgment. This failure to clarify crucial factual and legal aspects pertaining to the appellant's employment status and the official rules governing his appointment as Incharge leaves significant gaps in the prosecution's foundational claims regarding the appellant's "public servant" status and his designated responsibilities. The learned AAG for the State, while attempting to counter the appellant's arguments, largely relied upon the reasoning and findings of the trial court's judgment. However, he contended that the appellant's prior theft FIR was merely an "afterthought" and a "precautionary measure" to evade accountability, especially since the alleged theft amount was insignificant compared to the embezzlement. The appellant's inability to provide information about the FIR's fate reinforced this view. The prosecution witnesses, including PW-1 Kamal Mustafa, PW-3 Ateeq-ur-Rehman, and PW-5 Altaf Hussain, provided consistent and corroborative evidence, duly supported by documentary evidence. The extensive documentary evidence, particularly the audit reports and stock reconciliation (Ex.6/A, Ex.6/B series), clearly established the shortage of Rs. 1,088,700.25/-. The trial court noted that many of these documents remained un-rebutted in cross-examination. The departmental inquiry (Ex.9/A) proved the allegations against the appellant, and the appellant himself admitted his participation in and the outcome of the inquiry in his Section 342 Cr.P.C. statement. The contention regarding the appellant not being a "public servant" was squarely addressed by the trial court, which correctly interpreted Section 21 of the PPC, specifically the 9th exception, to include the appellant as a public servant, given his contractual appointment and responsibility for Government property/funds. The handing and taking over process was properly conducted and evidenced by the

signatures of the appellant and PW-5 Altaf Hussain on the relevant sheet (Article 6/B/79). The arguments regarding lack of security guards and non-maintenance of ICL were duly rebutted by the trial court, which found that proper records were maintained and the appellant could not absolve himself of responsibility based on such pretexts. Overall, the prosecution had established the charges against the appellant beyond a reasonable doubt, warranting his conviction.

8. This Court has meticulously re-appraised the entire evidence on record, the arguments advanced by both sides, and the findings of the learned trial court. While the trial court's judgment is comprehensive and attempts to address most of the defense pleas, certain critical aspects, particularly when viewed through the prism of establishing guilt beyond reasonable doubt, merit a different conclusion.

9. The most striking infirmity in the prosecution's case is the alleged testimony of PW-10 Faisal Majeed, a Junior Audit Assistant, reporting a shortage of Rs. 6,339/-. If this claim by the learned counsel for the appellant is borne out by the actual deposition of PW-10 in the trial record, it creates an irreconcilable conflict with the primary charge of Rs. 1,088,700.25/-. This is not a mere technicality; it goes to the very essence of the alleged embezzlement. A prosecution witness, particularly one involved in the audit process, cannot offer a figure that is about 170 times lower than the alleged misappropriated amount without fundamentally eroding the credibility of the entire financial accounting. The failure of the trial court to explicitly address or reconcile this alleged glaring contradiction in its judgment amounts to a non-appreciation of material evidence, which is a grave error. Such a colossal discrepancy, if true, inherently generates an insurmountable reasonable doubt as to the actual quantum of loss, and consequently, the culpability of the accused for the charged amount.

10. The core of the prosecution's case under Section 409 PPC and Section 5(2) PCA-II, 1947, hinges on the appellant being a "public servant." While the trial court relied on Section 21, ninth exception, of the PPC to establish this, the consistent stance of the appellant that he was a "daily wages" employee necessitates a robust rebuttal. This Court specifically put queries to the learned AAG for the State regarding the appellant's permanent employment status and the rules governing the appointment of an Incharge of a Utility Store. The failure of the learned AAG to provide any concrete response or documentary evidence in this regard is highly detrimental to the prosecution. The

prosecution has a burden to prove every ingredient of the offense, including the status of the accused. If the prosecution fails to convincingly demonstrate, through official records or explicit rules, that a "daily wages" employee could indeed be vested with such significant responsibilities as an Incharge, especially when dealing with large sums of public money/stock, and definitively falls under the definition of a public servant in such a capacity, then a fundamental doubt arises. While the trial court merely noted his contractual appointment based on guarantees, the precise nature of that contract, particularly concerning "daily wages" and its implications for public servant status in the context of such heavy responsibilities, remained unaddressed. The absence of specific rules for appointing an Incharge on a daily wage basis, despite court queries, leaves a void that the prosecution cannot afford.

11. While the trial court dismissed the appellant's theft FIR as an "afterthought," the disposal of FIR No. 09/2009 under "A-Class" cannot be lightly brushed aside. An "A-Class" report implies the truthfulness of the incident, albeit with untraced culprits. The shifting of the investigation from P.S. Sir Syed to FIA after a month, as argued by the appellant, when coupled with the alleged "A-Class" report, raises legitimate concerns regarding the integrity and thoroughness of the subsequent investigation. The prosecution did not provide a satisfactory explanation for this jurisdictional shift or the apparent lack of follow-up on the initial theft FIR. This sequence of events, though not directly exculpatory, contributes to the overall cloud of doubt surrounding the genesis of the present case.

12. The appellant's assertion that he was denied adequate opportunity for cross-examination of key witnesses and documents, particularly PW-6 Nisar Ahmed and the extensive seizure memo documents, merits serious consideration. While the trial court simply noted the absence of cross-examination, the crucial question is whether this was due to the defense's deliberate choice or a lack of opportunity provided by the court. Fair trial principles demand that the defense be afforded every legitimate opportunity to test the veracity of prosecution evidence. In the absence of a clear record demonstrating that adequate opportunity was indeed provided and consciously foregone by the defense, the benefit of doubt on this procedural aspect must be extended to the appellant.

13. It is a well-established principle of criminal jurisprudence that the prosecution must prove its case beyond all reasonable doubt. If, from the

evidence as a whole, two rational conclusions are possible, the one favorable to the accused must be adopted. In the instant case, the significant and unresolved contradiction regarding the quantum of shortage, the prosecution's failure to definitively clarify the appellant's "public servant" status in light of his alleged daily wage employment and the lack of clarity on the rules of his appointment, the lingering questions regarding the handling of the prior theft FIR, and the assertion of denied cross-examination opportunities, collectively create a formidable edifice of reasonable doubt. The cumulative effect of these infirmities undermines the prosecution's ability to prove the appellant's guilt beyond a shadow of doubt.

14. It is not for the defense to prove its innocence; it is for the prosecution to establish guilt. Where the prosecution fails to plug significant holes in its narrative and provide convincing answers to fundamental queries, the benefit must accrue to the accused.

15. In light of the detailed analysis above, this Court finds that the prosecution has failed to discharge its burden of proving the charges against the appellant, Muhammad Abid, beyond reasonable doubt. The findings of the learned trial court are consequently found to be based on an insufficient appreciation of certain material aspects of the evidence and an omission to address critical queries that go to the root of the prosecution's case.

16. For the reasons elaborated hereinabove, this Criminal Jail Appeal allowed vide short order dated 29.05.2025. Resultantly, the impugned judgment dated November 28, 2019, passed by the Learned Special Judge (Central-I) Karachi in Case No. 03/2009 (FIR No. 22/2009) is hereby set aside. The appellant, Muhammad Abid, is acquitted of the charges leveled against him. He is present on bail, his bail bond is cancelled and surety is discharged.

J U D G E