

IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-

Mr. Justice Muhammad Iqbal Kalhoro;
Mr. Justice Shamsuddin Abbasi.

Criminal Accountability Appeal No.56 of 2018

Appellant Masood Alam Niazi son of Rasheed Ahmed
Niazi through M/s Amer Raza Naqvi and
Muhammad Rehman Ghous, Advocate.

Respondent The State through Chairman NAB, Karachi
through Mr. Khalid Mahmood Awan, Special
Prosecutor NAB.
Mr. Irfan Ahmed Memon, DAG.

Criminal Accountability Appeal No.57 of 2018

Appellant Ziaullah Khan Warsi son of Shafiullah Khan
through Mr. Muhammad Muneer Ahmed,
Advocate.

Respondent The State through Chairman NAB, Karachi
through Mr. Khalid Mahmood Awan, Special
Prosecutor NAB.
Mr. Irfan Ahmed Memon, DAG.

Constitutional Petition No.D-7425 of 2018

Petitioner Ziaullah Khan Warsi son of Shafiullah Khan
through Mr. Muhammad Muneer Ahmed,
Advocate.

Respondent The State through Chairman NAB Islamabad
through Mr. Khalid Mahmood Awan, Special
Prosecutor NAB.
Mr. Irfan Ahmed Memon, DAG.

Constitutional Petition No.D-7277 of 2018

Petitioner Masood Alam Niazi son of Rasheed Ahmed
Niazi through M/s Amer Raza Naqvi and
Muhammad Rehman Ghous, Advocate.

Respondent The State through Chairman NAB Islamabad
through Mr. Khalid Mahmood Awan, Special
Prosecutor NAB.
Mr. Irfan Ahmed Memon, DAG.

Dates of hearings 18.07.2019, 30.07.2019 and 01.08.2019.

Date of short order **01.08.2019**

Date of detailed reasons **07.08.2019**

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JUDGMENT

SHAMSUDDIN ABBASI, J:-Appellants/Petitioners Masood Alam Niazi
and Ziaullah Khan Warsi were tried by Accountability Court No.III,

{Sindh}, Karachi, in NAB Reference No.41 of 2016 filed by the Director General NAB within the meaning of Section 16{c} of National Accountability Ordinance, 1999 {NAO, 1999), on the charges of corruption and corrupt practices and misuse of authority as defined under Section 9{a} of NAO, 1999 punishable under Section 10 of NAO, 1999. By a judgment dated 11.10.2018 appellant Masood Alam Niazi was convicted under Section 10 of NAO, 1999 read with Serial No.4 of the Schedule thereto and sentenced to undergo rigorous imprisonment for five {05} years whereas appellant Ziaullah Khan Warsi was convicted under Section 10 of NAO, 1999 read with Serial No.4 of the Schedule thereto and sentenced to undergo rigorous imprisonment for seven {07} years and to pay a fine of Rs.6,292,151/- {equivalent to the amount of 29 cheques deposited through deposit slips Ex.5/3 to Ex.5/31 in the bank account of accused Ziaullah Khan Warsi, in default whereof he was ordered to suffer rigorous imprisonment for one {01} year more. While recording convictions and sentences, the trial Court further ordered both appellants to cease to hold public office forthwith, if any, held by them and also ordered their disqualification for a period of ten {10} years to be reckoned from the date of their release after serving the sentences, for seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body or any statutory or local authority or in service of Pakistan or of any Province as well imposed an embargo on availing financial facility in the form of any loan or advance from any bank or financial institution in the public sector for a period of ten {10} years from the date of their conviction. However, the benefit in terms of Section 382-B, Cr.P.C. was extended in favour of the appellants.

2. The appellants/petitioners through their respective appeals, referred herein above, have sought their acquittal by setting-aside impugned judgment dated 11.10.2018 whereas through their respective petitions, referred herein above, have prayed for suspension of sentences and their release on bail.

3. Since both appeals and petitions have arisen out of same reference and the question of law and facts are also same, therefore, we deem it appropriate to decide them together.

4. Facts as emerged from the reference are that consequent upon a complaint against Masood Alam Niazi, Deputy Managing Director, Utility Stores Corporation for his involvement in corruption and corrupt practices, an inquiry followed by an investigation was conducted wherein it was concluded that Masood Alam Niazi, the then Zonal Manager of Zonal Office, Utility Stores Corporation, Karachi, had misused his authority and transferred an amount of Rs.19,236,702/- into Account No.1041-0081-004437-01-0 drawn at Bank Al-Habib, Gulshan-e-Hadeed Branch, Karachi, which was owned and operated by Ziaullah Khan Warsi, the then Accounts Clerk, who was deputed as Incharge for lifting of sugar from Pipri Godown of Trading Corporation Pakistan {TCP} on account of labour charges, which have already been paid by TCP to the Handing Agent namely, M/s Badaruddin Terminal, Karachi, as per agreement dated 12.07.2006 executed between TCP and Handing Agents. The investigation further revealed that Ziaullah Khan Warsi in the capacity of Accounts Clerk, Utility Stores Corporation, Zonal Office, Karachi, as well Incharge for lifting of sugar from various regions of TCP from 2006 to 2008 illegally received an amount of Rs.19,236,702/- through deposit into his own account, withdrew cash in violation of the financial rules and procedures. It was also found that Masood Alam Niazi and Ziaullah Khan Warsi in connivance with each other have misused their official authority and misappropriated an amount of Rs.19,236,702/- through fake payment on account of labour charges, thereby caused a loss to the public exchequer.

5. After completing the usual investigation a reference was filed on 08.08.2016 under the provision of Section 16{c} of NAO, 1999, nominating two accused namely, Masood Alam Niazi and Ziaullah Khan Warsi, for commission of offences of corruption and corrupt practices and misuse of authority as envisaged under Section 9{a} of NAO, 1999 punishable under Section 10 of NAO, 1999, whereby both appellants/petitioners were sent up to face the trial.

6. The trial Court, after completing pre-requisite legal formalities framed a charge against appellants/petitioners in respect of offences of corruption and corrupt practices punishable under

Section 9{a}{vi} of NAO, 1999 at Ex.2 to which they pleaded not guilty and claimed trial.

7. At trial, the prosecution examined as many as eight {08} witnesses, namely, {i} Syed Zia Abbas Shah at Ex.5, {ii} Muhammad Aqeel Siddiqui at Ex.6, {iii} Muzaffar Hussain at Ex.7, {iv} Asad Ilyas at Ex.8, {v} Muhammad Azeem at Ex.9, {vi} Qutib Khan at Ex.10, {vii} Atiq-ur-Rehman at Ex.12, {viii} I.O. Waliullah at Ex.13 and then closed its side of evidence vide Ex.14.

8. Statements of appellants/petitioners were recorded under Section 342, Cr.P.C. at Ex.15 and Ex.16, wherein they have denied the allegations leveled against them, professed their innocence and falsified the case of the prosecution. Appellant Masood Alam Niazi while recording his statement emphasized that in view of evidence of Atiq Rehman {PW.7} the offence falls within the ambit of Finance Department and not of Zonal Manager for the reason that the cheques in dispute had been signed by Regional Manager and Accounts Officer, which does not cover his job description and further the reference relates to loading of sugar and not for import/purchased of pulses and not a single penny in lieu of loading charges came into his account; that he has not mis-used his authority and none of the PWs have implicated him with the commission of offences; that he has been involved in this case at the behest of rival group as one Mir Faisal Baloch, who is an absconder in FIR lodged against him by FIA, filed a complaint with NAB and FIA just to damage his reputation, and after investigation he was set free in the said FIR. He lastly prayed for justice. Appellant Ziaullah Khan Warsi in his statement has stated that he was only an Account Clerk and has nothing to do with the affairs of Utility Stores Corporation, the allegations do not come within the ambit of his job description, he had no authority to issue a cheque of Utility Stores Corporation, he performed his duties as per directions of authorized officer and paid the loading charges to the transporters, which was acknowledged to the Utility Stores Corporation and he has not embezzled a single penny. He further stated that none of the PWs have deposed against him except I.O. The entire amount was paid to the transporters towards loading charges, which was released by authorized officers

namely, Kamal Mustafa, Sardar Muhammad Riaz, Accounts Officer Muhammad Saeed and Cashier Atiq-ur-Rehman and such a fact was admitted by PW.6 and PW.7. Lastly submitted that one Mir Faisal Baloch filed a complaint against him with FIA and after investigation he was exonerated and prayed for justice. The appellants/petitioners, however, opted not to examine themselves on oath and did not lead any evidence in their defence. However, the trial culminated in conviction and sentence of the appellants/petitioners as stated above, necessitating filing of instant appeals/petitions.

9. It is jointly contended on behalf of the appellants/petitioners that the impugned judgment is bad in law and facts inasmuch as the learned trial Court did not appreciate the evidence on record in line with the applicable law and surrounding circumstances, has based its findings on misreading and non-reading of evidence and arrived at a wrong conclusion in convicting the appellants/petitioners. It is next submitted that during cross-examination the defence has shattered the prosecution case but the learned trial Court neither discussed nor evaluated the relevant portion of cross-examination and convicted the appellants/petitioners only on the examination-in-chief of prosecution witnesses. It is also submitted that the witnesses in their respective depositions have not specifically implicated the appellants/petitioners with the charges leveled against them even no incriminating evidence in shape of ocular or documentary was brought on record against them; that the disputed amount was paid to the transporters through cheques towards labour charges and it has been wrongly stated in the reference that such charges were paid by the TCP. They have also stressed the point that no money trail has been shown either orally or through any documentation; that appellant Masood Alam Niazi was Zonal Manager, neither he is signatory of any cheque nor has any connection with the issuance of cheques; that he was an officer of BPS-20 and initiation of an inquiry against him was without any authority particularly when such initiation of inquiry was not published in Gazette, hence the inquiry followed by investigation was unjustified. The learned counsel for appellant/petitioner Ziaullah Khan Warsi has submitted that most of the cheques were signed by Kamal Mustafa and Muhammad Saeed but they have not been shown

as accused; that the amount was paid through cheques towards transportation charges in accordance with the rules and procedures and no case of misappropriation, corruption and corrupt practices and misuse of authority is made out against appellant/petitioner Ziaullah Khan Warsi. It is jointly submitted that the conviction and sentences awarded to the appellants/petitioners is not sustainable in the eyes of law inasmuch as the same is contrary to evidence on record and based on speculative and artificial reasons; that the appellants/petitioners have performed their duties in accordance with law and never misused their authority which is evident from the depositions of prosecution witnesses; that the case of the prosecution against appellants/petitioners does not come within their job descriptions; that no iota of evidence is available on record to establish corruption and corrupt practices and misuse of authority for any gain for themselves or for any other person; that the investigating officer has exonerated the real culprits and implicated the appellants/petitioners with malafide intention and ulterior motives, hence it is a clear case of pick and choose; that the impugned judgment is capricious, bad in law and against the principle of natural justice. He lastly submitted that the prosecution has failed to discharge its liability of proving the guilt of the appellants/petitioners beyond shadow of reasonable doubt and prayed for setting-aside the impugned judgment and acquittal of the appellants/petitioners in circumstances. In support of their submissions, the learned counsel for appellants/petitioners have placed reliance on PLD 2016 Supreme Court 276 *{The State v Anwar Saif Ullah Khan}*, PLD 2008 Supreme Court 166 *{Mansur-ul-Haque v Government of Pakistan}*, PLD 2002 Lahore 233 *{Maj. {Retd.} Tariq Javed Afridi v The State}*, PLD 2002 Lahore 95 *{Dr. Farooq Sattar v The State and others}*, 1995 SCMR 1345 *{Tariq Pervez v The State}*, 2010 SCMR 1706 *{Muhammad Asghar alias Nannah v The State}*, 2018 CLC 54 *{Messrs Friends Technical Engineering Association v Barrister Syed Iftikhar Ali Gillani}*, PLD 2010 Karachi 236 *{Mst. Ummatullah v Province of Sindh and 6 others}*, 2010 P.Cr.L.J. 1311 *{Doulat Ali and another v The State and another}* and an unreported judgment passed by the Hon'ble Supreme Court in Criminal Appeals No.153, 154, 155, 156, 157 and 158 of 2008 *{Sikandar Ali and others v The State}*.

10. The learned Special Prosecution NAB, on the other hand, has supported the convictions and sentences recorded by the trial Court against appellants/petitioners on the ground that the witnesses in their respective evidence have implicated them with the charges leveled against appellants/petitioners without major contradictions and discrepancies and sufficient documentary evidence has been brought on record to establish the guilt of the appellants/petitioners; that the appellants/petitioners willfully and deliberately acted in violation of financial rules and procedures and they in connivance with each other have misused their authority, misappropriated an amount of Rs.19,236,702/- and caused a colossal loss to public exchequer. Finally, he submitted that the prosecution has successfully proved the charge of misuse of authority against appellants/petitioners and the learned trial Court has rightly convicted the appellants/petitioners and prayed for dismissal of appeals/petitions being devoid of merits.

11. We have given anxious consideration to the submissions of respective parties and perused the entire material available before us and the relevant law with their able assistance.

12. In all the prosecution has examined eight {08} witnesses, who have been subjected to cross-examination by the defence. The appellants/petitioners in their statements under Section 342, Cr.P.C. have denied the prosecution case, pleaded their innocence and stated that none of the PWs have implicated them with the commission of offence and that the allegations contained in the reference do not cover their job descriptions and no offence of misappropriation, corruption and corrupt practices and misuse of authority is made out. The learned trial Court while relying on the prosecution evidence has convicted the appellants/petitioners on the testimony of PW.2 Muhammad Aqeel Siddiqui {Operation Manager UBL, North Nazimabad Branch}, PW.3 Muzaffar Hussain {DGM Godown Incharge, TCP}, PW.4 Asad Ilyas and PW.7 Atiq-ur-Rehman {Accounts Officer, Utility Stores Corporation, Zonal Office} hence their testimony is essential for arriving at a just and fair decision in the matter.

13. PW.2 Muhammad Aqeel Siddiqui {Ex.6} has deposed that on 14.09.2015 he was called by I.O. for submission of details in

respect of Account No.1200008-6 of Utility Stores Corporation, which was opened on 24.08.2006. He produced attested photocopy of Account Opening Form at Ex.6/1, photocopies of NICs of Kamal Mustafa, Masood Alam and Muhammad Saeed at Ex.6/2 to Ex.6/4 respectively, photocopy of letter dated 19.06.2006 at Ex.6/5, attested photocopies of 49 cheques at Ex.6/6 to Ex.6/54, attested photocopy of statement of account at Ex.6/55 and seizure memo at Ex.6/56. He was subjected to cross-examination by the respective counsel for both appellants/petitioners, wherein he has stated that the account was jointly operated by Masood Alam Niazi and Muhammad Saeed from Group 'A' and Kamal Mustafa and Muhammad Saeed from Group 'B'. He admitted that cheques are to be signed by Masood Alam Niazi and Muhammad Saeed or by Kamal Mustafa and Muhammad Saeed as provided in the letter dated 19.06.2006. He further admitted that all 49 cheques do not bear signatures of accused Masood Alam Niazi. He also admitted that total amount of 49 cheques is Rs.11,289,375/-, which is different from the amount of Rs.19,236,702/- as mentioned in the reference.

14. PW.3 Muzaffar Hussain {Ex.7} is the D.G.M. Godown Incharge, Trading Corporation of Pakistan has deposed that an agreement was executed between Al-Asqa, Badaruddin, Trans World and International Equipment and they all four were the custodian of imported sugar and required to shift sugar from Port to Pipri, Korangi and Landhi Godown and there were no charges for delivery of imported sugar to the companies nominated by Trading Corporation of Pakistan. He further deposed that as per agreement between Trading Corporation of Pakistan and Handling Agent, the labour charges of lifting of sugar from port area and its delivery to nominees including Utility Stores Corporation of Pakistan were already paid by Trading Corporation of Pakistan. He produced attested photo copies of agreement between Al-Asqa Marine Service and TCP dated 19.06.2006, agreement between M/s Badaruddin Terminal and TCP dated 12.07.2006 and agreement between M/s Trans World Cargo Dispatch Company and TCP dated 30.06.2006 at Ex.7/1 to 7/3 respectively. He also produced seizure memo and photocopy of public notice dated 30.12.2005 at Ex.7/4 and Ex.7/5 respectively. He was subjected to cross-examination by the defence wherein he showed his

ignorance about the agreements produced by him in Court and admitted that he has not produced any record regarding payment of loading charges to handling agent by Trading Corporation of Pakistan. He also admitted that no document has been produced by him showing that TCP intimated Utility Stores Corporation regarding payment of loading charges to the Handling Agent. He further admitted that Trading Corporation of Pakistan invited bid for sugar from buyers through publication dated 30.12.2005 mentioning therein that loading charges are to be paid by buyers/bidders to the handling agent of Trading Corporation of Pakistan at Pipri and Landhi Godown. He also admitted that as per terms and conditions of public notice regarding loading charges viz 1.50 for local truck and Rs.2.00 per bag for high wall truck were mentioned. He further admitted that his senior namely, Ramzan, General Manager told him verbally that public notice does not apply on Utility Stores Corporation but did not produce any circular or written directions issued from his office showing that public notice does not apply on Utility Stores Corporation. He denied the suggestion that G.M. Ramzan just to save skin of TCP informed that public notice {Ex.7/5} is not applied on USC. He further denied that Ex.7/5 applied on all bidders/buyers. He showed his ignorance that Handling Agent of TCP had not issued receipts of payment for loading charges. He further showed his ignorance that accused Masood Alam Niazi written a letter dated 06.03.2006 to G.M. TCP for issuance of proper receipts/bills against payment of loading/handling charges. He also showed his ignorance as to whether letters dated 12.08.2006 and 21.08.2006 were received to TCP that handling agents are demanding excessive loading charges. Further cross-examination of this witness was reserved for want of verification of letter No.ZOK/136/2006-702 dated 06.03.2006 and letters dated 12.08.2006 and 21.08.2006 but he failed to produce the same and stated that the same are not available in the office and the record of last 10 years is not available. He showed his ignorance that Zonal Manager of Utility Stores wrote a letter to G.M. Godown, TCP that the labour contractor of nominated handling agent is demanding excessive charges of Rs.4 per bag instead of Rs.2 per bag as agreed. He admitted that M. Atiq Khan, Deputy Manager Godown replied the said letter mentioning therein that the arrangement of labour for loading of sugar bags into trucks

and its transportation is the responsibility of Utility Stores Corporation and TCP had nothing to do with it. He denied the suggestion that management of TCP deliberately concealed the facts of the case from I.O. only to save its skin.

15. PW.4 Asad Ilyas {Ex.8} has deposed that a letter was received by him from NAB regarding investigation against Masood Alam Niazi and Utility Stores Corporation of Pakistan. He is doing job in “Sea Trade Group”, a subsidiary of M/s International Equipment, Karachi, to handle sugar from port including transportation to TCP Pipri Godown and their company is also the custodian of Godown and deliver sugar to TCP’s nominees from Pipri Godown through delivery order. He further deposed that as per agreement between TCP and M/s International Equipment all the charges are inclusive and M/s International Equipment did not receive any payment regarding labour charges from Utility Stores Corporation or any of its employees. During cross-examination he stated that no record was supplied by him to the I.O. showing that TCP paid labour charges to them. He further stated that they did not demand labour charges from TCP. He showed his ignorance as to whether labour charges of loading and unloading were taken by Nazar ul Islam on their behalf. He admitted that their labour taken incentives/tip from drivers. He further showed his ignorance that Utility Stores made payments to transporters on the basis of certificates issued by Nazar ul Islam.

16. PW.7 Atiq-ur-Rehman {Ex.12} has deposed that he was deputed by Nazir Ahmed Soomro, the then Manager of Utility Stores Corporation, Karachi, for production of documents/record in connection with the investigation against Masood Alam Niazi, DMG before I.O. He produced such documents to I.O. vide Zonal Office letter dated 18.11.2015. He deposed that as per record loading charges were paid to the transporters by the Accounts Officer after verification and pre-audits of the bills. The acknowledgment receipts with regard to loading charges amounting to Rs.19,236,702/- from 2006 to 2008 paid by Utility Stores Corporation to the transporters are produced by him in Court at Exc.12/2. In his cross-examination, this witness has admitted that as per his job description he prepared cheques. He further admitted that handling agents and transporters

used to give bills of their loading and unloading charges to accused Ziaullah Warsi, who forwarded the same to Utility Stores Corporation before Accounts Office and after pre-audit of bills the cheques were to be made. The cheques were made in the name of accused Ziaullah Warsi, which were collected by transporters who deposited the same in the account of accused Ziaullah Warsi and then accused made payment to transporters through cheques from his account. He admitted that all loading charges of Rs.19,236,702/-, which were deposited in the account of accused Ziaullah Warsi were distributed amongst the transporters through cheque. He admitted that audit is conducted every year by the Corporation and all vouchers, cheques and acknowledgement are also audited. He has stated that there is separate department regarding financial responsibilities in Utility Stores Corporation, which is called Finance Department and Zonal Manager has no link with the Finance Department.

17. The case of the prosecution is that Appellant Masood Alam Niazi while performing his duties as Zonal Manager, Utility Stores Corporation, Karachi, had transferred an amount of Rs.19,236,702/- towards labour charges into the account of appellant Ziaullah Khan Warsi, who at the relevant time was Accounts Clerk and further assigned duties as Incharge for lifting of sugar from Pipri Godown of Trading Corporation Pakistan {TCP} despite the fact that there was an agreement between TCP and Handling Agent M/s Badaruddin Terminal, Karachi, for payment of labour charges by TCP and such amount had already been paid by TCP to Handling Agents and the amount so deposited in the account appellant Ziaullah Khan Warsi was withdrawn in violation of the financial rules and procedures, thereby both appellants in connivance with each other have misused their official authority and misappropriated an amount of Rs.19,236,702/- through fake payment towards labour charges and caused a loss to the public exchequer.

18. We have minutely examined the entire evidence brought on record by the prosecution. It has been observed that none of the witnesses have implicated the appellants/petitioners with the allegations of misappropriation or embezzlement of amount. All the

payments were made through cheques to the handling agents towards labour charges for loading and unloading and this position has been admitted in evidence. During investigation, the I.O. recorded the statements of handling agents /transporters but none of them have been examined during trial except PW.4 Asad Ilyas, who is doing job in a private company namely, Sea Trade Group, which is subsidiary of M/s International Equipment Corporation, Karachi, to handle sugar from Port including transportation to Trading Corporation of Pakistan's nominees from Pipri godown through delivery order. This witness in his cross-examination has stated that they did not make any demand of labour charges from Trading Corporation of Pakistan. In view of this background of the matter, no case of misappropriation has been made out against appellants/petitioners. Even no money trail has been sorted out and no evidence of whatsoever nature has been brought on record to show that appellants/ petitioners were the beneficiaries. Hence, at the most the prosecution has been able to establish that in view of the agreement between Trading Corporation of Pakistan and Handling Agents, the charges of loading/ unloading were to be paid by Trading Corporation of Pakistan and appellants/petitioners in connivance with each other paid such charges to handling agents and caused loss to the Utility Stores Corporation. We are afraid, the prosecution has failed to bring on record any evidence to show that Trading Corporation of Pakistan had also made payment to the handling agents towards labour charges for loading and unloading. The learned Special Prosecutor NAB has also admitted this position. He only emphasized that appellants/petitioners had illegally paid labour charges to the handling agents, which constitutes offence of corruption and misuse of authority. We have noticed that PW Muzaffar Hussain, D.G.M. Godown Incharge, Trading Corporation of Pakistan has admitted that T.C.P. issued a public notice dated 30.12.2005 bearing No.E&M-Sugar/Sale-7/2005 for buying same sugar as involved in this reference mentioning therein that the loading charges are to be paid by buyers/bidders to the handling agents of T.C.P. at Pipri and Landhi Godowns. Record also reflects that T.C.P. wrote a letter to Utility Stores Corporation {Ex.7/6} regarding arrangement of labour for loading of sugar bags into trucks and its transportation by the Utility Stores Corporation and T.C.P.

has nothing to do with it. The question of payment of labour charges by Utility Stores Corporation to handling agents does not constitute an offence by means of corruption and corrupt practices or misuse of authority but mere a procedural irregularity. The Hon'ble apex Court in the case of *The State v Anwar Saif Ullah Khan* {PLD 2016 Supreme Court} 276 observed as follows:-

“With reference to the precedent cases mentioned above the law appears to be settled by now that in a case involving a charge under section 9(a)(vi) of the National Accountability Ordinance, 1999 the prosecution has to make out a reasonable case against the accused person first and then the burden of proof shifts to the accused person to rebut the presumption of guilt in terms of section 14(d) of the said Ordinance. It is also apparent from the same precedent cases that a mere procedural irregularity in the exercise of jurisdiction may not amount to misuse of authority so as to constitute an offence under section 9(a)(vi) of the National Accountability Ordinance, 1999 and that a charge of misuse of authority under that law may be attracted where there is a wrong and improper exercise of authority for a purpose not intended by the law, where a person in authority acts in disregard of the law with the conscious knowledge that his act is without the authority of law, where there is a conscious misuse of authority for an illegal gain or an undue benefit and where the act is done with intent to obtain or give some advantage inconsistent with the law. The said precedent cases also show that misuse of authority means the use of authority or power in a manner contrary to law or reflecting an unreasonable departure from known precedents or custom and also that mens rea or guilty mind, in the context of misuse of authority, would require that the accused person had the knowledge that he had no authority to act in the manner he acted or that it was against the law or practice in vogue but despite that he issued the relevant instruction or passed the offending order”.

In another case of *M. Anwar Saifullah Khan v. State* (PLD 2002 Lahore 458), the Hon'ble apex Court while adverting to the initial burden on prosecution to prove the charge of misuse of authority or power held as under:--

“Misuse of authority means the use of authority or power in a manner contrary to law or reflects an unreasonable departure from known precedents or custom. Every misuse of authority is not culpable. To establish the charge of misuse of authority, the prosecution has to establish the two essential ingredients of the alleged crime i.e. "mens rea" and "actus reus". If either of these is missing no offence is made out. Mens rea

or guilty mind, in context of misuse of authority, would require that the accused had the knowledge that he had no authority to act in the manner he acted or that it was against law or practice in vogue but despite that he issued the instruction or passed the order. In the instant case the documentary evidence led by the prosecution and its own witnesses admit that the appellant was told that he had the authority to relax the rules and the competent authority P.W.3 could make the appointments thereafter. The guilty intent or mens rea is missing. Even the actus reus is doubtful because he had not made the appointments. He merely approved the proposal and sent the matter to the competent authority. At worst he could be accused of mistake of civil law. i.e. ignorance of rules. But a mistake of civil law negates mens rea."

19. The learned trial Court while convicting the appellants/petitioners emphasized that in view of Section 14{d} of NAO, 1999, the prosecution was not under obligation to prove the case against the appellants/petitioners and it was obligatory on appellants/petitioners to disprove the charges leveled against them. It is settled principle of law that accused is always presumed to be innocent and the onus of proving the commission of offence and the guilt of the accused lies on the prosecution but under the NAO, 1999, an exception has been provided to this rule and it has been provided in section 14(c) that in any trial of an offence punishable under clause (v) of subsection (a) of section 9 of the NAO, 1999, the fact that the accused person or any other person on his behalf, is guilty of the offence of corruption and corrupt practices and his conviction, therefore, shall not be invalid by reason only that it is based solely on such a presumption. However, the presumption is subject to the condition that the prosecution shall first make out a "reasonable" case against the accused. Language used in the proviso tagged to the main provision i.e. section 14 is explicit in this regard. The proviso reads as follows:--

"Provided that the prosecution shall first make out a reasonable case against the accused charged under clause (vi) or clause (vii) of subsection (a) of section 9."

Hence, notwithstanding the presumption contained in section 14{c} of the NAO, 1999, the initial burden of proof always rests on the prosecution. It is well-settled that the burden to prove all ingredients of the charge always lies on the prosecution and it never shifts on

accused who can stand on the plea of innocence, assigned to him under the law, till it is dislodged. In other words unless the presumption of innocence imputed to the accused is crowded out by the force of suspicious circumstances he cannot be called upon to prove that the charge was false or he was innocent. The prosecution, therefore, is never absolved from proving the charge beyond reasonable doubt and burden shifts to the accused only when the prosecution succeeds in establishing the presumption of guilt. Reliance may well be made to the case of *Mansoorul-Haq v. Government of Pakistan* {PLD 2008 SC 166}, wherein it was laid down as under:-

“The National Accountability Bureau Ordinance, 1999, no doubt is a special law and prosecution having the advantage of the provision of section 14(a) of the Ordinance may not under heavy burden to discharge the onus of proving the charge as the Court may on discharge of initial burden of proving prima facie case by the prosecution raise a presumption of guilt but in the light of concept of criminal administration of justice, the prosecution is not absolved of its duty to prove the charge beyond reasonable doubt under NAB Ordinance as the burden of proof is only shifted on the person facing charge if the prosecution succeeds in making out a reasonable case by discharging the initial burden of proving the charge. The provision of section 14(d) of the said Ordinance envisages that burden of proof is only shifted to the accused to rebut the allegations if the prosecution succeeds in establishing the preliminary facts to raise the presumption of guilt”.

The Hon'ble Supreme Court in the case of *Khan Asfandyar Wali v. Federation of Pakistan* {PLD 2001 SC 607} having examined the provisions of section 14(d) of the Ordinance held as under:-

"Be that as it may, the prosecution has to establish the preliminary facts whereafter the onus shifts and the defence is called upon to disprove the presumption. This interpretation appears to be reasonable in the context of the background of the Ordinance and the rationale of promulgation the same notwithstanding the phraseology used therein. The above provisions do not constitute a bill of attainder, which actually means that by legislative action an accused is held guilty and punishable. For safer dispensation of justice and in the interest of good governance, efficiency in the administrative and organizational set up, it is necessary to issue the following directions for effective operation of section 14(d):

(1) *The prosecution shall first make out a reasonable case against the accused charged under section 9(a)(vi) and (vii) of the National Accountability Bureau Ordinance, 1999.*

(2) *In case the prosecution succeeds in making out a reasonable case to the satisfaction of the Accountability Court, the prosecution would be deemed to have discharged the prima facie burden of proof and then the burden of proof shall shift to the accused to rebut the presumption of guilt”.*

Similarly, in the case of *Pir Mazharul-Haq v. The State* {PLD 2005 SC 63}, The Hon’ble Supreme Court has held that Section 14 of the Ordinance cannot be used to undermine the well-established rule of law that burden to prove guilt of the accused initially is on the prosecution and it never shifts to the accused unless discharged through cogent and reliable evidence. The section does not affect the onus of proving the guilt of an accused which always rests on the prosecution and does not cast any burden on the accused to prove that no crime was committed, nor does it warrant the conclusion that if anything remains unexplained, then the accused to be held guilty. The relevant extract from the said judgment is reproduced herein below:-

"In criminal cases the general rule is that the accused must always be presumed to be innocent and the onus of proving everything essential to the establishment of the offence is on the prosecution. All that may be necessary for the accused is to offer some explanations of the prosecution evidence and if this appears to be reasonable even though not beyond doubt and to be consistent with the innocence of accused, he should be given the benefit of it. The proof of the case against accused must depend for its support not upon the absence or want of any explanation on the part of the accused but upon the positive and affirmative evidence of the guilt that is led by the prosecution to substantiate accusation. There is no cavil with the proposition and judicial consensus seems to be that "if on the facts proved no hypothesis consistent with the innocence of the accused can be suggested, the conviction must be upheld. If however, such facts can be reconciled with any reasonable hypothesis compatible with the innocence of the accused, the case will have to be treated as one of no evidence and the conviction and the sentence will in that case have to be quashed."

20. We are not persuaded to agree with learned trial Court that conviction could have been awarded in view of the provision as contained in section 14 of NAO, 1999, for the simple reason that "the section cannot be used to undermine the well-established rule of law that save in very exceptional class of cases, the burden to prove the guilt of the accused is on the prosecution and never shifts. The section does not affect the onus of proving the guilt of an accused which always rests on the prosecution.

21. It hardly needs any elaboration that "the ordinary rule that applies to criminal trials, viz., that the onus lies on the prosecution to prove the guilt of the accused, is not in any way modified by the rule of evidence contained in this section which cannot be used to make up for the inability of the prosecution to produce evidence of circumstances necessary to prove the guilt of the accused.

22. It would be a misconception of law that every accused who faced trial in the Accountability Court or against whom a reference has been sent, the "presumption as envisaged in section 14 of the NAB Ordinance, 1999" would start running against him. Where the prosecution has failed to discharge the onus of "proof" by adducing cogent, concrete and forthright evidence the presumption of guilt would not arise against him and thus the question of conviction would have not arisen. The said proposition has been clarified by Hon'ble Supreme Court in the case of *Khan Asfandiyar Wall v. Federation of Pakistan* {PLD 2001 SC 607}, referred herein above. In no circumstances the defence should be expected to prove the accusation. In a similar wake of event while discussing the question of presumption it was held in *Rehmat v. State* {PLD 1977 SC 515} as follows:-

"Needless to emphasize that in spite of section 106 of the Evidence Act in a criminal case the onus rests on the prosecution to prove the guilt of the accused beyond reasonable doubt and this section cannot be construed to mean that the onus at any stage shifts on to the accused to prove his innocence or make up for the liability and failure of the prosecution to produce evidence to establish the guilt of the accused. Nor does it relieve the prosecution of the burden to bring the guilt home to the accused. It is only after the prosecution has on the evidence adduced by

it, succeeded in raising reasonable inference of the guilt of the accused, unless the same is rebutted, that this section wherever applicable, comes into play and the accused may negative the inference by proof of some facts within his special knowledge. If, however, the prosecution fails to prove the essential ingredients of the offence, no duty is cast on the accused to prove his innocence."

23. The final and eventual outcome of the entire discussion is that the prosecution has failed to discharge its onus of proving the guilt of the appellants/petitioners beyond shadow of reasonable doubt. Accordingly, both appeals are allowed, the convictions and sentences recorded by the learned trial Court vide judgment dated 11.10.2018 are set-aside and the appellants/petitioners are acquitted of the charges by extending the benefit of doubt. They shall be released from the jail forthwith if not required to be detained in connection with any other case. In view of the above, the Constitutional Petition No.D-7425 and Constitutional Petition No.D-7277 of 2018 are dismissed as having become infructuous.

24. Above are the reasons for our short order dated 01.08.2019.

JUDGE

JUDGE

Naeem