

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD**

Cr. Accountability Appeal No. D-68 of 2019

Cr. Accountability Appeal No. D-69 of 2019

Cr. Accountability Appeal No. D-71 of 2019

C.P No. D-973 of 2019

C.P No. D-1039 of 2019

Present:

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Khadim Hussain Tunio,

Appellant(s): (1) Mehboob Ali Zardari through Barrister Fayyaz Ahmed, Advocate.

(2) Fayyaz Hussain Channa and (3) Imtiaz Ali, through Mr. Muhammad Hashim Leghari, Advocate.

Respondent(s): N.A.B through Mr. Jangu Khan, Special Prosecutor.

Date of hearing: 15.04.2020, 29.04.2020 & 06.05.2020

Date of announcement: 14.05.2020

J U D G M E N T

KHADIM HUSSAIN TUNIO, J- Through captioned criminal accountability appeals, the appellants have impugned the judgment dated 24.04.2019 passed by the Accountability Court, Hyderabad in Reference No.05 of 2017 whereby they were convicted for offence punishable under Section 10 of the National Accountability Ordinance, 1999 and sentenced to suffer R.I. for five years each and to pay the misappropriated amount of Rs.36,887,559/- being fine. The appellants were further disqualified for a period of 10 years, to be reckoned from the date, they are to be released after serving their sentence for seeking, from being elected, chosen, appointed or

nominated as member or representative of any public body or any statutory or local authority or in service of Pakistan or any of the province. However, benefit of Section 382-B Cr.P.C has been extended to them. The above captioned petitions have also been filed by the appellants for the quashment of their sentences awarded to them by the Accountability Court, Hyderabad.

2. Brief facts of the prosecution case are that a complaint was received against one Mehboob Ali Zardari, Town Officer, Town Committee Chachro, Tharparkar regarding embezzlement of funds. Pursuant to an investigation, it was revealed that accused Mehboob Ali Zardari, in collusion with Fayyaz Hussain Channa, Accountant, Town Municipal Administration, Chachro, embezzled a total amount of Rs.73,775,117/- belonging to Town Municipal Administration, Chachro by transferring the same to various bank accounts in the names of fake contractors and thereafter withdrew the said amount through his clerk Imtiaz Ali. Tender of Pardon under Section 26 of National Accountability Ordinance, 1999 were granted to the contractors through whom the money was embezzled. Thereafter, reference was filed by the Director General NAB against the present appellants.

3. Prosecution in order to substantiate the accusations examined as many as 15(fifteen) witnesses, namely P.W-1 Qamar-u-ddin at Ex.04, P.W-2 Parkash Khatri at Ex.05, P.W-3 Kelash at Ex.06, P.W-4 Syed Muhammad Ali at Ex.09, P.W-5 Shahid Hussain at Ex.10, P.W-6 Abdul Rauf at Ex.11, P.W-7 Ali Nawaz at Ex.12, P.W-8 Ahsan Kumbhar at Ex.13, P.W-9 Manthar Kumbhar at Ex.14, P.W-10 Imtiaz Ahmed at Ex.15, P.W-11 Nazar Muhammad at Ex.16, P.W-12 Muhammad Ali at Ex.17, P.W-13 Kamran Ali at Ex.19, P.W-14 Ishrat Sultana at Ex.20 and P.W-15 Ali Ahmed Siddiqui at Ex.21, who

produced various documents in their evidence to support the prosecution case. Thereafter, prosecution side was closed vide statement at Ex.22.

4. Statements of appellants were recorded under Section 342 Cr.P.C wherein they denied the allegations levelled against them and claimed to be innocent. However, they neither examined themselves on oath nor produced any evidence in their defence.

5. After conclusion of the trial, the appellants were convicted of an offence punishable under Section 10 of the National Accountability Ordinance, 1999 and sentenced to suffer R.I for five years each and to pay in fine the embezzled amount of Rs. 36,887,559/-. The appellants were further disqualified for a period of 10 years to be reckoned from the date of their release after serving their sentence.

6. Learned Counsels for the appellants have argued that the appellants are innocent and have never been involved in such like cases of corruption or corrupt practices; that the prosecution has failed to provide cogent evidence to establish the guilt of the appellants; that the appellants were not responsible for any embezzlement nor for the opening of the alleged accounts used for the transfer of embezzled funds; that no evidence is available against any of the appellants to link them with the commission of the alleged offence; that the prosecution case is based on conjectures and presumptions; that the impugned judgment is bad in the eyes of law and facts as the learned trial Court did not appreciate the evidence available on record in line with the applicable laws and surrounding circumstances; that none of the prosecution witnesses has deposed in his testimony that the appellants have gained any personal benefit or had been involved in corruption and corrupt practices or had obtained bribe, gift or any

other illegal remuneration; that the prosecution has also miserably failed to establish any link of the appellants with the alleged transactions; that the amount was paid to the contractors through cross cheques on account of their approved tenders in accordance with rules and procedures and no case of misuse of authority is made against any of the appellants; that the appellants have performed their duties in accordance with law; that during the so-called tenure, all the above named officers/officials and the contractors remained engaged in transaction of TMA, Chachro and admittedly no transaction could be carried out in their absence and the I.O, N.A.B has falsely implicated the appellants with *malafide* intention and ulterior motives, therefore, it is a clear case of pick and choose; that all the payments were made to the registered contractors, which were related to already approved tenders and with regard to ongoing schemes and that payments were made after getting approval from the Administrators/Assistant Commissioners/Drawing Disbursing Officers and the Deputy Commissioner/the Controlling Authority, TMA, Chachro and so also getting pre-audit being done from the Auditor and the Assistant Director, Local Fund Audit, Tharparkar @ Mithi and sites were duly verified by the Engineer as per procedure; that the reference has not been filed by the Chairman N.A.B, same had been filed by D.G N.A.B to whom powers had not been delegated by the Chairman N.A.B; that the cheques in question were encashed in good faith for the contractors; that there is no proof of any amount allegedly misappropriated by the appellants; that the appellants have not materially got benefit nor derived any gain or asset from the alleged misappropriation; that the original pictures of development works, for which payments were issued, are available on the record; that the Bank Statement of TMA account and budget copy were not

made part of the instant reference; that all the contractors were awarded by the administrators and not by the appellants; that the signatures of the appellants on the cheques in question were not verified nor those were sent to an expert for expert opinion, therefore, learned Counsels pray for the acquittal of the appellants. In support of their contentions, they have placed reliance on the case law reported as *(PLD 2017 Lahore 23, PLD 2008 SC 166, PLD 2016 Lahore 667, 2016 SCMR 816, PLD 2002 Lahore 95, unreported case of Muhammad Bilal Sheikh v. National Accountability Bureau (W.P. No. 4166 of 2019), 2008 SCMR 1118, 2009 SCMR 790, PLD 2001 SC 607, PLD 2005 SC 63, 2007 YLR 825 [Lahore], 2016 YLR 2547 [Lahore], 2016 SCMR 267, unreported case of Mr. Masood Alam Niazi v. The State (Cr. Acc. Appeal Nos. 56 & 57 of 2018 Sindh) and Cr. Accountability Appeal Nos. 41, 42, 43, 44 & 45 of 2018 (Sindh).*

7. Conversely, learned Special Prosecutor for N.A.B vigorously supported the impugned judgment and emphatically opposed the plea of acquittal while arguing that there is sufficient documentary evidence available on record against the appellants; that the alleged cheques used for misappropriation of funds were issued by Mehboob Ali Zardari while appellant Fayyaz Hussain Channa was a co-signatory and appellant Imtiaz Ali en-cashed the same and presented the cheques before concerned banks; that appellant Fayyaz Hussain, without any verification, signed the cheques in question and that all the P.Ws have supported the prosecution case, that all the appellants in collusion with each other have misappropriated the funds of TMA Chachro, therefore, these appeals may be dismissed and the judgment of the learned trial Court may be maintained.

8. We have heard the learned counsels for the parties and carefully perusing the material available on the record. We find that

the prosecution has successfully made reasonable case by showing misuse of authority by the appellants. The appellants, in collusion with each other, embezzled a huge sum of money by transferring the same to the accounts in the names of fake contractors and thereafter withdrawing the same in cash as well as through cheques. A huge amount of money was withdrawn from the account of TMA Chachro funds through cheques signed by Town Municipal Officer, Accountant and Administrator of TMA Chachro. At the relevant time, appellant Mehboob Ali Zardari was posted as Town Officer from 22.08.2014 to 01.10.2014 and then again from 15.10.2014 to 02.03.2015. Throughout the appellant Mehboob Ali Zardari's tenure, the position of Accountant was held by appellant Fayyaz Hussain Channa. The appellant has not denied the issuance of cheques and their signatures over it.

9. The learned defence counsel has failed to rebut the allegations so levelled against the appellants. The prosecution appears to have successfully proved the charge under Section 9(a)(vi) of the Ordinance against the appellants before the Court and after doing so, the prosecution is deemed to have discharged the burden of proof, hence, the burden of proof shifts upon the accused to refute the presumption of guilt against them. In this respect, reliance is placed upon the case reported as *PLD 2001 SC 607*.

10. Before entering deeply into the merits of the case, it would be pertinent to examine as to what the legislature is meant by the word "misuse" present in Section 9(a)(vi) of the N.A.O, 1999. According to the concise Oxford Dictionary (9th Edition), on page 872 the word "misuse" is described as to use wrongly and apply to the wrong purpose. The Oxford (Advanced Learner's) Dictionary (5th Edition), page 747 provides the meaning as its meaning is; "To use in the wrong

way or for the wrong purpose: misuse a word/an expression, misuse alcohol/public funds; To treat badly." Contrarily, the Chambers' 21st Century Dictionary (Revised Edition), page 877 provides the meaning of the word "misuse" as "*To put something to improper or inappropriate use or; To treat something or someone badly.*"

Since the word misuse has not been defined under the Ordinance, it would be wise to follow its ordinary dictionary meaning. In plain words, misuse of authority would mean a wrong and improper exercise of authority for a purpose not intended by the law or any given legislation. A person may, in exercise of his authority, go wrong due to some ordinary human failing, or error but this, per se, will not be actionable under the law. However, if a person knowingly and deliberately follows a wrong course of action and deviates from the purpose of law to achieve some other objective either prohibited or not intended by the law then he becomes liable under the law. In the present case, it was not a mere erroneous order or lack of jurisdiction on that part of a public functionary, but in the present circumstances, the appellants being representatives of a public functionary, deliberately used/exercised their own authority or for that matter usurped the power of the public functionary with the object of gaining advantage/benefit. Under such circumstances, they are guilty of an offence under section 9(a)(vi) of the Ordinance. During the process of misappropriation of the TMA funds and issuance of cheques and deposits in the accounts of fake contractors, the appellants have gained benefits for themselves. Not only was the money swindled from the TMA account, the racket deprived the Town Municipal Authority to the tune of Rs.73,775,117/- which also deprived the public as it could have been used for the betterment of the public at large, as such, the offence committed by the appellants is

against the development of our country and no concession in the prevailing circumstances of the country can be made against any of the accused / appellants.

11. According to Crawford's Interpretation of Laws, Criminal and Penal Statutes must be strictly construed, that is, they cannot be enlarged or extended by intendment, implication, or by any equitable considerations. In other words, the language cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purpose for which the statute was enacted.

12. Not only this, the principles governing the white collar crime have been laid down by the Honourable Supreme Court in the case of *Imtiaz Ahmed v. The State PLD 1997 SC 545*. Even though the Honourable Supreme Court was considering a bail application in the cited case, but the principles laid down are in general terms and shall apply to the final determination of the guilt or innocence of an accused charged with corruption or corrupt practices as is in the present case. The Honourable Supreme Court has observed as follows:-

"I may observe that a distinction is to be made between an offence which is committed against an individual like a theft and an offence which is directed against the society as a whole for the purpose of bail. Similarly, a distinction is to be kept in mind between an offence committed by an individual in his private capacity and an offence committed by a public functionary in respect of or in connection with his public office for the aforesaid purpose of bail."

It was further observed by the Honourable Supreme Court as under:-

"The Court should not be oblivious of the fact that at present Pakistan is confronted with many serious problems/difficulties of national and

international, magnitude, which cannot be resolved unless the whole Pakistani Nation as a united entity makes efforts. The desire to amass wealth by illegal means has penetrated in all walks of life. The people commit offences detrimental to the society and the country for money. Some of the holders of the public office commit or facilitate commission of offences for monetary consideration. In the above scenario the Court's approach should be reformation-oriented with the desire to suppress the above mischieves. To achieve the above objective, it is imperative that the Courts should apply strictly the laws which are designed and intended to eradicate the above national evils but at the same time, they are duty bound to ensure that the above approach should not result in miscarriage of justice. It should not be overlooked that Article 9 of our Constitution, which relates to a fundamental right guarantees life and liberty of every person. Life, inter alia, includes the right to have access to a fair and independent judicial forum for redress. A balance is to be struck between national and individual interest/right."

13. Following the dicta laid down by the Honourable Supreme Court cited above, it is settled that the ratio of the judgments in ordinary criminal cases pertaining to the benefit of doubt are not attracted to the case coming within the purview of white collar crime and particularly pertaining to the corruption and corrupt practises. The above observations have found support by the Honourable Supreme Court in *Cr. A. No. 7, 8 & Misc. A. No. 1725, 522 of 2019* while deciding an appeal against the reported case of *Khadim Hussain Kutrio and another v. The State (2019 P.Cr.L.J 1001)* where the Honourable Supreme Court remarked as under:-

"After arguing the matter at great length the learned counsel for the appellants wish to withdraw these appeals. These appeals are, therefore, dismissed as have been withdrawn."

14. Now diving into the merits of the case, the appellants have not denied their signatures over the cheques in question that were used to

transfer TMA funds to various bank accounts and later withdrawn in cash or via cheques. Per the depositions of P.W Kelash, the then Branch Manager of UBL Chachro, various transactions were relating to the bank account of TMA Chachro. A total sum of Rs.73.78 Millions was transferred from the account of TMA Chachro to various bank accounts as available on the record on the pretext of the payments to be made to the numerous contractors for works/schemes. However, when the said contractors recorded their statements, they disclosed their employment with TMA Chachro or a close relationship with workers of TMA. After due investigation, it was revealed that none of the said contractors in fact received the TMA funds and their bank accounts were merely used as a medium for various transactions to cover-up the money trail and the same amount was later on withdrawn by appellant Mehboob Ali Zardari. Appellant Fayyaz Hussain Channa remained posted as Accountant during appellant Mehboob Ali's tenure and they used their influence and authority to illegally obtain the signed cheques from the said "fake" contractors, which were later signed by him and appellant Mehboob Ali for withdrawal of the funds belonging to TMA Chachro. Appellant Imtiaz Ali, who was the clerk of appellant Mehboob Ali during his tenure, was then responsible for the deposit and withdrawal of the TMA funds from various accounts. P.W Kelash was examined at Ex.6, he has deposed against appellant Imtiaz Ali that; *"accused Imtiaz Ali had brought cheques and online transfers"*. Not only that, he also maintained an account in UBL Chachro in which he received TMA funds and later withdrew the same in cash or via transfer. Such facts have been admitted by him in his statement under Section 342 Cr.P.C while answering the Question No. 1, the relevant portion of which is reproduced hereunder:-

“Furthermore, no direct transfer of funds has been made into my bank account from TMA Chachro in fact the funds transferred into my bank account were made from the account of one namely Muhammad Ali s/o Tugo who became approver in order to save his own skin.”

15. Per the depositions of P.W Kelash, appellant Imtiaz Ali encashed an amount of Rs.696,000/- from the account of Manthar wherein he had deposited an amount of Rs.1,606,000/-. Thereafter, appellant Imtiaz Ali, by signing an application for online transfer, received an amount of Rs.900,000/- through the account of Dileep Kumar, transferred from the account of Manthar. Appellant Imtiaz Ali then presented cheque bearing No.0597089, which was in the name of one Muhammad Ali, who he claims has framed him. The said funds were all later transferred from the account of accused Imtiaz Ali to the account of Dileep Kumar maintained at UBL Jhok Sharif. The alleged “fake contractors” have all deposed in their 164 Cr.P.C statements against the appellants, who have later been granted pardon by the N.A.B. P.W Ali Nawaz, P.W Ahsan, P.W Manthar, P.W Imtiaz Ahmed and P.W Muhammad Ali all have categorically implicated accused Mehboob Ali Zardari of obtaining signed cheques from the P.Ws, which were later used by him for the embezzlement of funds.

16. As far as the contention of the learned Counsels for the appellants regarding filing of reference by the Director General National Accountability Bureau is concerned, the same is not irregular and does not in any way vitiate the proceedings. The law knows no vacuum in the interest of public policy, even if the same was an irregularity, it cannot give benefit or open a flood gate for those involved in corruption or plundering the public money on account of such irregularity. In this respect, reliance is placed upon the case of *Niaz A. Baloch v. Chairman N.A.B and 4 others (2008 MLD 1451)*, wherein the High Court has observed while deciding a petition for

dismissal of the case that;

“In any view of the matter, the Chairman N.A.B had in exercise of the vested powers issued the above orders directing all the Director-Generals, Regional N.A.B to carry out functions for the smooth running of the objects of the Ordinance and for expeditious disposal of cases which contained powers to refer matters to inquiry, investigation in terms of section 18-C of Ordinance, 1999.”

17. The orders referred to include Order No. 19(4) / NCS (NAB) / 2004 dated 22.09.2004 and its continuation order dated 27.05.2005. These orders granted powers to all D.G N.A.B to even file references or refer the cases to the Courts as they deem fit and since then no express orders have been passed revoking the said delegated powers, the ultimatum being that the same orders still stand intact. Moreover, similar statutory notifications were issued in the recent years by the Chairman N.A.B, delegating same powers via S.R.O dated 30.10.2015 issued by the then Chairman Qamar Zaman and S.R.O dated 24.10.2017 issued by the Chairman Mr. Justice Javed Iqbal. Furthermore, the learned special Prosecutor NAB while confronting with the above contention of the learned Counsels for the appellants has placed on record a copy of statement dated 17.03.2020 and Notifications dated 30.10.2015 and 05.10.2017 as well as authorization of investigation to Mr. Kamran Ali Janwari and Ali Ahmed Siddique vide authorization letters dated 03.12.2015 and 10.05.2016 respectively, therefore, the contention of the learned Counsels for the appellants has no force at all. Even otherwise, the appellants/accused have not challenged the said reference during trial before High Court by filing petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, or a premature acquittal by filing application under Section 249-A Cr.P.C or under Section 265-K Cr.P.C. Moreover, the appellants Fayyaz Hussain

Channa and Imtiaz Ali have pleaded that they were under direct orders from their superior being appellant Mehboob Ali Zardari and they had no choice but to follow his instructions. However, the Honourable Supreme Court has time and again held that the duty of those holding public office is to independently discharge their functions and they should not be influenced by “dictatorial misuse of powers” at the hands of those in power. The compliance of illegal orders is not justified on the basis of having been issued from higher authority as it is the law and Constitution, which must be obeyed. Reliance in this respect is placed upon the case of *Samiullah Khan Marwat v. Government of Pakistan (2003 SCMR 1140)*, *Syed Nazar Abbas Jafri v. Secretary to the Government of Punjab and other (2006 SCMR 606)* and *Iqbal Hussain v. Province of Sindh (2008 SCMR 105)*. Even otherwise, the Honourable Apex Court in **Human Rights Cases No. 4668 of 2006, 1111 of 2007 and 15283-G of 2010 (PLD 2010 SC 759)** have observed that in case the subordinates are directed to implement an illegal order, they are required to put on record a dissenting note to show their protest for such actions. However, this was not the case in the given circumstances and therefore appellants Fayyaz Hussain Channa and Imtiaz Ali cannot simply shift the blame on their superior as the act done by them clearly show their willingness. Therefore, they have committed the offence of corruption and corrupt practices, for which the N.A.O, 1999 clearly speaks that; “if he aids, assists, abets, attempts or acts in conspiracy with a person or a person or a holder of public office accused of an offence, he is said to have committed the offence of corruption and corrupt practices”.

18. The learned Counsels for the appellants also argued that the co-signatories of the cheques issued in favour of the contractors as well as beneficiaries were not joined as accused by the N.A.B and only

present appellants were discriminated against and singled out. Such an argument is baseless and is no ground for the acquittal of the appellants in the present case. The Honourable Apex Court in the case of *Malik Din v. Chairman N.A.B and another (2019 SCMR 372)* has held that:-

“8. It is by now a settled principle of criminal jurisprudence that challenging prosecution on the ground of discrimination by the State cannot be a complete valid defence to absolve an accused from criminal liability arising from his actions or inactions. Any person charged for a crime is answerable for his own acts or omissions and has to defend himself in a trial for the said charged offence.”

19. The offence committed by the appellants is very heinous in nature because they have committed fraud by not only influencing their employees and private individuals to give them signed cheques to their personal bank accounts, but also by later using the same to misappropriate an amount worth fortune, which could have otherwise been used for the betterment of the under-developed areas of Thar. If the public functionaries are doing such kind of a job, especially when they are the custodians of public record and committing forgery and fabrication to gain unfair advantage, so in the prevailing circumstances, no misreading or non-reading of evidence has been pointed out by the learned Counsels for the appellants, hence, the same is based on proper appraisal of proof. Therefore, the findings of the Accountability Court, Hyderabad in Reference No.05 of 2017 are fully supported by the evidence on record, as such, the judgment dated 24.04.2019 is hereby upheld and consequently the appeals in hand are dismissed. Since the appeals are dismissed, the petitions have become infructuous and the same are, therefore, dismissed as well. Appellant Imtiaz Ali is called absent. Let N.B.W be issued against him, his bail bond stands

forfeited and notice to his surety in terms of Section 514 Cr.P.C. After arrest of accused Imtiaz Ali, he shall be sent to the jail to serve out the remaining sentence awarded to him by the trial Court. The surety proceedings are adjourned to a date to be fixed by the office within a week's time.

20. Before parting with this judgment, it is pertinent to observe that the Investigating Officer in the present case has failed to join the co-signatories, namely Syed Muhammad Ali Zaidi and Nazeer Ahmed Abro, who signed the cheques in question, which resulted into embezzlement of the aforesaid huge amount by the appellants. Their such conduct undermines the public confidence in a fair and accountable system with fair and effective administration of justice. Therefore, the Chairman N.A.B, Islamabad is directed to look into role played by accused namely Syed Muhammad Ali Zaidi and Nazeer Ahmed Abro, who are co-signatory of the cheques in question, proceed in accordance with law and file reference against them. Office is directed to send a copy of this judgment to the Chairman N.A.B at Islamabad for compliance.

JUDGE

JUDGE

Shahid