IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Shamsuddin Abbasi

Criminal Accountability Appeal No.12 of 2020

Appellant	Anwar Ali son of Rajab Ali through Mr. Shahab Sarki, Advocate a/w M/s Zulfiqar Ali Langah, Abdul Rashid Rajar, Jawaid Panhwar and Ghulam Mujtaba Sahito, Advocates.
Respondent	The State through Chairman NAB through Mr. R.D. Kalhoro, Special Prosecutor NAB.

Const. Petition No.D-4978 of 2020

Appellant	Anwar Ali son of Rajab Ali through Mr. Shahab Sarki, Advocate a/w M/s Zulfiqar Ali Langah, Abdul Rashid Rajar, Jawaid Panhwar and Ghulam Mujtaba Sahito, Advocates.
Respondents	The NAB through its Chairman NAB and 2 others through Mr. R.D. Kalhoro, Special Prosecutor NAB.

Dates of hearings 12.08.2021 and 24.08.2021

Date of judgment **07.09.2021**

<><><><><>

JUDGMENT

SHAMSUDDIN ABBASI, J:- Impugned in this Criminal Accountability Appeal is the judgment dated 29.09.2020, penned down by the learned Accountability Court No.III {Sindh}, at Karachi, in Reference No.43 of 2016, through which he was convicted under Section 10 of National Accountability Ordinance, 1999 (NAO, 1999) for commission of offences of corruption and corrupt practices as defined in Section 9(a)(vi)(xii) of NAO, 1999, and sentenced him to undergo rigorous imprisonment for five years and to pay a fine of Rs.5,95,000/- {without consequential gain}, ordered to forthwith cease to hold public office, if any, held by him, disqualified him for a period of ten years to be reckoned from the date he is released after

having served the sentence 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 and from seeking any financial facility in the form of loan or advances from any financial institution in the public sector for a period of ten years from the date of his conviction.

2. The facts which led to the filing of reference are that on receipt of information with regard to misappropriation/embezzlement of market and vehicle fees in New Sabzi Mandi, Karachi, an inquiry was initiated against the officers/officials of Market Committee, Karachi, which was upgraded into investigation, wherein it was found that a departmental enquiry of Agricultural, Supply & Prices Department, Government of Sindh, regarding misappropriation of market and vehicle fees for the period from 01.07.2010 to 23.12.2010 and 25.01.2012 to 31.05.2012 was submitted for further action, according to which there was a discrepancy of Rs.5,633,575/-, out of which an amount of Rs.141.675/- was deposited on time and an amount of Rs.1,675,315/- was found to be deposited after retention over different periods of time while the remaining amount of Rs.3,816,585/- was misappropriated and during such period Anwar Ali, appellant, being Incharge Recovery was found to be responsible for issue/collect receipt books and vehicle token fee in accordance with Rule 29{8}, {8-A}, {8-B} and {8-C} of Agricultural Produce Market Rules, 1940. He was also accountable to count cash, actually received against receipt books and certify it through his signature and date on the back of last counterfoil of each receipt book as well as credit all receipt amounts into Government Treasury or the authorized bank under Rule 37, but he failed to discharge his duty. The appellant found to have issued receipt books and vehicle fee token and the recovery staff alleged to have maintained recovery/collection registers on daily basis making summary of the receipt books utilized alongwith number of receipt and number of token issued to the vehicle and total amount received in each shift. He was responsible to maintain receipt book registers, but he did not sign any page with malafide intention and ulterior motives just to misappropriate the amount collected in the head of market and vehicle fees, however, each receipt book issued by him during his

aforesaid tenure contained his signatures. It is, thus, made clear that he in connivance with other accused Hafiz-ul-Hassan and Akbar Baig Mughal {who returned their liabilities through plea bargain} misappropriated an amount of Rs.3,126,268/- causing a loss to the national exchequer, which constitutes an offence of corruption and corrupt practices as envisaged under Section 9{a} of NAO, 1999 punishable under Section 10 of the Ordinance.

3. The learned Accountability Court, on taking cognizance of the matter, charged the appellant for an offence of corruption and corrupt practices as defined under Section 9{a} of NAO, 1999 punishable under Section 10 the Ordinance, who pleaded not guilty and claimed a trial.

4. The gist of evidence adduced by the prosecution in support of its case is as under:-

5. **Gul Hassan** {Director Agricultural Hyderabad} appeared as **witness No.1** at Ex.4. He conducted inquiry under the orders of Secretary Agricultural and submitted his report to the Secretary and also exhibited the same in his evidence. **Javed Ahmed** {Secretary Market Committee, Karachi} appeared as **witness No.2** at Ex.6. He handed over the relevant record to investigating officer, who took custody of the same under a seizure memo and admitted his signature on it. **Ziaullah Tunio** {Customer Services and Operation Manager} appeared as **witness No.3** at Ex.7. He handed over account opening from of Karachi Market Committee, bank statement, deposit slips/credit vouchers to investigating officer, who seized the same under a memo prepared in his presence and he also affirmed his signature on it. **Abdullah Roomi** {Branch Manager Bank Al-Habib Hussainabad Branch, Karachi} appeared as **witness No.4** at Ex.8. He provided account opening form and bank statement to investigating officer, who seized the same under a memo prepared in his presence and he also affirmed his signature on it. **Khadim Hussain** {Advisor Export Processing Zone} appeared as **witness No.5** at Ex.9. He bring the shortfall in the head of vehicle fee and market fee into the notice of the then Secretary Market Committee. **Abdul Haq Massan** {Office

Superintendent Market Committee} appeared as **witness No.6** at Ex.10. He provided joining report of appellant to investigating officer, who seized the same under a memo prepared in his presence and he also affirmed his signature on it. **Sarwar Ahmed Khan** {Assistant Director NAB, Karachi} appeared as **witness No.7** at Ex.11. He verified that whole investigation was conducted by him and on completion thereof the reference was filed in Court on the recommendation of the competent authority. All of them have exhibited number of documents in their evidence and were subjected to cross-examination by the defence. Thereafter, the prosecution closed its side vide statement Ex.12.

6. The appellant was examined under Section 342, Cr.P.C. at Ex.13 denying the allegations imputed upon him by the prosecution, professed his innocence and stated his false implication in this case. He also denied his posting as Incharge of Recovery, New Sabzi Mandi, Karachi, and stated that he performed his duties honestly and fairly and did not commit any misappropriation in the funds of Market Committee. All the witnesses examined by the prosecution are official witnesses and they have falsely deposed against him being influenced by NAB. He produced **Nisar Ahmed Soomro** {Sub Inspector Market Committee Karachi} as **DW.1** Ex.14 and **Muhammad Naeem Khan** as **DW.2** Ex.15 in his defence and opted not to make a statement on Oath under Section 340(2), Cr.P.C.

7. The trial culminated in conviction and sentence of the appellant as stated in para-1 {supra}, hence necessitated the filing of listed appeal and petition, which are being disposed of together through this single judgment.

8. It is contended on behalf of the appellant that he is innocent and has been falsely implicated in this case with malafide intention and ulterior motives as otherwise as such kind of offence cannot be committed without the active connivance of others, but here in this case only the appellant has been made victim of the circumstances and none else has been nominated as accused. It is next submitted that the prosecution has failed to discharge its legal obligation of proving the guilt of the appellant as mandatory requirement of

Section 14 of the NAO, 1999, and the appellant was not liable to prove his innocence. It is also submitted that the appellant was neither Recovery Incharge nor Recovery Collection Officer even never authorized to collect revenue, hence the question to misappropriation of any amount does not arise. Per learned counsel, the two co-accused namely, Hafiz-ul-Hassan and Akbar Baig Mughal, who entered into plea bargain and settled their liabilities with NAB, were responsible for financial affairs of Market Committee, who misappropriated the amount and were the actual beneficiaries. The investigating officer conducted a dishonest investigation and involved the appellant in a case with which he has no nexus. The prosecution has failed to produce any iota of evidence against appellant to substantiate his involvement in the commission of offence and none of the witnesses have uttered a single word against the appellant with regard to alleged misappropriation. The case against the appellant lacked *mens rea* or commission of any illegality while performing his duties and in absence thereof no criminal liability could be penned down on him. Per learned counsel, the appellant performed his duties honestly, fairly and in accordance with law and he never misused his authority. The prosecution has failed to bring home the charge against the appellant through cogent and reliable evidence. The witnesses examined by the prosecution are official witnesses and they have deposed against the appellant being interested and inimical to him as such their evidence is neither trustworthy nor confidence inspiring and the same has wrongly been relied by the learned trial Court. The witness did not ascribe any direct or indirect role to the appellant with regard to his involvement in the alleged offence. They were inconsistent with each other rather contradicted on crucial points benefit whereof must go to the appellant. The learned trial Court did not appreciate the evidence on record in line with the applicable law and surrounding circumstances and based its findings on misreading and non-reading of evidence and arrived at a wrong conclusion in convicting the appellant merely on assumptions and presumptions. The learned trial Court totally ignored the evidence adduced by the appellant in his defence, which was sufficient to prove his innocence. Per learned counsel, the appellant performed his duties honestly, fairly and in accordance with law and has not done

any illegal act or misuse of his authority, which could saddle penal consequences on him. It might be a case of mere procedural illegalities and in absence of any strong evidence on record no conviction could be based for offence under Section 9(a)(vi) of the Ordinance. Thus, the conviction and sentence awarded to the appellant is illegal and liable to be set-aside. Finally, the learned counsel submitted that the appellant did not derive any personal financial gain from the act for which he was charged, tried and convicted, thus the conclusion drawn merits reversal.

9. Strongly opposing the contentions of the learned counsel for the appellant, the Special Prosecutor NAB has contended that the appellant was lawfully proceeded against under the enabling provisions of the Ordinance, which were strictly in accordance with the settled principles of the criminal justice system of providing the appellant with complete opportunity of defending him. The appellant in his official capacity has misused his authority and caused a loss to the national exchequer through misappropriation of amount collected from the head of market and vehicle fees. It is also submitted that the prosecution in support of its case produced oral as well as documentary evidence, which was rightly relied upon by learned trial Court. Per him, the witnesses were subjected to lengthy and taxing cross-examination but nothing favourable to the appellant could come out from their mouth to show his false implication. Even the prosecution was not under obligation to prove the case against the appellant and it was the duty of the appellant to disprove the case of the prosecution and prove his innocence through valid and cogent evidence in view of the provision of Section 14 of NAO, 1999. Finally, submitted that the findings recorded by the learned trial Court in the impugned judgment are based on fair evaluation of evidence and documents brought on record, to which no exception could be taken. He, therefore, prayed for dismissal of appeal as being devoid of any merit.

10. We have given our anxious consideration to the submissions of learned counsel for the appellant and the learned Special Prosecutor NAB and gone through the entire material available on record with their able assistance.

11. First of all we would like to take up the submission of learned Special Prosecution NAB that prosecution was not under obligation to prove the case against appellant and it was the duty of the appellant to disprove the prosecution case and prove his innocence through valid and cogent reason in view of the provision as contained in Section 14 of NAO, 1999. This submission, on the face of it, seems to be incorrect for the simple reason that this 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. This Section does not affect the onus of proving the guilt of an accused which always rests on the prosecution. 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. 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 Hon'ble apex Court while discussing the question of presumption in *Rehmat v. State* {PLD 1977 SC 515} held 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."*

12. 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. 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".*

13. Adverting to the allegation as set-forth against the appellant is that he being Recovery Incharge of New Fruit and Vegetable

Market, Super Highway, Karachi, for the period from 01.07.2010 to 23.12.2010 and 25.01.2012 and 31.05.2012, was responsible to issue/collect receipt books and vehicle token fees to the recovery staff and he was also accountable to count cash collected through receipt books and vehicle tokens as well as required to deposit the same into Government Treasury or bank accounts of the Market Committee. Here it would be conducive to review the charge framed against the appellant by the Accountability Court, which reads as follows:-

> *"I, Dr. Sher Bano Karim, Judge Accountability Court-III, Sindh, Karachi, charge you accused Anwar Ali s/o Rajab Ali as under:-*
>
> *You accused Anwar Ali being Incharge recovery of New Sabzi Mandi Karachi w.e.f. 01.07.2010 to 23.12.2010 and from 28.01.2012 to 31.05.2012 was responsible to issue/collect Receipt Books, Vehicle Tokens Fee to/from recovery staff under your supervision in accordance with Rule 29{8}, {8-A}, {8-B} and {8-C} of Agriculture produce Markets Rules, 1940, you were also responsible to count cash actually received and Receipt Books amount and certify through your signature and date on the back of last counterfoil of each receipt book and all receipts amounts were required to be credited on daily basis into Government Treasury or in the bank as per Rule 37 which was ignored by you, you was responsible to maintain Receipt Book Register but you did not sign any page of Register in order to misappropriate the amount collected by you on account of Market and Vehicle Fee with ulterior motives and malafide intention, however, your signatures are present on the back of each Receipt Book issued by you during your aforesaid tenure.*
>
> *You accused named above with the connivance of other accused person Hafiz-ul-Hassan and Akbar Baig Mughal {who entered into option of plea bargain and returned their own liabilities} have misappropriated an amount of* ***Rs.3,126,268/-*** *and caused loss to the Government Exchequer, thereby you have committed an offence of corruption and corrupt practices as envisaged under section 9{a} of the National Accountability Ordinance, 1999 punishable u/s 10 and Sr. no.2 of the Schedule of offences appended with the NAB Ordinance 1999 within the cognizance of this Court.*
>
> *And I hereby direct that you accused be tried by this Court on the above said charge".*

14. Reviewing the contents of the above charge, it is noted that, in essence, there are two major allegations against the appellant. Firstly, that he during his posting as Incharge Recovery of New Sabzi Mandi, Karachi, with effect from 01.07.2010 to 23.12.2010 and 25.01.2012 to 31.05.2012 violated Rule 29{8}, {8-A}, {8-B} and {8-C} of Agriculture Produce Market Rules, 1940, whereby he was responsible to issue/collect receipt books, vehicle token fee to/from recovery staff under his supervision, count cash actually received and certify it through his signature and date on the back of last counterfoil of each receipt book and then credit entire amount into government treasury or bank on daily basis by maintaining receipt book register, and secondly, that he in connivance with other accused misappropriate the amount collected in the head of Market and Vehicle Fees.

15. The learned trial Court convicted the appellant under Section 10 of NAO, 1999, holding that the prosecution has proved the guilt of the appellant regarding unscrupulous act of misappropriated amount and misuse of authority as envisaged under Section 9{a}{vi}{xii} of NAO, 1999 and convicted him under Section 10 of the Ordinance, 1999. A brief reference to Section 9{a}{vi}{xii} would be relevant, which reads as follows:-

> ***9. Corruption and Corrupt Practices:***
>
> *{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;*
>
> *{i}*
>
> *{ii}*
>
> *{iii}*
>
> *{iv}*
>
> *{v}*
>
> *{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 willfully 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;*

{vii}

{viii}

{ix}

{x}

{xi}

{xii} *if he aids, assists, abets, attempts or acts in conspiracy with a person or a holder of public office accused of an offence as provided in clauses {i} to {xi}.*

16. In terms of the aforesaid charging provision, the initial burden lies on the prosecution to prove that the accused was guilty of any of the offences with which he was being charged. In this background of the matter, we deem it appropriate to go through the evidence of PW.1 Gul Hassan, Director {Admn}, Agricultural Extension {Sindh}, Hyderabad, who alongwith Javed Hassan Kaimkhani, Director, Bureau of Supply and Prices, Karachi, conducted an inquiry under the orders of Secretary Agricultural on the charges of rampant corruption. The inquiry team having completed the inquiry submitted its report to the Secretary Agricultural concluding that it was a case of misappropriation of funds generated through the gate money of Market Committee and recommended recovery of the embezzled amount from the responsible officers who committed default in their duties and formulation of proper mechanism to ensure transparency in collection of market fee/vehicle entry fee at the gates of New Sabzi Mandi, Karachi. The said report is placed on record as Ex.4/1, which shows discrepancy of Rs.3,816,585/-. The inquiry report further reveals that no audit of accounts of Market Committee was carried out since 01.07.2010 till report of inquiry i.e. 13.10.2014. It also manifests that M/s. Ashfaq Ahmed Soomro and Abdul Hakeem Baloch remained posted as Administrators of Market Committee from 01.07.2010 to 11.07.2010 and 12.07.2010 to 20.10.2010 respectively while M/s Hafiz ul Hassan, Akbar Baig and Shoukat Ali Abro were the Secretaries from 01.07.2010 to 12.07.2011, 01.03.2012 to 25.05.2012 and 01.03.2012 to 25.05.2012 respectively. The report also reflects that during the period from 01.07.2010 to 31.12.2010 and 01.01.2012 to 31.05.2012 a sum of Rs.14,750,045/- was

collected, out of which an amount of Rs.9,116,470/- was deposited in bank accounts of Market Committee leaving a discrepancy of Rs.5,633,575/-. According to the report, out of total short fall of Rs.5,633,575/-, an amount of Rs.1,816,990/- was justified and deposited in the bank account of Market. Thus, a sum of Rs.3,816,585/- was sorted out as misappropriated/embezzled amount. The inquiry team also held Administrator, Secretary and Accounts Section of Market Committee responsible for alleged misappropriation holding that they turned blind-eye towards such misappropriation. Here it would also be conducive to refer deposition of investigating officer {PW.7} Sarwar Ahmed Khan, available at page 1145 of the paper book. He in his cross-examination has admitted that the two Secretaries Akbar Baig Mughal and Hafeez ul Hassan had settled their liabilities and returned Rs.1,229,743/- and Rs.1,991,842/- respectively to NAB through Plea Bargain {PB}. He further admitted that accumulated amount of both PBs was Rs.3,221,585/- leaving a shortfall of Rs.5,95,000/- as being the liability of appellant Anwar Ali. Surprising to note that entire record is silent as to the role played by co-accused Akbar Baig Mughal and Hafeez ul Hassan, who settled their liabilities with NAB and deposited major part of the alleged misappropriated amount. Nothing has been brought on record as to how they misappropriated the funds of Market Committee and what was their *modus operandi*. The prosecution has also failed to establish any nexus of appellant with them inspite of the fact that they entered into PB and settled their liabilities with NAB. It was the duty of the investigating officer to bring on record the evidence showing connivance of appellant with them, but such kind of evidence is lacking. This fact, thus, rendered the case of the prosecution extremely doubtful simply for the reason that if the appellant was solely responsible for misappropriation in the funds of Market Committee then why the two accused entered into PB and deposited major part of the misappropriated amount. Even no money trail or accumulation of assets beyond his known source of income has been established against the appellant. As to the case of the prosecution that the appellant was assigned charge to look-after the work of the Market Committee through office order dated 24.01.2012 and he was responsible for alleged misappropriation. The entire record is silent as to how much time he

remained Incharge or hold look-after charge of the Market Committee.

17. Javed Ahmed appeared as PW.2 Ex.6. He has defined the procedure of collection of market and vehicle fees and its deposit in the relevant head or bank. He exhibited certain documents including recovery registers and deposed that market and vehicle fees were to be collected from two main gates, one reserved for vegetable and another one for fruit, of which entries were made in the recovery/collection registers and subsequent thereto such collected amount was to be deposited in bank on daily basis. Zainullah Tunio is witness No.3 Ex.7, who was Services and Operation Manager UBL, New Sabzi Mandi Branch, Karachi, and deposed about bank account of Karachi Market Committee. He exhibited bank statement for the period from 01.01.2012 to 31.05.2012 and deposit slips/credit vouchers for the same period. Abdullah Roomi is witness No.4 Ex.8. He was Manager, Bank Al-Habib, Hussainabad Branch, Karachi, and deposed about bank account of Market Committee lying in his bank. He produced bank statement for the period from 01.07.2010 to 31.12.2010. Khadim Hussain appeared as witness No.5 Ex.9. He was Advisor in Export Processing Zone since 2005 and was entrusted charge of Accounts Branch of Market Committee, Karachi. He deposed that in the year 2010 on noticing some shortfall in the head of market and vehicle fees, he informed the Secretary Market Committee. He further deposed that two accused Hafeez-ul-Hassan Zaidi and M. Akbar Baig settled their liabilities and deposited the amount with NAB. Abdul Haq Massan is witness No.6 Ex.10, who was Office Superintendent, Market Committee, Karachi. He exhibited certain office orders regarding assigning duties.

18. We have minutely examined the entire evidence brought on record by the prosecution. It has been observed that none of them have shown any criminal intent of the appellant for personal gain or to extend any unlawful monetary benefit to anyone else. Admittedly, the offences under National Accountability Ordinance, 1999 are the offences which require proving of *mens rea* on the part of appellant. In order to prove the offences and specifically the offence under section 9{a}{vi}{xii} of the NAO, punishable under section 10 of the

Ordinance, it is mandatory for the prosecution to prove the intention on the part of an accused that he by playing corrupt, dishonest or illegal means obtained for himself, his spouse, or dependent or for any other person any property, valuable thing or pecuniary advantage. All these acts or omissions, constituting an offence, are essentially required proving of *mens rea* on the part of accused. No doubt in Section 14{a} of National Accountability Ordinance, 1999 certain presumptions are provided against an accused for certain acts or omissions constituting the offences but initial burden to make out a reasonable case against an accused charged under any of the offences under the Ordinance, *ibid* always lies on the prosecution and thereafter it shifts towards the accused. If leaving aside the defence evidence, the prosecution evidence is seen, as discussed above, none of the prosecution witnesses has stated even a single word against the appellant with regard to his conduct, behavior, criminal intent, money trail or accumulation of assets beyond his known source of income as well as his nexus with two accused Hafeez-ul-Hassan Zaidi and M. Akbar Baig, who settled their liabilities and paid major part of misappropriated amount. No iota of evidence is available on record to show any monetary benefit ever was extended by the appellant to anyone or he himself got any such illegal gain as a result of alleged crime, hence charges under Section 9{a}{vi}{xii} of NAO, 1999, stand not proved.

19. As to the testimony of investigating officer is concerned, suffice to observe that the investigating officer is an important character, who is under obligation to investigate the matter, honestly, fairly and justly, so as to bring on surface the truth. It is the bounden duty of the Investigation Officer not only to build-up the case with such evidence enabling the Court to record conviction by all means, but also to dig out the truth to light to reach at a just and fair decision. Meaning thereby that the purpose of investigation is to collect all relevant evidence pertaining to allegation of crime and to dig out the truth enabling and facilitating the Court to administer justice and to bring the real culprits to book, however, it appears that investigating officer has failed to discharge his duties in the manner as provided under the law. It is noteworthy that appellant while agitating the plea of his innocence has placed on record duty rosters as Ex.15/1 to

Ex.15/10, available at page 1183 to 1201, through his witness Muhammad Nadeem Khan {Ex.15}, Secretary Committee, Karachi, which do not disclose the name of the appellant either as recovery incharge or collection officer. Even otherwise, the investigating officer did not bother to examine any person from the list of duty rosters in order to establish the charge that after collection of amount through receipt books and token fees, the recovery staff deposited the same with the appellant as being Recovery Incharge.

20. The prosecution has claimed that the recovery staff, after collection of amount, deposited the same with the appellant, who was required to deposit the same in Government Treasury or in the bank account of Market Committee and whose signatures are available on the back of last counterfoil of each receipt book, which is sufficient to prove his guilty conscious. On the contrary, the appellant in his Section 342, Cr.P.C. statement has denied his posting as Incharge or collection officer at any time as well as receipt of any amount from the recovery staff. The appellant also admitted that he was only responsible to maintain receipt book registers which he maintained property and such a fact could be verified from Investigation Report. It is noteworthy that investigating officer neither verified the signatures of the appellant through forensic expert nor placed any other material to substantiate that the same were of the appellant. This lacuna, thus, caused a big dent to the prosecution case.

21. At this juncture, it is very difficult for us to give due weight to the testimony of prosecution witnesses. It is by now a well settled by our Superior Courts that no one should be construed into a crime unless his guilt is proved beyond reasonable doubt by the prosecution through reliable and legally admissible evidence, which is lacking in this case. It is apparent from the record that the findings of the learned trial Judge are based on presumption, suffering from misreading and non-reading of evidence as well as from factual and legal infirmity thus, not sustainable in the eyes of law. Even otherwise, if the evidence led by prosecution is seen in its entirety, admittedly none of the witnesses has expressed any suspicion about the involvement of appellant with the offence charged with nor have they shown any criminal intent for corruption and corrupt practices

against him. Admittedly, the offences under National Accountability Ordinance, 1999 are the offences which require proving of *mens rea* on the part of accused by the prosecution. If the whole prosecution evidence is seen, leaving aside the defence evidence, none of the prosecution witnesses ever stated even a single word against the appellant with regard to his conduct, behavior, criminal intent as well as *mens rea* for commission of offences of corruption and corrupt practices, hence in absence of evidence regarding *mens rea* etc., charge under Section 9{a} stand not proved against appellant beyond doubt. The Hon'ble Supreme Court in the case of *The State v Anwar Saif ullah Khan* {PLD 2016 Supreme Court 276}, held that:-

> *"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 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."*

22. We are also conscious of the fact that the learned trial Court dealt with the evidence led by the appellant in the mode and manner as if he has to establish his innocence irrespective of the evidence led by the prosecution. The prosecution since remained unable to produce convincing evidence to discharge initial onus, therefore, there is no legal compulsion to deal with the evidence led by appellant in his defence.

23. In criminal cases the general rule is that the accused must always be presumed to be innocent and the onus of proving the offence is on the prosecution. All that may be necessary for the accused is to offer some explanation of the prosecution evidence against him 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 has to be quashed. Reliance may well be made to the cases of *Muhammad Luqman v. State* {PLD 1970 SC 10}, *Shamoon v. State* {1995 SCMR 1377}, *Wali Muhammad v. The State* {1969 SCMR 612}, *Khushi Muhammad v. Muhammad Hanif* {1980 SCMR 616}, *Ali Sher v. State* PLD 1980 SC 317}, *Hakim Ali v. State* {1971 SCMR 432} and *Rab Nawaz v. State* {PLD 1994 SC 858}. Rule of Islamic Jurisprudence has been laid down in the judgment rendered by the Hon'ble Supreme Court of Pakistan in *Ayub Masih's case* (PLD 2002 SC 1048), wherein the Hon'ble apex Court ruled that:-

> *"It is also firmly settled that if there is an element of doubt as to the guilt of the accused, the benefit of the doubt must be extended to him. The doubt, of course, must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, "It is better that ten guilty person be acquitted rather than one innocent person be convicted". In simple words it means that utmost care should be taken by the Court in convicting an accused.* ***It was held in "The State v Mushtaq Ahmed (PLD 1973 SC 418)*** *that this rule is antithesis of haphazard approach or reaching a fitful decision in a case. It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic Laws and is enforced rigorously in view of the saying of Holy Prophet (P.B.U.H) that the mistake of Qazi (Judge) in releasing a criminal, is better than his mistake in punishing an innocent".*

24. The final and eventual outcome of the entire discussion leads us to an irresistible conclusion that the prosecution has failed to prove its case against the appellant beyond shadow of reasonable doubt. We, therefore, allow this appeal, set-aside the conviction and sentence recorded by the learned trial Court vide judgment dated 29.09.2020 and acquit the appellant of the charge by extending him

the benefit of doubt. He shall be released forthwith from the jail if not required to be detained in connection with any other case.

25. In sequel to above, the C.P.D-4978 of 2020, seeking post arrest bail, is dismissed as having become infructuous.

JUDGE

JUDGE

NAK/PA