Order sheet

IN THE HIGH COURT OF SINDH, KARACHI.

Present:-
Mr. Justice Muhammad Iqbal Kalhoro J.
Mr. Justice Shamsuddin Abbasi J.

Constitutional Petition No.D-837 of 2021

Mansoor Ahmed Rajput

Versus

Accountability Court III & another

Date of Hearings: **14.04.2021, 20.05.2021, 16.08.2021, 26.08.2021 & 08.09.2021.**

Date of order: **20.09.2021.**

Mr. Zubair Ahmed Rajput, advocate for petitioner.
Mr. Shahbaz Sahotra, Special Prosecutor NAB a/w Imran Mangrio I.O. NAB.
Mr. Irfan Memon, DAG.

O R D E R

Muhammad Iqbal Kalhoro, J:- Petitioner arraigned in a reference No.30/2016 pending before learned Accountability Court III, Sindh at Karachi, filed applications u/s 265-K CrPC for his acquittal, dismissed vide orders dated 10.05.2019 and 26.06.2019 respectively, has impugned both the orders, besides asking for his acquittal, in this petition.

2. Relevant facts show that petitioner, the Deputy Director, Information and Archives Department, Government of Sindh, has been booked in the case alongside other officials working in different capacities in the same department, against allegations of misuse of authority in awarding a contract of a project known as Facilitating Working Environment and Supply of Computers, Hard Ware, Software, Printers, Scanners & Networking of Information & Archives Department to M/s Prime Trading, alleged to be a fake company, sparking embezzlement of millions of rupees. As per precise allegations set out in para 10 of the reference, the petitioner in the capacity of the then Director Admin and Accounts/Secretary Consultant Selection Committee in connivance with

other members of the committee qualified the said company for the project, and on purpose failed to evaluate its technical and financial proposal. In addition, he as Disburse and Drawing Officer willfully and with ulterior motives recommended bills of the said company without deducting sales tax at 16%. His omissions and actions in concert with that of co-accused have been estimated to have caused a loss of Rs.147.32 million to the National Exchequer.

3. Learned defense counsel has argued that petitioner is innocent; there is no evidence of misuse of authority on his part; the charge is groundless and he is not likely to be convicted for the alleged offence; in the evidence, PWs have exonerated him of the accusations; out of five committee members, the petitioner and another have been charged, while two have been made witnesses, the fifth one has neither been made accused nor the witness which is an undeniable proof of pick and choose on the part of NAB rendering the charge groundless against the petitioner. In order to augment emphasis on his contention that witnesses have not implicated the petitioner, learned counsel referred to some selected portions of their evidence.

4. As to the second allegation of not deducting sales tax from bills of M/s Prime Trading, which the petitioner approved in the capacity of DDO, learned counsel stressed that it was not the function of petitioner but that of the office of Accountant General, which, in due course, not only deducted the sales tax but income tax as well from all the bills, as such no offence has been committed by the petitioner. He while winding up his arguments contended that since the allegations i.e. qualifying M/s Prime Trading for the project and failing to deduct the sales tax have not been established against the petitioner, continuation of trial against him is nothing but abuse of process of law. He lastly in order to support his contentions has relied upon, among others, 1993 SCMR 523, 1994 SCMR 798, 2000 SCMR 122, 2008 SCMR 1118, and PLD 2019 SC 527.

5. Rebutting his arguments, learned Special Prosecutor NAB together with IO has submitted that all the witnesses have been examined, the trial is at the verge of conclusion and fixed for statement of accused u/s 342

CrPC; that sufficient evidence connecting the petitioner with the alleged offence has come on record; evaluation of chosen parts of evidence at this juncture under constitutional jurisdiction by this court has never been appreciated; the contract was awarded to a fake company on the basis of recommendation of the petitioner acting not only as a Member/Secretary, but as the Consultant, Selection Committee, which has resulted into a loss of millions of rupees to the national exchequer; that no opinion can be formed on the basis of reading of evidence of few witnesses as it is settled that an all-inclusive view of the entire evidence and the perception it creates have to be taken into account for deciding guilt or otherwise of the accused; 17 witnesses, examined in the trial, have produced bundles of documents which need to be looked into for determining point in hand, and which exercise cannot be embarked on under this jurisdiction. He to reinforce his contentions has relied upon 2005 SCMR 1544, 2020 YLR Note 7, 2016 P Cr. L J 305, PLD 2013 Balochistan 138, and PLD 2001 SC 7. Learned DAG has adopted his arguments.

6. We have heard the parties and perused the material available on record including the case law cited at bar. Before undertaking discussion on merit of petitioner's case, we would like to iterate that constitutional jurisdiction is not akin or additional to that of powers u/s 249-A, 265-K or 561-A CrPC to examine likelihood or otherwise of an accused's conviction in a criminal matter. The purpose and object of writ jurisdiction is to foster justice, check perpetuation of an illegality and to keep subordinate courts within their confines. Under this jurisdiction, High Court, in routine, does not interfere with the orders passed by the subordinate courts and start resolving the disputes between the parties, until and unless something totally unjust and unlawful in the proceedings before the trial court is brought to its notice. In certain circumstances, when it is clear that assumption of jurisdiction by the trial court is without lawful authority, or established facts of the case do not show commission of an offence, this jurisdiction could be invoked and the proceedings quashed. But it must be said at the same time, that writ jurisdiction is not out there to be exploited as a substitute of a regular trial or an additional recourse available to an accused to get his case decided. If there is material indicating that *prima*

facie an offence has been committed, the usual course of the trial has to be allowed to reach its pinnacle.

7. Against the petitioner, it is alleged that he was Director Admin & Accounts plus Secretary and Consultant of the Selection Committee which chose M/s Prime Trading for the project without verifying its qualification and evaluating its technical and financial proposal costing a heavy loss to the government. He is stated to have initiated a note sheet for approval, with his recommendation, to award contract to aforesaid company. Latter, he and the then Secretary, Archives and Information Department signed the contract with the said company paving the way for commission of the alleged offence. He was also a member / secretary of the Monitoring Committee tasked to look after the project. He is further stated to have recommended financial proposals of the said company for approval. In arguments, we noted that learned counsel referred to certain portions of cross-examination of the witnesses to convince us that there was no probability of the petitioner being convicted of the alleged offence. Before we let ourselves be influenced by these selected portions of the evidence, we wish to urge that piecemeal examination of material to form an opinion is neither desired here nor permitted under the law. Evidence in its entirety has to be appreciated to infer whether a certain fact or a set of facts has been established or not. Without taking into account a holistic view and overall effect of evidence, guilt or otherwise of an accused cannot be determined.

8. The ground of pick and choose taken by the petitioner does not seem to be relevant at all for acquitting him u/s 249-A or 265-K CrPC. These provisions proceed to benefit an accused only in the wake of a determination that the charge is groundless or there is no probability of the accused being convicted of the offence. Pick and choose, essentially a defense of an accused and relevant only when examined in juxtaposition of entire prosecution evidence, in no way can render the charge baseless or probability of conviction vanish. Each one in an offence committed with assistance and collusion of others is and has to be held responsible individually, and collectively also, for his role performed to achieve a common object. And therefore, even if this ground is *prima facie* available

to an accused in the trial would not be considered as relevant for acquitting him u/s 249-A, 265-K or 561-A CrPC.

9. Further, in the case, as reported, all the witnesses have been examined and several documents produced, which, for making a determination required here, are needed to be thoroughly scrutinized. Besides, it may be noted, that proprietor of the said company namely Aijaz Ahmed, during investigation, came forward and moved application for plea bargain dully supported by his affidavit admitting his guilt. It was accepted, his liability was fixed, and he was directed to make good of that. But before its materialization, he absconded and up till now has not been arrested. No doubt, it is settled that case of each accused has to be decided on its own merits, and therefore the merit of petitioner's case would be the determinative factor for deciding his guilt or innocence. But no one would dispute either the proposition that admission of guilt by an accused serves as a piece of circumstantial evidence against other accused and is relevant to that extent. This aspect of the case and its implication in conjunction with entire evidence has yet to be considered and decided by the trial court.

10. In such circumstances, the rule of caution tends to dictate us to exercise restraint in making a decision of a case, involving misappropriation of public money, without first letting the trial court look at the evidence and form its opinion. In addition, at this stage when the case is on the cusp of conclusion, expressing an opinion into merits of the case by appreciating evidence that too under discretionary constitutional jurisdiction is not only likely to prejudice the case of each party but will deprive them both an appellate forum in the shape of this court which otherwise in the wake of final decision by the trial court would be available to them. The petitioner is not the only accused in the reference but has been arraigned with others against not only individual liability but charge of colluding with others in furthering common object also. This situation, ostensibly, setting off a chain of cause and effect steering to alleged loss to the national exchequer is such that separating accusations against the petitioner from the others is not possible without undermining the whole prosecution case. Learned counsel's contention that no offence

has been committed by the petitioner is therefore not sustainable at this stage in that it can only be settled by deep examination of entire evidence, which exercise, suffice to say, under the constitutional jurisdiction is not permissible.

11. For foregoing discussion covering relevant facts and circumstances pertaining to petitioner's case here, in our view, the petition must fail. Resultantly, the petition is dismissed and disposed of along with all pending applications.

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At the onset, it may be stated that all the witnesses have been examined by the trial court and it is only the last witness, the I.O. of the case, whose cross examination is being conducted. The case insofar as prosecution is, is almost over. At this stage, expressing an opinion into merits of the case especially based on evidence that too under discretionary constitutional jurisdiction will not only prejudice the case of the parties but is likely to deprive both of them an appellate forum which otherwise in the wake of final decision by the trial court would be available to the aggrieved party. The petitioners are not the only accused in the reference but have been arraigned therein along-with other accused and the nature of allegations and overlapping role of each accused in causing the effect leading to alleged loss to the national exchequer is such that separating attribution to one accused from the other is not possible without undermining the whole prosecution case. And secondly such an approach would amount to resolving the controversy in piecemeal which has never been the scheme of law. Learned counsel's contention that no offence has been committed by the petitioners under NAO, 1999 or for that matter under any other law is premature in that it can only be settled after deep and at minuscule level examination of the evidence, which exercise under the constitutional jurisdiction is not permissible on the one hand and on **the other would be tantamount to stretching things beyond the prescribed limits.**