

IN THE HIGH COURT OF SINDH AT KARACHI

Present: Muhammad Karim Khan Agha and Omar Sial, JJ

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Crl. Accountability Appeal No. 19 of 2017

Muzaffar Ali Abbasi Appellant

Versus

The State
through National Accountability Bureau Respondent

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Crl. Accountability Appeal No. 23 of 2017

Ali Anwar Jokhio Appellant

Versus

The State
through National Accountability Bureau Respondent

Mr. Abbas Rasheed Rizvi, Advocate for Appellant Muzaffar Ali Abbasi.

Mr. Khadim Hussain Soomro, Advocate for Appellant Ali Anwar Jokhio.

Mr. Khalid Mehmood Awan, Special Prosecutor NAB a/w Ali Raza Talpur, I.O.

JUDGMENT

Omar Sial, J.: Muzaffar Ali Abbasi (appellant in Crl. Acct. Appeal No. 19 of 2017) and Ali Anwar Jokhio (appellant in Crl. Acct. Appeal No. 23 of 2017) have impugned a judgment dated 24.8.2017 passed by the learned Accountability Court, Hyderabad. In terms of the said judgment, both appellants were convicted for an offence under section 9(a)(vi) of the National Accountability Ordinance, 1999 and each was sentenced to suffer rigorous imprisonment for ten years and pay a fine of Rs. 52,084,243.50.

2. Muzaffar Ali Abbasi was the Chief Executive Officer of Hyderabad Electric Supply Company (HESCO) whereas Ali Anwar Jokhio was HESCO's In charge Administration and HR director in the year 2013. The case against them is that they appointed 537 daily wagers in HESCO whereas the Board of Directors had given approval for 428 appointments.

3. NAB filed Reference bearing No. 17 of 2016 against the two appellants and a charge was framed against them on 26-8-2016. Both appellants pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined Syed Imran Ali Askari as its first witness. He was the Director General (Admin and HR) of HESCO at the relevant time. The second prosecution witness was Muhammad Ayub, who was a Manager in the Human Resources Department at HESCO. Faheemullah Memon who was

the Company Secretary in Hyderabad was examined as the third prosecution witness Raham Ali who was the Chief Executive Officer of HESCO when evidence was recorded at trial recorded his testimony as the fourth witness of the prosecution. Saeed Ahmed, a Chief Engineer at HESCO was examined as the fifth prosecution witness whereas Umeed Ali Qureshi, a retired Chief Engineer appeared as the sixth witness. HESCO's Finance Director Nadeem Akhtar was the prosecutions seventh witness. The investigating officer of the case, Mir Ali Raza Talpur was the eighth and the last witness who appeared on behalf of the prosecution.

4. The appellants recorded their statements under section 342 Cr.P.C. on 12-8-2017 in which they denied the allegation against them. Both gave long drawn out explanations, which are not being reproduced for the sake of brevity as they form a part of the record.

5. We have heard the learned counsel for the appellants as well as the learned Special Prosecutor NAB, who was also assisted by the investigating officer of the case. The record available was also examined with the able assistance of the counsel for the parties. Our observations are as follows.

6. The offence with which the appellants were charged was under section 9(a)(vi) of the NAO 1999. This section provides as follows:

9 (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:

.....

(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;

As mentioned above, the allegation against the petitioners was that they hired 109 extra daily wagers i.e permission was granted for 428 by the Boards of Directors of HESCO but 537 were appointed. The first query which we made from the learned Special Prosecutor, NAB was to show us the relevant law or rule or regulation or the standard operating procedure pertaining to appointments of daily wagers in HESCO which had been violated by the appellants. The learned Special Prosecutor and the investigating officer both admitted categorically that there was none. Not surprisingly, at trial no document was produced to show the established criterion for appointment of daily wagers. Indeed, prosecution witnesses expressed their inability to identify any law, rule or regulation: Syed Imran Ali Askari – *“there is no SOP for the appointment on daily*

wage basis and only service rules are to be followed”; Muhammad Ayub – *“there is no SOP for appointment on daily wages in HESCO”*; Faheemullah Memon – *“I cannot say if there is no SOP for the recruitment of staff on daily wages [voluntarily says] the administration of HESCO can say about the SOP”*. In the light of the foregoing, the learned Special Prosecutor was unable to justify or explain the statement of the investigating officer Ali Raza Talpur at trial when he recorded in his examination-in-chief that the *“accused persons did not make the advertisements in newspapers for the appointment of employees and did not adopt legal procedure.”* However, it would not be out of place to mention that the investigating officer himself admitted in the cross examination that *“he did not know whether there is any SOP for the appointment on daily wage basis.”*

7. Keeping in view the inability of the prosecution to identify any law which was violated by the appellants, we asked the learned Special Prosecutor, NAB to explain to us as to on what basis had the prosecution alleged that the daily wagers were unlawfully hired. He explained to us that the violation was that in the 87th board of directors meeting permission was granted for the appointment of 428 daily wagers whereas 537 were hired. He referred to the minutes of the 87th meeting held on 8-11-2012, more specifically to the minute documented under agenda item 7. For ease of reference, this minute was as follows:

Agenda-7 Approval for recruitment in HESCO

The Admn. H.R. Director stated that we are normally reporting efficiency of staff to the head office i.e. Ministry of Water and Power and the Ministry vide letter dated 18.9.2012 directed this company to recruit staff against 428 vacant posts (Direct Quota) on daily wages basis therefore, this office twice requested the Ministry of Water and Power to issue directives for recruitment on contract basis because all these posts (BPS-1 to 15) are belonging to the regular cadre. In last Ministry again directed this office that the case for relaxation of ban has been referred to Ministry of Finance Government of Pakistan and till that time this company to process/start the recruitment on daily wages basis, therefore, management submit this matter before BOD to ask Ministry Water and Power for grant of permission to recruit staff on contract basis against the available direct quota posts of 428 Nos. to avoid the appointment of daily wages which can only be made merely for 89 days.

Decision: The BOD HESCO agreed to recruit staff on contract basis in principle and the Ministry Water and Power may also be informed.

8. Both, the prosecution and the defence counsel, were in agreement that the 87th Board of Directors meeting gave permission for the appointment of 428 daily wagers. However, the fact that the learned counsel for the appellants have highlighted during their arguments is that the Board of Directors in the 85th Board of Directors meeting had already approved the appointment of 121 daily wagers which appointment was confirmed in the 86th meeting. This very important board resolution, according to the learned counsel, had deliberately and intentionally been omitted from the record by the investigating officer. While reappraising the evidence that was recorded at trial we observed that the prosecution witness Syed Imran Ali Askari admitted in his testimony that *"it is correct that an approval is in place for 121 sanctioned posts approved in the BOD meeting No. 86 held on 28-9-2012."* He however tried to defend his position by further stating, rather arbitrarily, that the 121 appointments made had no nexus with the appointment with the daily wagers. Similarly, prosecution witness Muhammad Ayub Afridi testified that *"it is correct that as per meeting of BoD No. 85 & 86 held on 9-12-2012, the 121 posts for the new grid stations were sanctioned."* Another prosecution witness Faheemullah Memon testified that *"it is correct that the minutes of the 86th meeting were confirmed in the 87th BoD minutes with regard to 121 additional posts of grid stations."* Raham Ali Otho, the fourth prosecution witness went on to testify that *"the 538 appointments were according to the 87th & 88th BoD meetings."* Finally, the investigating officer Ali Raza Talpur himself testified at trial that *"it is correct to suggest that if 121 is added to 428 it becomes 549. It is correct to suggest that meeting no. 87 & 88 of BoD reaffirmed the minutes of meeting of BoDs No. 85 & 86 as per the agenda number 1. I do not remember as to whether I investigated regarding the meeting No. 85 and 86 of BoD. In his cross examination he further recorded that "it is correct that total approval was made by the BoDs for appointment of 428 employees on daily wages basis for different cadres and creation of 121 more employees was made in the minutes of the BoD 87 and 88."* From the testimonies of the prosecution witnesses at trial, it was clearly established that the BoD of HESCO had given approval for 121 appointments in the 85th & 86th meeting of the BoD whereas 428 appointments were approved in the 87th & 88th meeting.

9. We repeatedly asked the learned Special Prosecutor and the investigating officer as to why the record for the 85th & 86th was not obtained as it clearly would have revealed a different position as far as the allegations against the appellants are concerned – most unfortunately neither one of them could answer our query. Both, also expressed their inability to provide any clarification in this regard. We presume however from the testimony of prosecution witness Muhammad Ayub Afridi that the issue might have been that the 121 positions earlier authorized in the 85th & 86th BoD meetings

were for permanent positions whereas the approval in the BoD meeting 88 was for 428 daily wagers. Afridi testified at trial that *“it is correct that the nature of 121 posts was regular posts and against which no appointments has been made so far. It is correct that the new grid stations are functional and are being run by the staff appointment on daily wage basis.”* All the prosecution witnesses admitted that the 121 regular positions were not filled and that the 537 daily wagers who were appointed subsequently did the work of those 121 positions; that they continue to do so to date and that the burden on the national exchequer is far below what it would have been if the 121 regular appointments had been made. None of the daily wagers who were appointed were examined at trial nor did even one record a statement that they were appointed as daily wagers on any kickback given to the appellants for the appointment. In fact the prosecution witnesses have testified to the contrary i.e. that no financial benefit was obtained by the appellants.

10. Another aspect of the case that perturbs us is the lopsided and discriminatory investigation and prosecution in the matter. The appointments pertain to the period 2012-2013. A six member scrutiny committee was appointed for the purpose. The prosecution witnesses have testified that a proper scrutiny took place and all the persons appointed were fit for the job and needed in HESCO. Most appointments made were for linemen. The appointments made were for a period of 89 days with daily wages ranging from 500 to 650 rupees per day. Prosecution witness Syed Imran Ali Askari took over the charge of Director (Admin & HR) from 28-4-2014. He remained the Director till 2017. During this period three other CEOs were appointed. All of them continued with re-extending the contracts of all the daily wagers, including the 109 who were said to have been illegally appointed. Such a situation continues to date. The daily wagers are still working in HESCO and are performing important duties to keep HESCO operational. None of the CEOs and Admin and HR employees of HESCO stopped the practice. Yet, when the Reference was filed, NAB lumped the entire “loss” to the national exchequer on the appellants. When we inquired from the learned Special Prosecutor, he and the investigating officer preferred to remain quiet and not give any explanation on this aspect. Similarly, they could not offer any explanation as to why none of the other 5 members of the scrutiny committee was made an accused in the case. In our view, the appellants have to answer the allegations against them irrespective of whether potential persons were made accused or not yet we cannot turn a blind eye to the fact that the entire loss, if any, was lumped on the appellants and that when two persons are targeted amongst many who were sailing in the same boat, malafide on the part of the investigating officer in the investigation cannot be conclusively ruled out.

11. It is the duty of the investigating officer to conduct a fair and impartial investigation and determine the truth of the matter. It appears to us from the record that the investigating officer paid no heed to the explanations given by the appellants let alone inquire into the same. Such conduct on the part of the investigating officer casts a shadow of doubt on the entire investigation. We also note that perhaps from the charge that although the case seems to be of excess employment of 109, the charge framed stipulated 277 excess appointments made. No cogent evidence was led to establish that not 109 but 277 excess appointments were made.

12. To conclude, we are of the view that:

- (i) The BoD in its 85th and 86th meeting had authorized the employment of 121 personnel for regular positions. Such appointments could not be made due to lack of funds hence daily wagers were appointed.
- (ii) The BoD in its 87th and 88th meeting had authorized the employment of 428 personnel on daily wages.
- (iii) There was no law, rule, regulation or SOP in vogue for the appointment of daily wagers. The appointments were made as per the practice prevailing.
- (iv) A 6 member scrutiny committee was made that scrutinized all applications and then recommended the daily wagers finding them fit for the job.
- (v) The daily wage appointments made were needed for the smooth running of HESCO and most of the appointments were those of line men.
- (vi) All the daily wagers continue to perform their duties to date and their contracts have been successively renewed for 89 day periods to date by all the succeeding managements of HESCO.
- (vii) No witness has testified that the appellants made an illegal or unlawful gain or advantage from the appointment of daily wagers.
- (viii) No allegation has been made by the daily wagers that they gave any form of inducement or money to the appellants for their appointment as daily wagers.
- (ix) It could not be proved beyond reasonable doubt that the appellants misused their authority.
- (x) Incomplete and an ostensibly discriminatory investigation has been carried out.
- (xi) When the defence plea is taken in juxtaposition with the prosecution case it is the former that sounds more credible.

In view of the above, we are of the opinion that the prosecution was unable to prove its case against the appellants beyond reasonable doubt. In accordance with the well settled principles of law, the benefit of such doubt should have gone to the appellants. Accordingly, we allow this appeal and acquit the appellants of the charge against them. They may be released forthwith, if not required in any other custody case.

JUDGE

JUDGE