

# **IN THE HIGH COURT OF SINDH, KARACHI**

Criminal Accountability Appeal No. 06 of 2012 &

Criminal Accountability Appeal No. 16 of 2012

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Date

Order with signature of Judge

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Present: *Mr. Justice Muhammad Junaid Ghaffar*  
*Mr. Justice Agha Faisal*

Appellant in Cr. Acctt. Appeal  
No.06/2012 and Respondent No.1  
in Cr. Acctt. Appeal No. 16/2012:

Shaikh Shahid Umar  
Through Mr. Aamir Mansoob Qureshi.  
Advocate.

Respondent in Cr. Acctt. Appeal  
No.06/2012 and Appellant  
in Cr. Acctt. Appeal No. 16/2012:

The State/NAB  
Through Mr. R.D. Kalhoro, Special  
Prosecutor NAB.

**Date of hearing:**

**31.08.2022.**

**Date of Order:**

**31.08.2022.**

## **O R D E R**

**Muhammad Junaid Ghaffar, J.-** Through Criminal Accountability Appeal No. 06 of 2012, the Appellant has impugned Judgment dated 22.02.2012 passed by the Accountability Court No. II Sindh at Karachi in Reference No. 23 of 2007, whereby, the Appellant has been convicted for seven years Rigorous Imprisonment along with fine of Rs. 500,000/= and in case of non-payment of the fine, to further undergo imprisonment for six months, however, benefit of Section 382-B Cr.P.C. was awarded to him. Insofar as Criminal Accountability Appeal No. 16 of 2012 is concerned, The State through NAB seeks clarification in respect of the properties / assets of Respondent No.1 forfeited by Accountability Court No. II Sindh, Karachi.

2. Learned Counsel for the Appellant has contended that the matter in hand was purely of a civil nature between two contracting parties; hence neither NAB could have filed a Reference; nor Accountability Court was vested with any jurisdiction to carry on with the trial; that the person through whom purportedly a complaint was filed on behalf of the foreign party was neither authorized for such purpose; nor was the representative of the foreign party; that no authorization was ever produced before the Trial Court; that the case could not have tried under Section 9(a) (ix), (x) or for that matter (xi) of the NAB Ordinance, 1999 as it does not fall within

the definition of Public at Large, as defined in the NAB Ordinance, and interpreted by various Courts of the Country; that none of the prosecution witnesses have directly implicated the Appellant in the alleged crime; that there is no iota of evidence on record to suggest that the Appellant was involved in any criminal breach of trust as alleged, and therefore, the learned Trial Court has erred in passing the impugned judgment, whereby, the Appellant has been convicted and sentenced. In support of his contention he has relied upon the cases reported as ***Zahid Ali Noor Vs. NAB and others (2017 P.Cr.L.J 147)***, ***Abdul Aziz Memon and others Vs. The State and others (PLD 2013 Supreme Court 594)***, ***Rafiq Haji Usman Vs. Chairman, NAB and another (2015 SCMR 1575)***, ***Pir Mazharul Haq and others Vs. The State through Chief Ehtesab Commissioner, Islamabad (PLD 2005 Supreme Court 63)*** and ***Nabadwip Chandra Podder and another Vs. S.D. Ahmed, Official Receiver Official Liquidator, DASS Bank Ltd. (PLD 1969 Daaca 629)***.

3. On the other hand, learned Special Prosecutor NAB has contended that the amount embezzled as alleged in the Reference was admittedly credited in the account of the Appellant, whereas, the Appellant despite receiving the remittance never supplied the goods to the Complainant, and therefore, the case falls under Section 9(a)(ix) of the Ordinance; hence the impugned judgment is correct in law to the extent of the present Appellant. Insofar as the connected Appeal on behalf of NAB is concerned, the learned Special Prosecutor NAB has argued that the learned trial Court after convicting the Appellant was also required to further probe about the properties of the Appellant so as to enable NAB to recover the amount in question; and therefore, while maintaining the conviction and sentence, further orders are solicited in respect of the Properties of the Appellant.

4. We have heard the learned Counsel for the Appellant and Special Prosecutor NAB and perused the record including R & Ps. It appears that Reference No. 23 of 2007 was filed by NAB before the Accountability Court at Karachi and the precise allegation against the Appellant was to the extent that a complaint was received from International Credit Information Limited on 25.09.2004 (local representative) and CJ Polymers Sdn Bhd, (Private Limited) Kulalampur, Malaysia to the effect that an order was placed for purchase of Qaiser LG brand of DOP (D1-Octyl-Phthalate) (160 MT x US\$ 655 /MT) at the total cost of US\$ 104,800 against Letter of Credit on sight basis and despite remittance of the amount, the goods

were never shipped; hence this Reference. Para-3 of the same is reproduced as follows: -

*“3. That on the basis of the evidence on record and the scrutiny of documents, it is prima facie established that accused No.1 being entrusted with the money in the way of his business as a merchant has committed the offence of criminal breach of trust. By committing criminal breach of trust of US \$ 104,800, the accused No.1 has committed an offence under Section (9a) of the National Accountability Ordinance, 1999, which is punishable under section 10 of the said Ordinance and schedule thereto. Accused No.2 by corrupt, dishonest and illegal means caused remittance in the account of his mother and father US \$ 104,800. By dishonestly obtaining pecuniary advantage in the account of his mother and father accused No.2 has committed an offence under Section 9(a) of the National Accountability Ordinance, 1999, which is punishable under section 10 of the said Ordinance and schedule thereto.”*

5. The learned Trial Court took cognizance of the Reference and a Charge was framed against the present Appellant as well as one Mr. Faysal Sheikh (who stands acquitted by the trial Court and against whom no Acquittal Appeal has been filed), wherein, it was alleged that they, in connivance with each other, committed criminal breach of trust, and they, by corrupt, dishonest and illegal means misappropriated an amount of US \$ 104,800 and dishonestly obtained pecuniary advantage and committed corrupt practices, as defined in Section 9(a) punishable under Section 10 of the NAB Ordinance. Thereafter the prosecution led its evidence through P.Ws namely Mehboob Ahmed as P.W-1 Ex: 6, Sibtain Zaidi as P.W-2 Ex: 09, Syed Sultan Haider as P.W-03 Ex: 11, Yawar Hussain as P.W.04 Ex: 13, and the learned trial Court has convicted the Appellant as above, whereas, the co-accused Faysal Sheikh has been acquitted.

6. The main star witness of the Prosecution besides the Investigation Officer was PW-03 (Syed Sultan Haider) who was then working as head of recovery in M/s International Credit Institution Limited which was a company engaged in providing credit information services as well as recovery services of bad debts of companies and financial institutions. His deposition and relevant cross examination reads as under;

Presently I am working with Jung Group of Publication and GEO TV. In the year 2003 I was head of recovery in M/s International Credit Institution Limited (ICIL,) which is established in Pakistan. The object of company was to provide credit information services to the banks and financial institution of the companies. In the year 2003 the contractor namely Mr. Alvin of M/s CJ Polymer Malaysian Company based had visited the Pakistan for the recovery of US\$ 104,800 from M/s Queens Polyester which was represented by Mr. Shaikh Shahid Umer and his wife Naheed Shaikh. I know that for the product of DOP Petrochemical imported by M/s CJ Polymer Malaysian Company and in this respect accused Shahid Umer had asked them to produce the finance for that purpose and remitted such amount to them. Subsequently the M/s CJ Polymer Malaysian Company had remitted the amount and credit it in the account of M/s. Queen Polyester account

through Soneri Bank, Main Branch, Karachi 1 know that the rate of DOP Petrochemical was about US\$ 655 per MT. I know that one Mr. Qaiser Shaikh is elder brother of accused Shahid Umer who was owner of M/s. Qaiser LG Petrochemical Company. I know that some invoices were signed by accused Shaikh Shahid Umer of Qaiser LG Petrochemical and also the shipment was delayed. The Malaysian Company contacted with the M/s Qaiser LG Petrochemical Company owned by elder brother of accused. Mr. Qaiser intimated the Malaysian Petrochemical Company that no such order for supplying of petrochemical have been received to their company, therefore, there is no any question of shipment. Afterwards the M/s. Polymer Malaysian Company had approached the accused Shaikh Shahid Umer who sought time for the return of their amount. Mr. Alvin lastly approached our company and contacted with me for hiring our services in respect of recovery of an amount US\$ 104,800. Subsequently we had several time approached accused Shaikh Shahid Umer for return of amount but who disclosed that due to losses in his trade he requested for time so that he will adjust the amount of M/s CJ Polymer Malaysian Company. Lastly in order to settle the disputed of amount between the accused Shahid Umer and M/s CJ Polymer Malaysian Company, the negotiation were held and the company was agreed to wave US\$ 47000 from their actual amount. The company wanted that there should be an agreement between accused Shahid Umer and with them but accused had not fulfil such promise and refused to sign such agreement (At this stage learned Special Prosecutor has requested that the PW will produce original remittance slips before the Court, therefore time may be granted and case may be adjourned. Request allowed. Time granted.)

Relevant Cross to accused Shaikh Shahid Umer;

***“It is correct to suggest that on the proforma, the LC was not opened by the M/s C.J. Polymer Malaysian Company.”... “I know that on the 2<sup>nd</sup> Proforma the LC was not opened by the M/s C.J. Polymer Malaysian Company.”... “I do not know the 2<sup>nd</sup> time M/s C.J. Polymer Malaysian Company had not opened the LC.”... “It is correct to suggest that during the negotiation with the accused he has filed a claim of US\$ 97000/-.”...“It is correct to suggest that in the written, we had not provide the acceptance of claim to the tune of US\$ 47000/-.. We had received one notice regarding the agreement of US\$ 47000/- from the accused.”...“I do not remember the contents of authority letter issued by M/s C.J. Polymer Malaysian Company in my faovour.”...“M/s C.J. Polymer Malaysian Company had authorised me for the settlement of amount with the accused and such agreement was also reduced into writing, which was not sent(sic) by the accused.”... “I had not seen the original invoice which were sent by the accused. I also not known possession of the original letter in which the consignment was rejected or cancelled by M/s C.J. Polymer Malaysian Company.”... “It is correct to suggest that I had not gone through the contents of proforma invoice.”***

7. Perusal of the above evidence depicts that the person who claimed to be the authorised representative of the foreign company / purported complainant was not even aware of the true facts of the case. The controversy hinges upon issuing a proforma invoice, whereas, he has deposed that he is not aware of the contents of the said proforma invoice. He has further stated that he is not aware as to whether LC was opened by the foreign company. As stated by him he was an employee of some company engaged in recovery services and was made an authorised representative of the foreign company for the purposes of recovery of the amount and apparently under the garb of such understanding he had approached the NAB authorities on his own and convinced them to file Reference before the Accountability Court. On an overall perusal of the

evidence of this witness we do not see any reason to believe the same as it is neither confidence inspiring nor convincing; and is rather hearsay; hence, the conviction awarded by the trial court on the basis of this piece of evidence cannot be sustained.

8. The other witness is the Investigation Officer PW-4 Yawar Hussain. His relevant deposition and cross examination reads as under;

**Deposition of Yawar Hussain**

**Part of Examination in Chief.**

I know that there happens the settlement between the parties but it was not materialized. Afterwards M/s Queens Polyester had made demand for sending 12000 USD as the rates of the required items have been increased but M/s CJ Polymer Malaysian Company had accepted subject to the shipment of the consignment. Later on M/s Queens Polyester had not dispatch the goods therefore, such deal was also not materialized. I produce the Photostat copy of 3<sup>rd</sup> invoice at Ex. 13/10 to 13/21. (Learned advocate for accused has raised objection for the production of Photostat copies. Objection will be seen at the time of final arguments) I know that there happens several negotiations in between the parties but the matter will not be settled therefore I have completed the investigation and submitted the report to the legal wing of the NAB.

**Relevant Cross-examination**

It is correct to suggest that complainant Syed Sultan Haider had not produce the authority letter when he appears before me. Voluntarily says that afterwards such authority letter was produced by him. **I know that no such letter has been placed on the record.** I know that M/s C.J Polymer Malaysian Company had asked the M/s Queens Polyester for sending the consignment through 609 Industry chemical Pvt. Limited Sirilanka. **It is correct to suggest three times the deal was cancelled in between the parties. It is incorrect to suggest that deal was against the violation of contractual obligation of the parties. It is correct to suggest that dispute emerged between the parties due to enhancement of the prices of DOB chemical.** It is correct to suggest that after proforma invoice L.C has to be opened by the principal. It is correct to suggest that we had made correspondence to M/s C.J Polymer Malaysian Company. Voluntarily says that such complaint was received to NAB Islamabad by M/s C.J Polymer Malaysian Company through M/s International Credit Institution Limited (ICIL) based in Karachi. I know that ICIL. had authorized to settle the dispute between the parties. I know that ICIL. had not directly made the complaint but M/s C.J Polymer Malaysian Company had made such complaint to Chairman NAB, Islamabad. **It is correct to suggest that such complain of M/s. C.J Polymer Malaysian Company has not arrived upon the record.** It is incorrect to suggest that complainant Sultan Haider who worked for his commission in the transaction, had falsely filed the complaint against the accused. **I know that due to non-opening of LC by the importer and fluctuation in the prices of required chemicals the dispute was arisen.**

This P.W-4, the Assistant Director NAB-Punjab as well as Investigation Officer admitted in deposition by stating that “*I know that there happened a settlement between the parties; but it was never materialized*”, whereas, he also stated that several negotiations were held between the parties; but matter could not be settled. In cross-examination he admits that no Authority letter was placed on record, whereas, he has

further admitted that it is correct to suggest that *dispute arose between the parties due to enhancement of prices of some chemicals*. He has further admitted that *it is correct to suggest that complaint of M/s. C.J Polymer Malaysian Company was never available on record*. On perusal of the evidence of the prosecution witnesses, it appears that none of the witnesses have attributed any direct allegation against the present Appellant. It is a matter of fact that the foreign buyer had never come as a complainant before the NAB authorities; rather purportedly engaged some Credit Management Company in Pakistan, (International Credit Information Limited) who through their authorized representative approached the NAB Authorities as a complainant. It is a matter of record that witness P.W:4, the Investigation Officer Yawar Hussain admitted before the learned Trial Court that no authorization was ever produced before NAB authorities on behalf of the foreign company allegedly whose money was the bone of contention in this Reference.

9. As to the arguments of Special Prosecutor NAB that since money was credited in the account of Appellant, therefore, crime has been committed is concerned, in our considered view that though there is no denial on the part of the Appellant that no money was received; however, it is his case that a dispute arose, whereas, there were certain reasons / conditions and due to fluctuation in the prices of basic raw material, that the commitment could not be honoured; however, several settlements were offered and discussed; but the buyer refused to accept any of them. This apparently clarifies that matter was between two contracting parties and at best a dispute of civil nature for which the foreign company was obliged to seek recovery of the money allegedly payable by the Appellant by way of civil remedy as may be available in law; including but not limited to a suit for recovery; but how it could be an offence against public at large in terms of the NAB Ordinance has not been responded satisfactorily in any manner on behalf of NAB.

10. After perusal of the record and the evidence so led on behalf of the prosecution, it further appears that the case as set up is alleging violation of Section 9(a) of the NAB Ordinance; and similarly while framing the Charge and so also in the Reference no Sub-Clause of Section 9(a) has been specified so as to see that what is the precise allegation against the present Appellant and what offence has been committed by him. While

confronted learned Special Prosecutor NAB referred to Section 9(a)(ix),  
the same reads as under: -

“9. Corruption and corrupt practices. —(a) a Holder .....

(i).....

(ii).....

(iii).....

(iv).....

(v).....

(vi).....

(vii).....

(viii).....

(ix) *If he commits the offence of cheating as defined in section 415 of the Pakistan Penal Code, 1860 (Act XLV of 1860) and thereby dishonestly induces members of the **public at large** to deliver any property including money or valuable security to any person; or*

11. From perusal of the above provision, it clearly reflects that the person can be charged under this provision if he commits offence of cheating as defined in Section 415 of the Pakistan Penal Code, 1860 and thereby dishonestly includes members of the public at large to deliver any property including money or valuable security to any person. We had confronted the learned Special Prosecutor NAB as to how this case would fall within the definition of Public at Large as it is a transaction only between two parties, whereas, the complainant party is not even a resident of Pakistan; but a company based in Malaysia who never came up as a direct complainant in this matter, and learned Special Prosecutor NAB has not been able to satisfactorily respond. The word Public at Large was though not defined in the NAB Ordinance, until insertion of Section 5(s)<sup>1</sup> through National Accountability (Amendment) Act, 2022 promulgated on 22.6.2022. however, even prior to this, it has been settled that even 13 persons would hardly constitute public in its literal and ordinary sense; furthermore, meaning of the word large i.e. “*considerable or relatively great size, extent or capacity having wide range and scope*” does not bring 22 or 13 persons as the case may be within its concept and fold<sup>2</sup>. In the case of Abdul Aziz Memon<sup>3</sup>; though it was held by the Hon’ble Supreme Court that NAB Ordinance would be applicable to a person who is not a holder of public office and the words “any other person” appearing in Section 9(a) of the said Ordinance are to be understood and applied

<sup>1</sup> “Public at large” means at least one hundred persons;

<sup>2</sup> Rafiq Haji Usman v Chairman NAB (2015 SCMR 1575)

<sup>3</sup> PLD 2013 SC 594

accordingly; but at the same time it was further observed that “We may add that the offence of cheating mentioned in section 9(a)(ix) of the National Accountability Ordinance, 1999, and offence of criminal breach of trust referred to in section 9(a) (x) of that Ordinance can be dealt with under the said Ordinance only if such offences affect “the public at large” as stipulated therein, and thus, a reasonable classification exists in those provisions so as to ward off criticism based upon discrimination”. Here in the present matter we have not been assisted in any manner as to how this case could fall within the definition of “Public at Large” as interpreted by the Courts before the amending Act of 2022, whereby, now a definition of “Public at Large” has been provided in the NAB Ordinance. Hence, the present case could not have been tried in terms of Section 9(a) (ix) of the Ordinance. We have dealt with this sub-section of Section 9(a) as though the charge framed by the trial Court is silent as to any sub-section of Section 9(a) *ibid*; however, learned Special Prosecutor while confronted with this, had argued that NAB’s case falls within Section 9(a) (ix) *ibid*. In that case even if we look into Section 9(a)(x) of the Ordinance, it will remain the same as again the offence in this Sub-section can only be alleged if it is against the “Public at Large”. This leaves us only with Section 9(a) (xi) of the NAB Ordinance, and since we are of the considered view that there is no sufficient evidence or material on record so as to establish that an offence of criminal breach of trust as contemplated in section 409 PPC has been committed by the present Appellant and per settled law when primary offence of criminal breach of trust under section 405 PPC is not made out, the charge for the offences under Section 9(a)(x)&(xi) of the NAB Ordinance cannot sustain<sup>4</sup>. Nonetheless, it is the case of NAB that the offence committed by the Appellant is that of cheating as defined in Section 415 PPC, and in that case, neither sub-section (x) or (xi) of Section 9(a) would be attracted as it is well settled proposition of law that cheating and criminal breach of trust are two distinct offences and both cannot be alleged simultaneously<sup>5</sup>. Once it is admitted by the prosecution witnesses that the commitment could not be honored by the Appellant due to increase in prices of basic raw materials, then in the peculiar circumstances of this case we do not see any dishonest intention on the part of the Appellant so as to treat his act as criminal. The case in hand has appeared to us to be a classical case of civil dispute based upon alleged breach of agreement for which

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<sup>4</sup> Abbas Haider Naqvi v Federation of Pakistan (PLD 2022 SC 562)

<sup>5</sup> Dr. Waqar Hameed v The State (2020 SCMR 321)



remedies laid somewhere other than in a criminal court<sup>6</sup>. Therefore, it appears that the learned Trial Court has not only failed to appreciate this aspect of the case; but has so also failed to appreciate the evidence, which is not convincing; has failed to implicate the appellant and is not beyond reasonable doubts; lacking any cogent material to sustain the conviction and sentence.

12. Insofar as the Criminal Accountability Appeal No. 16 of 2012 filed by NAB is concerned, the same has been filed by NAB seeking modification of the impugned judgment regarding identification of properties and assets of Respondent No.1, the Appellant in Criminal Accountability Appeal No. 06 of 2012, which apparently does not seem to be competent under Section 32 of the NAB Ordinance; however, since we are of the considered view that the conviction and sentence as awarded by the trial Court through the impugned judgment cannot be maintained; this Appeal does not merit any consideration and is therefore liable to be dismissed.

13. In view of hereinabove facts and circumstances of this case, on 21.08.2022, both these Appeals were decided by a short order in the follow terms and above are the reasons thereof: -

*“Heard learned Counsel for the Appellant as well as Special Prosecutor NAB. For reasons to be recorded later on, Criminal Accountability Appeal No. 06 of 2012 is allowed; the impugned Judgment dated 22.03.2012 passed by Accountability Court No.II in Reference No.23 of 2007 (The State Vs. Shaikh Shahid Umar & another) to the extent of the Appellant is hereby set-aside; and he is acquitted from the charge under Section 9(a) punishable under Section 10 of the NAB Ordinance, 1999 and his conviction and sentence stands set-aside, whereas, the surety and bail bond furnished pursuant to suspension of judgment vide order dated 29.03.2012 stand discharged. Office to act according.*

*“Insofar as Criminal Accountability Acquittal Appeal No. 16 of 2012 is concerned, for reasons to follow the same stands dismissed. Office is directed to place copy of this order in the connected matter as mentioned above.”*

**J U D G E**

**J U D G E**

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<sup>6</sup> Hashmatullah v The State (2019 SCMR 1730)

Ayaz