

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Cr. Misc. Application No.319 of 2023

Date	Order with signature of Judge
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1. For orders on office objection at "A".
2. For hearing of main case.

Date of hearing: 21.11.2023

Date of order : 04.12.2023

Mr. Yousuf Moulvi advocate assisted by Ms. Rafia Murtaza advocate for the applicant.

Mr. Talib Ali Memon, APG along with Mr. Muhammad Urs Zardari, First Investigating Officer ACE and Inspector Yasir Latif, Investigating Officer, ACE East Zone Karachi.

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ORDER

The Applicant Mehmood Baqi Moulvi, being aggrieved by and dissatisfied with the Order dated 3-05-2023 passed by the Special Judge Anticorruption Court, (Provincial) Karachi, whereby his application under section 249-A, Cr. P.C for acquittal was dismissed in Special Case No. 51 of 2019, arising out of FIR No.50/2019 registered for offenses under section 109/409/420/467/468/ 471/34 PPC R/W Section 5(2) of prevention of corruption Act II 1947, of ACE Karachi, inter-alia on the ground that none of the PWs have deposed against him; and, 100% recovery of amount as involved was made as no financial loss to the government of Sindh had accrued, besides there was/is no probability of the applicant to be convicted of any offense.

2. Brief facts of the case are that Anticorruption Court Police lodged FIR No.50/2019 under section 109/409/420/467/468/ 471/34 PPC R/W Section 5(2) of Prevention of Corruption Act II 1947, of ACE Karachi, against the flour Mills owners with the allegations that they in collusion with Food Department Government of Sindh, deliberately knowingly, malafidely, intentionally caused loss to the public exchequer thus committed aforesaid cognizable offenses. The Charge was framed by the trial court against all the flour mill owners, who pleaded not guilty and claimed trial, the trial court examined witnesses, and in the middle of the trial applicant filed an application under section 249-A, Cr. P.C. for

his acquittal, which was dismissed vide order dated 3-05-2023 passed by the Special Judge Anticorruption Court, (Provincial) Karachi.

3. Mr. Yousuf Moulvi learned counsel for the applicant has argued that Special Judge Anticorruption Court has misconstrued the law as no offense was committed by the flour mill owners as a violation of Policy if any is no offense under the Penal Code. He contended that neither the FIR nor the Challan discloses criminal liability of the applicant. He further argued that there is no single piece of evidence available on record to prove the ingredients of offences under section 109/409/420/467/468/ 471/34 PPC R/W Section 5(2) of Prevention of Corruption Act II 1947. He emphasized that there is no probability of conviction of the applicant on any charge. He next argued that this is a simple case for departmental irregularity/insubordination, and nothing more than that. He referred to the statement of the PW-01 Investigating officer and submitted that the witness in his cross-examination admitted that None of the mill owners had given a bribe to Food Department and in return, he had given the wheat to them on a credit basis; that the PW-01 in his Examination in Chief also deposed that during raid proceedings, they also seized about two hundred cheques, some of those cheques were without date while some of the cheques were stale and those 200 cheques were not exhibited and cannot be considered in evidence; that PW-01 in his examination has stated that after completion of the investigation, he issued CFR with the recommendation to prosecute the DFC Malir as well as the then Directors Food, Asif Ikram and Qamar Raza Baloch. He also admitted the aforesaid cheques were submitted by the mill owners as a solid guarantee against the wheat obtained on a credit basis. He also referred to the stamen of PW 2 (Director Food Sindh) in his examination in Chief he admitted that the flour was indeed issued on credit, however, 100% recovery was made and no financial loss to the government had accrued. However, the action of the release of wheat on credit was in clear violation of government policy as such pendency of proceedings against the applicant/accused therefore amounted to an abuse of process of court and the same is liable to be quashed. In support of his contention he relied upon the case of *Syed Hamid Sayeed Kazmi v The State* 2017 P Cr. L.J 854, He prayed for allowing the instant Criminal Miscellaneous Application.

4. The learned APG has supported the impugned order and submitted that ACC-I, its meeting held on 07.05.201, directed the investigating officer to lodge FIR No. 50/2019 of ACE Karachi, which was registered with the allegations that Muhammad Aslam DFC Malir and other officers/officials of Food Department in collusion with Mill owners issued bags of wheat to mill owners on maximum 30 days credit period illegally without any bank guarantee and without approval of

the Competent Authority, due to which heavy loss was caused to Government Exchequer. He added that after finalizing the investigation, the investigating officer of the case issued final report No.641 dated 19.07.2019 and recommended to prosecute Muhammad Aslam, DFC Malir / East Karachi, and dropping the names of the flour mill owner. After legally examining, the Additional Director (Legal) Directorate of ACE Sindh vide letter No. 9369-70 dated 06.08.2019 conveyed the approval of the Competent Authority and directed to submit the final challan before the Court to prosecute all the accused persons nominated in the interim challan. In the meanwhile Deputy Director ACE East Zone Karachi directed vide letter No. 4242 dated 07.08.2019 to proceed as per law, while properly maintaining columns II & IV against persons in blue ink or otherwise, as per the role. Subsequently, 1st I.O of the case submitted the final challan before the Court of Special Judge Anti-Corruption (P) Karachi on 30.08.2019, which was not accepted by the court observed that Deputy Director ACE East-Karachi after receiving a letter dated 06.08.2019 from Additional Director (Legal) Directorate of ACE Sindh, directed to 1st I.O to place the names of the persons in column No. 2 & 4 in Blue ink. Further, the Court directed to depute another I.O, to submit proper Final Challan on the next date of hearing. Thereafter, Inspector Yasir Latif, ACE East-Karachi deputed as 2nd I.O and as per approval of the Competent Authority i.e. letter No. 9369- 70 dated 06.08.2019 and order dated 30.08.2019 submitted final challan before Special Judge Anti-Corruption (Provincial) Karachi on 13.09.2019 to prosecute Accused Muhammad Aslam, DFC Malir / East and accused mill owners being beneficiaries names mention in Final Challan, which was accepted on same day and Court commenced the trial. As regards allegation/evidence into the title FIR, it is submitted that as per Notification No. SO (Wheat)-4(07)/2018-19/Releases dated 19.11.2018 wheat policy has been notified, wherein clause (vii) is reproduced as under:

"In no case, wheat shall be released on a credit basis, not even for a single second"

5. Per learned APG in spite of clear directions from Higher Authorities of the Food Department, Mr. Muhammad Aslam, DFC Malir / East-Karachi in collusion with the accused owner of flour mills has deliberately released wheat (i.e) 74,658.9 metric tons & 93,675 metric ton total amount Approximately 6 Billion, for 30 days credit, as per the undertaking given by accused owner of flour mills, respectively, wherein clause 7 is stated that "in case the Mill managements fails to deposit the due amount as per the due date mentioned on the cheque, the Mill management will be bound to pay 12% Markup of amount as per cheque". But Flour Mills did not pay within time and after that, they paid the total principal amount after the due date. Thereafter Food Department issued a separate challan

for a 12% Markup to the accused flour mills, respectively. Meanwhile, the Secretary, of Pakistan Flour Mills Association vide letter dated 25.07.2019 had undertaken to make Markup payment accordingly. As per APG, the Court has already commenced trial, wherein the applicant had filed an application under section 249-A, which has also been dismissed by the learned trial Court on 05.2023. The Subject special case is fixed on 14.12.2023. In support of his contention, he relied upon the case of The State v Reja Abdul Reman **2005 SCMR 1544**. He lastly prayed for dismissal of the instant criminal miscellaneous Application on the ground that the trial is on the verge of conclusion.

6. I have the learned counsel for the parties and perused the record with their assistance and case law cited at the bar.

7. The question is whether there is no piece of evidence against the applicant as such he is liable to be acquitted of the charge under section 249-A, Cr. P.C., on the plea that violation of subject policy is not an offense under the law. Besides no loss to the public exchequer has been caused and if caused the same has been made good as per the statement of the official respondents. The learned Addl P.G has refuted such stance of the applicant on the ground it is not only a matter of the policy violation but sufficient evidence was/is available with the prosecution to connect him with the alleged crime on the premise that the applicant in connivance with D.F.C Aslam, (since died), caused loss to the public exchequer by receiving wheat on credit basis and the mill owners failed and neglected to deposit such amount in the government head though they had received wheat against such amount as such prima-facie offense was committed by the applicant being a mill owner. On such aspects of the case, it appears from the record that the application was filed by the applicant under section 249-A, Cr. P.C, which was dismissed by the trial court vide order dated 3-05-2023 on the following premises:-

“In order to appreciate the arguments from both sides properly, it may be mentioned here that at the first instances, the learned counsel for the accused has raised a legal aspect in the application i.e. violation of policy which according to him is not an offence. In support of his arguments, learned counsel has relied upon the case law including the famous case of Haj policy violation reported in 2007 PcrLJ 854 regarding Hamid Saeed Kazmi and others versus the State. During course of arguments, learned APG resisted against such submission submitting that it is not only matter of policy violation but violation of law is also on the surface and evidence is available with the prosecution. In such context, from the perusal of the said case law, it appears that at page No. 914, Paragraph No. 44, the Honorable Court has specifically held the violation of any policy decision requires proper legal action under the rules and the same amounts to misconduct on the part of civil servant. Here, the situation is prosecution has alleged against the accused that in connivance with D.F.C Aslam, since died, they have caused loss to

the govt. exchequer by receiving wheat on a credit basis and till the registration of FIR, no any amount was deposited by them in the govt head. During course of arguments, learned counsel for the accused was asked specifically to produce some documentary evidence showing that the mill owners had received wheat against depositing amount in the govt head prior to the registration of FIR, but he could not show a single document on said aspect. Further, learned APG has referred number of cheques of M.M floor mills of the accused Mehmood Baqi Molvi in support of the prosecution case against him which reveals that at this stage, when the side of prosecution evidence is open, no any opinion regarding guilt or innocence of the accused can be expressed. Circumstances reveal that, tentatively, without providing further opportunity to the prosecution for recording evidence, passing of an order u/s 249-A Cr.PC, in favor of the accused, would be a completely improper course rather prosecution would be prejudiced by such an order. The aspect of misconduct on the part of civil servant and role of beneficiaries of such act, is the scheduled offense of this court. It is yet to be determined by the recording of further evidence of the prosecution and statements of accused u/s 342 Cr PC as to whether the prosecution case against them, merits consideration or otherwise. At present, on the basis of incomplete evidence, the contention of the learned counsel for the accused cannot be deeply appreciated. Foregoing in view, finding no merit in instant application u/s 249-A Cr. P.C, this second application u/s 249-A CrPC stands dismissed. Let further evidence be recorded for decision.”

8. The question is whether the prosecution had sufficient material/evidence to warrant the prosecution of the applicant or whether there was no probability of the accused being convicted of any offense. In this regard, it is expedient to have a look at section 249-A, Cr.P.C., an excerpt whereof is reproduced as below:-

“249-A. Power of Magistrate to acquit accused at any stage: Nothing in this Chapter shall be deemed to prevent a Magistrate from acquitting an accused at any stage of the case if after hearing the prosecutor and the accused and for reasons to be recorded, he considers that the charge is groundless or that there is no probability of the accused being convicted of any offense.”

9. There is no cavil with the proposition that under section 249-A, the Magistrate is empowered to acquit any accused on two grounds i.e. charge is groundless and there is no probability of conviction.

10. From the above section, it is also clear that application under sections 249-A Cr.P.C. can be filed or taken up for adjudication at any stage of the proceeding of trial i.e. even before recording of prosecution evidence or during the recording of evidence or when recording of evidence is over. Although there is no bar for an accused to file an application under the said sections at any stage of the proceeding of the trial, the facts and circumstances of the prosecution case will have to be kept in mind and if there is a slight probability of conviction then of course, instead of deciding the said application should record the evidence and allow the case to be decided on its merit after appraising the evidence available on record.

11. I have gone through the FIR registered against the applicant and others as well as the evidence led before the trial Court. There were serious allegations against the applicant and other mill owners and the matter was inquired into at the departmental level and the allegations were found to be correct. Ex-facie the matter is based on documentary, oral, and circumstantial evidence that needs to be proved which is the function of the trial court, and at this stage, nothing can be said for and against because this premature stage, let the trial complete in its full swing and conclude within reasonable time as such the trial Court could not invoke section 249-A, Cr.P.C., and acquit the accused at the middle of the case without allowing the prosecution to bring evidence on the subject issue if any against the accused. On the aforesaid proposition I am guided by the decisions of the Supreme Court in the cases of Muhammad Sharif v. The State (PLD 1999 SC 1063), Ghulam Farooq Tarar v. Rizwan Ahmad, and others (2008 SCMR 383). Further, the Supreme Court has held that in appellate or revisional proceedings, the same sanctity cannot be accorded to acquittals at intermediary stages such as under, section 249-A Cr.P.C., as available for those recorded and based on full-fledged trial after recording of evidence. On the aforesaid proposition, I am also guided by the decision of the Supreme Court in the case of Model Customs Collectorate Islamabad Vs. Aamir Mumtaz Qureshi (2022 SCMR 1861).

12. In the instant case, if the allegations leveled in the FIR supported by the preliminary evidence are admitted to be true, it could not be said at that stage that there was/is no probability of conviction of the accused. In order to ascertain the genuineness of the allegations, the prosecution has to lead evidence to prove its case beyond the shadow of a doubt and no prejudice shall be caused to the applicant if the trial concludes in one month.

13. In the circumstances, I am of the view that the learned trial Court has to complete the trial by recording the remaining witnesses and decide the case upon the evidence produced before it positively, without being influenced by the observations mentioned above because the material collected by the prosecution, during the trial, will be subject to cross-examination to unearth the truth. The aforesaid exercise shall be completed within one month and no adjournment shall be granted to either party in the matter. The learned APG has assured to bring the remaining prosecution witnesses if any before the trial court on the date so fixed by the trial court without fail and if the ACE department fails to do so disciplinary action shall be taken against the

delinquent officers of the ACE department by the competent authority. The compliance report shall be submitted through MIT-II of this Court, and MIT-II shall seek compliance within time.

14. For the aforesaid reasons, the instant Criminal Miscellaneous Application is found to be made at premature stage and is dismissed based on the aforesaid reasons.

J U D G E

Shahzad Soomro