

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Crl. Appeal No.S-02 of 2023

DATE OF HEARING	ORDER WITH SIGNATURE OF JUDGE.
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For hearing of main case.

06.02.2025

M/s A.R Faruq Pirzada and Agha Faraz Khan, Advocate(s) for appellant.

Mr. Khalil Ahmed Maitlo, Deputy Prosecutor General.

JUDGMENT

Riazat Ali Sahar, J. This order dispose off the Jail Appeal preferred by the appellant, Irshad Ali Kalhoru, challenging the impugned judgment dated 11-01-2023, rendered by the learned Special Judge, Anti-Corruption (Provincial), Sukkur Division at Sukkur, in Special Case No. 26 of 2010, arising out of Crime No. 04/2008, registered under Section 409 PPC read with Section 5(2) of Act II of 1947 at Police Station, ACE Khairpur. By virtue of the impugned judgment, the appellant has been convicted under Section 5(2) of the Prevention of Corruption Act, 1947 (Act II of 1947) and sentenced to rigorous imprisonment (R.I.) for a term of five years, along with the imposition of a fine equivalent to the misappropriated government wheat, amounting to Rs.2,000,000/- (Twenty Lakh Rupees). In the event of default in the payment of the fine, the appellant shall undergo an additional imprisonment of one year.

Furthermore, the appellant has also been convicted under Section 409 PPC and has been sentenced to rigorous imprisonment (R.I.) for four years. Additionally, a fine of Rs. 50,000/- (Fifty Thousand Rupees) has been imposed upon him, and in default of payment thereof, he shall suffer simple imprisonment (S.I.) for a period of three months. It is further directed that both sentences shall run concurrently, and the benefit of Section 382-B Cr.P.C. shall be extended in favour of the appellant.

2. Precisely, the case of the prosecution is that Himath Ali Chandio, Circle Officer, Anti-Corruption Establishment, Khairpur, registered an FIR on behalf of the State with the approval of the competent authority, ACC-II, Khairpur, following a meeting convened on 04-03-2010, based on a written report submitted by the District Food Controller, Khairpur. The allegations levelled against the accused, Irshad Ali Kalhoro, who was serving as Food Supervisor and Incharge of the Wheat Procurement Centre, Fakirabad, pertain to the misappropriation of 4,958 bags of government wheat during the wheat crop season of 2006-2007. It is asserted that the accused, by misusing his official authority, caused a wrongful loss of Rs. 6,259,475/- to the government exchequer while securing an unlawful gain for himself. Consequently, the accused, Irshad Ali Kalhoro, is alleged to have committed the offence, and therefore, the FIR was duly lodged against him on behalf of the State.

3. The police after completing investigation submitted challan of the case and the learned trial Court after observing legal formalities framed the charge to which he pleaded not guilty and claimed trial.

4. To substantiate the charge, the prosecution examined the complainant, PW-1/Investigating Officer Himath Ali Chandio, at Ex.5, PW-2 Sikandar Ali Jalbani at Ex.6, and PW-3 Mohbat Khan Korai at Ex.7. During their examination, they produced the relevant documentary evidence in support of the case of the prosecution. Subsequently, the learned Assistant Prosecutor General (APG) closed the case of the prosecution. Upon the completion of the evidence of the prosecution, the learned trial Court recorded the statement of the appellant under Section 342 Cr.P.C., wherein he denied the allegations **levelled against him and asserted his innocence.**

5. The learned trial Court after hearing the arguments of learned APG, appellant and appraising the evidence passed impugned judgment.

6. At the very outset, the learned Counsel for the appellant contended that the impugned judgment, passed by the learned trial Court, is contrary to the norms of criminal administration of justice and is legally unsustainable. He asserted that the appellant was deprived of his valuable right to cross-examine the prosecution witnesses through his Counsel, which amounts to a serious violation of due process. On this ground, he prayed for the setting aside of the

impugned judgment and the remand of the case to the trial Court to afford the appellant an opportunity to engage a Counsel of his own choice and to cross-examine the witnesses. The learned Counsel further argued that, as per the contents of the FIR, the case was registered on the written report of the District Food Controller, Khairpur (DFC). However, despite being a star witness, the said DFC was neither cited as a prosecution witness nor subjected to cross-examination during the trial. He contended that the non-examination of such a pivotal witness constitutes an inherent defect in the prosecution's case, which is legally unjustifiable. Additionally, he submitted that during the wheat season of 2006-2007, there were no outstanding arrears of the Food Department against the appellant. In this regard, a "**No Dues Certificate**" issued by the District Food Controller, Khairpur, was duly placed on record by the appellant along with his statement recorded under Section 342 Cr.P.C. before the trial Court. However, the learned trial Court failed to consider this crucial document while rendering the judgment. The learned Counsel also referred to the testimony of PW-03 Mohbat Khan, who categorically stated during the trial that no amount was outstanding against the appellant. Furthermore, during cross-examination, PW-03 explicitly deposed that neither any government wheat bag nor any cash was outstanding against the accused. In light of these material discrepancies, he contended that defective and unreliable evidence cannot be made the basis for conviction. Consequently, the learned Counsel submitted that it would be just and appropriate to remand the case to the trial Court with directions to

conduct a "*de novo*" trial, commencing from the stage of recording evidence, including examination-in-chief and cross-examination of all witnesses. In support of his contentions, he placed reliance upon the cases reported as *Rajab Ali v. The State* (2019 MLD 1713), *Tamour Shah v. The State* (2001 P.Cr.LJ 1507), *Abdul Ghafoor v. The State* (2011 SCMR 23), *Shafique Ahmed alias Shahjee v. The State* (PLD 2006 Karachi 377), *Syed Waris Khan v. The State* (2018 MLD 422), *Raja Basharat Ali v. The State* (1986 P.Cr.LJ 1558), *Dr. Sher Afghan Khan Niazi v. Ali S. Habib and others* (2011 SCMR 1813), *Muhammad Uris v. The State* (1990 MLD 1583), *Abdul Rashid Nasir and others v. The State* (2009 SCMR 517).

7. Learned Deputy Prosecutor General appearing on behalf of the States does not oppose the legal position.

8. Having heard the learned counsels and after perusing the record available before me, I proceed to determine the matter accordingly.

9. Upon a meticulous examination of the record, it is evident that the learned trial Court recorded the evidence of Circle Officer/complainant Himath Ali; however, the cross-examination of the said witness was initially marked as "reserved." Subsequently, one Mr. Aijaz Ahmed Naich, Advocate, cross-examined the said witness; however, his vakālatnāma is not found in the entire case file. Furthermore, the Investigating Officer (I.O.) was cross-examined by another Counsel, and only a single question was put to him. A similar

situation is observed in the case of the third prosecution witness, Muhsat Khan, which demonstrably indicates that the appellant was not afforded a fair and meaningful opportunity to cross-examine the witnesses. Such denial of a fundamental right constitutes a manifest violation of Article 10-A of the Constitution of Pakistan, which guarantees the right to a fair trial and due process.

10. The evidence recorded under such circumstances holds no legal sanctity or evidentiary value, as a conviction cannot safely be based on such defective proceedings, particularly where the credibility of the witnesses remains untested on the touchstone of cross-examination. It is a well-established principle of law that cross-examination conducted by a Counsel who has not been engaged by the accused/appellant is not a substitute for a legitimate cross-examination conducted by a duly appointed defence Counsel. Any cross-examination by a stranger to the appellant cannot be deemed sufficient for the purposes of ensuring a fair trial. In light of these fundamental defects, the only appropriate course of action is to remand the case to the trial Court for retrial from the stage of examination-in-chief and cross-examination of all prosecution witnesses. In this regard, reliance is placed on the judgment reported as *Abdul Ghafoor and others v. The State (2011 SCMR 23)*, which underscores the necessity of ensuring that an accused is afforded a proper opportunity to cross-examine prosecution witnesses, failing which a conviction cannot be sustained under the law.

11. Keeping in view the aforementioned legal position, the instant appeal stands allowed. Consequently, the impugned judgment dated 11-01-2023, rendered by the learned Special Judge, Anti-Corruption (Provincial), Sukkur Division at Sukkur, is hereby set aside, and the case is remanded to the trial Court for the purpose of conducting a "de novo" trial. The trial Court shall recommence proceedings from the stage of recording evidence, including examination-in-chief and cross-examination, of all three prosecution witnesses. Furthermore, the trial Court is directed to ensure that the appellant is afforded a fair and meaningful opportunity to engage a Counsel of his own choice and to conduct cross-examination of the witnesses in the presence of the defence Advocate. Upon completion of the evidence and after affording the right of hearing to the Counsel for both parties, the trial Court shall proceed to render an appropriate judgment in strict accordance with the law. Since, the instant case/FIR pertains to year, 2008 (old one), therefore, the trial should be concluded preferably within three months without any delay.

12. The appellant was on bail at the time of judgment; therefore, he shall remain on same bail subject to furnishing of fresh affidavit of surety before the Trial Court or fresh surety.

13. In view of above stated legal position, this appeal is disposed of along with listed application.

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