

For Reporting

Amended 20-4-17

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**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD**

Before:

Mr. Justice Mohammad Karim Khan Agha

Cr. Appeal No.S-141 of 2015.

Muhammad Nadeem Shaikh

Versus

The State

Appellant : Muhammad Nadeem Shaikh, who is present on bail	Through Mr. Nazeer Ahmed Bhatti, Advocate
Respondent : The State	Through Mr. Shahid Ahmed Shaikh, A.P.G.
Date of hearing	19.04.2017.
Date of judgment	20.04.2017

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- Appellant Muhammad Nadeem Shaikh was tried by learned Special Judge, Anti-Corruption (Provincial) Hyderabad at Camp Badin, in Special Case No.113 of 2010, arising out of crime No.02/2009, registered at Police Station ACE Badin, under section 161 PPC read with section 5(2) of Prevention of Corruption Act-II, 1947. Accused / appellant was found guilty by judgment dated 29.09.2015 (the impugned judgment) and was convicted and sentenced (1) under section 161 PPC to suffer R.I. for 02 years and (2) under section 5(2) of Prevention of Corruption Act-II, 1947 to suffer R.I. for 03 years and to pay fine of Rs.100,000/-. In default of the payment of fine, the accused / appellant shall undergo further S.I. for 01 year. Both the sentences were ordered to run concurrently.

2. Briefly the facts of the prosecution case are that on 25.06.2009 at 10-00 am complainant Abdul Malak son of Khair Muhammad Mullan registered F.I.R. alleging therein that on 07.05.2009 he was retired from the post of BPS-17 from Government High School Khorwah after attaining the age of 60 years by the order of Secretary, Education

Department, Sindh at Karachi. As per office procedure, his pension papers were received in the office of District Accounts Officer, Badin after sanctioning from Secretary Education, Government of Sindh through EDO Education where complainant met with accused Muhammad Nadeem, Clerk in respect of his pension papers who demanded illegal gratification of Rs.8,000/- from him on the pretext to get sanction from the office of A.G Sindh which was paid by complainant to accused Muhammad Nadeem on 17.06.2009. Accused Muhammad Nadeem got sanction from the office of A.G Sindh and then demanded illegal gratification of Rs.50,000/- from complainant for giving him complete pension. On his requests, accused agreed to accept Rs.40, 000/- on 25.06.2009 on the pretext that in case of non-payment, his work will not be done.

3. Thereafter, on 25.06.2009 a trap was arranged under the supervision of Magistrate and accused accepted illegal gratification of Rs.40, 000/- from the complainant in presence of mashirs in the office of District Accounts Office, Badin. Thereafter, accused was apprehended and the said amount was recovered from right side pocket of his shirt. Such mashirnama of arrest and recovery was prepared.

4. The Circle Officer, ACE Badin after completing the investigation submitted challan in the trial Court on 09.12.2010 against the accused.

5. After completing necessary formalities charge was framed against accused at Ex.02 to which he pled not guilty and claimed for trial.

6. In order to substantiate its case the prosecution examined as many as five prosecution witnesses and thereafter side of prosecution was closed by the ADPP for the State vide his statement Ex.10.

7. That statement of accused Muhammad Nadeem under Section 342 Cr.P.C was recorded at Ex.11 wherein he denied the prosecution case claiming his innocence. He neither examined himself on oath nor led any evidence in his defence.

8. The learned trial court after hearing the learned counsel for the parties and on the assessment of the entire evidence convicted and sentenced the appellant/accused as stated above by the impugned judgment.

9. The facts of this case as well as evidence produced before the trial court find an elaborate mention in the judgment passed by the trial court therefore the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

10. During the pendency of the instant appeal the appellant moved this court vide M.A. No.7964/2015 praying therein to suspend the operation of the impugned judgment and to release him on bail during pendency of his appeal. Such application was allowed vide order dated 20.10.2015 by this court and the operation of the impugned judgment was suspended and appellant was ordered to be released on bail during the pendency of his appeal upon furnishing solvent surety in the sum of Rs.100,000/- and P.R. Bond in the like amount.

11. Learned counsel for the appellant contended that as the appellant was admittedly a public servant S.197 Cr.PC had been violated in that no government sanction had been given prior to the ACE initiating its action; that the tainted currency notes had not been initialed by the magistrate and as such they could not be differentiated from other similar currency notes in circulation; that there were major contradictions in the evidence of the prosecution; that a part from the complainant there was no other eye witness who saw the appellant taking the tainted money; that no other person heard the conversation between the complainant and the appellant at the time when the appellant took the money so there was no evidence that it was bribe money; that the benefit of the doubt should be given to the appellant and thus for all the above reasons the appellant was entitled to be acquitted.

12. In support of his contentions, learned counsel for the appellant placed reliance upon S.197 Cr.PC and the cases of **Zahoor and another v. Said-Ul-Ibrar and another** (2003 SCMR 59), **Muhammad Aslam v. The State, etc** (2013 Cr.LJ 7), **Abdul Majeed v. The State** (2012 YLR 2792), **Rashid Ahmed v. The State** (2001 SCMR 41) and **Habibur Rehman v. The State** (1994 PCr. LJ 111).

13. On the other hand, learned A.P.G. fully supported the impugned judgment. Whilst he conceded that there may have been some contradictions in the prosecution evidence these were of only a minor nature and were not fatal to the prosecution case. That otherwise the prosecution had proved its case through reliable and trust worthy

evidence beyond a reasonable doubt and as such the impugned judgment should be upheld and the appeal dismissed.

14. I have considered the arguments of learned counsel, perused the record and the case law cited by them at the bar.

15. At the outset I would like to deal with the submission by the appellant that the inquiry was in violation of S.173 Cr.PC on which he appears also to have relied on the case law of **Zahoor and another** (Supra), **Muhammad Aslam** (Supra) and **Habibur Rehman** (Supra).

16. It is settled law that a special law will prevail over the general law when in conflict. S.11 of the Sindh Enquiry and Anti Corruption Rules provides as under:

"S. 11. Registration of cases.—(1) Criminal cases shall be registered by the Establishment under Prevention of Corruption Act, 1947 and under such sections of the Pakistan Penal Code, as have been set forth in the schedule to the Act.

(2) No criminal case shall be registered against accused public servant without prior approval of the 'Competent Authority':

Provided that such prior approval shall not be necessary for registration of case against public servant likely to be caught red-handed as a result of raid/trap, arranged by Establishment under the supervision of a Magistrate and in case of his non-availability the Gazetted Officer of the Establishment.

(3) -----

(4) -----

(5) -----"

17. Since this is a special law it will override the Cr.PC and S.11(2) makes it clear that based on the facts and circumstances of this case no prior sanction under S.173 Cr.PC was required and as such this contention of the appellant is without substance.

18. Although the currency notes have not been initialed by the judicial magistrate based on the facts and circumstances of this case I do not find this omission to be fatal to the prosecution case (and the appellant has produced no case law to this effect). This is because the tainted currency notes carried unique serial numbers which were noted down and given to the complainant by PW 4 Jawaid Halepoto of the ACE in the presence of PW 5 S.M.Shakeel who was the concerned judicial magistrate as is evidenced from the record vide Mashirnama

No.1 and the same currency notes bearing the same serial numbers were recovered by the aforesaid magistrate and PW 4 Jawaaid Halepoto from the possession of the appellant as per the arrest and recovery memo (Mashirnama II). Thus, there can be no doubt, in my view, that the tainted currency notes were those which were recovered from the appellant despite the fact that they were not initialed by the magistrate and as such I do not consider this contention to be of any substance.

19. It is true that there are some contradictions in the evidence of the PW's however having reviewed the same I do not consider any of these to be material based on the facts and circumstances of the case and the other evidence available on record. These appear to be contradictions of a minor nature which can be accounted for by the fact that the evidence was recorded around 3 to 4 years after the occurrence of the incident. In this respect reference may be made to the case of **Zakir Khan & others v. The State** (1995 SCMR 1793)

20. The stronger part of the appellants case in my view rests on the fact that there was no other eye witness apart from the complainant who actually saw the tainted money being handed over to the appellant and heard the conversation between the complainant and the appellant during the handing over of the tainted money. In this respect the appellant has placed reliance on the cases of **Rashid Ahmed** (Supra) and **Abdul Majeed** (Supra)

21. The case of **Rashid Ahmed** (Supra) although a supreme court case is distinguishable from the facts and circumstances of this case. This is because in **Rashid Ahmed's case** (Supra) the accused was able to produce two defense witnesses who gave evidence that they had heard the conversation between the complainant and the accused at the time when the tainted money was handed over to the accused which was to the effect that the money was handed over to the accused in connection with funds for a Kabadi match. In this case the appellant has not been able to produce any such independent evidence as to why the tainted currency notes were handed over to him.

22. In my view whether any one else apart from the complainant witnessed the handing over of the tainted money may acquire relevance depending on the facts and circumstances of the particular case. In this case the tainted money was found on the appellant by PW 4 Jawaaid Halepoto and PW 5 S.M Shakeel the concerned judicial magistrate within minutes of it being given to him by the complainant

so there is no doubt in my mind that the appellant received the tainted money which could only have come from the complainant as it had matching serial numbers.

23. With regard to what was said between the complainant and the appellant before the tainted money was handed over to the appellant the appellant has given no explanation as to why he retained this money before it was recovered by the magistrate and P.W 4 Jawaid Halepoto. If it was forcibly put in his pocket as per his defense then why was no ruckus created during this occurrence? why did he not throw the tainted money on the floor or back at the complainant? According to his S.342 statement and his line of cross examination he has been falsely implicated in this case as he was unable to assist the complainant in his pension matters which annoyed the complainant. If this was so why would the complainant give him any money at all and why did the appellant keep the money? Why would a disinterested judicial officer like the concerned judicial magistrate in this case (S.M.Shakeel) want to falsely implicate the appellant? Or the ACE circle officer Jawaid Halepoto who, like S.M.Shakeel, had no enmity, ill will or animus towards the appellant as per the record. There is no reason or explanation whatsoever for any of the above. In addition if the appellant was a lowly clerk who could not assist the complainant why were some of the complainants pension papers recovered from his possession (EX 8/D)? The above remains unexplained and the situation does not appeal either to reason or common sense that the appellant was doing anything other than taking a bribe from the complainant in return for getting his work done. This in my view seems to be the only reasonable inference which can be drawn based on the facts and circumstances of this case and the evidence on record.

24. Furthermore, I find the prosecution witnesses to be all credible, reliable and trustworthy none of whom were damaged during cross examination and all tend to corroborate the case of the prosecution either orally or through the documents which have been exhibited in evidence. In my view the PW's through their evidence create a chain of consistent and reliable evidence which fits in fully with the prosecution case from the time the complainant reported the demand of a bribe by the appellant to the ACE circle officer up to the time of the trial.

25. In the case of **Malik Umer Hayat V State** (1998 SCMR 586) where no person except the complainant had witnessed the handing over of the tainted money and no other person heard the conversation between the complainant and the appellant at the time when the tainted money was handed over the supreme Court held this to be of little consequence in view of the other evidence lead by the prosecution in the following terms as under at P.588 Para 6.

"Mr. Ehsanullah Khan Lilla, learned counsel for the petitioner has argued that contradictory statements were given by the prosecution witnesses and that passing of the bribe money had not been witnessed by the raiding party neither conversation between the complainant and the petitioner had been heard by it. But none of the arguments appear to be of any substance. Evidentially, the complainant or the other prosecution witnesses did not have any motive to implicate the petitioner falsely in the case. The raid was conducted by Sohail Basit (P.W.3) who was a Magistrate and in whose presence the tainted money was taken out by the petitioner from his pocket and thrown on the ground. Further, even copy of Jamabandi which had been prepared by the petitioner was, subsequently, seized by the Circle Inspector and produced in evidence. The statement made by the petitioner before the Magistrate that the money had been thrust into his waist-coat pocket by the complainant was, therefore, not believable in such circumstances. Although the petitioner had alleged enmity with complainant Muhammad Afzal but such allegation was discarded both by the learned Trial Court as well as the learned Appellate Court in view of the clear prosecution evidence and in absence of proof to sustain such allegation. The mere fact that conversation between complainant and the petitioner was not heard by the witnesses or that the tainted money did not pass in their presence, therefore, would be of little consequence in view of the other evidence led by the prosecution in the case." (bold)

26. Such line of reasoning was also followed in the case of **Muhammed Abdullah V The State** (2001 P.Cr.LJ 1898).

27. Thus, based on **Malik Umer Hayat's case** (Supra) **and the other evidence lead by the prosecution which I have already found to be credible, reliable and trustworthy** I do not consider it of much relevance, let alone fatal to the prosecutions case, based on the facts and circumstances of this case that no one else heard the conversation between the complainant and the appellant prior to the complainant handing over the tainted money to the appellant.

28. I have also gone through the impugned judgment which I consider to be well reasoned and has attended to all the aspects of the case raised by the appellant in his appeal.

29. Undoubtedly in a criminal prosecution the appellant should be entitled to the benefit of the doubt and I am guided in this respect by the case of **Faheem Ahmed Farooqui V State** (2008 SCMR 1572) where it was held as under at P.1576 at Para D

"It needs no reiteration that for the purpose of giving benefit of doubt to an accused person, more than one infirmity is not required, **a single infirmity creating reasonable doubt in the mind of a reasonable and prudent mind regarding the truth of the charge makes the whole case doubtful.** Merely because the burden is on the accused to prove his innocence it does not absolve the prosecution from its duty to prove its case against the accused beyond any shadow of doubt."(bold added)

30. In this case I am of the view that when the evidence is read in totality there would be no doubt in a reasonable and prudent person's mind that the appellant was guilty of the offense for which he has been convicted notwithstanding the few minor contradictions in the evidence of the PW's which even otherwise are not fatal to the prosecutions case.

31. Thus, for the above reasons I find that the prosecution has proved its case beyond a reasonable doubt against the appellant, up hold the impugned judgment and hereby dismiss this appeal. The appellant on bail is ordered to be taken immediately into judicial custody where he shall serve out the remainder of his sentence as set out in the impugned judgment.

Hyderabad

Dated: 20-04-2017