

IN THE HIGH COURT OF SINDH, AT KARACHI

BEFORE:
MR. JUSTICE OMAR SIAL
MR. JUSTICE MUHAMMAD HASAN (AKBER)

Criminal Accountability Appeal No.01 of 2018

Appellant: Hussain Bux Baloch Advocate
through, Mr. Raj Ali Wahid, Advocate

Respondents: National Accountability Bureau and another
through, Syed Meeral Shah Special Prosecutor

Date of hearing: 22.04.2025, 26.05.2025 and 29.05.2025

Date of Judgment: 27.06.2025

JUDGMENT

MUHAMMAD HASAN (AKBER), J.-This is a unique case, perhaps the first of its kind in Pakistan which pertains to initiation of criminal proceedings by an investigating & prosecuting agency, against its own prosecutor/ law officer. The appellant, serving in the National Accountability Bureau ('**NAB**') as legal consultant/ prosecutor was tried and convicted by the Accountability Court-II Sindh Karachi vide Judgment dated 06.01.2018 in Accountability Reference No.20 of 2015 under section 9(a)(vi) of the National Accountability Ordinance, 1999 ('**Ordinance**'). He was sentenced to suffer Rigorous Imprisonment for seven (07) years and fine of Rs.28,87,60,000/- under section 11 of the Ordinance and in case of default in payment of fine, to suffer further Rigorous Imprisonment for two (02) years. He was also disqualified for 10 years under section 15 of the Ordinance from seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body or any statutory or local authority or in service of Pakistan or of any Province; and was also disqualified to obtain any financial facility in the form of loan or advance from any financial institution controlled by the Government for a period of 10 years. The appellant has preferred this appeal against his conviction.

2. Succinct prosecution version is that in compliance of the Order dated 30.01.2011 passed by the Supreme Court of Pakistan in Criminal Petition for Leave to Appeal Nos.230 to 243 of 2011, an Inquiry Board was constituted by NAB for fixing liability upon its officers/ officials who were responsible for causing delay in filing of (a) Criminal petitions for leave to appeal before the

Supreme Court, and (b) Criminal Acquittal appeals before the High Court of Sindh at Karachi in the same matters. Inquiry was initiated against 11 officials which was upgraded into investigation on 05.03.2012, and the 4th investigation Officer recommended filing of Reference against the appellant as the sole accused. Reference No.20 of 2015 (**'the said Reference'**) was filed before the learned Accountability Court-II Karachi wherein it was alleged that the appellant was appointed by NAB as prosecutor who was appearing in numerous cases before different Accountability Courts and he was present in Court at the time of announcement of Judgments in Reference Nos.12/2003 to 16/2003, 59/2007, 61/2007 and 9/2007 (**'the subject References'**), but he failed to apply for Certified True Copies (**'CTC'**) of the same except in Reference No.09/2007 wherein he did apply for CTC which shows that he was aware of the decisions but he failed to discharge his duties under *mala fide* intentions and *ulterior* motives, which amounted to misuse of authority under section 9(a)(vi) of the Ordinance. After appellant's resignation, another special prosecutor Feroz Mahmood Bhatti applied for CTC on 15-06-2009 after lapse of almost six months from the date of announcement of such Judgments. Accordingly, such acts of the accused extended benefit to those persons who were the accused in the said References which caused a loss of Rs.28,87,60,000/- and 406.26 acres of government land to the state exchequer.

3. Charge was framed on the accused on 07.10.2015 (Exhibit-03) to which he pleaded 'Not Guilty' whereafter trial proceeded wherein four (04) Prosecution Witnesses were examined whereafter the accused also recorded his statement under section 340 Criminal Procedure Code (Cr.PC) denying all allegations against him. The accused also recorded his statement on oath, under section 340(2) Cr.PC, and also produced 08 documents as Exhibits 12/1 to 12/8. The learned Accountability Court convicted and sentenced the accused in the manner as detailed at para 01 *ibid* against which he has preferred this appeal.

4. Mr. Raj Ali Wahid, learned counsel for the appellant has contended that the appellant was completely innocent; that he was not serving as Prosecutor but was a Legal Consultant; that in most of the cases, the appellant was out of Pakistan when the Orders were announced; there was no evidence available that he was in collusion or connivance with any of the accused persons; that there was no evidence of any monetary gain against the appellant; at worst the allegations in the reference could be considered as negligence but not criminal negligence; that no evidence to establish *mens rea* was produced against the

accused; that the test of 'beyond reasonable doubt' was not met by the prosecution; and the appellant was entitled to be acquitted. Reliance was placed upon 1994 SCMR 2232, PLD 2010 SC 623, PLD 2008 SC 166, 2005 SCMR 648, 2009 SCMR 230, 2022 SCMR 745, 1993 SCMR 2177, 1956 SCR 451, PLD 1998 SCMR 388 and [1994] 2 AER.

5. Syed Meeral Shah, the learned Special Prosecutor NAB vehemently supported the Judgment by contending that the appellant was representing NAB as prosecutor; that he was in complete knowledge of passing of the Orders and was also present in Court as well, but he deliberately and in connivance with the accused persons did not apply for CTC which resulted into huge loss to the state exchequer. Lastly contended that the prosecution has proved its case 'beyond reasonable doubt' and requirements of section 9(a)(vi) of the Ordinance were duly fulfilled. He prayed that the appeal be dismissed.

6. We have heard learned counsel for the appellant; the learned law officer; have gone through the record with their able assistance; and considered the relevant laws. The first objection raised against the maintainability of the subject Reference was on the ground that the appellant, being a special prosecutor of NAB, was entitled to Indemnity under section 36 of the Ordinance, 1999, which provides as under:

***“36. Indemnity.**--No suit, prosecution, or any other proceedings shall lie against the Federal Government, Provincial Government, Chairman NAB, or any other member of the or performing any function under this Ordinance or the rules made hereunder for any act or thing which has been done in good faith or intended to be done under this Ordinance or performing any function under this Ordinance or the rules made hereunder for any act or thing which has been done in good faith or intended to be done under this Ordinance.”*

7. The doctrine of indemnity for officials is intended to protect *inter alia* public servants, government officers and judicial officers from legal liabilities incurred while performing their official duties in good faith. Identical statutory provisions¹ with a slight variation of language are also available in different statutes in Pakistan. A study of precedence on the doctrine of indemnity and

1. Article 248 of the Constitution; section 132 of the Criminal Procedure Code (Cr.P.C.) for magistrates, police officers, and other individuals viz a viz unlawful assemblies; section 197 Cr.P.C. for public officials including Judges, Magistrates, public servants requiring prior sanction of the relevant government before initiating any prosecution or legal proceedings against them; section 75 of the Control of Narcotic Substances Act, 1997; section 48 of the Competition Commission of Pakistan Act 2010 for the Commission and its officers; provisions in the respective Civil Servants Acts of the provinces; section 77 of the Pakistan Penal Code (PPC.); the Judicial Officers Protection Act, 1850.

immunity evolved within administrative law in Pakistan²⁻⁶ guides us that these statutory provisions for Indemnity/ immunity are intended to empower and enable the authorities and their officials to perform their duties honestly, effectively, responsibly and without fear of vexatious litigation. The provisions also help in promoting good governance and smooth functioning of the state machinery whereby a *prima facie* presumption of good faith is attached with the official acts conducted in good faith. However, such immunity is not absolute for it does not shield those acts which are done dishonestly, maliciously, illegally or beyond the authority vested by law thereby maintaining a necessary balance between the official protection and the accountability. It is a conditional legal shield for official acts done in good faith, but not a cloak for acts done otherwise, and the *prima facie* presumption of good faith attached to such official acts is rebuttable subject to material and proof. The criteria of 'good faith' is the linchpin, the catalyst, and the deciding factor, in determining whether the officer is entitled to immunity or otherwise whereas the burden to prove that the act was not done in good faith is on the person who alleges so, subject to proof by the complainant. Applying the principles *ibid* to the facts of the present case we are of the considered view that the appellant's plea *qua* the very maintainability of criminal proceedings by NAB against him appears to be premature since section 36 of the Ordinance does not provide an absolute bar against initiating proceedings against those acts which are not done in good faith, especially when the center of allegations by NAB against the accused is that the alleged acts/ omissions were conducted by him under dishonesty and *mala fide* intentions. Needless to mention that the success of these proceedings would entirely depend upon the prosecution evidence to establish *mens rea* which will be appraised in the latter part of this Judgment.

8. The first limb of appellant's second argument was that he was appointed as a 'Legal Consultant' and not as a 'Prosecutor', duties whereof were substantially different and that the accused being a Legal Consultant ('LC') was

2. 'Qazi Faez Isa v. The President of Pakistan' PLD 2021 SC 1; PLD 2001 SC 607; PLD 1956 865; PLD 1974 SC 151.

3. 'Pakistan v. Umar Khan' 1992 SCMR 2450; 'Sherin and 4 others v. Fazal Muhammad and 4 others' PLD 1995 SC 584.

4. 'Masroor Ahsan v. Ardeshir Cowasjee' PLD 1998 SC 823.

5. 'Messrs Airport Support Services v. The Airport Manager, Quaid-e-Azam International Airport, Karachi' (1998 SCMR 2268); 'Province of Sindh through its Chief Secretary v. Syed Kabir Bokhari' (2016 SCMR 101).

6. 'Abdul Rehman Malik v. Synthia D. Ritchie and others' 2020 SCMR 2037; 'The State v. Syed Mazhar Alam' PLD 2003 Karachi 122; 2010 PTD 292; 2010 P Cr.LJ 206; 2016 P L C (C.S) 845; 2018 MLD 1993; 2019 PCr.LJ. 665; 2020 CLD 995; 2021 PTD 1585; 2022 C L D 1343; 'Dr. Imtiaz Ellahi Piracha v. Government of Punjab and others' 2004 PLC (C.S) 705; 'Muhammad Sharif v. Federation of Pakistan' PLD 1988 Lahore 725; 'Aftab Ahmed Khan Sherpao v. Farooq Ahmed Leghari' PLD 1997 Peshawar 93.

basis for NAB Sindh and such duty was joined by the appellant on 14.04.2008 (Exhibits 7/1 and 7/2). Title of the appointment letter Exhibit 7/1 reflects that both terms were used therein as “**Legal Consultant/ Prosecutor**”. Secondly, in terms of the Office Order dated 15.04.2008 (Exhibit 7/3), the appellant was posted to perform duty in the Accountability Court No.1 as “**Special Prosecutor**” which was acted upon by the accused. Thirdly, the Appellant immediately started representing NAB before Accountability Court No.1 Karachi as special prosecutor and not as Legal Consultant. No objections were raised by him in this regard at any stage but on the contrary, he started representing NAB in other Courts as well as prosecutor which fact is repeatedly admitted by the accused himself throughout the trial. Even otherwise a Legal Consultant could not have pleaded on behalf of NAB before Accountability Courts and it is only a special Prosecutor who could do so. Conduct of the appellant therefore further confirms the situation as referred in Exhibits 7/1 to 7/3. Considering the above position, we are unable to agree with appellant’s plea, since on one hand he claims that he was not serving as prosecutor while simultaneously he himself admits having regularly represented NAB as prosecutor in multiple courts in numerous cases for many years. To approbate and reprobate (blow hot and cold) is not permissible. We are therefore of the view that the accused was appointed and was working both as ‘Legal Consultant/ Prosecutor’ and not solely as a Legal Consultant.

9. This takes us to the second prong of the appellant’s argument that since he was not a prosecutor therefore was not responsible to obtain CTC of the subject Orders. He claims that Exhibit 8/1 the letter dated 26.03.2008 titled: “**Instructions for process of cases for appeals**” pre-dates his appointment and therefore he had no knowledge of the same. The prosecution also could not produce any evidence to establish service of the same on the accused. Surprisingly and in contrast to his own stand, the accused has himself repeatedly asserted during trial that he did apply for CTC in some References when he was present in Court but could not apply for the same when he was busy in other Courts or was travelling out of Pakistan. In his examination-in-chief he confirmed that:

“.... In reference number 23/2009 the state versus Niaz Ali Baloch judgement for passed on 15.04.2009. In all those cases either I was on leave or I have applied for CTCs.”

The accused also recorded during his evidence on oath that:

“.... It is correct to suggest that prosecutor, NAB is responsible for filing application for obtaining CTC and in absence of prosecutor, NAB D.D. Coord. and D.P.G.A. are responsible. My application for obtaining CTCs are available in the R&Ps and prosecution has not produced any record to show that I had received the cost of CTC. I

had filed application for obtaining CTC in all cases when I was present in court, but in some cases I could not apply for CTC because I was out of country."

(emphasis supplied)

10. The above statement recorded the appellant clearly reflects that though he may not be having knowledge of Exhibit 8/1 but by his own evidence, conduct and admissions he was regularly applying for CTC in cases wherein he was present in Court and such conduct therefore attracts the maxim "***qui approbate non reprobate***" (one who approbates cannot reprobate). We have already held in the preceding paragraph that accused was representing NAB in Accountability Courts as special prosecutor, hence in view of his evidence, admission and conduct we are also of the view that he was responsible to apply for CTC of the Orders passed in his presence. As regards consequence of his absence from Pakistan during travel or his absence on a particular day, the same will also be considered during appraisal of evidence in the latter part of this Judgment.

11. The third argument of the appellant was against withdrawal of application under section 9(c) of the Ordinance by the Bureau. Succinct facts in this regard are that based upon directions of the Supreme Court dated 01.01.2011, an Inquiry Board was constituted, and 11 persons were enquired. Consequently, the First Investigation ('**1st Investigation**') was conducted by Mr. Masood Ahmad but no recommendation from his side for filing of reference against the accused has come on record. The second investigation ('**2nd Investigation**') was conducted by Senior Investigation Officer Mr. Muhammad Sajid yet again no recommendation from his side for filing of reference against the accused has come on record. The third investigation ('**3rd Investigation**') was conducted by Mr. Abdul Fateh who clearly recommended in his Investigation Report (Exhibit 12/8) that no cognizable offense under section 9 of the Ordinance was made out and proceedings before Bar Councils may be initiated against the accused and other officials. Based thereon, a thorough and detailed process was adopted within the Bureau under its Standard Operating Procedures ('**SOP**') resulting in a collective decision within the Bureau to withdraw the investigation and to file application under section 9(c) of the Ordinance (Exhibit 12/7). Consequently, an application under section 9(c) was filed by the Bureau on 07.01.2014 before the Administrative Judge of the Accountability Courts at Sindh Karachi, which remained pending for more than three months without any Order thereon. On 29.04.2014 a STATEMENT was filed by a prosecutor for withdrawal of the said application under section 9(c), which was allowed to be withdrawn by the Court on the same day without recording any reasons and without notice to the accused. After the above

withdrawal, Fourth Investigation ('4th Investigation') was conducted by the Bureau which culminated into filing of the Reference against the appellant. Appellant claims that all these acts of withdrawal of application under section 9(c) by the Bureau; the conduct of the accountability Court; initiation of 4th Investigation; the consequential filing of Reference; and based thereon, his ultimate conviction were all illegal acts on multiple grounds, and which infringed upon of his fundamental rights to a fair trial under the Constitution. This gives rise to the following legal questions:

- (i) Whether the act of withdrawal of application under section 9(c) of the Ordinance, based upon a STATEMENT on oral instruction and without any reasons was valid?
- (ii) While dealing with the application under section 9(c) and the STATEMENT and while passing the Order dated 29.04.2014, whether the learned Judge performed his judicial duty in accordance with law? and
- (iii) Whether initiation of 4th Investigation without any fresh incriminating material after NAB's decision to close the investigation, based upon earlier three investigations, was valid?

12. Section 9(c) of the Ordinance 1999 provides that:

"9.(c) If after completing the investigation of an offence against a holder of public office or any other person, the Chairman NAB is satisfied that no prima facie case is made out against him and the case may be closed, the Chairman NAB shall refer the matter to a Court for approval and for the release of the accused, if in custody."

13. To understand the process by which an application under Section 9(c) is approved for Closure/ termination of an investigation within the Bureau's hierarchy, one needs to look at the procedures and mechanisms followed by NAB as provided in its Standard Operating Procedures ('SOP') which have been duly considered in a number of cases by the Superior Courts⁷ and held as applicable throughout the country. For instance, the powers and Responsibilities of an Investigating Officer are provided in Chapter IV 'Investigations' of Volume I from Page 178 in the SOP, which includes guidelines on, "(e). Powers and Responsibilities of Investigation Officer.", "(f). Collection of Evidence." and "(o) completion of Final Investigation." Furthermore, "Form- T (Chapter-Investigation) INVESTIGATION ACTIVITIES FLOW CHART" at page 252 of the Volume-I of the NAB SOP, also provides a detailed Flow-Chart to provide guidelines to Investigators for timely completion

7. 'Abdul Sattar Dadabhoy v. Director General NAB and others' PLD 2017 Sindh 331; 'Pervaiz Zaki v. The State' 2017 PCr.LJ 747; 'Muhammad Fakhar Javed Khokhar and another v. NAB and others' 2018 PCr.LJ 477.

of various stages of Investigation. With regards to the process of Closure/ termination of an Investigation, the SOP provides the following 'Parameters for Closure of Investigation' at Chapter 4 page 176 of Volume-I:

'Investigation closure/ Termination Parameters':

*"1. **Investigation** To standardize the procedure of Investigation following guidelines will be observed by CITs:*

a.

b.

*c. **Investigation Closure/ Termination Parameters***

(1) if there is insufficient material to justify for closure or filing of Reference.

(2) If application of the accused for Plea Bargain has been accepted and final discharge of liability takes place.

(3) If the accused expires during Investigation.

(4) Chairman, DG Regional NAB or any other authorized officer after consideration of evidence seized by NAB and circumstances of the case is prima facie convinced that up gradation of Investigation into Reference is not in the public interest."

(emphasis supplied)

14. In addition to above guidelines for Investigators, the SOP also provides guidelines for Regional and Headquarter levels, for Closure/ termination of Investigations at Chapter 4, pages 177, 178 of Volume-I, titled:

"d. Investigation Disposal Procedure At Regional Level

(1) IT will explore all possible sources to collect incriminating evidence during the Investigation. Examination of witnesses, record, accused persons and seizure of record is to be undertaken

(2) When the Combined Investigation Team (CIT) concludes the Investigation proceedings then the Team will prepare Investigation report and give clear recommendations.

(3) The Case Officer will process for recommendations of Director IW.

(4) Director IW will give his recommendations keeping in view the merit of the case and process through DPGA.

(5) DPGA will assign the case to Special Prosecutor / Legal Consultant

(6) The Legal Consultant will give his recommendations on case file after thoroughly analyzing the findings of the Investigation report and available evidence. He will process the case with his recommendations on case file to DPGA.

(7) DPGA will give his recommendations on case file after examining all the aspects of the case.

(8) Case will be discussed in the next Regional Board meeting.

(9) In case the Investigation has been upgraded, the Reference is to be signed by the DG Regional Bureau.

(10) In case of closure, the closure letter to be signed by DG Regional Bureau.

(11) If as per delegation of powers, the case falls within the jurisdiction of HQ, the case shall be forwarded to HQ.

At Head Quarters Level

(1) The concerned Desk Officer shall analyze the case and forward his recommendations to Director Monitoring. The Director shall give his recommendation on the case file and forward to DG (Ops) for his perusal.

(2) DG (Ops) after examining the case will solicit the legal opinion through PGA/APGA and concerned Prosecution Desk. Recommendations will be given on case file.

(3) The case will be put up in EBM for final decision.

(4) All concerned shall initiate required actions on top priority after receipt of minutes of EBM.

(5) In case any observations have been raised at any level, every effort shall be made to get the same addressed at the earliest.

(6) In case of upgradation the Chairman shall sign the Reference received from Regional Bureau.

(emphasis supplied)

15. Lastly, the umbrella guidelines for any important operational or administrative decision-making in the Bureau including the 'Closure of an Investigation' are defined at Chapter 1, page 5, Volume-I of the SOP titled 'NAB's OPERATIONAL METHODOLOGY', in the following words:

"a. Executive Board (HQ)

.....

*3. **Decision making process:** In the course of enforcement operations and legal proceedings, all decisions for authorization/ closure of inquiry/ investigation, accepting / rejection of PB/VR application and reference or appeal filing will be taken through consultative process in the Executive Board and Regional Board, prescribed by Chairman NAB and Director General of concerned regions respectively. All matters will be decided through speaking order in terms of section 24-A of General Clauses Act at all stages of operational and administrative activities."*

(emphasis supplied)

16. In the instant case, the first three Investigations went through the above referred stringent test of the guidelines, procedures, stages and inputs from all relevant experts in the Bureau culminating into clear recommendations to close the investigation. Based thereon, application under section 9(c) dated 07.01.2014 was filed by the Bureau before the Accountability Court. The application was duly signed by the Director General NAB Karachi and the concerned prosecutor. It is pertinent to note that at paragraph 2 of the affidavit with the application, it was clearly stated by the Bureau that, "the investigation is being closed since no gain of accused during course of investigation was established." Again, at paragraph 3 of the same affidavit, it was further stated that, "no plausible evidence came on record against the accused therefore the case is recommended for closure." The application remained pending before the learned Judge for more than three months, but no order was passed thereon. On 29.04.2014, a STATEMENT was filed by a prosecutor for withdrawal of the application under section 9(c), in the following terms:

“STATEMENT

It is most respectfully submitted as under:

*That **I was verbally directed by the D.D. Coord. Legal** and given under Office Note of Deputy Director Coordinator namely Muhmmad Salim Ahmed who was directed by the worthy DG NAB for withdrawal of letter of closure submitted in this Honourable Court on 07.01.2014. This Honourable Court may be pleased to grant this prayer for **withdrawal of closure application**.*

The enter Office Note of Deputy Director Coord. is attached herewith for kind appraisal of this Court.

The request is made in the interest of justice

Karachi

Dated 29.04.2014

Sd/-

Senior prosecutor

M. Arif Khan”

17. Based upon the above STATEMENT, the following Order was passed by the learned Accountability Judge on the same day:

“Order

In view of STATEMENT filed by learned Sr. Prosecutor NAB, the instant application u/s 9(c) of the Ordinance of NAO, 1999 is dismissed as withdrawn.

Sd/-

Judge

Accountability Court.....”

18. As visible from paragraphs 13 to 15 *ibid*, the provisions of SOP incorporate detailed guidelines and encapsulates modern and robust investigation techniques, scientific formulas, best practices, collective wisdom and application of judicial mind, not only for conducting an Investigation, but also for its Closure. From an accused’s perspective, the encouraging aspect to note is that the SOP ensures due care and diligence to safeguard the rights of an accused to a fair investigation and trial, *inter alia* under Articles 10-A and 25 of the Constitution of Pakistan 1973. The detailed processes referred at paras 13 to 15 *supra* demonstrate that an application under section 9(c) is not filed in a casual routine manner but a meticulous process is involved wherein complete chain of senior most officers are involved, ranging from the concerned Region and the Headquarters, from the Operations-side to the Prosecution-side including the Regional Director General, the Director General-Operations, the Prosecutor General, the Deputy Chairman and ultimately the Chairman to decide after collective deliberations in the Regional Board Meeting (at Regional level) and the Executive Board Meeting (at Headquarter level), and only thereafter such decision for closure of investigation is finalized. Chapter 1 of the SOP (para 15 *supra*) mandatorily requires all decisions for closure of an

investigation to be taken after collective wisdom and due application of judicial mind and with reasons under section 24-A of the General Clause Act and only then the recommendations for closure of investigation are approved. Needless to mention that section 9(c) of the Ordinance statutorily empowers the Chairman to pass the final decision, whereas the detailed mechanism in SOP is put in place to properly assist the Chairman in taking the final decision.^{7-A} In the present case expert opinions and collective wisdom of all the above senior officers and forums after three investigations, decided to close the Investigation and file application under section 9(c). The Investigation Officer also clearly admitted in his cross examination that he was not aware about any such decision to close the investigation taken by the Regional Board or the Executive Board or the Chairman or the Prosecutor General, nor was he aware about any legal opinion by the Prosecutor General or the concerned Additional Prosecutor General or the relevant law officers at Headquarters or at the Region and no such document was produced in evidence. We are therefore of the view, that such a meticulous, transparent and valid process of collective wisdom and stringent legal considerations adopted by a large number of experts from relevant fields cannot be ignored or by-passed, and that too without expressing any reasons therefor, without any fresh material and without adopting the same course. In the present case such collective decision was circumvented and by-passed in an unprecedented manner in utter violation of section 24-A General Clauses Act 1897, Article 10-A of the Constitution and the above discussed provisions of the NAB SOPs. Such an action was neither supported by law, nor by the procedures/ regulations, nor does it appeal to logic. Such an arbitrary one-man-decision not only violates the entire essence of the statute and its procedures but also impinges upon the fundamental rights of an accused which cannot be casually taken away from him. The decision of closure of investigation after adopting due process, therefore could not be disturbed withdrawn varied or amended without adopting the same due process and procedures through which the decision to withdraw the investigation, was reached.

7-A. Since the argument concerning delegable and non-delegable statutory powers of the Chairman under the Ordinance are not relevant for the present discussion, we therefore do not feel it appropriate to discuss the same at this point.

19. As regards the duty of the Accountability Judge while dealing with an application under section 9(c), clear guidelines have been enunciated by a Division Bench of this Court in *Abdul Sattar Dadabhoy* case⁷ in the following words:

“40. In this respect it is notable that when the Chairman sends his application for closure of the investigation under Section 9(c) he does not send a bare application but also the investigation report and all the material gathered during the course of the inquiry and later investigation.

41. In our view the role of the Accountability Judge under Section 9(c) while acting as a check and balance on the Chairman's power to close an investigation was to review all the material placed before him albeit in a cursory manner and then after applying his judicial mind as envisaged under Section 24(A) of the General Clauses Act 1897 to pass a speaking order either approving the closure or not with reasons and /or recommendations of further avenues of inquiry.

45. Whether a reference is filed or whether an investigation is closed is not a matter of ego between the Chairman NAB and the Accountability Court Judge rather it is a question of law and the need to do justice and the need to increase the public's confidence in the fair administration of justice...

50. Thus, in our view the Accountability Court's role under Section 9(c) through legislative intent is not to act as a post box or rubber stamp on the Chairman's decision to close the investigation but to try and play a meaningful role in determining whether that decision required reconsideration by the collection of additional evidence or rethinking of the evidence already collected or even whether legitimate lines of inquiry had not been followed. The Accountability Court Judge however should be mindful that the Chairman himself would have applied his mind to the case and considered all the evidence with the advice and assistance of his expert legal and investigative teams and should not lightly interfere with the decision of the Chairman to close the case also bearing in mind the Chairman's own qualifications to hold such an exalted office. In our view such non-approval of the Chairman's decision should only be rarely made and not as a matter of routine and should only be made in cases where it is quite clear that the investigation has not been carried out thoroughly or that the conclusions so reached appear to be clearly incorrect which may even suggest bad faith on the part of the Chairman in seeking closure. The Accountability Court Judge in deciding whether or not to approve the application of the Chairman for closure of the investigation must also within the bounds of what the Chairman is required to do under Section 9(c) NAO. Namely, be satisfied that no prima facie case is made out. We would however reiterate, as mentioned above, that the Accountability Court Judge can in no circumstances direct the Chairman to file a reference which is contrary to the legislative intent of the NAO and whilst considering his approval under Section 9(c) NAO the Accountability Court Judge should only make a tentative assessment of the material before him rather than go into it in great detail as his role, in our view, is limited to that of a watch dog to ensure that no completely unjustified decision based on the material before him has been made by the Chairman as opposed to running the investigation which is outside his domain.”

20. Applying the above principles to the facts of the present case, Firstly, the application under section 9(c) remained pending with the learned Judge for more than three months without any order; Secondly, the statement dated 29.04.2014 was filed for withdrawal of the application under section 9(c) on verbal instructions, without collective wisdom, without application of judicial mind, without recording any reasons, without following the detailed procedures and without opinions from the concerned officers from the operations and the prosecution sides; Thirdly, no fresh incriminating material or reasons were provided along with the Statement to justify such withdrawal; Fourthly and above all, no reasons were recorded or speaking order was passed by the learned Judge while allowing the said STATEMENT and while disposing-off the application under section 9(c), nor any notice was issued to the accused. The law is well established that when the rights of an accused are to be adversely affected then the accused must be provided an opportunity of hearing, *audi alteram partem* being part of every statute.⁸ No such exercise was conducted in the present case. Such conduct by the learned Accountability Judge and by the Bureau was neither in consonance with the settled principles of law, nor with the judicial norms, or with the relevant provisions of the SOP of the Bureau (para 13 to 15) but was in utter disregard to the rights of the accused person. The learned Judge did not play his judicial role by applying his judicial mind, as required under section 24-A of the General Clauses Act 1897 on the application filed under section 9(c) of the Ordinance. Neither any speaking order nor any reasons were expressed by the learned Judge for allowing such STATEMENT. Such conduct reflects that the learned Judge did not perform his part and instead of exercising his judicial duty, acted as a post office on both scores, i.e. while disposing application under section 9(c) and the STATEMENT dated 29.04.2014. Such conduct was in violation of the ratio settled by this Court in the cases of *Abdul Sattar Dadabhoy*⁷ and *Ali Muhammad*⁸ *supra*.

21. Turning to the question at para 12(iii) regarding validity of the 4th Investigation by the Bureau on the same issue without any fresh material, our study of the precedence and wisdom on the subject begins with the observations by a Three-member Bench of the Supreme Court in the case of *Riaz Hussain*⁹ declaring that the system of re-investigation in criminal cases is an innovation which is always taken up at the instance of influential people for obtaining favourable reports and that re-investigations do not assist the Courts in coming to a correct conclusion but rather creates more complications to the

8. *'Ali Muhammad v. The State'* PLD 2010 SC 623; *'Abdul Majeed Zafar v. Governor Punjab'* 2007 SCMR 330.

9. *'Riaz Hussain and others v. The State'* 1986 SCMR 1934.

Court administering justice. In *Bahadur Khan* case¹⁰ the same rule was followed by another Two-Member Bench wherein the Supreme Court endorsed High Court's view that reinvestigations in a matter retard the administration of justice instead of proving any assistance thereto. In *Muhammad Irshad Khan*¹¹ which case specifically pertains to NAB, another Two-Member Bench of the Supreme Court also followed the above principles in a case where three investigations were conducted by NAB authorities spread around six years against respondent, on two occasions Investigating Officer though recommended the filing of the reference, but the case could not be filed for the reason that in the opinion of the legal expert the case against the respondent was weak. In that case, the third Investigating Officer also recommended closure of investigation and legal expert also concurred with such view, but a Deputy Director General NAB was not satisfied and again referred the matter for investigation. The Supreme Court held such an exercise as futile and undue harassment towards the accused and upheld the decision of the High Court as being perfectly legal, in accordance with the well-established principles of law, and warranting no interference. For further guidance on the subject, students of law may avail the below list of cases¹² of superior Courts strongly disapproving multiple investigations in a matter. This makes it crystal clear that the practice of re-investigations in a matter, without any new and sufficient material and without a speaking order, without careful application of mind, and recording of reasons, and without a legal opinion have been consistently discouraged by the superior Courts, for such a practice causes hardship to the effected parties and their witnesses as well and smacks of ulterior motives and *mala fide* intentions, which does not help in assisting the Courts in coming to a correct conclusion, but on the contrary, creates more complications for the Courts administering Justice. Specifically speaking, in the NAB's case of *Muhammad Irshad Khan*¹¹ due weightage was given to the opinion of the legal expert, who had opined that the case against the Respondent was weak. In the

10. 'Bahadur Khan v. Muhammad Azam and 2 others' 2006 SCMR 373.

11. 'Chairman, National Accountability Bureau and another v. Muhammad Irshad Khan' 2008 SCMR 1012; 'Malik Shaukat Ali Dogar & 12 others v. Ghulam Qasim Khan Khakwani & others PLD 1994 SC 281; 'Wali Muhammad alias Walia v. Haq Nawaz and 3 others' 1971 SCMR 717; 'Raja Rustam Ali Khan v. Muhammad Hanif and 6 others' 1997 SCMR 2008; 'Muhammad Sharif and 8 others v. The State and another' 1997 SCMR 304; 'Brig. (Rtd.) Imtiaz Ahmed v. Government of Pakistan through Secretary, Interior Division, Islamabad and 2 others' 1994 SCMR 2142; 'Mian Khan v. Ghulam Mustafa and 6 others' 1996 SCMR 654; 'Hakim Ali Zardari v. The State' 2007 MLD 910.

12. 'Riaz Hussain and another v. The State' 1986 SCMR 1934; 'Abdul Aziz v. S.P. (C.I.A.), Sargodha and 2 others' PLD 1997 Lahore 24; 'Qaiser Iqbal v. Inspector General police Punjab' 2001 PCr.LJ 320; 'Muhammad Akram V. Deputy Inspector-General of Police, Gujranwala Range, Gujranwala and 3 others' 2000 YLR 1869; 'Abdul Ghaffoor V. Deputy Inspector-General of Police, Gujranwala Range, Gujranwala and another' 1995 PCr.LJ 1514; 'Mazhar Siddique Cheema V. District Police Officer, Hafizabad and 7 others' PLD 2008 Lahore 215; 'Riaz Hussain and others v. The State' 1986 SCMR 1934; 'Muhammad Khan and others v. Inspector-General Police, Punjab and others' PLD 1976 Lah. 574; 'Syed Waqar Hussain Shah v. The State' PLD 1998 Lahore 666.

present case the investigation officer has clearly admitted that there was no legal opinion by the prosecutor general or the Additional Prosecutor General or other relevant officers. He also admitted his lack of knowledge about any legal opinion by any prosecutor to file this reference.

22. Upshot of the above discussion, in response to questions recorded at paragraph 11 (i), (ii) and (iii) is that:

(a) in the instant case application under section 9(c) of the Ordinance was filed after duly considering the 3 investigations already conducted, after adopting due course, thorough procedures, application of mind, collective wisdom and for valid reasons, in consonance with the Ordinance and in line with the SOP and section 24-A of the General Clauses Act 1897 as discussed above, which was wrongly and unlawfully withdrawn in the absence of any fresh material; without any sufficient reasons under section 24-A of the General Clause Act; and without adopting the same due course and due application of mind.

(b) that the learned accountability judge by keeping the application under section 9(c) pending for more than three months; and then by disposing-off the same in one day, without any fresh material; based on verbal instructions; without notice to the accused; and without a speaking Order and application of judicial mind, erred, in contrast to the ratio discussed *ibid*^{7, 8}.

(c) that initiation of the 4th Investigation on the same issue (especially after the decision of the competent authority to close the investigation), without any fresh material and sufficient cause, and without a speaking order was in utter violation of the SOP, section 24-A of the General Clauses Act 1897, and in violation of the ratio settled by Supreme Court in the cases of *Muhammad Irshad Khan*¹¹, *Riaz Hussain*¹² and *Bahadur Khan*¹⁰ *supra*. Cumulative effect of the above in our view is, that all the above acts were in violation of the essence and spirit of the Ordinance, the SOP and also against the rights of the accused under the Constitution.

(d) Reply to all three queries at paragraph 11 (i), (ii) and (iii) are therefore in, NEGATIVE.

23. The appellant's last submission was a challenge to the very basis and root of the Reference in this case on the grounds of *malice* and *mala fide* intentions on part of the Bureau. Per the appellant, the very basis on which the inquiry committee was constituted was the Supreme Court's Order dated 14.06.2011 in Criminal Petition No.230-243 of 2011. The said petitions were filed against the Judgment dated 31.01.2011 (page 455 of the paper book)

which were passed by the High Court of Sindh Karachi in Criminal Appeal Nos.8 to 17/2009, 19 to 23/2009. Firstly, in paragraph 1 of the subject Reference it is claimed that the reference is being filed on instructions from the Supreme Court whereas in the last sentence of the Supreme Court clear directions have been given to file a report with respect to an inquiry to be conducted. Surprisingly, no such report has been produced in evidence by the prosecution. Secondly, the Supreme Court through the above order, gave clear directions to hold an inquiry against all persons responsible for causing delay in filing: (a) the criminal petitions before the Supreme Court; and (b) the criminal acquittal appeals before the High Court of Sindh. Evidence produced from both sides reflect that the petitions for leave to appeal, were filed before the Supreme Court after a delay of around 115 days. Although an enquiry was initiated wherein 11 persons were impleaded, however Reference was filed only against the appellant. Who was responsible for filing criminal petitions before the Supreme Court? The prosecution evidence clearly reflects that it was not the accused, since neither in the Investigation Report nor in the Reference nor in the evidence, has the prosecution side ever alleged even for once, that accused was responsible for filing leave petitions before the Supreme Court. The Investigation Officer PW-4 clearly admitted during his evidence that the accused was not responsible for filing petitions before the Supreme Court. PW3 also admitted that NAB has not initiated any enquiry/investigation against advocates/prosecutors who filed these criminal appeals with delay before the Supreme Court. On the contrary, appellant was the sole accused in the subject Reference and no person responsible for filing leave petitions before the Supreme Court with a delay of 115 days was impleaded in the Reference. This clearly establishes that the order of the Supreme Court was not carried out in its true letter and spirit and therefore the entire edifice built thereon, including the inquiry, four Investigations and the subject Reference, would not sustain. It also raises serious questions about the fairness of the subject investigation and gives credence to the appellant's allegations of impartiality, discrimination and pick-and-choose.

24. Once all arguments from the appellant side have been attended to, we now turn to the evidence produced by the prosecution, to establish its case, where in emphasis have been supplied to more important parts:

(i) Muhammad Zahid Mangrio, Reader of the Accountability Court No.1 Karachi was examined as PW-1, who stated that he was posted as reader in the Accountability Court-I Karachi. On 18.05.2015, special prosecutor R.D. Kalhoro applied for certified true copies of eight orders under section 265-K

Cr.P.C and two Judgments, which were supplied by him on 19.05.2015, which he produced as Exhibits 5/1 to 5/10.

(ii) Kalim Abbas appeared as PW-02, who was working as Assistant Director (NAB), produced exhibits 7/1 to 7/16, the service record and documents pertaining to personal file of the accused, which included letter of recruitment of ADPGA and legal consultant on lump sum contract basis, the resignation letter of the accused dated 29th May 2009 the Memorandum dated 06.05.2009 and 11.05.2009, the application for grant of 11 days ex-Pakistan leave of the accused person, the letter dated 31st July 2009 regarding professional misconduct of the accused and the Office Note dated 25.09.2014. He stated that on 25.09.2014 he was called by the Investigation Officer NAB for recording his statement.

(iii) PW-3 was Muhmmad Salim Ahmed, Additional Director NAB Peshawar, KPK, whose duty was to compile the daily Situation Reports (**SITREPs**) as reported by the prosecutors, and then to forward the same to the concerned quarters. He stated that his statement under section 161Cr.P.C. was recorded on 22.12.2014. He stated that the Investigation Officer asked him about the SITREPs dated 17.02.2009, 3.3.2009, 7.3.2009, 14.3.2009, 19.3.2009, 13.4.2009 and 15.4.2009. **In his examination in chief, he also stated that on 17.2.2009 when Reference No.13/2008 was disposed of under section 265-K Cr.PC, the accused was busy at City Courts. He also stated that on 15.4.2009, when Reference No.78/2007 and 14/2008 were disposed of under section 265-K Cr.PC, the accused was on leave.**_(emphasis added)

(iv) Prosecution Witness PW-4, Errol Phillips Winston was the Investigation Officer ("IO") and the last prosecution witness, who was authorised the Investigation on 23.07.2014. He produced eight (8) documents Exhibits 9/1 to 9/8, which included the authorisation for Investigation letter dated 13.03.2014 (Exhibit 9/2), the first authorised inquiry to Mr. Masood Ahmed dated 21.11.2011 (Exhibit 9/3), the authorisation of first investigation to Mr. Masood Ahmed Senior Investigation Officer dated 05.03.2012 (Exhibit 9/4), the transfer of investigation to Muhammad Sajid Senior Investigation Officer dated 09.04.2012 (Exhibit 9/5), thereafter transfer of Investigation to Abdul Fateh, Investigation Officer on 10.01.2013 (Exhibit 9/6), and finally transfer of investigation to Errol Philip Winston dated 25.11.2014 (Exhibit 9/7).

25. The accused, in addition to his statement under section 340 Cr.P.C., also examined himself on oath under section 340(2) Cr.P.C. and produced important documents, which included letter dated 04.09.2013 (Exhibit 12/6) issued on behalf of DG NAB Karachi whereby the accused was informed that investigation against him has been closed. He also produced the application

under section 9(c) dated 07.01.2014 (Exhibit 12/7) filed by the Bureau before the Accountability Judge seeking closure of investigation against the appellant on the grounds that neither any gain nor any evidence of collusion with other accused persons against the appellant was established on record during investigation (paras 2 & 3 of the affidavit). Exhibit 12/8 produced by the accused was the Investigation Report conducted by the 3rd I.O. Abdul Fateh, wherein it was recorded that:

“6. Conclusion.:

“..... however it is also fact that no gain of accused established (no property and account identified except two accounts in which no massive entries reported). This case can be fit for departmental enquiry, however cannot be prosecuted under any provision of 9(a) of NAO 1999.

7. Recommendation:

In light of the above facts and findings, it is recommended to close the investigation, after soliciting the legal opinion from prosecution wing.”

The STATEMENT dated 29.04.2014 for withdrawal of application under section 9(c) was also produced by accused.

26. While appraising the prosecution evidence, PW-1 during his cross-examination admitted that **he was not acting as a reader** at the relevant time; that he **did not produce the application for CTC** of the orders produced by him; that he **did not produce any register or record** to issue the CTC; **nor produced any record** with regards to payment of cost for the said CTC; that a **reader of a court is not authorised to issue CTC** of the orders/ Judgments as per Court Rules; that the **accused had already applied for CTC** of the said orders/ Judgments, which were already available in the case file; that **application for grant of CTC, which was moved by the accused was not produced by him**. Lastly, he also admitted his ignorance to the fact that sometimes Deputy Director Coordination Legal and the Investigation Officer NAB also used to apply for CTC of orders/ Judgment. With his admissions that he was not serving as the reader in the relevant court at the relevant time, and that a reader was not authorised to issue certified copies under the rules, the said witness also lost his relevance. Another serious question about the **eligibility of said witness** to appear as a Prosecution Witness, is raised as to whether a staff/ reader of a Court can appear as a prosecution witness in a criminal case on behalf of another party (prosecution or the accused) for an issue which concerned acts in his official capacity, without express permission/ authorisation from the Presiding Officer or the Administrative Judge of the Accountability Courts at Karachi, or from the Incharge Judge of the

Accountability Courts in Sindh or the Registrar of the High Court. On the other hand, if the prosecution was interested to produce such CTC as exhibits, then the most relevant persons were those who actually applied for the CTC at the belated stage (i.e. prosecutors Mr. Feroz Mehmood Bhatti Advocate and Mr. R. D. Kalhoro Advocate), but they were not produced as witnesses.

27. The PW-2 during his cross examination, admitted that **no seizure memo was prepared by the investigation officer when he produced these documents which are produced by him in court**; that in the terms of appointment of the accused, it was clearly mentioned at paragraph 4, that **he will be additionally allowed 40 days leave with full pay for performance of Hajj once in a service**. He also admitted that **no show cause notice against the accused person was available in his personal file**; that **while accepting the resignation of the accused person, Exhibit 7/13, no objections were raised in the office order while accepting his resignation**; that **NAB officials also filed a complaint against the accused person before the Chairman Sindh Bar Council (Exhibit 7/15)** to which no response was received from the Bar Council; and that **he had no knowledge about pendency of this reference against the accused**.

28. PW-3 in his cross-examination, admitted that the **accused was the only prosecutor who was looking after all cases of NAB in five different Accountability Courts in Karachi and one Accountability Court in Hyderabad, during the period for which the SITREPs were produced by him**. He admitted that **the fact-finding enquiry committee was constituted also to enquire about delay in filing appeals before the High Court and the Supreme Court; and that such enquiry was initiated against DPGA NAB-Sindh, Mr. Aslam Butt, two Advocates from Headquarter NAB, and the accused**. He also admitted that the **departmental inquiry extended warning to the accused**; and that **filing of appeal was the responsibility of the Prosecutor General**. He also admitted that whenever a case is disposed by acquitting the accused persons, usually meeting was held at NAB, **however in the instant case, no meeting was held with the concerned Investigation Officer**. He also admitted that all the correspondence from the concerned prosecutor were dispatched to the Headquarters at Islamabad through DPGA; and that **letter dated 26.03.2008 was issued before the appointment of the accused**. Lastly he admitted that the **costs for the certified copies in the subject case were filed through the Deputy Director Coordination, Prosecution Wing, NAB**.

29. PW-4 the Investigation Officer initially claimed that it was not in his knowledge that prior to filing of this Reference, NAB had also filed a complaint against the accused before Sindh Bar Council, but later, he admitted, that at page number 206 and 209 of the Investigation Report, NAB has filed complaint against the accused in SBC.

“it is not in my knowledge that prior to filing of this reference, NAB has also filed complaint against you in Sindh Bar Council. It is a fact that page No.206 and page 209 of the I/R, NAB has filed complaint against you in Sindh Bar Council. I do not know that the matter of the letter/complaint written to Sindh Bar Council and the contents of reference are same.”
The said complaint was not produced during trial.

He also admitted that the **criminal petitions for leave to appeal were filed after delay before the Supreme Court of Pakistan; and that NAB has not initiated any inquiry/ investigation against advocates/ prosecutors who filed these criminal appeals with delay before the Supreme Court.** He clearly admitted that he did not prepare any seizure memo while collecting documents; that he did not seize the record and proceedings of the references/cases; that he did not collect/seize diaries of the court files. He expressed his lack of knowledge about the fact that the accused was the only prosecutor to look after all accountability courts in Karachi and Hyderabad. He admitted **that prior to authorisation of investigation to him, three NAB officials had conducted investigations against the accused;** and also admitted that statements under section 161 Cr.P.C. of the 3 investigation officers was not recorded by him; **nor any document was collected from the 3 earlier IOs through seizure memo; nor the said 3 Investigation Reports were produced during trial.** Another contradiction in his statements was again noticed when on one hand during his cross examination on 18.08.2017, he stated on oath that he has no knowledge that the earlier three Investigation Reports had recommended closure of investigation, however during his further cross examination on 28.09.2017, he admitted that previous 3 I.Os had recommended closure:

Cross examination dated 18.08.2017

“...I have no knowledge that all three I/Os had recommended for closure of investigation against you, but I know that only Abdul Fateh, I/O NAB had recommended for closure of investigation...”

Further Cross examination dated 28.09.2017:

“....it is correct to suggest that there is a difference between the investigation reports of previous I/Os and my investigation report, that previous I/Os recommended for closure of investigation whereas I recommended for filing of reference against you.”

30. PW-4 also admitted that Abdul Fateh (the 3rd I.O) **had recommended for closure of investigation** against accused; and that the said Investigation Report of Abdul Fateh was not produced during trial. He admitted that an **application under section 9(c) was filed** before accountability court Karachi on 07.01.2014 on 01.01.2014. Also admitted that at **para 3 of the said application it was mentioned that no prima facie case was made out** against the accused, therefore the case may be closed. The said letter was not produced during trial._The I.O. claimed that Director Operations forwarded a letter dated 20.01.2014 where it was mentioned that case is not fit for closure and a proper investigation should be conducted to file reference but admitted that the said letter was not produced during trial; and also expressed lack of knowledge about the date of withdrawal of the application under section 9(c). He admitted that **there was no reason mentioned on the application for withdrawal of application under section 9(c); and also admitted that he has not seen the recommendations of prosecutor general NAB nor seen the recommendation of Chairman NAB for withdrawal of application under section 9(c). The said recommendations were also not produced during trial.**_He also expressed his lack of knowledge that the application under section 9(c) remained pending before the concerned Accountability Court for many months and was also unaware about name of the Accountability Judge at the relevant time. He again admitted that **in the withdrawal application, no reason was mentioned for such withdrawal and further admitted that in the order dated 29.04.2014 by the Accountability Court, no reason for withdrawal of application under section 9(c) was mentioned; and also admitted that such application was allowed only on the basis of statement of special prosecutor.** The I.O. also admitted that the earlier investigation officer Abdul Fateh in his Investigation Report recommended that complaint against the accused, Aslam Butt, Tanveer, Khaled Mahmood, Dr Asghar Ahmed, Sultan Mansoor may be sent to the respective Bar Councils. He also admitted that the earlier IO Abdul Fateh in his Investigation Report had recommended that **no gain was established against the accused/ appellant and closure of investigation was also recommended. The said investigation report by Abdul Fateh was also not produced during trial.** He admitted that every prosecutor has to produce daily situation report SITREP however he expressed his lack of knowledge that daily SITREP are forwarded to the DG NAB, Chairman NAB, PG NAB and the concerned Investigation Wings. He also expressed his lack of knowledge about the fact that in every acquittal case of NAB, a meeting was held with the I/O, DG NAB and Director Investigation; and further admitted that the authorisation letter of PGA for filing appeals against acquittal orders of cases in this reference

has not been produced by him. He admitted that **no Show Cause Notice was issued to the accused**; and **expressed his lack of knowledge about issuance of Clearance Certificate in favour of the accused by chairman NAB**. He admitted that for closure of investigation in any case, a meeting of the Executive Board Meeting is held in NAB, however expressed his lack of knowledge about the decision of EBM in the present case. He also admitted that he did not ascertain that any NAB prosecutor had recommended for filing of this reference against the accused. Lastly, it was also admitted by the IO that **at the relevant time, the Deputy Prosecutor General NAB Sindh was Mr Aslam Butt who was the head of the prosecution in Sindh at the relevant time, however he neither recorded his statement, nor issued any show cause notice to him, nor conducted any inquiry against him, nor is he a witness in this case.**

31. Perusal of the prosecution evidence though establishes that accused was serving as Prosecutor and was also responsible to obtain CTC of the orders in which he was appearing, however it utterly failed to establish that not obtaining CTC by the accused during his travel abroad while performing Umra from 13.04.2009 to 25.04.2009 and on the day when he was attending cases at the city Courts, were acts which were tainted with malice, deliberate dishonesty and bad intentions, to the extent of criminal culpability. It has come on record that in Reference 08/2009 to 12/2009 (PNSC case) order was announced on 03.03.2009 and CTC was duly obtained by accused; in Reference 16/2009 order was announced on 17.02.2009 and CTC was applied. It has come on record through SITREPs that the accused informed about cases when he was present in country. It was also admitted by prosecution witness that on one occasion the appellant was busy in city courts in other cases when the order was announced. It is also admitted by the witness that from 13.04.2009 to 25.04.2009 he was out of Pakistan on Umra. Whether his leave absence was allowed in writing or verbally by the then DPG etc., is an administration issue within the Bureau but it would definitely not qualify the test of *mens rea* and criminal intent. The accused could not be held criminally liable for something which occurred during his absence and without his knowledge. A substantial number of officers must have been available in the Prosecution wing of the Bureau, including the then DPG (Head of the Prosecution), the Deputy Director Coordination, support staff or other prosecutors etc., who could have easily obtained CTC of those orders, as soon as they came to know that the appellant is absent. The same situation may also be routinely occurring any time when one of the prosecutors would remain absent for a few days due to sudden illness or some emergency, in which

situation other prosecutors, staff and officials fill in the gap. It has also come in evidence that accused was the sole prosecutor simultaneously appearing in five Accountability Courts in Karachi for the Bureau, so also appearing before other courts including at city Courts at Karachi and the Accountability Courts at Hyderabad, for a long period of time, proceeding with multiple cases in each court at a time, and also responsible for obtaining CTC of the Orders passed without any other prosecutor assisting him and without any assisting staff and then being criminally charged and convicted for not obtaining CTC of orders passed in his absence when he was out of country, is something untenable, unheard of and which by itself is against the Instruction No.18 of the 'PROSECUTION SOP NO.5' at page 1426 of the NAB SOP titled: 'MONITORING, EVALUATION AND INSPECTION OF NAB PROSECUTION' which clearly provides that **"18. The workload of the LC/prosecutor shall be kept within reasonable limits so that the quality of his output may not be affected adversely."** Prosecution evidence also establishes the admitted position that during disciplinary proceedings against the accused for his unauthorized leave even Show Cause notice was not issued to the accused. Even after his resignation letter dated 29.05.2009 no investigation or Reference was initiated against him. Even his resignation was approved by the Chairman without raising any objection of any sort whatsoever. It was only after two years in 2011 i.e. after passing of the Supreme Court Order that inquiry was initiated but even then, 3 investigators did not recommend filing of reference. The accused could not be held criminally liable for not obtaining CTC of orders passed in his absence (when he was busy in other courts or was out of Pakistan on Umra from 13.04.2009 to 25.04.2009, or for those duly intimidated by him through daily SITREPs). The "PROSECUTION: SOP NO.2" titled "ORGANISATION OF PGA DIVISION" pertaining to "APPEALS:" at page 1413 of the SOP clearly specifies the mandatory responsibility of the concerned DPGA of the regional NAB for forwarding his detailed recommendations for filing of an appeal within the stipulated time together with draft of the appeal and thereafter the the appeal shall be filed before the appellate court within the stipulated period after concurrence at the Headquarter level. In the present case, it was clearly admitted by the Investigation Officer that no person was impleaded as accused in the reference as being responsible for filing of criminal petitions before the Supreme Court after a delay of 115 days. He also admitted in trial that no seizure memo was prepared for relevant documents produced in evidence nor did he investigate the then DPGA who was the head of the prosecution at the relevant time nor recorded his statement, nor made him a witness nor investigated the persons responsible for delay in filing appeals before supreme court. Such conduct creates serious doubts on the fairness

and impartiality of the investigation and the Reference. Moreover, some material documents/ orders/ proceedings were not produced by the prosecution side, especially considering their direct relevance to the facts of the present case and their availability on record of the Bureau. The same were produced by the accused in his evidence containing ample content to support that no cognizable case under section 9 was made out against him. The only presumption which could be drawn in these circumstances under Article 129(g) of the Qanoon-e-Shahadat Order 1984 is that best evidence was withheld by the prosecution.¹³ Based upon these important documents, we have already expressed our view in the preceding paras 11 to 23 with respect to the withdrawal of investigation; withdrawal of application under section 9(c) and the 4th Investigation in this matter, which are not being repeated here for brevity's sake.

32. The question of existence of *mens rea* in this case was also not considered by the learned trial Court at all. While deciding criminal liability of the accused, the learned trial Judge ought to have considered that the accused was a professional lawyer serving as special prosecutor for the Bureau and even to establish simple negligence committed by a professional, there are certain benchmarks to be fulfilled. Negligence is the breach of a duty caused by doing something which a prudent and reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would not do, or omission to do something which a reasonable man would do in the circumstances. It becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are "duty", "breach" and "resulting damage", whereas to prosecute a professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no professional in his ordinary senses and prudence would have done. Mere omission, negligence, simple lack of care, an error of judgment or an accident cannot be construed as offence and that there has to be some '*mens rea*' on part of the professional.¹⁴ To prove criminal negligence, *mens rea* has to be proved and the principle of ***res-ipsa liquitor*** is not applicable in a criminal case especially when the accused is sought to be punished for criminal negligence. To prove negligence

13. 'Muhammad Sarwar v. Mumtaz Bibi and others' (2020 SCMR 276); 'Mst. Kamalan Bibi V. Province of Punjab' (2022 CLC 890).

14. 'Dr. Rajiv Jain vs The State of Madhya Pradesh' on 22 December 2023, Madhya Pradesh High Court; 'Prem Dass V. Income Tax Officer' (1999) 5 SCC 241; Shri. K.E. Gnanavel Raja vs The Assistant Commissioner of Income (22 February 2022) Madras High Court; Bombay Hospital and Medical Research Centre vs. Asha Jayswal, reported in (2021) 0 AIJEL-SC 68074.

in criminal law, the element of *mens rea* and the degree of negligence should be much higher i.e. gross or of a very high degree. Even in cases wherein death occurred due to some rash or negligent acts by drivers or even by doctors, the above principles have been duly followed.¹⁵ To fasten liability in criminal law on a professional the standard of negligence require to be proved should be so high as can be described as "gross negligence" or "reckless" and the degree of negligence has to be higher than that of negligence enough to fasten liability in civil law.¹⁶ A negligence which is not of such a high degree may provide a ground for action in civil law, but it cannot form basis for criminal prosecution.¹⁷ So far professionals are concerned where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. The only state of mind which deserves punishment is the one which demonstrates an intention to cause harm to others or where there is deliberate willingness to subject others to the risk of harm. The negligent conduct does not entail an intention to cause harm, but, only involves a deliberate act subjecting another to the risk of harm where the actor is aware of the existence of the risk and, nonetheless, proceeds in the face of the risk.¹⁸ The Honourable Supreme Court in a case specifically pertaining to NAB¹⁹ has already decided that mere procedural irregularities in a transaction would not be sufficient to constitute an offence under section 9 of the ordinance. The Court clearly emphasised that to determine the question of criminal liability, a distinction must be drawn between procedural irregularities, and violation of substantial provisions of law. The procedural irregularities may bring an act done in the official capacity within the remit of misconduct which is distinguishable from criminal misconduct or an act which may constitute an offence and thus unless it is established through the evidence that an act or series of acts done in a transaction constituted an offence, the criminal charge would be groundless. Even in the case of special provision in the ordinance regarding shifting of burden of proof, the fundamental principle of law of criminal administration of justice that basic onus is always on the prosecution to establish the commission of an offence is not changed. Lastly, in respect of burden of proof between the civil and criminal liability, there is a marked difference as to the effect of

15. *'Jacob Mathew vs. State of Punjab'* 2005 Cr. LJ. 3710; *'Kalimudeen vs State of H.P'* Himachal Pradesh High Court; *'Nidhi Tribhovanbhai Patel vs State of Gujarat'* on 1 March 2023 Gujarat High Court at Ahmadabad; *'Malik Salah-Ud-Din Dogar v. The State'* 2006 YLR 1648.

16. *'Malay Kumar Ganguly vs. Sukumar Mukherjee'* (2009) 9 SCC 221.

17. *'Dr. Suresh Gupta vs. Government of NCT of Delhi & another'* AIR (2004) SC 4091.

18. *'P.B. Desai vs. State of Maharashtra'* AIR (2014) SC 795.

19. *'Mansur-ul-Haque v. Government of Pakistan'* PLD 2008 SC 166; *'Khan Asfandiyar Wali v. Federation of Pakistan'* PLD 2001 SC 607.

evidence. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt but in criminal proceedings the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man beyond all reasonable doubt.²⁰

33. Lastly, that the existence of dishonesty and *mens rea* is the fundamental requirement of law for convicting an accused and the burden to prove the same heavily lies upon the prosecution, not only through strong and positive evidence, but to the extent of fulfilling the mandatory criteria of “**beyond reasonable doubt**”. In the present case, the prosecution has failed to meet such criteria and to establish *mens rea* and dishonesty on part of the accused. Upon appraisal of the evidence and all the legal and factual aspects of the case, we are of the considered view, that the directions of the Supreme Court in its order dated 29.01.2011 were not complied with in its letter and spirit; that no person was impleaded as accused as being responsible for filing criminal petitions before Supreme Court with a delay of 115 days; that the decision of the Bureau to close the investigation after three investigations was based upon the correct application of law; that the withdrawal of the application under section 9(c) was not in consonance with law and NAB SOP; that the act of disposal of application under section 9(c) by the learned Judge without notice to the accused, without any sufficient cause and without recording any reasons was in violation of law and the guidelines of the Supreme Court; that initiation of the 4th Investigation against the accused was unlawful and in violation of the principles settled by the Supreme Court in a large number of cases; that seizure memo was not prepared by the investigation officer for material documents which were produced in evidence; that material documents, orders and proceedings were deliberately withheld by the prosecution during evidence, which were later on produced by the accused; that although the accused was acting as a prosecutor and was responsible to obtain CTC of orders passed in his presence however no evidence was produced to establish that accused was present in Pakistan from 13.04.2009 to 25.04.2009 and was not travelling out of Pakistan on Umra when some of the orders were announced; that not a single evidence was produced by prosecution to establish any sort of benefit or financial gain by the accused;²¹ Not a single evidence was produced by

20. ‘Sayyad Akbar Vs. State of Karnataka’ AIR 1979 (SC) page 1848.

21. ‘Ramesh M. Udeshi v. The State’ 2005 SCMR 648; ‘State v. Lt. Gen. (Retd.) Sabeh Qamruzzaman’ 2017 P.Cr.LJ N 250; ‘National Accountability Bureau v. Khalid Ahmad Khan Kharral’ 2013 MLD 849.

22. ‘Tariq Pervez v. The State’ 1995 SCMR 1345; ‘Muhammad Akram v. The State’ 2009 SCMR 230.

prosecution to establish any collusion between the accused and the beneficiaries of the orders passed in the subject cases; single evidence was not produced to establish dishonesty, criminal intent and *mens rea* against the accused; and therefore, the prosecution utterly failed to prove the Charges against the accused, beyond reasonable doubt. None of the laws, principles or factors as discussed above were considered by the learned trial judge while convicting the accused. It is trite law that even if there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right,²² whereas in the present case there are multiple contradictions, deficiencies and flaws as discussed above, which will go to the benefit of the accused.

34. Based upon the above, we hold that the prosecution has failed to prove its case, beyond reasonable doubt, against the appellant. Consequently, the appeal is allowed, the Judgement dated 06.01.2018 is set-aside, and the appellant is acquitted of the charges against him.

35. Before parting with this Judgment, we highly commend the level of assistance, diligence, preparation and presentations displayed during course of hearing of this appeal by Syed Meeral Shah learned special prosecutor for NAB and Mr. Raj Ali Wahid Kunwar learned counsel for the appellant.

JUDGE

JUDGE