

51

ORDER SHEET

THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANO

Cr. Appeal No. S-43 of 2016

Date

Order with signature of Judge

11-02-2019

The appellant Imtiaz Ali Unar is present in person, (on bail).

Mr. Sharafuddin Kaanhar, A.P.G for the State.

Heard appellant in person. He submits that alleged offence as shown in F.I.R pertains to the years from 1999 to 2001 and inquiry into the matter as is evident from F.I.R was completed in the year 2004. Upon the basis of said inquiry, letter dated 04.12.2004 was issued by the complainant to Circle Officer, ACE Larkana for registration of the case against him, however, it was got registered on 10.02.2009, i.e. delay of about more than four years. He next submits that shortage whatever is alleged against him is due to poor management of the department and due to passage of time.

For the detailed reasons to be recorded later-on, instant criminal appeal is allowed. Impugned judgment dated 17.05.2016, passed by Special Judge Anti-Corruption (Provincial) Larkana, in Special Case No.07 of 2010, re: State Versus Imtiaz Ali being outcome of Crime No.6/2009 of P.S. ACE Larkana, under Section 409 P.P.C r/w Section 5(2), Act-II of 1947 is hereby set-aside. Consequently the appellant Imtiaz Ali s/o Ali Hassan, by caste Unnar, is hereby acquitted of the charges. He is present on bail, his bail bond is cancelled and surety furnished by him is also stand discharged.

Judge

Abdul Salam/P.A

53

IN THE HIGH COURT OF SINDH, CIRCUIT COURT
LARKANO

CRIMINAL APPEAL NO.S-43 of 2016

Appellant : Imtiaz Ali Unnar, in person.
State through : Mr. Sharafuddin Kaanhar, APG, for the State.
Date of hearing: : 11.02.2019
Date of announcement : 11.02.2019

JUDGMENT

Muhammad Saleem Jessar, J.- The appellant, Imtiaz Ali, is aggrieved by the judgment dated 17.5.2016 passed by Special Judge, Anti-Corruption (Provincial), Larkana, in Special Case No.07 of 2010, which is outcome of Crime No.06 of 2009 PS ACE, Larkano (State v. Imtiaz Ali), whereby he was convicted under section 409, PPC read with section 5(2) of Prevention of Corruption Act, 1947 and was sentenced to suffer R.I. for four (04) years and fine of Rs.50,000/- and in case of default in payment of fine, to suffer R.I. for six months more. However, benefit of section 382-B, Cr.P.C. was extended to the accused / appellant.

2. The facts of the case, in a nutshell, are that in the years 1999-2000 and 2000-2001 appellant Imtiaz Ali, Food Inspector, was incharge at Food Godown Badeh. During the year 1999-2000 he stored 46,878 bags of wheat, weighing 4698.404 M. Tons and disposed of 4342.054 M. Tons while 356.350 M. Tons wheat was short. In the year 2000-2001 at the same centre 21,3342bags of wheat weighing 2138.861 </ Tons were stored and the same wheat was disposed of weighing w 2073.079 M. Tons and thus there was shortage of 66.782 M. Tons. The total shortage of what for the above two years was 422.132 M. Tons containing 4221 bags of wheat. It was alleged that the appellant has embezzled / misappropriated 4221 bags and 32 Kilograms of wheat and at the rate of Rs.973/- per bag, the total value of the missing wheat comes to Rs.41,07,344/- which is due against the appellant and thus he has caused loss to the Government exchequer. Accordingly, on 20.2.2009, Niaz Hussain Khajar, Circle Officer, ACE, Larkana lodged FIR on behalf of the State after receipt of permission from competent authority and as a result of inquiry conducted on 4.12.2004.

3. After usual investigation, the accused / appellant was challaned before the Court of Special Judge, Anti-Corruption (Provincial), Larkana and necessary papers were provided to him as per receipt at Exh.1. Formal charge against the accused / appellant was framed at Exh.2 to which he pleaded not guilty and claimed to be tried vide his plea at Exh.3.

4. In order to prove its case against the appellant / accused, the prosecution examined PW-Muhammad Punhal at Exh.5, he has produced daily reports of issue and balance at Exh. 5-A to 5-E, PW-Bashir Ahmed at Exh.6, he produced photo copy of letter and reports as Exh.6-A, PW-Madad Ali was given up by the Prosecution vide statement of the ADPP at Exh.7, PW-Niaz Hussain Khajar at Exh.8, he has produced permission letter and FIR as Exh.8-A and 8-B. Thereafter the ADPP closed the side of the Prosecution vide his statement at Exh.9.

5. The statement of the accused / appellant was recorded at Exh.10, wherein accused / appellant pleaded his innocence and showed his inclination to examine himself on oath as required under section 340(2), Cr.P.C. and to lead evidence of one Daud in his defence. Accordingly, the accused / appellant was examined under section 340(2), Cr.P.C. at Exh.11, he produced the copies of letter as Exh.11-A, DW-Muhammad Daud was examined at Exh.12 while DW-Assadullah Baloch, Additional Director Food was examined at Exh.13, he produced the entry report as Exh.13-A. Thereafter, learned counsel for the accused / appellant closed his side vide statement at Exh.14.

6. Learned trial Court, after formulating points for determination and after hearing learned counsel for the parties, convicted and sentenced the accused / appellant as above. Hence, this appeal.

7. I have heard the appellant Imtiaz Ali Unnar, in person and Mr. Sharafuddin Kaanhar, learned DA.P.G. for the State and have perused the record with their assistance.

8. The appellant, who appeared in person and argued his case, submitted that there is unexplained delay of about four years in lodging of the FIR. He also argued that he was not responsible for any misappropriation of wheat as alleged by the Prosecution and the shortage, according to the appellant, occurred due to mis-management, poor handling of wheat by the department and due to passage of time. He finally prayed for his acquittal.

9. On the other hand, learned APG fully supported the impugned Judgment and submitted that at the relevant time the accused / appellant was incharge of the Food Centre, Badeh and shortage of wheat was unearthed at the said centre. He submitted that the prosecution witnesses have fully implicated the accused / appellant in the instant case. He also submitted that the FIR was registered in consequence of raid conducted by ACE officials in presence of the Judicial Magistrate, Larkana which exposed the misdeeds of the accused / appellant.

10. From the evidence of PW- Muhammad Punhal, it transpires that the incident pertains to the year 2001. However, from the evidence of PW-Niaz Hussain Khajar, it transpires that on 4.12.2004 a raid was conducted by Mr. Nisar Ahmed Brohi in presence of Judicial Magistrate and Civil Judge at the office of DFC, Larkana. Later on enquiry in the raid was conducted by Mr. Muhammad Younis the then Sub-Inspector ACE, Larkana. However, the F.I.R. was registered on 20.02.2009. Therefore, if calculated from the date of incident i.e. 2001 then there is a delay of about eight years in lodging of the F.I.R; however, if the period is calculated from the date of raid i.e. 4.12.2014, then there is delay

of about four / five years in lodging of the F.I.R. There is no explanation for such long and inordinate delay from the side of the prosecution.

11. Un-explained delay in lodging of FIR has been held by the superior Courts to be an element which tarnishes the authenticity of the FIR. Reference in this regard may be made to the case of Ayub Masih v. The State (PLD 2002 SC 1048) wherein the Honourable Supreme Court held as under:-

"The unexplained delay in lodging the F.I.R. coupled with the presence of the elders of the area at the time of recording of F.I.R. leads to the inescapable conclusion that the F.I.R. was recorded after consultation and deliberation. The possibility of fabrication of a story and false implication thus cannot be excluded altogether. Unexplained inordinate delay in lodging the F.I.R. is an intriguing circumstance which tarnishes the authenticity of the F.I.R., casts a cloud of doubt on the entire prosecution case and is to be taken into consideration while evaluating the prosecution evidence. It is true that unexplained delay in lodging the F.I.R. is not fatal by itself and is immaterial when the prosecution evidence is strong enough to sustain conviction but it becomes significant where the prosecution evidence and other circumstances of the case tend to tilt the balance in favour of the accused."

12. In the above case, there was delay of only one day in lodging of the FIR, however, in the present case there is delay of about five years or more in lodging the FIR. In view of unexplained delay occurring in lodging of the F.I.R. in the instant case possibility of collusion and false implication of the accused could not be excluded from consideration.

13. So far as merits of the cases are concerned, the prosecution has not been able to prove its case beyond reasonable doubt. PW-1 Muhammad Punhal in his cross-examination stated that the shortage of wheat might be due to natural decay. If this statement of the PW is seen in the backdrop of the fact that wheat stock was stored in the year 1999-2000 and was disposed of in the year 2003 and 2004, coupled with the fact that the stock was lying in open as well as in godwons which were damaged and not upto the mark, then it becomes quite doubtful whether there was any misappropriation of the wheat by the appellant or there was loss of wheat due to natural decay. It is, of course, not disputed that wheat is a perishable commodity although having a longer life span than the other perishable items like vegetables and fruits.

14. This witness, i.e. Muhammad Punhal (PW-1) was asked about an enquiry conducted by Mr. A.D. Khawaja with regard to shortage of wheat. Although he stated in reply to the question put to him in this regard that he does not know whether any enquiry committee was constituted by our department but, as a matter of fact, Mr. A.D. Khwaja was appointed by a Division Bench of this Court at Sukkur to conduct inquiry in this regard. In another case of similar nature bearing Criminal Appeal No. S-49 and S-50 of 2016 (Abdul Aziz Bhutto v. The State), the report of Mr. A.D. Khawaja was produced and was discussed in detail in the following words:

"In this regard reference may also be made to the report submitted by Mr. A.D. Khwaja, the then Director, ACE, who was appointed by a Division Bench of this Court in C.P. No. D-350 of 2005 to conduct an inquiry and submit his report

regarding shortage / damage of wheat grain. The salient features of the report of Mr. A.D. Khwaja are as under:

- a) Godwon condition play a vital role in safe storage of food grain. Most of the godowns were old, unhygienic and used without spray and white wash. Food officers admitted that most of the godowns are old.
- b) Wheat procurement mainly depends on timely supply of bardana / jute bags. B class / retrieved jute bags were provided during procurement of wheat.
- c) That application of insecticide was conventional, unscheduled, unscientific and time barred.
- d) Due to lack of capacity, in some cases wheat was stored in open areas and Menthol / polyethylene sheets were used for the protection of what stored in open areas.
- e) In most cases plinth and dunnage were not provided / prepared.

In the above case, the following relevant observations were also made in respect of the report of Mr. A.D. Khawaja:

"This report is very critical of the manner in which wheat is stored as the above factors play a vital role in damage to stored wheat. Even in para 20 above PW-Bashir Ahmed has stated in cross-examination that crop pertaining to the year 1999-2000 was lying in the godown upto April, 2004 while crop pertaining to year 2000-2001 was cleared in December, 2002. This shows that the disposal of stored wheat was not done in a proper way as the proper method should have been to use the earlier crop first and the latter crop thereafter. However, in this case, the earlier crop was left in the store and the latter crop was used."

15. The facts in the present case are somewhat similar and the above observations and finding are fully applicable to the present case as in the present case also there is a question mark hanging over the arrangements made for stocking the wheat and there is also an objection with regard to delayed disposal of the wheat.

16. The appellant examined himself on oath as Exh. DW-1. In his examination-in-chief he stated that "the stock was shifted after four years, therefore, shortage occurred. I had intimated to my superiors from time to time but no action was taken. DFC prepared S 2 who had intimated the superior officers. In this regard, when a question was put to PW-3 Niaz Hussain Khajar, IO of case, with regard to report S-2, he replied "I had not collected the report S-2 dated 30.9.2001 from the DFC during investigation." He also stated that he does not know whether the stock was kept for four years and that whether wheat stock if kept for such long period will lose its weight. In case the IO does not know these facts then how he investigated such a matter. It seems that the I.O. has completely followed the direction given to it by the complainant and has not performed his duties honestly and fairly.

17. The appellant during his deposition also stated as under:

"The stock lying at centers [was] checked quarterly and such report was sent to the officers. On the directions of the Honourable Supreme Court the departmental enquiry was conducted by the superior officers of the Food Department and they claimed the damage charges of stock of 1999 from the Punjab Government and they held responsibility of 50 percent upon DFC and 50 percent upon the Centre incharge. I produce the attested copy of enquiry report as Exh.11-A. It is the same. Firstly the Deputy Director had written letter to me for shortage of 66 tones and after the enquiry officer again wrote letter of shortage of 33 tons. This loss occurred due to vivilation and I have not committed any misappropriation as alleged."

18. During his cross-examination the appellant was not confronted by any document to disprove his above assertions nor was any suggestion made to him that he is falsely deposing regarding letter of Deputy Director or that no inquiry was conducted on the directions of the Hon'ble Supreme Court or that no responsibility was fixed with regard to loss of wheat.

19. There is another aspect of the case also which needs consideration. The allegation against the appellant is that he misappropriated 422 metric tons of wheat or 4221 bags of wheat. It is an undeniable fact that such a huge quantity of wheat cannot be moved by a single person from one place to another. Therefore, it is quite reasonable to presume that if such a huge quantity of what is embezzled then a number of persons would be involved in it. However, surprisingly not a single person other than the appellant has been shown as the accused.

20. The quality of investigation in this case leaves much to be desired. Nothing has been brought on record to show that in what manner the misappropriation was made. PW-Niaz Hussain Khajar, Inspector, FIA/IO, in his deposition stated that "He [appellant] dispatched the bags to the Wagon godown and other godown and the DFC official counted and found that 4221 bags and 32K.Gs were short weight." However, neither any document was produced by him to show as to how many bags were to be dispatched and how many were actually dispatched nor breakdown of the bags of wheat has been given as to how many bags were received at respective godowns like how many bags were sent to Wagon godown and how may to other godowns nor reference was made to the quarterly reports submitted by the appellant to his superiors to show any discrepancy between the number of bags shown in the reports and the number of bags available in the godown. On the contrary, in his cross-examination he admitted that S-2 report dated 30.9.2001 was not collected by him.

21. The effect of the above contradiction is that doubts have been created in the prosecution case. It is well settled principle of law that the prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt. In view of aforesaid defects and lacunas, it can safely be held that the prosecution has not succeeded in discharging such obligation on its part. Needless to emphasize the well settled principle of law that the accused is entitled to be extended benefit of doubt as a matter of right. An accused cannot be deprived of benefit of doubt merely because there is only one circumstance which creates doubt in the prosecution story. In the case reported as Tariq Pervaiz vs. The State 1995 SCMR 1345 the Honourable Supreme Court held as under :-

"The concept of benefit of doubt to an accused is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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. The upshot of the above discussion is that I am of the considered opinion that the impugned judgment suffers from contradictions and flaws and is not sustainable in the eye of law.
23. For the aforesaid reasons, by a short order passed on 11.2.2019, instant appeal was allowed and conviction and sentence including imposition of fine awarded to the appellant vide impugned judgment dated 17.05.2016 passed by Special Judge, Anti-Corruption (Provincial;) Larkana in Spl. Case No. 07 of 2010 (State v. Imtiaz Ali) was set aside and consequently the appellant Imtiaz Ali Unnar was acquitted of the charge. He was present on bail, his bail bonds stood cancelled and surety submitted by him was also discharged.
24. Above are the reasons for the said short order.

Let R&PS of Special Case No.07 of 2010 re-the State Vs Imtiaz Ali Unar being outcome of Crime No.06 of 2009, PS ACE Larkano under section 409 PPC, r/with section 05(2) Act-II of 1947 may be sent back to the trial court alongwith copy of judgment.

JUDGE
27/02/19