

ORDER-SHEET  
IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Crl. Appeal No. S- 13 of 2017.

Date of hearing	Order with signature of Judge
13.11.2017.	

For hearing of case.

Mr. Saeed Ahmed Bijrani, Advocate for appellant.

Mr. Sardar Ali Rizvi, D.P.G.

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Heard arguments.

Mr. Fazal Muhammad, District Food Controller, Kashmore @ Kandhkot present in person; states that appellant Muhammad Ayoub Bijarani was charged for misappropriation of 238 wheat bags and 1962 empty bags and during pendency of case before the trial Court the appellant had deposited Rs.7,62,167/- against 238 wheat bags and Rs.1,04,545/- as price of 1962 empty bags and he has also led such evidence before the trial Court, as is evident from his statement recorded in terms of Section 342 Cr.P.C and he himself examined on 06.8.2016 at Ex.11, this fact is available at page 73 of the paper book. The District Food Controller further states that no any other enquiry or complaint is on record against the appellant and he has also extended no objection, if the appellant is acquitted. Learned DPG also concedes his opinion.

In view of above and for reasons to be recorded later on, the instant appeal is allowed. The conviction and sentence awarded to appellant vide impugned judgment dated 26.01.2017 passed by learned Special Judge, Anti-corruption (Provincial) Larkana, in Special case No.32/2010, Re; State v. Muhammad Ayoub, arisen out of F.I.R No.18/2009 of A.C.E P.S Kandhkot, is hereby set-aside. The appellant stands acquitted of the charge; he is present on bail, his bail bond stands cancelled and surely discharged.

  
JUDGE

Ansari/\*

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IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA.

Criminal Appeal No.S-13 of 2017

Appellant : Muhammad Ayoob Bijarani, through Mr. Saeed Ahmed B. Bijarani, Advocate.

Respondent: The State through Mr. Sardar Ali Rizvi, DPG.

Date of Hearing : 13.11.2017.

Date of Judgment : 13.11.2017.

JUDGMENT.

MUHAMMAD SALEEM JESSAR, J.- The appellant faced trial in Special Case No.23 of 2010 re-State v. Muhammad Ayoub Bijarani (Crime No.18/2009 of Police Station ACE, Kandhkot, u/s 409, PPC read with Section 5(2) Act-II of 1947) and at the conclusion of trial; after having been found guilty, was convicted and sentenced to R.I. for 04 years with a fine of Rs.100,000/-, in default whereof RI for six months more, however, benefit of section 382-B, Cr.P.C. was extended to him vide judgment dated 26<sup>th</sup> January, 2017 of learned Special Judge, Anti-Corruption (Provincial), Larkana.

2. The allegation against the appellant as per FIR is that on 24.7.2009 Inspector Israr Ahmed Brohi, Circle Officer ACE, Kandhkot lodged FIR on behalf of State, stating therein that this case has been registered with the approval of ACC-II, Kashmore at Kandhkot in meeting held on 23.6.2009 received vide letter dated 13.7.2009 from Deputy Director, ACE, Sukkur in the result of enquiry into complaint No.25/2008 of ACE, Kandhkot, alleging that District Food Controller Jacobabad reported vide his office letter No.882, dated 27.6.2007 that Muhammad Ayoub Bijarani, Food Supervisor, was posted as Incharge Wheat Procurement Centre (WPC) Karampur during wheat procurement

campaign 2006-2007 during his posting at Karampur Centre he has committed misappropriation of 1962 empty Government Bardana worth Rs.104,142/- and caused loss to the Government, hence this FIR.

3. After collection of evidence during investigation, the I.O. submitted challan.

4. On indictment, the appellant did not plead guilty to the charge and claimed trial.

5. At the trial, the prosecution examined three witnesses, namely, PWs Ghulam Mustafa, Israr Ahmed, Nasrullah, Agha Rafique Ahmed. On close of prosecution side, the appellant was examined under section 342, Cr.P.C, wherein he denied the charge, professed innocence and alleged to have been implicated falsely. He declined to produce any defence witness, however, examined himself on oath in terms of section 340(2), Cr.P.C and adduced documentary evidence. The trial ended in conviction and sentence of the appellant, as stated hereinabove, which has been impugned by filing instant appeal.

6. Learned counsel for appellant contended that the prosecution failed to bring home the charge against the appellant through cogent and reliable evidence; that the witnesses examined by prosecution were inconsistent with each other rather contradicted on material aspects, benefit whereof must go to the appellant; that the findings of the learned trial Court are not supported from the record; that the witnesses produced by prosecution at trial were interested and were pressurized, thus, they deposed against the appellant favouring the prosecution, hence their testimony was wrongly relied upon by learned trial Court; that the charge against the appellant has not been established through evidence but the learned trial court wrongly and illegally convicted and sentenced the appellant for no valid reason, thus, the

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impugned judgment needs interference. Lastly, learned Counsel contended that it is an admitted position on record that the alleged misappropriated amount was deposited by the appellant/accused and copy of such challan paid by the appellant was also placed by him on record with his statement u/s 340(2), Cr.P.C, whereby the loss, if any, caused to the exchequer stood repaid.

7. Conversely, the learned DPG appearing for the State supported the impugned judgment contended that the appellant has rightly been convicted by the learned trial Court on the basis of evidence of prosecution witnesses examined during trial.

8. The allegation against the appellant is that he was serving as Food Supervisor in Food Department and during his posting as Incharge Wheat Procurement Centre (WPC) Karampur, he allegedly misappropriated 1962 empty bags (Bardana) worth Rs.104,142/- and caused loss to the Government. In this regard, the explanation offered by the appellant was that Bardana was issued by him to the growers on the instructions of his high-ups, later on the wheat prices had increased and the Bardana remained with the growers, which was wrongly shown by the department outstanding against him. It is also an admitted position on record after deposit of the alleged embezzled amount by the appellant, he was reinstated in service. The prosecution evidence brought on record does not reflect that the alleged embezzled amount Rs.104,142/- was actually recovered by the appellant and it was lying with him, therefore, it cannot be said with certainty that such amount was misappropriated by the appellant himself. No direct evidence has come on record during trial that the alleged amount of Rs.104,142/- was misappropriated by the appellant. The evidence of Investigation Officer also does not reflect as to whether the alleged amount was misappropriated by the accused or the same was outstanding against the growers. From the evidence on

record, the appellant/ accused at the most could be saddled with the responsibility of dereliction in performance of his official duties and the charge of misappropriation of the said amount could not be held to be established against him. It is also a matter of record that the alleged misappropriated amount was deposited by the appellant. It may be observed here that mere repayment and/deposit of the alleged misappropriated amount by the accused does not establish the charge of misappropriation of government amount against the appellant/accused. As discussed above, no direct evidence has come on record to show that the amount of Rs.104,142/- was in fact misappropriated by the appellant.

9. In addition to above, it may be observed that to constitute an offence under Section 409, PPC there must not only be entrustment but dishonest misappropriation or conversion to one's own use or dishonest disposal of property by the offender are the essential ingredients to constitute an offence under Section 409, PPC. As is obvious from the scrutiny of evidence, such ingredients are absolutely lacking in the present case. Reliance can be placed on the case of *Muhammad Iqbal Chattha v. The State* (1988 MLD 354), wherein Bench of Lahore High Court held as under:-

*"It was held in Shakir Hussain v. The State P L D 1956 SC (Pak) 417, that to establish a charge of criminal breach of trust the prosecution was not to prove only entrustment or dominion over property but also that the accused either dishonestly misappropriated, converted, used or disposed of that property himself or that he willfully suffered some other person to do so. The irregularity committed by the appellant in issuing the bank guarantee without securing hundred per cent margin amount could not have made him criminally liable unless it had been proved that he knew that the amount of the Bank guarantee was to be misappropriated."*

10. In his statement u/s 340(2), Cr.P.C the appellant has adduced entire documentary evidence, which the trial Court has not considered. He also deposed that he had issued Bardana to growers at

the instance of his superiors. He adduced copies of challan/deposit slips showing that the loss allegedly caused to Government had stood repaid. There remains only misappropriation which the prosecution has failed to prove as no tangible material has been brought on record for constituting an offence u/s 409, PPC. It is manifest from record that not a single bag (Bardana) was secured from his possession nor any grower/person/shopkeeper was associated in investigation, to whom the Bardana was allegedly given presuming to have been misappropriated. No evidence has been brought on record to show that the appellant had converted it for his personal/own use. Therefore, basic ingredients for misappropriation of the goods/consignment/ Bardana etc is lacking in this case. The trial Court has not kept the defence version in juxtaposition, therefore, has caused miscarriage of justice.

11. After a combined study of the material available on record and in view of the reported case of *Muhammad Iqbal Chattha* (supra), I have come to an irresistible conclusion that the impugned judgment of learned trial Court does not appear to be in accordance with law and is not inspiring confidence, thus is liable to be set aside. I am, therefore, persuaded to allow instant appeal, consequently same is hereby allowed. The impugned judgment dated 26.01.2017 is set aside. Appellant is acquitted of the charge. He is present on bail, his bail bonds are cancelled and surety discharged.

12. Above are the detailed reasons of short order dated 13.11.2017.

JUDGE  
Amal Ali Aulay