

(59)

ORDER SHEET  
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA  
Crl. Appeal No.S-14 of 2017.

DATE OF HEARING	ORDER WITH SIGNATURE OF HON'BLE JUDGE
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**For Hearing of case.**

**04.03.2019.**

Mr. Saeed Ahmed B. Bijarani, advocate for the appellant along with appellant (on bail).

Mr. Muhammad Noonari, D.P.G. along with Fazul Muhammad Bangwar, District Food Controller, Kashmore @ Kandhkot bearing CNIC No.45205-6554441-1.

Fazul Muhammad Bangwar, District Food Controller, bearing CNIC No.45205-6554441-1 is present and files list of challan paid by appellant Muhammad Ayoob Bijarani in favour of Food Department. Per the list, total amount of Rs.28,44,439/- has been deposited by the appellant. Besides he has also filed **No Dues Certificate** and copies of the challan dated 01.04.2015 & 31.03.2016, same are taken on record. He submits that there is no outstanding against the appellant and, therefore, he has no objection, if the instant appeal filed by the appellant Muhammad Ayoob is allowed and he may be acquitted of the charges.

Mr. Muhammad Noonari, learned D.P.G in view of the statement of Fazul Muhammad Bangwar, District Food Controller, Kashmore @ Kandhkot has also extended no objection for the grant of appeal.

Heard arguments. For the detailed reasons to be recorded later on, instant appeal is allowed and the impugned judgment dated 26.01.2017 handed down by the learned Special Judge, Anti-Corruption (Provincial) Larkana in Special Case No.31 of 2010 (Re: State v. Muhammad Ayoob) being outcome of Crime No.17/2009 under section 409, PPC R/w Section 5(2) Act-II of 1947 is hereby set aside. Consequently, appellant is acquitted of all the charges. He is present on bail, his bail bonds are cancelled and surety is hereby discharged.

~~Judge~~

## IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANO

Cr. Appeal No. S-14 of 2017.

Appellant : Mohammad Ayoub Bijarani,  
through Mr. Saeed Ahmed Bijarani, Advocate.

Respondent : The State, through Mr. Mohammad Noonari, DPG,  
along with Fazul Mohammad Bhangwar, District  
Food Controller, Kashmore at Kandhkot, bearing  
CNIC No.45205-6554441-1.

Date of hearing : 04.03.2019.  
Date of Decision : 04.03.2019.

J U D G M E N T

Muhammad Saleem Jessar, J.- The appellant faced trial in Special Case No.31 of 2010 re-State v. Muhammad Ayoub Bijarani (Crime No.17/2009 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 to suffer 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 110 bags of Government wheat worth Rs.146198/- and shortage 48.055 M.Tons Wheat Rs.12.76 per K.G inclusive penalty Rs.6,13,181-80 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, PW-1 Ghulam Mustafa at Ex.5; PW-2 Israr Ahmed at Ex.6, who produced report of DFC, permission letter, FIR, permission of challan and mashirnama at Ex.6-A to 6-E; and PW-3 Nasrullah at Ex.7, who produced report at Ex.7-A. On close of prosecution side, the appellant was examined under section 342, Cr.P.C at Ex.10, 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 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 copies of such challans paid by the appellant along with No Dues Certificate issued by District Food Controller, Kashmore at Kandhkot have been placed by him on record, whereby the loss, if any, caused to the exchequer stood repaid.



7. Conversely, the learned DPG appearing for the State, assisted by District Food Controller have extended no objection if the appeal filed by the appellant is allowed, on the ground that the alleged embezzled amount has been deposited by the appellant.

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 110 bags of Government Wheat worth Rs.146,198/- and shortage of 48.055 M.Tons wheat Rs.12.76 per KG inclusive penalty Rs.6,13,181-80 and caused loss to the Government. In this regard, the explanation offered by the appellant was that during his incumbency as Incharge Wheat Procurement Centre, Karampur in the year 2006-2007 he procured wheat from growers and kept it in a private godown hired by the department. According to him, the stock was lying 5/6 months there and then was dispatched, hence the wheat lost its wheat; he had intimated to his higher officers for shifting the stock but no response was given; the wheat was dispatched in the month of August. 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 shortage was actually caused by the appellant. No direct evidence has come on record during trial that the alleged shortage was due to negligence of the appellant, particularly when the appellant in his statement u/s 340(2), Cr.P.C specifically stated that the stock was lying 5/6 months in the private godown hired by the department and that he had sent intimation to his high-ups, but no response was given. The evidence of Investigation Officer also does not reflect as to whether the alleged shortage was on the part of appellant/accused alone. 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 or causing shortage by himself alone 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 alleged shortage/loss was in fact caused by the appellant alone.

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 deposed that after procuring the wheat from the growers he had kept the same in a private godown hired by the department and despite his intimation to the high-ups the same was dispatched after delay of 5/6 months. He adduced copies of challan/deposit slips and No Dues Certificate 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 of wheat was secured from his possession nor any grower/person/shopkeeper was associated in investigation, to whom the wheat 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/wheat 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.

12. For the foregoing reasons, instant appeal was allowed by me through short order dated 04.03.2019, whereby the impugned judgment dated 26.01.2017 was set aside and the appellant was acquitted of all the charges.

13. Above are the detailed reasons of short order dated 04.03.2019.

JUDGE