

Judgment sheet.
**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.**

Cr. Appeal No.S-138 of 2003.

DATE	ORDER WITH SIGNATURE OF JUDGE
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Date of hearing: 26 .09.2017.

Date of decision: 26.09.2017

Appellant: Through Mir Shakir Ali Talpur, Advocate.

The State Through Syed Meeral Shah DPG .

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J U D G M E N T :-

ABDUL MAALIK GADDI, J- Through instant appeal, the appellant has challenged the judgment dated 16.08.2003 passed by learned Special Judge, Anti-Corruption (P), Hyderabad in Special Case No.40 of 1995 of P.S. ACE Sanghar, Re: State vs. Inayatullah, whereby the learned trial court after full-dressed trial convicted and sentenced the appellant in Para-08 of the impugned judgment which reads as under:-

“08. In view of the aforementioned analysis of evidence no second opinion could be entertained but that the prosecution was able to prove successfully the charge to the accused beyond shadow of doubt. I find genuine ring of truth in the statement of PW Badaruddin and place implicit faith on his version as the same appears to be worthy of credit in all respects. He had no reasons to put false finger upon the accused who was none-else but his subordinate. Thus it stands established that the accused while being public servant was entrusted empty bags for supply to the growers but he committed criminal breach of trust by misappropriating four thousand seven hundred seventy three bags worth rupees ninety two thousand eight hundred

thirty four eighty five paisa and thereby gave wrongful loss to the Government and pecuniary gain to himself. As such, accused Inayatullah Memon is found guilty for an offence punishable under Section 409 of the Pakistan Penal Code read with section 5(2) of the Prevention of Corruption Act-II of 1947 and is accordingly convicted and sentenced to suffer Rigorous Imprisonment for two years and fine of rupees one lac. In case of default of payment of fine he shall undergo Rigorous Imprisonment for six months more. He is allowed to avail benefit of section 382-B of the Criminal Procedure Code. Accused is present on bail and is remanded to Central Prison Hyderabad to serve out the sentence awarded to him.”

2. The allegation against the accused named above has been that he while being posted as Incharge Wheat Procurment Centre Dodo Bhambro and Rawatyani during the year 1988-89 by abuse of his official position as public servant received fifty one thousand empty bags for supply to the Growers and out of which he misappropriated four thousand seven hundred seventy three bags worth rupees Ninety two thousand eight hundred thirty four and eighty five paisa and thereby gave wrongful loss to the government and pecuniary gain to himself. The instant case was registered against him on the basis of report made by District Food Controllers Sanghar. And on conclusion of investigation after observing the legal formalities the charge sheet against the accused was presented before this Court by the Circle Officer Anticorruption Establishment Sanghar.

3. The charge was framed against the accused under Section 409 of the Pakistan Penal Code read with section 5(2) of Prevention of Corruption Act-II of 1947, to which he pleaded not guilty.

4. At trial, prosecution examined the following witnesses.

- 1) Ghulam Muhammad Retired Deputy Food Controller at Exh.09.
- 2) Badaruddin Assistant Director Food at Exh.10.
- 3) Muhammad Rafique Retired Inspector ACE at Exh.12.
- 4) Zameer Baig Sub-inspector at Exh.14.

5. Statement of accused was recorded under section 342, Cr.P.C, wherein he denied the allegations leveled against him and claimed himself innocent.

6. After hearing the parties' counsel, learned trial court came to the conclusion that the case has been proved against the appellant/accused; he convicted and sentenced him as stated above.

7. The main contention of the learned counsel for the appellant is that the impugned judgment of conviction and sentence is perfunctory, opposed to law and facts on record; that the witnesses so examined are official one; that the learned trial court did not consider the documentary evidence which was brought on record and that prosecution suppressed the real facts and failed to produce

the real documents and those documents were on the contrary shown to the PWs and were produced in evidence while cross-examining the witnesses; that the learned trial court did not consider the lacunas in the case of prosecution and passed 'botch-up judgment', whereby innocent appellant/accused is suffering woe, therefore he prayed for his acquittal.

8. Conversely, learned D.P.G argued that the contradictions in the evidence of prosecution witnesses are minor in nature and the accused is specifically nominated in the commission of heinous offence which is against society, therefore he is not liable to any grace or relief in his favour.

9. I have carefully considered the arguments as advanced by the learned counsel for the parties and carefully scanned the material so available before me.

10. Read-through the contents of FIR as well anticipation the whole situation of the case from cranium to tail it aromas that the learned trial court while passing the impugned judgment did not consider the same. Whereas, the perusal of evidence so examined by the prosecution namely Ghulam Muhammad Retired Deputy Food Controller, Badaruddin Assistant Director Food, Muhammad Rafique Retired Inspect ACE and Zameer Baig Sub-Inspector, inevitably the animation fact is apparent, however it is not

necessary to reiterate the whole evidence of above said prosecution witnesses, but even though for the sake of convenience the lacunas so left by these witnesses in their cross-examination to which the relevant inconsistencies are reproduced hereunder, as such, strangely did not consider while passing the impugned judgment by the learned trial court.

CROSS EXAMINATIONS.

(1) PW Ghulam Muhammad (Retired Deputy Food Controller at Exh.9.

I don't know the name of the author of the mashirnama. This mashirnama was written on 28.7.1992. Mashirnama was readover to me. I am shown mashirnama it is dated 28.7.1992. It is incorrect to suggest that the mashirnama is dated 28.5.1992. It is incorrect to suggest that the mashirnama was not read over to me. It is incorrect to suggest that the name of the Centre is not mentioned in the mashirnama.

(2) PW Badarudding Assistant Director Food at Exh.10.

As per record of my office and order No.63 and 633 dated 12.4.1989 the positing of the accused who is present in this Court was at the Centres which I had already quoted. I do not know about the posting of Ghulam Mohammad s/o Ali Mohammad. It is a fact that in the notice issued to the accused he was required by this notice to recover the bardana valued out standing against his Centres. It is a fact that in the notice it has been mentioned that the bardana as to the extent of 5773 were out standing against the Centres and against the above named accused at Dodo Bhambro and Rahoojani. It is a fact that Incharge of the Centre has shown these bardanas out standing against the growers. I am shown order of posting of the accused it stands issued by my predecessor under the orders of my Deputy Director Food. In the order the posting of the accused is shown that Chak No.23 Dodo Bhambro

Centre. I do not know whether Mohammad Bux Mallah was posted at these Centres. It is a fact that the payments are made through banks to the wheat suppliers. I do not know whether the M.B.Branch and Habib Bank Branchs were responsible for making payment to the wheat suppliers. I cannot say whether the M.Commercial had supplied to make the payment because the copy is not original. I am shown Photostat copy of bank letter/certificate but I cannot reply properly because it is not original. I am shown original certificate from the Bank for the payment towards the suppliers of the wheat. I produce the certificate in three leaves as Exh.10/D. Voluntarily says that these certificate are issued by the bank and it can be certified and confirmed by the bank official concerned. I am shown original charge fard and according to this the accused had taken over from Mohammad Bux Malah. . It is a fact that I only on the basis of the report/list of outstanding bardanas registered the case and I have not verified the record. It is a fact that at the entre the Register of bardana is maintained. It is a fact that the Register containing the particulars showing the name of the growers to whom the bardana are supply alongwith the signature of the growers.

(3) PW Muhammad Rafique Retired Inspector ACE at Exh.12.

The wheat procurement centre Dodo Bhambro and Rotiani were not visited during this crime and the investigation was carried out in respect of both these centres. Both the centres were neither visited by me nor any record from both the centres was secured by me during investigation.

(4) Zameer Baig Sub-Inspector at Exh.14.

Note:- this witness appears to be formal one, hence he was not cross examined by the defence counsel.

11. Also, besides that, the evidence of PW Ghulam Muhammad (Retired DFC) has drawn attention of this Court towards his examination-in-chief wherein he admitted that the bales has been

received as per this page (delivery book for bardana) by Mohammad Bux Mallah which creates doubt that the said bardanas were not received by the appellant. Likewise, PW-2 Badaruddin in his examination-in-chief described another centre i.e. Rahojani, but in charge sheet which is foundation of the case showing another centre Rawtiani, such facts creates doubt and also cuts at the root of prosecution and makes the whole episode doubtful as the prosecution evidence is materially discrepant. Notwithstanding, no effort for recovery was made at the time of investigation regarding the misappropriation of the alleged bags from the accused, as such only the interested testimony of officials was not enough to record conviction.

12. Looking to the above the evidence so brought on record is contradictory on material particulars therefore, I have no hesitation to hold that the prosecution has failed to prove its case against the appellant and the learned trial court did not appreciate the evidence properly. It is settled position of law that if there is slight apprehension regarding prosecution case being untrue, its benefit extends to the accused. Reliance is placed in the case of **Tariq Perves v. The State** reported as **1995 SCMR 1345**, wherein it has been held that if a single circumstance creates reasonable doubt in the prudent mind about the guilt of the accused then he will be entitled to such benefit not as a

matter of grace, but as a matter of right. Similar view has also been taken in the case of **Muhammad Akram v. The State** reported as **2009 SCMR 230**.

13. In addition to the above position, I have also quest the defective Charge so framed by the learned trial court as well as the statement of accused under section 342 Cr.P.C which shows that this charge is missing in respect of *specific date and time of the incident*, however it is strange to note that the date viz. 1988-89 is mentioned in the said charge regarding showing the incident, hence in this respect I relied upon the case law reported in SBLR 2017 Sindh 1379 which for the sake of convenience is reproduced hereunder:-

C) Criminal Procedure Code (V of 1898)---Section 221 to 240---Chapter XIX---Charge---Charge being foundation of trial is precise-formulation of specific accusation made against a person who is entitled to know its nature at the earlier stage, which he is required to defend---Chapter XIX of the Cr.P.C, contains provisions with regard to the charge in criminal cases---Section 221 to 240 specify different provisions regarding charge. The subject of charge in criminal cases is of utmost importance as the entire edifice of a criminal case is built upon the framing of a correct charge.

14. Similarly, it is settled principal of law that at the time of recording statement under section 342 Cr.P.C of accused the specific question be put forth him regarding the whole episode of the commission of offence, but the same was not exercised by the

trial court and also the *specific date and time of the incident* is missing, therefore the major lacuna has also been left in it which cuts the root of whole proceedings before the trial court and creates dent into it.

15. For my above stated reasons, I have no hesitation to hold that the prosecution has failed to prove its case against the appellant and the learned trial court did not appreciate the evidence and record properly, resultantly appeal is allowed. The impugned judgment is set-aside and the appellant is acquitted from the charge. He is present on bail, his bail bond stands cancelled and surety discharged.

JUDGE.