

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, KARACHI.

Present:

Mr. Justice Muhammad Iqbal Kalhoro, J.
Mr. Justice Shamsuddin Abbasi, J.

Cr. Accountability Appeal No.06 of 2019
C.P.No.D-718 of 2019

Appellant: Faisal through M/s. Khawaja Naveed Ahmed, Advocate.
Respondent: The State through M/s Khalid Mehmood Awan & R.D. Kalhoro
Special Prosecutors, NAB

Cr. Accountability Appeal No.16 of 2019
C.P.No.D-4586 of 2019

Appellant: Muhammad Rafi through Mr. Abdul Sadiq Tanoli, Advocate.
Respondent: The State through M/s Khalid Mehmood Awan & R.D. Kalhoro
Special Prosecutors, NAB .

Amicus curiae Aamir Raza Naqvi, Advocate.

Date of hearing 03.07.2019, 10.07.2019, 17.07.2019 & 19.07.2019

Date of Decision:- 19.07.2019

J U D G M E N T

MUHAMMAD IQBAL KALHORO J: Appellants have filed captioned appeals against the impugned judgment dated 23.01.2019 passed in Reference No.07/2017, re the State Vs. Muhammad Rafi and others, by the learned Accountability Court-III, Sindh, Karachi, whereby, they have been convicted and sentenced to suffer R.I. for five (05) years for having committed an offence u/s 10 of National Accountability Ordinance, 1999 (NAO, 1999) r/w Sr. 5 & 11 of the schedule of the offences appended with NAO, 1999. In addition, they have been disqualified to hold a public office, seek election, appointment or nomination as a member or a representative of any public party or any statutory or local authority, or in service of Pakistan, or of any province or availing any financial facilities in the form of any loan or advances from any bank or financial institution in the public sector for a period of ten (10) years with effect from the date of release after serving sentence.

2. As per brief facts, an FIR bearing Crime No.01/2009, U/s 419, 420, 468, 471, 109, 34 PPC r/w Section 5(2) Prevention of Corruption Act, 1947 was registered at Police Station ACE, Karachi on a written complaint of Deputy Secretary (RS&EP), Board of Revenue, Sindh dated 28.09.2007 alleging transfer of Government Land/Plot measuring 427 sq. yds situated in Artillery Maidan Karachi in favour of an unauthorized person. An inquiry into the allegation conducted by Sub-Inspector, Ch. Hameedullah, ACE, Karachi

revealed that the plot in question is property of Ministry of Finance, Government of Pakistan but accused including the appellants, one Sarfraz Ahmed Narejo and Muhammad Ashraf in collusion with each other managed fake and fabricated documents with intention to usurp the said plot. It was discovered that appellant Muhammad Rafi had prepared the documents and showed his grandfather namely Ahmed Ali s/o Hussain Bux (Late) as owner of the said plot. Thereafter, he had sold out a portion thereof admeasuring 253 sq. yards to appellant Muhammad Faisal vide a General Power of Attorney dated 27.01.2005 through accused Muhammad Ashraf Kaka (a Broker). The Special Power of Attorney was registered by (Late) Sarfraz Ahmed Narejo, the then Sub-Registrar, Saddar Town, Karachi without confirming the status of the plot from the relevant departments with mala fide intention. During inquiry, the said documents were referred to the relevant authorities i.e. DDO Revenue, Saddar Town, Karachi and DDO (Record LM-II) CDGK for verification, who reported the same to be fake and not issued by them.

3. On the basis of such facts, the case against the appellants was initially tried by the learned Special Judge, Anti-Corruption (Provincial), Karachi being Special Case No.06/2009. In the trial, prosecution examined six (06) PWs, who have produced all the relevant documents in their evidence. Thereafter, the statements of accused were recorded U/s 342 Cr. P.C. in which they have denied the allegations. Finally, learned Special Judge announced the judgment on 22.12.2016 whereby she has held that the subject plot is federal property belonging to Ministry of Finance, Government of Pakistan as such only the Accountability Court has the jurisdiction to entertain the matter. And in view thereof, she referred the matter to the learned Accountability Court u/s 16A of NAO, 1999. Resultantly, the case came on the file of learned Accountability Court-III, Sindh, Karachi as Reference No.07/2017, which proceeded with the matter and announced the impugned judgment convicting and sentencing the appellants in the terms as stated above and acquitting co-accused Muhammad Ashraf on the basis of benefit of doubt.

4. Learned defense counsel at the very outset of their arguments stated that transfer of the case from Special Court Anti-Corruption to Accountability Court was illegal, void *ab initio* as the Special Court had no powers to refer the case on its own to the Accountability Court; that the Special Court passed such order without affording an opportunity of hearing to the appellants; that the learned Accountability Court did not frame charge against the appellants under NAO, 1999 but has convicted them under the said law, which has resulted into miscarriage of justice; that cognizance of the offences against the appellants by the Accountability Court was in violation of Sections 16A and 18 of NAO, 1999; that learned Accountability Court has no jurisdiction to take cognizance of any

offence except on a reference made by the Chairman NAB or an officer of the NAB duly authorized by him; that in the present case no such reference was filed by the Chairman NAB against the appellants; that procedure adopted by both the Courts below is contrary to law and has seriously prejudiced right of the appellants to a fair trial guaranteed under Article 10A of the Constitution.

5. M/s Khalid Mehmood Awan & R.D Kalhoro, Special Prosecutors, NAB and learned Deputy Attorney General conceded to the legal points raised by the defense counsel in their arguments and in fact recorded no objection to remand of the case. Learned amicus curiae referred to the case law reported in PLD 1957 SC 157, PLD 2001 SC 601 and 2012 SCMR 669 in his arguments and submitted that transfer of the present case to the Accountability Court and its assuming jurisdiction in the stated manner are not warranted in law and cannot be upheld. He further submitted that this court under the jurisdiction conferred by sections 435 and 439 Cr.P.C can look into the judgment of Special Judge Anti-Corruption and pass appropriate orders to rectify the wrong.

6. We have considered submissions of the parties and perused the material available on record. During the hearing of these appeals, we called the relevant record from the office and have come to know that initially R&Ps of the case were sent to the Registrar, Accountability Courts Sindh, Karachi by learned Special Judge Anti-Corruption in terms of her judgment dated 22.12.2016 but the Registrar returned the same vide a letter dated 16.01.2017 to the Special Court requesting to send it through High Court of Sindh in terms of section 526 Cr. P.C. This led the Special Judge to file a reference dated 20.1.2017 before this court for sending the case to the court having jurisdiction. It was taken up on administrative side and on an office note, the Honorable Chief Justice was pleased to transfer the case on 26.1.2017 to the learned Administrative Judge Accountability Courts, Sindh, Karachi for disposal according to law. Resultantly the case was admitted as a reference under NAO, 1999 and has been disposed of through the impugned judgment.

7. A reading of provisions of NAO, 1999, which is a special law, would reveal that legislature has intended a special dispensation for carrying out investigation and trial under the said Ordinance. For instance, in section 25 and 25A of NAO, 1999 has been provided provision for voluntary return, plea bargain and payment of loan by the defaulter and section 26 empowers the Chairman NAB to grant full or conditional pardon to an accused in the circumstances enumerated therein. There are no analogous provisions in the general law to draw parallel from and it is now a well-recognized principal of interoperation of statutes that provisions of special law shall exclude operation of general law to the extent of the context in which former has been enacted. **(2012 SCMR 669)**. While keeping in view the above, the points which come up

in our mind for consideration here are that whether Special Court Anti-Corruption while passing a final judgment in a case pending before it can refer the matter to the Accountability Court under section 16A NAO, 1999 and whether it can be done without affording an opportunity of hearing to the parties. And whether on a reference by a Special Court Anti-Corruption for transfer of a pending case on the point of jurisdiction u/s 526 Cr.P.C, the case can be transferred administratively by the Honorable Chief Justice to the Accountability Court for trial and that too without hearing the relevant parties. Sections 16 and 18 of NAO, 1999 appear to hold the key to a reply in this regard. Section 16 provides for trial of offences under the said Ordinance and defines that Accountability Court shall sit at such place or places to be specified by the Federal Government in this behalf. Further, where more courts than one have been established at a place, the Chief Justice of the High Court of the relevant province shall designate a judge of any such courts to be administrative judge in whose court the case triable by the Ordinance shall be filed, which either he may try, or assign it for trial to any other court established at that place at any time prior to framing of the charge.

8. It is obvious that the Accountability Court would assume jurisdiction to try a case under the NAO, 1999, when the reference is filed before it. There appears no other form in the said provision of law or in the entire Ordinance whereby a case can be brought on the file of the Accountability Court for trial. This disposition also stands fortified by section 18 of NAO, 1999, which in clear terms provides for that Accountability Court shall not take cognizance of any offence under the Ordinance except on a reference made by the Chairman NAB or an officer of the NAB duly authorized by him. This provision of law is couched in the negative language which unless the context would otherwise require shall be considered as mandatory in nature and not directory. Meaning thereby that prosecution in the Accountability Court shall be started only on a reference filed by the Chairman NAB therein and not otherwise. Because it is a settled law that when a mandatory condition for the court to exercise the jurisdiction is not satisfied, the entire proceedings that ensue shall become *coram non judice*. However, the only exception to above enabling the Accountability Court to assume jurisdiction otherwise has been provided under section 16A NAO, 1999 whereby the Chairman NAB can apply to any Court or Tribunal for transfer of any case pending before it to the Accountability Court on the ground that it involves an offence which is triable under the Ordinance. It is to be noted that on such transfer, which cannot be refused by such Court or Tribunal in the said context, the case would be deemed to be a reference under section 18 of NAO, 1999, and hence the Accountability Court will have jurisdiction to hold trial therein. It may be added that in such event, where the case is transferred to the

Accountability Court, it shall not be necessary for it to recall any witness or again to record any evidence that may have been recorded.

9. The above discussed provisions of NAO, 1999 do not leave any ambiguity in defining the powers and procedure whereby the Accountability Court would take cognizance of offences and assume jurisdiction to hold trial. Those being mandatory have to be strictly followed. Any other mode to bring the case on the file of the Accountability Court would be contrary to law and make the entire proceedings that follow as *coram non iudice*. In the present case, learned Special Court while passing the judgment in a case being tried by it came to a conclusion, and which it may be noted is without making any distinction or referring to any provision of law in this regard, that it had no jurisdiction in the matter, and referred the case to the Accountability Court u/s 16A of NAO, 1999 without realizing that under the said provision of law it had no jurisdiction to pass such an order. And when finally the matter was taken up in this Court on administrative side on a reference of the Special Judge, acting mainly on her finding that she recorded even without notifying the parties in this respect, the case was consigned to the Accountability Court. Transfer of a case from any other Court to the Accountability Court and its assumption of jurisdiction thereby in such a manner are not provided under NAO, 1999, therefore in our view in law such transfer would not be held valid. It is also worth noting that while making a decision on such an issue of fundamental nature, the accused were required to be heard, but no such effort was made at any level. The accused were facing a trial in the offenses less stringent in punishment and then suddenly without being extended an opportunity of hearing they were made to face trial under NAO, 1999, which carry harsher punishments. Such an approach was not only against natural norms of justice but resulted in abridgment of the right of the accused to a fair trial guaranteed under Article 10A of the Constitution.

10. Besides, in our view, the transfer of the case in the above manner has translated in curtailment of powers of the Chairman NAB or an officer of NAB acting on his behalf provided under section 18 of NAO, 1999, which stipulate a preliminary scrutiny of the received material/complaint, etc. by him and forming an opinion to initiate proceedings and referring the matter against the accused for an inquiry or investigation. And in the course of which exercising all the powers of an officer-in-charge of a police station; seeking assistance of an agency, police officer or any other official, etc.; and finally his (the Chairman NAB) powers to take a decision on the basis of appraisal of the material collected during the inquiry/investigation as to whether there is sufficient evidence justifying filing of reference, and if so, referring the matter to a Court for a trial. These powers to be exercised in an apparent circumference of stipulated procedure seem to have been vested with the office of the Chairman

NAB to achieve mainly two objects i.e. (i) to nip in the bud frivolous complaints, etc. and (ii) to ensure collection of best evidence to stand trial. Both these objects which are dependent on the exercise of such powers by the Chairman NAB would not be achieved, if the Accountability Court is allowed to assume jurisdiction of the cases on transfer from any other Court of law or Tribunal in the manner other than provided under the provisions of NAO, 1999.

11. Therefore, we are of the view that taking cognizance of the offenses and assuming jurisdiction in the present case by the learned Accountability Court was illegal and proceedings that followed were *coram non jndice*. Resultantly, we set aside the impugned judgment and remit the matter back to the Accountability Court for returning the R&Ps of the case to learned Special Court Anti-Corruption (Provincial), Karachi. Having inferred already that the Special Court had no jurisdiction to refer the matter to the Accountability Court u/s 16A of NAO, 1999 and/or to maintain a reference therefore in this regard before this court, we proceed to exercise revisional jurisdiction to direct the Special Court that on receiving the R&Ps of the case shall start hearing the case without being influenced by its judgment dated 22.12.2016 as if it is not in the field and proceed to decide the question of its jurisdiction in the matter in accordance with law after hearing the parties and keeping in view the scheme of NAO, 1999 on the subject in addition to provisions of the Prevention of Corruption Act, 1947. Needless to add that since the appellants were on bail in the trial, they shall be allowed to remain so should the surety furnished by them is still intact. But if not they shall furnish a fresh surety of the same amount to the satisfaction of the trial court.

The appeals and constitution petitions along with pending applications stand disposed of in the above terms.

JUDGE

JUDGE

Rafiq P.A.