

**IN THE HIGH COURT OF SINDH, AT KARACHI**

**PRESENT:-**

**Mr. Justice Muhammad Iqbal Kalhoro**

**Mr. Justice Shamsuddin Abbasi**

**Criminal Accountability Appeal No.19 of 2019**

Appellant                Muhammad Sajjan Mallah son of Muhammad Hashim Mallah through Mr. Muhammad Ashraf Kazi, Advocate.

Respondent             The State through the Chairman NAB through Mr. R.D. Kalhoro, Special Prosecutor NAB.

**Const. Petition No.D-1130 of 2020**

Petitioner                Muhammad Sajjan Mallah son of Muhammad Hashim Mallah through Mr. Muhammad Ashraf Kazi, Advocate.

Respondent             The State through the Chairman NAB through Mr. R.D. Kalhoro, Special Prosecutor NAB.

Dates of hearings    10.12.2020 and 22.12.2020

Date of judgment     **29.01.2021**  
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**JUDGMENT**

**SHAMSUDDIN ABBASI, J:-** Through listed appeal, Muhammad Sajjan Mallah, appellant has challenged the vires of the judgment dated 30.03.2019, penned down by the learned Accountability Court No.III {Sindh}, at Karachi, in Reference No.47 of 2016, through which he was convicted under Section 10 of NAO, 1999 read with Serial No.4 and 5 of the Schedule appended thereto and sentenced to undergo rigorous imprisonment for seven {07} years and to pay a fine of Rs.48,550,098/- and in default of payment of fine he was ordered to undergo further two {02} years' rigorous imprisonment, forthwith cease to hold public office, if any, held by him, disqualified him for a period of ten {10} years to be reckoned from the date he is released after having served the sentence from being elected, chosen, appointed or nominated as a member of representative of any public body or any statutory or local authority or in service of Pakistan or of any Province and from seeking any financial facilities in the form of loans or advances from any bank or financial institution in the public

sector for a period of ten {10} years from the date of conviction. The benefit in terms of section 382-B, Cr.P.C. was, however, extended in favour of the appellant.

2. Facts relevant for the purpose of deciding the appeal are that National Accountability Bureau {NAB} filed a Reference against the appellant under Section 18{g} read with Section 24{b} of the National Accountability Ordinance, 1999 {Ordinance} before the learned Accountability Court-III, at Karachi {Accountability Court} for misusing his authority as acting Director of Schools, Karachi, for illegally regularizing 140 persons against teaching and non-teaching posts by managing fake medical fitness certificates, extending pecuniary advantage in the form of salaries and thereby causing a loss of Rs.48,550,998/- to the national exchequer. The learned Accountability Court, on taking cognizance of the matter, charged the appellant for the offence of corruption and corrupt practices under Section 9{a} punishable under Section 10 and Sr. No.2 of the Schedule of offences of NAO, 1999, who pleaded not guilty and claimed a trial. The prosecution, in support of its case, examined 12 witnesses, namely, **Dr. Mansoob Hussain Siddiqui** as PW.1 Ex.4. He categorically deposed that the salaries disbursed to the appointees were actually monetary loss caused to the National exchequer owing to illegal regularization orders issued by the appellant. **Muhammad Sadiq** as PW.2 Ex.5. He deposed that the complaint was lodged by him on the instructions of competent authority under the directions Sindh Service Tribunal and produced original complaint and judgment passed by SST. **Ahmed Nawaz Niazi** as PW.3 Ex.6. He was the head of enquiry committee constituted by the Director Schools and produced order for constitution of a committee, inquiry report with recommendation, original outward registers and deposed that as per findings of the enquiry committee the regularization orders were not tallied with outwards registers. **Shah Jahan** as PW.4 Ex.7 is the witness of seizure memo and affirmed his signature on it. **Zain-ul-Abdin** as PW.5 Ex.8 is also mashir of seizure memo and affirmed his signature on it. **Mirza Arshad Baig** as PW.6 Ex.9. He is one of the members of enquiry committee and affirmed his signature on enquiry report. **Muhammad Jamil Khan** as PW.7 Ex.10. He is one

of the members of the enquiry and affirmed his signature on enquiry report. **Noor Muhammad** as PW.8 Ex.11 has deposed that the regularization orders are fake. **Ghulam Hussain Abbasi** as PW.9 Ex.12 is Section Officer, Home Department, Government of Sindh. He is one of the mashirs of seizure memo of three fitness certificates and affirmed his signature on it. **Muhammad Azhar Ahmed** as PW.10 Ex.13. He has produced record relating to disbursement of salaries to the illegal appointees to the tune of Rs.48,550,098/-. **Usman Khalid** as PW.11 Ex.14. He is one of the mashirs of seizure memo relating to record of salaries paid to the illegal appointees. **Usama Younus** as PW.12 Ex.15 is the investigating officer. He has recorded the statements of witnesses, seized the relevant record and filed reference on the recommendations of the competent authority. Thereafter, the prosecution closed its side. The appellant was examined under Section 342, Cr.P.C. who denied all allegations imputed upon him by the prosecution, professed his innocence and stated his false implication owing to enmity, but opted not to examine himself on Oath and did not lead any evidence in his defence. Thus, the trial culminated in conviction and sentence of the appellant as stated in para-1 {supra}, hence necessitated the filing of listed appeal and petition, which are being disposed of through this single judgment.

3. It is contended on behalf of the appellant that the prosecution has not been able to bring on record original regularization orders and the learned trial Court has relied upon photostat copies of the same, which is inadmissible in view of Article 78 of Qanun-e-Shahadat Ordinance. Even the same have not been put to the appellant in his Section 342, Cr.P.C., hence no conviction can be based on material not put to appellant in his statement under Section 342, Cr.P.C. It is also submitted that case against the appellant lacked *mens rea* and in absence thereof no criminal liability could be penned down on him under Section 9{a} of NAO, 1999. Per learned counsel, such kind of offence cannot be committed without the active connivance of others, but here in this case only the appellant has been made victim of the circumstances and none else has been nominated as accused, which shows clear malafide on the part of the prosecution. The prosecution has failed

to bring home the charge against the appellant through cogent and reliable evidence. The witnesses produced by prosecution were interested and inimical to the appellant, thus, they deposed against the appellant favouring the prosecution, hence their testimony was wrongly relied upon by learned trial Court. They were inconsistent with each other rather contradicted on crucial points benefit whereof must go to the appellant. It is also submitted that the learned trial Court did not appreciate the evidence in line with the applicable law and surrounding circumstances and based its findings on misreading and non-reading of evidence and arrived at a wrong conclusion in convicting the appellant merely on assumptions and presumptions. Per learned counsel, all steps taken by the appellant were in accordance with law and he has not done any illegal act, which could saddle penal consequences on him. Finally, the learned counsel submitted that the appellant did not derive any personal financial gain from the acts for which he was charged, tried and convicted, thus the conclusion drawn merits reversal. In support of his submissions, the learned counsel for the appellant has placed reliance on the cases of *Syed Saeed Muhammad Shah and another v The State* {1993 SCMR 550}, *Baliram Tikaram Marathe and others v Emperor* {AIR (32) 1945 Nagpur 1}, *Dr. Waqar Hameed v The State and another* {2020 SCMR 321} and an unreported judgment passed by this Court on 17.09.2020 in Criminal Accountability Appeals 29, 30 and 31 of 2018.

4. Strongly opposing the contentions of the learned counsel for the appellant, the Special Prosecutor NAB contended that the appellant was lawfully proceeded against under the enabling provisions of the Ordinance, which were strictly in accordance with the settled principles of the criminal justice system of providing the appellant with complete opportunity to defend himself. It is next submitted that the appellant in his capacity as acting Director of Schools misused his authority by illegally regularizing the services of 140 persons against teaching and non-teaching posts and caused a colossal loss to the national exchequer. It is also submitted that the prosecution in support of its case produced oral as well as documentary evidence, which was rightly relied upon by learned trial Court. Per him, the witnesses were subjected to lengthy

and taxing cross-examination but nothing favourable to the appellant could come out from their mouth. Finally, submitted that the findings recorded by the learned trial Court in the impugned judgment are based on fair evaluation of evidence and documents brought on record, to which no exception could be taken. He, therefore, prayed for dismissal of appeal as being devoid of any merit.

5. We have given our anxious consideration to the submissions of learned counsel for the appellant and the learned Special Prosecutor NAB and gone through the entire material available on record with their able assistance.

6. To substantiate its case, the prosecution has examined twelve {12} witnesses in all. They were subjected to lengthy cross-examination but nothing favourable to the appellant could come out from their mouth. They were consistent on each and every aspect of the matter and did not contradict each other on material points. Nothing has been brought on record on behalf of the appellant that the prosecution witnesses had some grudge against him for his false implication in the commission of offence. We have noticed that in rebuttal to overwhelming prosecution evidence, the appellant has failed to produce any tangible material to rebut the trustworthy and confidence inspiring evidence of the prosecution witnesses. All the witnesses have supported the case of the prosecution and implicated the appellant in the commission of offence. As to the plea that original regularization orders, signed by the appellant, have not been produced in evidence, suffice it to say that the issue pertains to fake appointments and original record was not available with the Education and Literacy Department, therefore, witnesses belonging to the Education and Literacy Department were unable to produce original record, however, the employees in order to get released their salaries had filed appeals before Sindh Service Tribunal alongwith recruitment orders, which were photostat copies, and after obtaining orders approached the office of Accountant General {Sindh} and produced photostat copies of their regularization orders. PW.10 Muhammad Azhar Ahmed, who is Assistant Accounts Officer in the office of Accountant General {Sindh}, has produced record relating to salaries disbursed to

illegal appointees on the basis of regularization orders issued by the appellant, which are about 88 in numbers. The contention that photostat copies have no legal impact in view of Article 78 of Qanun-e-Shahadat Ordinance, 1984, is irrelevant because it is by now a well settled law that where original of any document is not available then its photostat copy can be produced and used as a secondary evidence to arrive at a just and fair decision in the matter. It is noteworthy that during trial appellant has neither denied his posting at the relevant point of time nor issuance of regularization orders so also his signatures on it. No request was made to the learned trial Court to challenge the genuineness of regularization orders and verification of his signatures through forensic expert. The said regularization orders neither tallied with outward register nor supported by any record from the office of Education and Literacy Department and the fitness certificate were also found fake. The record is also suggestive of the fact that a Committee was constituted, which also observed that entries of all 140 employees were not genuine in the outward register.

7. Insofar as the contention of the learned counsel for the appellant challenging the very jurisdiction of NAB to initiate proceedings against the appellant on the ground that there was no criminal intent / *mens rea* on the part of appellant is concerned, suffice to observe that Sub-section (b) of Section 18 of the Ordinance deals with the initiation of a reference by NAB, which reads as under:-

**"Cognizance of Offences:-**

*{b} A reference under this Ordinance shall be initiated by the National Accountability Bureau on*

*{i} a reference received from the appropriate Government; or*

*{ii} receipt of a complaint; or*

*{iii} its own accord."*

8. The above provision clearly provides three different modes to initiate a reference against an accused. Clause (ii) (supra) is so worded to encompass a complaint filed by any person accusing any

person of committing corruption to be the basis for NAB to initiate a reference under the Ordinance. We have gone through the reference which clearly manifests that NAB initiated inquiry into the matter on receipt of a complaint from Section Officer {Judicial-I}, Education and Literacy Department, Government of Sindh regarding illegal regularization of 140 persons against teaching and non-teaching posts. Pursuant to such inquiry the investigation was followed and it was found that appellant in his capacity as acting Director of Schools, Karachi, misused his official authority and issued orders regularizing 140 persons against teaching and non-teaching posts to which he had no power or authority and by acting so managed fake medical fitness certificates, extended pecuniary advantage in the form of their salaries and caused a loss of Rs.48,550,998/- to the national exchequer. In view of this background of the matter, the offence falls within the purview of a complaint as provided under clause {ii} of Sub-section (b) of Section 18 of the Ordinance. Thus, the stance taken by the learned counsel for the appellant challenging the entire reference on the touchstone of this alleged jurisdictional defect in initiating a reference against the appellant is misconceived.

9. As to the next contention of the learned counsel for the appellant that the action of NAB was discriminatory as it had only singled out the appellant as accused in the reference. This contention on the face of it seems to be legally incorrect. It is a well settled principle of criminal jurisprudence that challenging prosecution on the ground of discrimination cannot be a complete valid defence to absolve an accused from criminal liability arising from his actions or inactions. Any person charged for an offence is answerable for his own acts or omissions and has to defend himself in a trial for the offence with which he has been charged. Here it would be conducive to review the charge framed against the appellant by the Accountability Court, which reads as follows:-

*“I, Dr. Sher Bano Karim, Judge Accountability Court-III, Sindh, Karachi, charge you accused Muhammad Sajjan Mallah son of Muhammad Hashim Mallah as under:-*

*You accused Muhammad Sajjan Mallah, Ex-Director of Schools, Karachi, have misused of your official authority by illegal regularizing 140 teachers while you had no*

*power to issue orders for regularization of employees but you had illegally and with malafide intention issued regularization orders in the garb of humanitarian grounds as well on the condition that they will not claim arrears of their pay and allowances, such orders were false and concocted as the same were not tallied and duly supported by any record from the Office of Education and Literacy Department, except alleged medical fitness certificates, which were missing and even otherwise declared to have found fake and bogus as the same were never issued by Medical Superintendent Office, Health Department, Government of Sindh, in this respect, a committee consisting over 3 officers of Education Department was constituted, who collected and verified record from DEO Male/ Female and DDOs and it was found that the entries of all above 140 employees of regularization orders could not be traced as the same were not genuine and out of context and resultantly salaries of all allegedly regularized employees were stopped on the recommendation of said committee.*

*You abovenamed accused have misused your official authority by passing illegal and malafide regularization order to regularize the services of 140 persons against teaching and non-teaching posts illegally showing them as appointees retrospectively and thereby extending the pecuniary advantage in the form of salaries to 88 illegal regularized employees to the tune of Rs.48,550,098/- which resulted into heavy loss to the National Exchequer, thus you have committed an offence of corruption and corrupt practices as envisaged under Section 9{a} of the National Accountability Ordinance, 1999 punishable u/s 10 and Sr. No.2 of the Schedule of offences appended with the NAB Ordinance 1999 within the cognizance of this Court”.*

10. Reviewing the contents of the above charge, it is noted that, in essence, there are two major allegations against the appellant. Firstly, that he acted beyond his authority and used power of Secretary Education, who was the competent authority to regularize the services of teachers, and secondly, that he in his capacity as acting Director of Schools issued orders of regularization of 140 persons against teaching and non-teaching posts showing them appointees of 1998 without having any power or authority by managing fake and bogus documents. Insofar as the first allegation is concerned, the prosecution has been able to place on record sufficient evidence, which established that the appellant was not the Secretary Education and he had issued



regularization orders in his capacity as acting Director of Schools to which he had no power or authority. The second allegation entails the issuance of illegal orders of regularization for 140 persons against teaching and non-teaching posts. The photostat copies of regularization orders initially produced before Service Tribunal by the fake appointees are part of the record of this case, which bears the signature of the appellant. He has failed to produce any justifiable explanation for his such acts and deeds. On the contrary, he himself admitted in his Section 342, Cr.P.C. statement that he was District Education Officer so also acting Director of School and was not competent to pass /issue regularization orders for 140 persons against teaching and non-teaching posts and confirmed that Secretary Education was the competent authority to pass such orders. It is noteworthy that the appellant has acted beyond his authority and issued orders for regularization of 140 persons against teaching and non-teaching posts showing them appointees of 1998, out of whom 103 persons approached Sindh Service Tribunal {SST} seeking release of their salaries and by an order dated 18.07.2013 their appeals were allowed. Against such decision, the Department preferred appeals before Hon'ble Supreme Court and by an order dated 30.06.2014 the orders of SST were set-aside and the matters were remanded back to the SST for fresh proceedings. In compliance thereof, the SST proceeded with the appeals afresh and finally dismissed the same vide judgment dated 30.06.2014 with the following observations:-

*“For the foregoing reasons, it is held that all the appeals are frivolous on facts and are not sustainable in law. Consequently all the appeals are dismissed.*

*While we were hearing these appeals, yet another mega scandal came to our knowledge and several appeals were filed alleging appointments in Education Department in the year 2011-12. Nineteen {19} appeal have been heard and dismissed by us on 27.06.2014 for the simple reason that everything was false and concocted. It appears that a flourishing business of sale and purchase of fake appointments sat large scale is going on in the Education Department. If the authorities in the Education Department would have taken appropriate action in the year 1998*

*/1999 the subsequent mega scandals would not have taken place. We, therefore, expect that the Competent Authorities in the Education Department shall take strict disciplinary actions against Mr. Shamsuddin G. Dal, ex-Director School Education Karachi Region Karachi, Mr. Bashir Ahmed Abbasi, ex-District Officer Education Secondary & Higher Secondary {Male} Karachi, Mr. Abdul Jabbar Dayo, Ex-District Officer Education Karachi and other concern officers of the Education Department in order to prevent the occurrence of such scandals in future. We are of the considered opinion that merely disciplinary action would not be sufficient. The matter should be referred to the N.A.N. Authorities for proper investigation and initiation of criminal proceedings against all the officers found responsible for such scandalous acts. However, we would like to emphasize that in doing so no injustice should be done to anyone. The disciplinary proceedings should be initiated strictly in accordance with law after issuance of proper show cause notices, constitution of inquiry committee and providing full opportunity to every one of defending himself, likewise criminal proceedings should also be strictly in accordance with the dictates of justice. As already observed the flood of fake appointments started in the year 1998 by Mr. Gul Muhammad Hajono or in his name by other persons which had subsided but the upheaval and disaster resurged with the so-called regularization orders passed by Mr. Sajjan Mallah, which were based on false factual statements and without any authority. He is reported to have retired and appropriate action should be taken against him also, of course strictly in accordance with the law”.*

11. The learned counsel for the appellant has further agitated the point that the regularization orders allegedly issued by appellant were not confronted to him while recording his Section 342, Cr.P.C. statement and the learned trial Court has wrongly relied upon the same. Record reflects that the learned trial Court in Question No.4 has specifically put a question to the appellant that he had no authority to regularize the services of 140 persons against teaching and non-teaching posts and in reply thereof the appellant admitted that he was not competent to regularize the services of teachers and Secretary Education was the competent authority to regularize them, hence this contention too is misconceived. The record is also suggestive of the fact that out of

140 employees, 103 approached Sindh Service Tribunal for release of their salaries and such appeals were allowed, however as per statement of PW.10 salaries of only 88 employees were disbursed to the tune of Rs.48,550,998/-.

12. As to the plea that the witnesses are inimical to the appellant have deposed against him favouring the prosecution is not borne out from the record, the witnesses are independent and private persons, have specifically involved the appellant in the commission of the offence. Even he has not appeared on Oath under Section 340{2}, Cr.P.C. The appellant has also failed to speak a single word as to why the witnesses have deposed against him and mere saying that he has falsely been implicated in this case is not sufficient to prove his innocence particularly in view of the fact that the prosecution witnesses were consistent and their evidence could not be shattered in cross-examination. In the circumstances, the learned trial Court has rightly appreciated the evidence on record and conviction was recorded against the appellant acting upon the material available with the learned trial Court by holding that the prosecution has succeeded to establish its case against the appellant. We are also conscious of the fact that law requires that if accused had a defence plea the same should be put to the witnesses in cross-examination and then put forward the same while recording statement under Section 342, Cr.P.C. which is lacking in the instant case. In the circumstances, since the specific defence plea had not been taken by the appellant in his Section 342, Cr.P.C. the learned trial Court has rightly discarded the same to be of not confidence inspiring.

13. Insofar as the last contention that the appellant had not drawn any personal gain or caused any financial loss to the National exchequer is concerned, suffice to observe that the Sindh Service Tribunal in its judgment dated 30.06.2014 has reproduced letter /order, issued by the appellant, available at typed page 24 and 25 of the judgment, which reflects that regularization orders dated 04.11.2005 /05.11.2005 were issued by the appellant after proper verification of the record as genuine. This aspect of the matter shows that the appellant had been regularly appearing before Sindh Service Tribunal and submitting his statements to the

extent of issuance of regularization orders. The contention raised by the learned counsel for the appellant that the salaries of the illegal appointees were released by the office of Accountant General {Sindh} and not by the appellant is also irrelevant. No doubt salaries of 88 employees of Education and Literacy Department were issued by the office of Accountant General {Sindh} but we cannot ignore this aspect of the matter that release of salaries and judgment passed by the SST were based on the acts and deeds of the appellant and his contention of regularizing the services of the illegal appointees and pursuance of the appeals before SST. But when Hon'ble Supreme Court set-aside the decision of the Sindh Service Tribunal and remanded the case back to the SST for a decision a fresh in accordance with law and when the matters were reheard it had come on record that the appointment/regularization orders were fake. Therefore, we are of the considered view that National exchequer has sustained colossal loss due to the acts and deeds of the appellant. Moreover the offence of corruption or corrupt practices as provided in clause (vi) of subsection (a) of section 9 of the Ordinance includes even an attempt to misuse authority so as to gain any benefit to any other person and it need not necessarily result in any personal gain to the accused. The said provision reads as under:-

**"9. Corruption and Corrupt Practices:---"**(a)(vi) *[If he] misuses his authority so as to gain any benefit or favour for himself or any other person, or renders or attempt to render to do so, for willfully fails to exercise his authority to prevent grant, or rendition of any undue benefit or favour which he could have prevented by exercising his authority]*".

14. The learned trial Court after scrutinizing the material available on record convicted the appellant on the ground that he being the holder of public office misused his official authority and fraudulently caused huge loss to the National exchequer It is noteworthy that the Courts in the past have extended lenient treatment to the accused involved in like cases but now when corruption is cutting the very root of the economy of the country at a large scale in a very organized manner and it has become free for all then it has become the primary

and foremost obligation of the Court to arrest this evil monster which would ultimately be a threat not to latter alone but to the very survival of the State. Due to massive corruption the poor among poorer are not getting the basic facilities to live a peaceful and Hon'ble life as envisaged by the provisions of the Constitution. Majority of the children in millions could not go to school as their parents cannot afford the education expenses, same is the problem in the health care sector for the poor and other departments. This homeland was not gifted to us but millions of lives were sacrificed in achieving independence for a better and Hon'ble life style and to become a welfare state where every citizen whether belongs to majority or minority would be entitled to equal rights as laid down in Part 1 of Chapter 1 of the Constitution of Pakistan, 1973. However the nation is still dreaming this dream which is yet to be given practical shape. If massive corruption is allowed to go unchecked, we would, remain unable to drop from our hands the begging bowls. In view of the globalization of the world, the independence of a country/State is mainly dependent on sound economy therefore, in the larger interest of the State and the nation, the Courts have to apply strict standards and to show a zero tolerance for corruption and people involved in such type of crimes whose guilt is well established should get the maximum and no mercy to be shown to them. As to the case law cited by the learned counsel for the appellant, in support of his submissions, in our humble view, the facts and circumstances of the said cases are distinct and different from the present case, therefore, none of the precedents cited by the learned counsel are helpful to the appellant.

15. From the combined study of material available on record, we are of the humble view that the prosecution has successfully proved its case against the appellant beyond shadow of any doubt. Learned counsel for the appellant has failed to point out any material illegality or serious infirmity committed by the learned trial Court while passing the impugned judgment, which in our humble view is based on fair evaluation of evidence and documents brought on record, hence calls for no interference by this Court. In view thereof, the conviction and sentence awarded to the appellant through impugned judgment dated 30.03.2019 warrants no

interference. Consequently, the appeal, listed above, is dismissed as being devoid of any merit.

16. In sequel to above, the Const. Petition No.D-1130 of 2020, seeking post arrest bail, is dismissed as having become infructuous.

JUDGE

JUDGE

NAK/PA