

IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-

Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Shamsuddin Abbasi

Criminal Accountability Appeal No.76 of 2018

Appellant Muhammad Asif son of Abdul Jabbar
through Mr. Mehmood-ul-Hassan, Advocate.

Respondent The State through National Accountability Bureau
{NAB} Karachi through Mr. R.D. Kalhoro, Special
Prosecutor NAB.

Const. Petition No.D – 478 of 2019

Petitioner Muhammad Asif son of Abdul Jabbar
Through Mr. Mehmood-ul-Hassan, Advocate.

Respondents The State through National Accountability Bureau
{NAB} Karachi & another through Mr. R.D. Kalhoro
Special Prosecutor NAB.

Criminal Accountability Appeal No.74 of 2018

Appellant Mumtaz Ali Nizamani son of Lal Dino Nizamani
through Mr. Muhammad Jamil, Advocate.

Respondent The State through National Accountability Bureau
{NAB} Karachi through Mr. R.D. Kalhoro, Special
Prosecutor NAB.

Criminal Accountability Appeal No.01 of 2019

Appellant Muhammad Adil Ashraf son of Muhammad Ashraf
through Mr. Mehmood-ul-Hassan, Advocate.

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

Dates of hearing 16.02.2021 and 08.03.2021

Date of judgment **15.03.2021**

<><><><><>

JUDGMENT

SHAMSUDDIN ABBASI, J:- Muhammad Asif son of Abdul Jabbar,
Mumtaz Ali Nizamani son of Lal Dino Nizamani and Muhammad Adil
Ashraf son of Muhammad Ashraf, the appellants, are nominated as
accused No.1, 2 and 3 respectively in Reference No.24 of 2016 under
Section 18(g) read with section 24(b) of National Accountability
Ordinance, 1999 {NAO, 1999} for committing offences of corruption

and corrupt practices and misuse of authority falling under Section 9{a} read with Section 10 of NAO, 1999 and scheduled thereto. They were tried by learned Accountability Court No.II {Sindh}, at Karachi, and by a judgment dated 14.12.2018 accused Muhammad Asif and Muhammad Adil Ashraf were convicted under Section 10 read with section 9{a} of NAO, 1999 and sentenced to undergo rigorous imprisonment for ten {10} years each and to pay a fine of Rs.51,60,990/- each or suffer simple imprisonment for a further period of six {06} months each in default while accused Mumtaz Ali Nizamani was convicted under Section 10 read with section 9{a} of NAO, 1999 and sentenced to undergo rigorous imprisonment for three {03} years and to pay a fine of Rs.15,48,300/- or suffer simple imprisonment for a further period of one {01} month in default. The punishment of restriction /prohibition, as defined in Section 15 of NAO, 1999, were also ordered to be enforced on three accused, however, the benefit in terms of Section 382-B, Cr.P.C. was extended in their favour.

2. Shortly stated the facts as set forth in the reference are that pursuant to a report with regard to bogus sales tax refund, an inquiry was conducted, which led to an investigation, whereby it was revealed that accused Mumtaz Ali Nizamani being an official of IRS/FBR in his capacity as Inspector misused his authority in connivance with accused Muhammad Asif and Muhammad Adil Ashraf and caused a loss to the national exchequer. Accused Muhammad Asif got himself registered with FBR as an individual vide NTN No.3288441-9 and obtained sales tax refund amounting to Rs.11,870,280/- through his A/c No.52002017735001 declaring himself as manufacturer of M/s Asif Traders through a false undertaking whereas accused Muhammad Adil Ashraf became beneficiary of such refund claim by transferring an amount of Rs.12,448,000/- into his two bank accounts titled as "Muhammad Adil Ashraf" and "M/s Zeenat Impex" and they were facilitated by accused Mumtaz Ali Nizamani, who extended undue favour and issued a false physical verification report in favour of M/s Asif Traders with regard to its manufacturing unit at P-17, Singoo Lane, Wali Hassan Road, Lyari, Karachi, without having a meeting and visiting the site. Thus, the three accused in connivance with each

other committed an of corruption and corrupt practices and caused a colossal loss of Rs.11,870,280/- to the national exchequer.

3. On indictment, the appellants did not plead guilty to the charge and claimed trial. At trial, the prosecution examined seven witnesses in all. On close of prosecution evidence, the appellants were examined under Section 342, Cr.P.C. wherein they denied the prosecution case, professed innocence and stated their false implication, however, they opted not to examine themselves on Oath under Section 340{2}, Cr.P.C. and did not lead any evidence in their defence except Muhammad Asif, who appeared on Oath under Section 340{2}, Cr.P.C. Thus, the trial culminated in conviction and sentences of the appellants as stated in para-1 {supra}, hence necessitated the filing of their respective appeals coupled with petition, filed by Muhammad Asif, seeking suspension of sentence and his release on bail, which are being disposed of through this single judgment.

4. The gist of evidence adduced by the prosecution in support of its case is as under:-

5. **Faryal Qurban** {Manager of Bank Al-Falah} appeared as PW.1 Ex.7. He has given the details with regard to accounts operated by M/s Asif Traders and Muhammad Adil Ashraf and exhibited certain documents such as cheques, account opening form, statement of accounts etc in his evidence. **Muhammad Anwar** {Inspector RTO-III Inland Revenue} appeared as PW.2 Ex.8. He exhibited three claim files of M/s Asif Traders pertaining to tax period of March 2012, July 2012 and September 2012 and deposed that the same were seized by the investigating officer. **Syed Ilyasuddin** {Inspector RTO} appeared as PW.3 Ex.10. He deposed about the physical verification report of M/s Asif Traders and files pertaining to sales tax refund claim and exhibited the same in his evidence. **Hafiz Muhammad Ishaq** {Manager K-Electric} appeared as PW.4 Ex.11. He accompanied with NAB team and located the site and electric meters on the basis of electric bill. **Nabeel** {salesman of a mobile shop} appeared as PW.5 Ex.12. He denied himself to be the owner of site where M/s Asif Traders was running its business and deposed that he has no plot in

Singoo Lane and also not knew Muhammad Asif. **Muneer Ahmed** {Steno in NAB office} appeared as PW.6 Ex.13. He acted as mashir of seizure of documents. **Kamran Janvri** {Assistant Director NAB} appeared as PW.7 Ex.14, who conducted investigation vide authorization letter dated 09.06.2015 and deposed about the investigation being carried out by him and filing of reference in Court.

6. It is contended on behalf of appellant Mumtaz Ali Nizamani that he has been falsely implicated in this case with malafide intention and ulterior motives; that the appellant had acted legally and did not derive any personal gain, his duty was only to verify the business place for registration of a firm or a person with FBR and he has no nexus with the refund process; that the report prepared by the appellant in his capacity as Inspector was a genuine one and based on the documents produced by co-accused Muhammad Asif and such a report was accepted by Sales Tax Department and based on such acceptance the firm was registered with FBR and once a firm or an individual is registered the Inspector has no nexus with the subsequent procedure; that the investigating officer failed to collect any evidence as to who is the real owner of the premises in question and the learned trial Court did not appreciate this aspect of the matter; that the prosecution has failed to bring home the charge against the appellant through cogent and reliable evidence as per requirement of Section 14 of NAO, 1999; that the witnesses produced by prosecution have not uttered a single word as to the involvement of appellant in the commission of offence; that the witnesses were inconsistent with each other rather contradicted on crucial points benefit whereof must go to the appellant; 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; that the investigating officer exonerated Qurban Ali Jamali, Auditor Zone-IV, RTO-II and Masood Ahmed Gorski, Incharge Refund Division, who processed and sanctioned the refund claim files of M/s Asif Traders, and implicated the appellant falsely just to save the real culprits; hence it is a clear case of pick and choose; that no evidence has been brought on record as to establish that he was the beneficiary of the embezzled amount; that

the charge against the appellant has not been established through evidence despite the learned trial Court convicted and sentenced the appellant without any valid reason and elucidating a role under which an accused can be convicted, thus, the evidence recorded and conclusion drawn merits reversal.

7. The learned counsel appearing on behalf of appellants Muhammad Asif and Muhammad Adil Ashraf, after arguing the matter at some length, submits that they would not press the appeals on merits if their sentence of 10 years is reduced to the period they have already undergone contending that the appellants are not dangerous, desperate and hardened criminal and served sufficient punishment and due to their continuous confinement in jail their family members are passing a miserable life as they are the only earning members for their family.

8. As against that learned Special Prosecutor NAB while supporting the impugned judgment, has argued that the appellants are involved in a case of corruption and corrupt practices and in connivance with each other have caused a colossal loss of Rs.11,870,280/- to the national exchequer through bogus sales tax refund. It is next 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. It is also submitted that the witnesses produced by prosecution were subjected to lengthy and taxing cross-examination but nothing favourable to the appellants could come out from their mouth and 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 and prayed for dismissal of appeals. He, however, extended his no objection to the submission of learned counsel for appellants Muhammad Asif and Muhammad Adil Ashraf with regard to conversion of their detention sentence into the period already undergone.

9. We have given our anxious consideration to the submissions of learned counsel for the appellants and the learned Special

Prosecutor NAB and gone through the entire material available on record with their able assistance.

10. The case of the prosecution against the appellants is that they in connivance with each other embezzled an amount of Rs.11,970,280/- towards refund of sales tax obtained illegally and caused a colossal loss to the national exchequer. Appellant Muhammad Asif since registered with FBR as an individual claimed sales tax refund and got an account opened for obtaining the refund. He approached Sales Tax Department for registration of a unit in the name and style of "M/s Asif Traders declaring him as manufacturer of paper, paper board and stationary items. The department deputed appellant Mumtaz Ali Nizamani, acting as Inspector of FBR, who furnished a fake verification report of site in favour of Muhammad Asif, registered with FBR as an individual, and based on such report he got his unit registered with Sales Tax Department in the name of M/s Asif Traders and illegally obtained sales tax refund to the tune of Rs.11,970,280/- and subsequently such amount was transferred by appellant Muhammad Adil Ashraf into his two bank accounts and became a beneficiary. Thus, the three appellants have committed the offences of corruption and corrupt practices and misused of authority.

11. The prosecution in order to substantiate its case examined seven witnesses in all. PW.1 Faryal Qurban has given the details of accounts operated by M/s Asif Traders and Muhammad Adil Ashraf and deposed that he provided account opening forms, statement of accounts, original cheques, deposit slips, debit vouchers, credit vouchers and other relevant documents pertaining to the said accounts to investigating officer, who took the same into his custody under two memos of seizure in his presence. PW.2 Muhammad Anwar has deposed that on the directions of his boss Rafique-ur-Rehman, he went to the office of NAB and produced three claim files of M/s Asif Traders pertaining to tax period of March, July and September, 2012, to investigating officer, who took the same into custody under a seizure memo in his presence. PW.3 Syed Ilyasuddin is the witness, who on the directions of Deputy Commissioner handed over physical verification report belonging to M/s Asif

Traders, three files relating to sales tax refund claim for the period of March, July and September, 2012 of M/s Asif Traders to investigation officer, who took the same into custody under a seizure memo in his presence. PW.5 Nabeel has deposed that in the month of June, 2016 he went to the office of NAB where investigating officer inquired him about ownership of Plot Nol.P-17, Singoo Lane and showed him documents but he denied to be the owner of the said plot and also not knew Muhammad Asif. PW.6 Muneer Ahmed is the mashir of seizure memos Ex.10/1, Ex.P/07/1 and Ex.P/07/2 and admitted his signatures thereon. PW.7 Kamran Ali Janvri is the investigating officer, who has supported the investigation being carried out by him and deposed that the reference was filed by him on the basis of documentary evidence collected by him during investigation, which are part of the record of this case. All of them were subjected to lengthy cross-examination but nothing favourable to the appellants 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 aspects of the matter. Nothing has been brought on record on behalf of the appellants that the prosecution witnesses had some grudge against them for their false implication in the commission of offence.

12. We have noticed that in rebuttal to overwhelming prosecution evidence, the appellants have 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 appellants in the commission of offence. A keen look at the evidence reveals that Muhammad Asif was the mastermind of the whole scam, who formed a company in the name and style "M/s Asif Traders" showing its manufacturing unit at P-17, Singoo Lane, Wali Hassan Road, Lyari, Karachi, alleged to be acquired on rent from PW.5 Nabeel, who denied to be the owner of the said premises and also not knew Muhammad Asif. It has also come on record that Muhammad Asif being registered as an individual with FBR approached Sales Tax Department seeking registration of a unit in the name of M/s Asif Traders and the department deputed Mumtaz Ali Nizamani {Inspector} for verification of site, who submitted a fake verification report and based on such

report the claim files of M/s Asif Traders were processed and an amount of Rs.11,970,280/- was sanctioned, which was subsequently transferred into two bank accounts of Muhammad Adil Ashraf.

13. The entire case of the prosecution rests on the physical verification report stated 06.02.2012, stated to be issued by appellant Mumtaz Ali Nizamani, Inspector of FBR, which facilitated M/s Asif Traders to get the unit registered with the Sales Tax Department. Here it would be conducive to refer last paragraph of the said report, which is that:-

“General Remarks:- Visited the declared Manufacturing address as per STR-1 and the unit found existing working condition and engage in paper & paper board applicant MR. MUHAMMAD ASIF CNIC 42301-0266507-1 was present at the time of visit during course of physical verification applicant signature STR-1 form and provide electric bill and tenancy agreement with CNIC landlord applicant provide supportive and relative documents i.e. CNIC, NTN, Electric Bills, Bank Certificate, Rent Agreement with CNIC landlord and photograph machinery which are placed in file for record. In view of above facts and provided supported documents in relations business premises be treated as VERIFIED”.

14. A keen look at the above report reveals existence of manufacturing unit at P-17, Singoo Lane, Wali Hassan Road, Karachi, in the name of M/s Asif Traders, in working condition with machinery equipment supported by documentary evidence viz tenancy agreement, CNIC of landlord, bank certificate, electric bills and NTN, however, the same was found fake. The prosecution has relied upon the evidence of PW.5 Nabeel, alleged to be the owner/ landlord of the premises where the unit was said to be existed. He has categorically denied himself to be the owner of Plot No.P-17, Singoo Lane, Wali Hassan Road, Karachi. He further denied to have landlord of the premises in question and entered into an agreement of tenancy with Muhammad Asif, who is not known to him. He has been supported by PW.7 Kamran Ali Janvri, who deposed that name of Nabeel was mentioned in the tenancy agreement as landlord of the plot, but he denied himself to be the owner or landlord of the premises in question. He stated that premises in question was located by officials of K-Electric, which was found closed.

15. The appellants though denied the commission of offence in their Section 342, Cr.P.C. statements but failed to produce any material or a witness to disprove the prosecution case. Neither any utility bill has been produced nor any witness either from M/s Asif Traders, claiming to be its employee or from the locality, has been examined to prove existence of manufacturing unit. Even no receipt either of rent or security deposit in respect of the premises in question has been produced to substantiate the said premises was obtained on rent for establishing manufacturing unit. In absence thereof, the learned trial Court has rightly believed the prosecution evidence and disbelieved the plea taken by the appellants in their defence. We are also conscious of the fact that the three appellants, on the same set of allegations, have been convicted by learned Accountability Court No.II, Sindh, Karachi, in Reference No.28 of 2016 vide judgment dated 14.12.2018. They assailed their conviction and sentences through their respective appeals, which were dismissed by this Court on merits vide judgment dated 09.10.2020, however, the sentences of Muhammad Asif and Muhammad Adil Ashraf were ordered to be treated as already undergone.

16. The learned counsel for appellant Mumtaz Ali Nizamani has claimed that the action of NAB against the appellant 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. In the case in hand, the appellant has failed to prove his innocence through cogent and reliable evidence.

17. As to the submission that appellant Mumtaz Ali Nizamani acted illegally and real culprits were set free by the investigating officer, suffice to observe that the reference disclosed that no incriminating evidence had come on record to establish involvement

of Qurban Ali Jamali and Masood Ahmed Gorski in the commission of offence, who had processed and sanctioned the claim files of M/s Asif Traders after completing all codal formalities since sales tax refund amount was validated by STARR/CREST. The witnesses are independent and private persons and they have specifically involved appellant Mumtaz Ali Nizamani in the commission of offence. Even otherwise, the appellant has neither produced any witness in his defence nor placed on record any other material to persuade us about his innocence. He also opted not to examine himself on Oath under Section 340{2}, Cr.P.C. and 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 recorded conviction acting upon the material available with it by holding that the prosecution has succeeded to establish its case. We are also conscious of the fact that law requires that if accused had a defence plea the same should have been put to the witnesses in cross-examination and then put forward 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. statement, the learned trial Court has rightly discarded the same to be not of confidence-inspiring.

18. As to the next contention that the prosecution has not been able to discharge its duty of proving the guilt of the appellant Mumtaz Ali Nizamani and shifting onus on the appellant as mandatory requirement of Section 14 of NAO, 1999 is concerned, suffice to observe that the prosecution has examined as many as seven {07} witnesses, who 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. The ocular account furnished by the prosecution had also been supported by the documentary evidence, which are part of the record of this case. In view thereof, we are of the considered view that the prosecution has successfully discharged its burden of proving the guilt of the appellant, hence it was his duty to disprove the prosecution case and prove his innocence, but he failed to do so.

19. As to the contention that the appellant had not drawn any personal gain or caused any financial loss to the National exchequer is concerned, we have minutely assessed the entire record, which reflects that the appellant issued a fake physical verification report of site which facilitated M/s Asif Traders in getting a Registration Certificate with Sales Tax Department and based on such registration an amount of Rs.11,970,280/- was obtained illegally towards sales tax refund causing a colossal loss to the national exchequers. 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]*".

20. From the combined study of material available on record, we are of the humble view that the prosecution has successfully proved its case against three appellants beyond shadow of any doubt. The defence 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 three appeals, which impugn conviction and sentences, have no merit and are dismissed accordingly.

21. Taking into account the fact that two appellants Muhammad Asif and Muhammad Adil Ashraf have not pressed their appeals on merits and submitted that they are the sole bread earners and their family members are virtually starving due to their confinement in jail, hence their sentences of ten years be treated as already undergone. The Jail Roll reflects that Muhammad Asif has passed seven {07} years five {05} months and nineteen {19} days including remissions while Muhammad Adil Ashraf has spent seven {07} years one {01} month and twenty two {22} days including remissions in prison as on 10.02.2021, hence keeping in view their period of detention in prison and the mitigating circumstances, referred herein above, as well as the fact that their further detention in jail shall certainly compel their families to step-out for survival may ruin their lives, therefore, in our humble view it would serve both purposes of deterrence and reformation, if their sentences are altered and reduced to one already undergone. Accordingly, the sentences of ten years awarded to appellants Muhammad Asif and Muhammad Adil Ashraf are modified and reduced to one already undergone. It is noteworthy that appellant Mumtaz Ali Nizamani has contested his appeal on merits and did not make a request of treating his sentence as already undergone, however, keeping in view the fact that he has already served major portion of his sentence in prison, which is two {02} years six {06} month and twenty four {24} days including remissions as on 10.02.2021, we deem it appropriate to reduce his sentence of three years to the period as already undergone. Before parting with this order, we may make it clear that the order of reducing sentence of three appellants to one already undergone does not include other sentences such as restriction /prohibition as defined in Section 15 of NAO, 1999 as well as the sentences awarded in lieu of fine. The amount of fine shall be recovered as arrears of land revenue in terms of Section 33-E of the Ordinance.

22. In sequel to above, the Const. Petition No.D-478 of 2020, seeking suspension of sentence and release of appellant Muhammad Asif on bail, is dismissed as having become infructuous whereas the appeals, listed above, are disposed of in the foregoing terms.

JUDGE

JUDGE

NAK/PA