

IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-

Mr. Justice Naimatullah Phulpoto

Mr. Justice Shamsuddin Abbasi

Criminal Accountability Appeal No.20 of 2008

Appellant Nisar Ahmed son of Muhammad Farooq through Mr. Waqar Alam Abbasi, Advocate.

Respondent The State through M/s Muhammad Anwar Shaheen and Syed Dilshad Hussain Shah, Special Prosecutors NAB.

Criminal Accountability Appeal No.32 of 2008

Appellant Nadir Khan son of Nauroz Khan through Mr. Z.U. Mujahid, Advocate.

Respondent The State through M/s Muhammad Anwar Shaheen and Syed Dilshad Hussain Shah, Special Prosecutors NAB.

Dates of hearing 02.05.2023 and 03.05.2023

Date of judgment **16.05.2023**

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JUDGMENT

SHAMSUDDIN ABBASI, J:- Nadir Khan and Nisar Ahmed, appellants, faced trial in Reference No.33 of 2007 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 forgery for the purpose of cheating and misappropriation falling under Section 9(a) read with Section 10 of NAO, 1999, and scheduled thereto. They held by learned Accountability Court No.IV (Sindh), at Karachi. After regular trial vide judgment dated 14.11.2008 convicted and sentenced under Section 9(a)(iii)(iv)&(vi) of NAO, 1999, punishable under Section 10(a) of NAO, 1999, to undergo rigorous imprisonment for three years each and to pay a fine of Rs.500,000/- each or suffer simple imprisonment for a further period of six months each in lieu of fine. They were also convicted under Sections 468 and 471, PPC and sentenced to suffer rigorous imprisonment for two years each and to pay a fine of Rs.5,000/- each or suffer simple imprisonment for a further period of three months in lieu of fine. Both the sentences were ordered to run concurrently and the benefit in terms of Section 382-B, Cr.P.C. was extended in favour of the appellants. The punishment of restriction /prohibition, as defined in Section 15 of NAO, 1999, was also ordered to be enforced on the appellants.

2. Shortly stated the facts as set forth in the reference are that Nadir Khan during his posting as cashier, Habib Bank Limited, Barnes Street Branch, Karachi, misused his authority, and committed fraud and cheating in connivance with Nisar Ahmed, a private person, misappropriating an amount of Rs.887,660/- through fraudulent and illegal means. It is stated in the Reference that one Rafiullah Khan was operating PLS A/c No.0002085505 with National Bank of Pakistan, Sharifabad Branch, Karachi, whose wife stolen his two cheques and handed over the same to the wife of his tenant namely, Waseem Ahmed, Inspector Intelligence Bureau (IB). As per bank record, the impugned cheque No.6973097 amounting to Rs.887,660/- was encashed on 27.06.2003 through a fake A/c No.9480-1, opened by Nisar Ahmed, in Habib Bank Limited, Barnes Street Branch, Karachi, pasting his photograph on the photocopy of NIC of one Aleemuddin, impersonating himself as Aleemuddin, which was processed and verified by Bank Manager Umar Khan on the request of Nadir Khan (cashier), who prepared deposit slips in his own handwriting and later on the same was reported to be of Nadir Khan by the handwriting expert. During investigation, statement of His Ping Tusi, a chinese businessman, was recorded, who stated that in the month of June, 2003, one Aleemuddin placed an order for purchase of tissue paper and credited a sum of Rs.750,000/- into the account of HSL PING TRADING, owned by him, through cheque pertaining to PLS A/c No.9480-1. He further stated in his statement that after three days the purported buyer approached him and cancelled the deal and also demanded return of Rs.750,000/, paid through cheque, and such amount was paid by him in cash. It is also alleged in the Reference that another amount of Rs.133,000/- was drawn through cheque No.3256452 from the said fake account, thus constitute an offence of forgery for the purpose of cheating and misappropriation.

3. On indictment, the appellants did not plead guilty to the charge and claimed trial. At trial, the prosecution examined as many as nine witnesses. On close of prosecution evidence, the appellants were examined under Section 342, Cr.P.C. wherein they denied the prosecution case, professed innocence and claimed 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. The trial, thus, culminated in conviction and sentences of the appellants as stated in para-1 {supra}, hence necessitated the filing of their respective appeals, which are being disposed of together through this single judgment.

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

5. Muhammad Umar Khan (Manager HBL) appeared as PW.1 Ex.7, Rafiullah (account holder) as PW.2 Ex.8, Syed Raees Ahmed (Manager NBP) as PW.3 Ex.9, Muhammad Yaqoob (Officer of HBL) as PW.4 Ex.10, Sultan Ahmed (Security Guard of NBP) as PW.5 Ex.11, Aleemuddin (Tailor Master) as PW.6 Ex.12, Muhammad Rafique (Manager HBL) as PW.7 Ex.13, Nadeem Ahmed Shahid (investigating officer) as PW.8 Ex.14 and Syed Raees Ahmed (Officer NBP) as PW.9 Ex.15. They exhibited certain documents in their evidence.

6. The learned counsel appearing on behalf of appellant Nadir Khan has contended that appellant has been falsely implicated in this case; that no witness from prosecution side has implicated the appellant with the commission of offence except PW.1 Umar Khan, who actually committed fraud and in order to save his skin joined hands with PW.8 Nadeem Ahmed Shahid (investigating officer), and falsely implicated the appellant in the commission of offence; that the entire case of the prosecution is based on the report of handwriting expert, which cannot be treated as admissible piece of evidence more particularly when author of such report has not been examined; that the investigating officer has conducted dishonest investigation and involved the appellant in a case with which he has no nexus exonerating main accused Umar Khan, who was actually involved in the commission of offence, hence it is a case of pick and choose; 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 no evidence has been brought on record against appellant as to establish *mens rea* or that he was beneficiary of the misappropriated amount; that the prosecution has failed to discharge its legal obligation of proving the guilt of the appellant as mandatory requirement of Section 14 of the NAO, 1999, and the appellant was not liable to prove his innocence; that the charge against the appellant has not been established through valid and reliable evidence despite the learned trial Court convicted and sentenced the appellant without any lawful justification 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 appellant Nisar Ahmed somewhat has adopted the same arguments as advanced by the learned counsel for appellant Nadir Khan and added that none of the prosecution witnesses have involved the appellant in the commission of offence. It is next submitted that the prosecution has failed to place on record any incriminating evidence against appellant to show his involvement in the commission of offence. It is also submitted that the investigating officer has involved the appellant in the commission of offence solely on the statement of Bank Manager Muhammad Umar Khan, without conducting an identification parade before Magistrate, hence identification and involvement of appellant in the commission of offence, on the sole statement of Bank Manager, is without any valid reason and the conviction so awarded to the appellant is liable to be set-aside and the appellant deserved to be acquitted of the charge and prayed accordingly.

8. Strongly opposing the contentions of the learned counsel for the appellants, the Special Prosecutor NAB has contended that the appellants were lawfully proceeded under the enabling provisions of the Ordinance, which were strictly in accordance with the settled principles of the criminal justice system of providing the appellants with complete opportunity of defending themselves. It is next submitted that the appellants are involved in a case of corruption and corrupt practices where they in connivance with each other have misappropriated an amount of Rs.887,660/- through fraudulent and illegal means. It is also submitted that the prosecution in support of its case produced oral as well as documentary evidence coupled with the report of handwriting expert, which was rightly relied upon by learned trial Court. Per him, 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. In response to the submissions of learned counsel for the appellants that the prosecution was bound to prove its case as mandatory requirement of Section 14 of the Ordinance, it is submitted that it was the duty of the appellants to disprove the charges levelled against them by the prosecution and prove their innocence through valid and cogent evidence in view of the provision of Section 14 of NAO, 1999, and prayed for dismissal of appeals as being devoid of any merit.

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. First of all we would like to take up the submission of learned Special Prosecution NAB that prosecution was not under obligation to prove the case against appellants and it was the duty of the appellants to disprove the prosecution case and prove their innocence through valid and cogent reason in view of the provision as contained in Section 14 of NAO, 1999. This submission, on the face of it, seems to be incorrect for the simple reason that this Section cannot be used to undermine the well-established rule of law that save in very exceptional class of cases, the burden to prove the guilt of the accused is on the prosecution and never shifts. This Section does not affect the onus of proving the guilt of an accused which always rests on the prosecution. It hardly needs any elaboration that "the ordinary rule that applies to criminal trials, viz. that the onus lies on the prosecution to prove the guilt of the accused, is not in any way modified by the rule of evidence contained in this Section which cannot be used to make up for the inability of the prosecution to produce evidence of circumstances necessary to prove the guilt of the accused. It would be a misconception of law that every accused who faced trial in the Accountability Court or against whom a Reference has been sent, the "presumption as envisaged in Section 14 of the NAB Ordinance, 1999" would start running against him. Where the prosecution has failed to discharge the onus of "proof" by adducing cogent, concrete and forthright evidence the presumption of guilt would not arise against him and thus the question of conviction would have not arisen. The Hon'ble apex Court while discussing the question of presumption in *Rehmat v. State* {PLD 1977 SC 515} held as follows:-

"Needless to emphasize that in spite of section 106 of the Evidence Act in a criminal case the onus rests on the prosecution to prove the guilt of the accused beyond reasonable doubt and this section cannot be construed to mean that the onus at any stage shifts on to the accused to prove his innocence or make up for the liability and failure of the prosecution to produce evidence to establish the guilt of the accused. Nor does it relieve the prosecution of the burden to bring the guilt home to the accused. It is only after the prosecution has on the evidence adduced by it, succeeded in raising reasonable inference of the guilt of the accused, unless the same is rebutted, that this section wherever

applicable, comes into play and the accused may negative the inference by proof of some facts within his special knowledge. If, however, the prosecution fails to prove the essential ingredients of the offence, no duty is cast on the accused to prove his innocence."

11. It is settled principle of law that accused is always presumed to be innocent and the onus of proving the commission of offence and the guilt of the accused lies on the prosecution but under the NAO, 1999, an exception has been provided to this rule and it has been provided in section 14(c) that in any trial of an offence punishable under clause (v) of subsection (a) of section 9 of the NAO, 1999, the fact that the accused person or any other person on his behalf, is guilty of the offence of corruption and corrupt practices and his conviction, therefore, shall not be invalid by reason only that it is based solely on such a presumption. However, the presumption is subject to the condition that the prosecution shall first make out a "reasonable" case against the accused. Language used in the proviso tagged to the main provision i.e. section 14 is explicit in this regard. The proviso reads as follows:--

"Provided that the prosecution shall first make out a reasonable case against the accused charged under clause (vi) or clause (vii) of subsection (a) of section 9."

Hence, notwithstanding the presumption contained in section 14(c) of the NAO, 1999, the initial burden of proof always rests on the prosecution. It is well-settled that the burden to prove all ingredients of the charge always lies on the prosecution and it never shifts on accused, who can stand on the plea of innocence, assigned to him under the law, till it is dislodged. The prosecution, therefore, is never absolved from proving the charge beyond reasonable doubt and burden shifts to the accused only when the prosecution succeeds in establishing the presumption of guilt. Reliance may well be made to the case of *Mansoorul-Haq v. Government of Pakistan* {PLD 2008 SC 166}, wherein it was laid down as under:-

"The National Accountability Bureau Ordinance, 1999, no doubt is a special law and prosecution having the advantage of the provision of section 14(a) of the Ordinance may not under heavy burden to discharge the onus of proving the charge as the Court may on discharge of initial burden of proving prima facie case by the prosecution raise a presumption of guilt but in the light of concept of criminal administration of justice, the prosecution is not absolved of its duty to prove the

charge beyond reasonable doubt under NAB Ordinance as the burden of proof is only shifted on the person facing charge if the prosecution succeeds in making out a reasonable case by discharging the initial burden of proving the charge. The provision of section 14(d) of the said Ordinance envisages that burden of proof is only shifted to the accused to rebut the allegations if the prosecution succeeds in establishing the preliminary facts to raise the presumption of guilt”.

The Hon’ble Supreme Court in the case of *Khan Asfandyar Wali v. Federation of Pakistan* {PLD 2001 SC 607} having examined the provisions of section 14(d) of the Ordinance held as under:-

“Be that as it may, the prosecution has to establish the preliminary facts whereafter the onus shifts and the defence is called upon to disprove the presumption. This interpretation appears to be reasonable in the context of the background of the Ordinance and the rationale of promulgation the same notwithstanding the phraseology used therein. The above provisions do not constitute a bill of attainder, which actually means that by legislative action an accused is held guilty and punishable. For safer dispensation of justice and in the interest of good governance, efficiency in the administrative and organizational set up, it is necessary to issue the following directions for effective operation of section 14(d):

- (1) *The prosecution shall first make out a reasonable case against the accused charged under section 9(a)(vi) and (vii) of the National Accountability Bureau Ordinance, 1999.*
- (2) *In case the prosecution succeeds in making out a reasonable case to the satisfaction of the Accountability Court, the prosecution would be deemed to have discharged the prima facie burden of proof and then the burden of proof shall shift to the accused to rebut the presumption of guilt”.*

12. Adverting to the allegations as set-forth against the appellants in the Reference are that Nadir Khan during his posting as cashier, Habib Bank Limited, Barnes Street Branch, Karachi, misused his authority, and committed fraud and cheating in connivance with Nisar Ahmed, a private person, misappropriating an amount of Rs.887,660/- through cheque belonging to one Rafiullah Khan, who was operating account with National Bank of Pakistan, Sharifabad Branch, Karachi, which was encashed on 27.06.2003 through a fake A/c No.9480-1, opened by Nisar Ahmed, in Habib Bank Limited, Barnes Street Branch, Karachi, pasting his photograph on the

photocopy of NIC of one Aleemuddin, impersonating himself as Aleemuddin. Here it would be conducive to review the charge framed against the appellant by the Accountability Court, which reads as follows:-

"I, Muhammad Riaz Rajput, Judge, Accountability Court No.IV, Sindh, Karachi, do hereby charge you:

- 1. Nadir Khan s/o Noroze Khan;*
- 2. Nisar Ahmed s/o Muhammad Farooqi;*

1. That you accused Nadir Khan, accused No.1 was holder of public office, posted as cashier at Habib Bank Limited, Barness Street Branch, Karachi.

2. That you accused Nisar Ahmed, accused No.2 with the connivance of accused No.1 opened a fake bank account in the name of one Aleemuddin by pasting your photograph on the photocopy of NIC of Aleemuddin and opened an Account No.9480-1 at the said bank, impersonating yourself as Aleemuddin.

3. That on 25.06.2003 you accused managed to deposit a crossed cheque of Account No.PLS-0002085505 bearing No.6973097 dated 17.06.2003 for Rs.887,660/- with the fake signature of Rafiullah (account holder of Account No.PLS-0002085505 in Account No.9480-1 at Habib Bank Limited Barness Street Branch, Karachi. The amount of Rs.887,660 was credited into fake account opened by you accused No.2.

4. That a cheque of Rs.750,000/- of Account No.9480-1 was issued to His Ping Tusi, a chinese businessman of Tissue Paper at Saddar, Karachi, which was accordingly credited to the account of His Ping Tusi from the fake account. Another cheque bearing No.3256452 for Rs.133,000/- was drawn in cash from the said fake account.

5. That you accused Nadir Khan by taking illegal advantage of your official position being cashier of said branch removed the Account Opening Form from the bank record of Habib Babk Limited, Barness Street Branch, Karachi and destroyed the same.

6. That you both accused in connivance with each other have committed fraud and cheating in withdrawing of Rs.887,660/- from the account of one Rafiullah with National bank of Pakistan, Sharifabad branch, Karachi.

7. That you accused Nadir Khan being holder of public office, misused your authority, committed fraud and cheating in connivance with co-accused Nisar Ahmed and misappropriated an amount of Rs.887,660/- and thus by corrupt, dishonest,

fraudulent and illegal means obtained for yourself pecuniary advantage and corresponding loss to the public exchequer and thereby you have committed offences of corruption and corrupt practices as defined under Section 9(a)(iii)(iv) & (vi) of National Accountability Ordinance, 1999 and Sections 409, 468 and 471 PPC being scheduled offences of National Accountability Ordinance, 1999 read with offences described at serial No.8 of Scheduled Offences attached thereto, punishable under Section 10 of National Accountability Ordinance, 1999 within cognizance of this Court.

And I hereby direct that both of you be tried by this Court on the aforesaid charge”.

13. Reviewing the contents of the above charge, it is noted that, in essence, there are two major allegations against the appellants. Firstly, that Nadir Khan during his posting as cashier, Habib Bank Limited, Barness Street Branch, Karachi, misused his authority, and facilitated Nisar Ahmed in opening a fake account in the name of one Aleemuddin, who was operating account at National Bank of Pakistan, Sharifabad Branch, Karachi, pasting his photograph on the NIC of Aleemuddin, and got his signature verified through Manager in the account opening form, and secondly, that he in connivance with Nisar Ahmed deposited a crossed cheque of Rs.887,660/- belonging to Aleemuddin’s account, preparing deposit slips in his own handwriting, whereby the cheque amount was credited to the fake account, opened by Nisar Ahmed, impersonating himself as Aleemuddin.

14. The learned trial Court while convicting the appellants under Section 10 of NAO, 1999, held that the prosecution has successfully proved the guilt of the appellants regarding unscrupulous act of misappropriated amount and misuse of authority as envisaged under Section 9(a)(iii)(iv)(vi) of NAO, 1999 and convicted them under Section 10 of the Ordinance, 1999. A brief reference to Section 9(a)(iii)(iv) & (vi) would be relevant, which reads as follows:-

9. Corruption and Corrupt Practices.—

(a) A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices--

(i)

(ii)

- (iii) *if he dishonestly or fraudulent misappropriates or otherwise converts for his own use, or for the use of any other person, any property entrusted to him, or under his control, or willfully allows any other person so to do; or*
- (iv) *if he by corrupt, dishonest, or illegal means, obtains or, seeks to obtain for himself, or for his spouse or dependents or any other person, any property, valuable things or pecuniary advantage; or*
- (v)
- (vi) *if he intentionally misuses his authority by disregarding law so as to gain any monetary benefit or favour for himself or any other person related to him or on his behalf.*

15. In terms of the aforesaid charging provision, the initial burden lies on the prosecution to prove that the accused was guilty of any of the offences with which he was being charged. In this background of the matter, we deem it appropriate to go through the evidence of PW.1 Muhammad Umar Khan (Manager HBL Barness Street Branch, Karachi). This witness in his deposition has stated that on 24.06.2003 accused Nisar Ahmed came in the branch and got opened an account showing himself as Aleemuddin and on 25.06.2003 deposited a cheque of Rs.887,660/- and another cheque of Rs.11,87,400/- on 12.07.2003, slips of two cheques were filled by accused Nadir Khan showing himself as Aleemuddin. He further deposed that on 28.06.2003 an amount of Rs.750,000/- was withdrawn from the said account through cheque No.2256451 in favour of HSL Ping Trading, slip whereof was filled by accused Nadir Khan, another amount of Rs.133,000/- on 28.06.2003 and again a sum of Rs.5,000/- was withdrawn on 12.07.2003 through cheque No.0325653. The cheques and slips were sent to the handwriting expert, who reported the handwriting to be of Nadir Khan. He further deposed that fraud was detected on 28.10.2003 when the Manager, NBP informed that cheque of Rafiullah (account holder) was not honoured.

16. PW.2 Rafiullah in his deposition has stated that PLS A/c No. 208550-50 was opened by him about 20 years ago. He came to know a shortfall of Rs.887,660/- from his account when he checked the balance and came to know that such amount was withdrawn from HBL, Barness Street Branch, Karachi through cheque and when he contacted Manager of said branch, two

cheques were shown to him, out of two one cheque was encashed, he, therefore, made a complaint to Deputy Director, FIA, CBC, Karachi.

17. PW.3 Syed Raees Ahmed, Manager NBP, Sharifabad Branch, Karachi, has deposed that the cheque of Rs.887,660/- was collected by HBL in the name of Aleemuddin, issued by Rafiullah Khan, which was passed after observing necessary formalities while the second cheque of Rs.11,87,400/- was not cleared and on inquiry Rafiullah denied issuance of both cheques. He had written letter to Manager HBL for providing details in respect of account of Aleemuddin, who did not provide details.

18. PW.5 Sultan Mehmood (OG-II NPP) has deposed that on 25.06.2003 cheque No.6973097 dated 17.06.2003 of Rs.887,660/- was received through NIFT in clearing from HBL, Barness Street Branch, Karachi, in the name of Aleemuddin pertaining to Account No.208550-5 of Rafiullah, presented in A/c No.9480-1. He deposed that Manager verified the signature with SS card and he also compared the same with SS card and then signed the cheque as secondary signature and thereafter it was sent to NIFT for onward transmission to HBL, Barness Branch, Karachi.

19. PW.6 Aleemuddin has deposed that he is tailor by profession and never opened account in any branch of HBL and told the Manager, HBL Barness Street Branch, Karachi, that the person who opened account in HBL using his I.D. card is not known to him and he never delivered his I.D. card to anyone and his original card is with him.

20. PW.7 Muhammad Rafique, Manager HBL, Barness Street Branch, Karachi, has deposed that fraud took place during the tenure of Manager Umar Ali Khan and as per procedure, the Branch Manager is the custodian of account opening forms. He admitted that during checking photocopy of NIC of Aleemuddin and account opening form of Aleemuddin's account were missing.

21. PW.8 Naveed Ahmed Shahid (investigating officer) has deposed that one Rafiullah Khan made an application to NBP, Sharifabad Branch, Karachi, regarding commission of fraud and also stated in his statement under Section 161, Cr.P.C. that two cheques from his cheque book were stolen by his wife. He visited HBL Barness Street Branch and verified the record viz SS card, three cheques and three deposit slips while account opening form was

missing. He further deposed that Bank Manager informed him that encashed cheques were of Rs.750,000/-, Rs.133,000/- and Rs.5,000/-.

22. A minute examination of the whole evidence brought on record by the prosecution reveals that none of the witnesses have shown any criminal intent of the appellants for personal gain or to extend any unlawful monetary benefit to anyone else. Admittedly, the offences under National Accountability Ordinance, 1999, are the offences which require proving of *mens rea* on the part of accused. In order to prove the offences and specifically the offence under section 9(a)(iii)(iv) & (vi), punishable under section 10 of the Ordinance, it is mandatory for the prosecution to prove the intention on the part of an accused that he by playing corrupt, dishonest or illegal means obtained for himself, his spouse, or dependent or for any other person any property, valuable thing or pecuniary advantage. All these acts or omissions, constituting an offence, are essentially required proving of *mens rea* on the part of accused. No doubt in Section 14(a) of National Accountability Ordinance, 1999, provides certain presumptions against an accused for certain acts or omissions constituting the offences but initial burden to make out a reasonable case against an accused charged under any of the offences under the Ordinance, *ibid*, always lies on the prosecution and thereafter it shifts towards the accused. If leaving aside the defence evidence, the prosecution evidence is seen, as discussed above, none of the prosecution witnesses has stated even a single word against the appellants with regard to their conduct, behavior, criminal intent, money trail or accumulation of assets beyond their known source of income. No iota of evidence is available on record to show any monetary benefit ever was extended by the appellants to anyone or they themselves got any such illegal gain as a result of alleged crime. This position has further been admitted by the investigating officer in his deposition that Nisar Ahmed was not a beneficiary of the crime, hence charges under Section 9(a)(iii)(iv)(vi) of NAO, 1999, stand not proved.

23. As to the testimony of investigating officer is concerned, suffice to observe that the investigating officer is an important character, who is under obligation to investigate the matter, honestly, fairly and justly, so as to bring on surface the truth. It is the bounden duty of the Investigation Officer not only to build-up the case with such evidence enabling the Court to record conviction by all means, but also to dig out the truth to light to reach at a just and fair decision. Meaning thereby that the purpose of investigation is to

collect all relevant evidence pertaining to allegation of crime and to dig out the truth enabling and facilitating the Court to administer justice and to bring the real culprits to book, however, it appears that investigating officer has failed to discharge his duties in the manner as provided under the law. The Reference disclosed that complainant Rafiullah Khan was operating A/c No.0002085505 at National Bank of Pakistan, Sharifabad Branch, Karachi, whose two blank cheques were stolen by his Ex-wife Rabia Anjum, and handed over the same to Waseem Ahmed, Inspector Intelligence Bureau (IB). Surprising to note that when complainant himself particularly involved his Ex-wife in the commission of theft of two blank cheques from his cheque book, then how investigating officer reached to a conclusion as to her innocence. The entire record is silent as to what action was carried out against Rabia Anjum and Waseem Ahmed, Inspector Intelligence Bureau, to whom Rabia Anjum handed over the stolen cheques. We are also conscious of the fact that the prosecution has failed to produce NIC of Aleemuddin and account opening form, allegedly opened by Nisar Ahmed with collusion of Nadir Khan. Mere explanation furnished by the prosecution that the same were missing is not valid excuse because it was the duty of the investigating officer to collect evidence from all corners and bring the responsible persons to book.

24. The another intriguing aspect of the matter is that as per prosecution case the amount of Rs.750,000/- was withdrawn through cheque No.2256451 in favour of HSL Ping Trading, but none either from the proprietor or anyone else from the said company has been cited as witness or examined at trial. Appellant Nadir Khan in reply to Question No.6 of his statement under Section 342, Cr.P.C. has stated that actually the fraud was committed by Bank Manager PW.1 Umar Khan, who in order to save his skin from his wrong doings has falsely involved him in the commission of offence with collusion of investigating officer. He further stated that it is the job of Bank Manager to keep the record of bank accounts in his safe custody, which finds support from the testimony of PW.7 Muhammad Rafique, who in his deposition has stated that it is the duty of the Branch Manager to keep the record of accounts in safe custody.

25. We are conscious of the fact that two leaves from cheque book of PW.2 Rafiullah Khan were used in the commission of crime, which were deposited in the account of Aleemuddin (account holder of HBL) and both cheques were sent to HBL for clearance. The record is also suggestive of the

fact that signatures of Rafiullah were verified with the signatures, available on SS card, by PW.3 Syed Raees Ahmed, Manager NBP, and PW.5 Sultan Ahmed, which were found as genuine, but the investigating officer did not bother to send said cheques and SS card to handwriting expert for verification and report. Omission, thus, caused a fatal blow to the prosecution case. The only piece of evidence that has come on record against Nadir Khan is that he has filled the deposit slips in his own handwriting, but that too has not been verified through handwriting expert. The report of handwriting expert, exhibited in evidence, was managed by PW.1 Muhammad Umar Khan through private handwriting expert, who has neither been examined during investigation nor produced at trial. PW.2 Rafiullah Khan has admitted in his cross-examination that he was involved in 5/6 criminal cases, which were tried and culminated into his acquittal, which shows that he was a habitual offender, but the investigating officer did not investigate this aspect of the matter. He has also not examined Mst. Rabia Anjum, who allegedly stolen two leaves of cheque book, which were used in the commission of offence. A bare perusal of the impugned judgment reveals that the learned trial Court did not appreciate these aspects of the matter and convicted the appellants without any cogent material.

26. Reviewing the evidence of the prosecution witnesses, as discussed above, it is very difficult for us to give due weight to the testimony of prosecution witnesses. It is a well settled law that no one should be construed into a crime unless his guilt is proved beyond reasonable doubt by the prosecution through reliable and legally admissible evidence, which is lacking in this case. It is apparent from the record that the findings of the learned trial Judge are based on presumption, suffering from misreading and non-reading of evidence as well as from factual and legal infirmity thus, not sustainable in the eyes of law. Even otherwise, if the evidence led by prosecution is seen in its entirety, none of the witnesses has expressed any suspicion about the involvement of appellants with the offence charged with nor have they shown any criminal intent for corruption and corrupt practices against him. Admittedly, the offences under National Accountability Ordinance, 1999 are the offences which require proving of *mens rea* on the part of accused by the prosecution. If the whole evidence produce by the prosecution is seen, leaving aside the defence evidence, none of the prosecution witnesses ever stated even a single word against the appellant with regard to his conduct, behavior, criminal intent as well as *mens rea* for commission of offences of corruption and corrupt practices, hence in

absence of evidence regarding *mens rea* etc., charge under Section 9(a) stand not proved against appellants beyond doubt. The Hon'ble Supreme Court in the case of *The State v Anwar Saif ullah Khan* {PLD 2016 Supreme Court 276}, held that:-

“With reference to the precedent cases mentioned above the law appears to be settled by now that in a case involving a charge under section 9(a)(vi) of the National Accountability Ordinance, 1999 the prosecution has to make out a reasonable case against the accused person first and then the burden of proof shifts to the accused person to rebut the presumption of guilt in terms of section 14(d) of the said Ordinance. It is also apparent from the same precedent cases that a mere procedural irregularity in the exercise of jurisdiction may not amount to misuse of authority so as to constitute an offence under section 9(a)(vi) of the National Accountability Ordinance, 1999 and that a charge of misuse of authority under that law may be attracted where there is a wrong and improper exercise of authority for a purpose not intended by the law, where a person in authority acts in disregard of the law with the conscious knowledge that his act is without the authority of law, where there is a conscious misuse of authority for an illegal gain or an undue benefit and where the act is done with intent to obtain or give some advantage inconsistent with the law. The said precedent cases also show that misuse of authority means the use of authority or power in a manner contrary to law or reflecting an unreasonable departure from known precedents or custom and also that mens rea or guilty mind, in the context of misuse of authority, would require that the accused person had the knowledge that he had no authority to act in the manner he acted or that it was against the law or practice in vogue but despite that he issued the relevant instruction or passed the offending order”.

In another case of *M. Anwar Saifullah Khan v. State* {PLD 2002 Lahore 458}, the Hon'ble apex Court held as under:--

“Misuse of authority means the use of authority or power in a manner contrary to law or reflects an unreasonable departure from known precedents or custom. Every misuse of authority is not culpable. To establish the charge of misuse of authority, the prosecution has to establish the two essential ingredients of the alleged crime i.e. "mens rea" and "actus reus". If either of these is missing no offence is made out. Mens rea or guilty mind, in context of misuse of authority, would require that the accused had the knowledge that he had no authority to act in the manner he acted or that it was against law or practice in vogue but despite that he issued the instruction or passed the order. In the instant case the documentary evidence led by the prosecution

and its own witnesses admit that the appellant was told that he had the authority to relax the rules and the competent authority P.W.3 could make the appointments thereafter. The guilty intent or mens rea is missing. Even the actus reus is doubtful because he had not made the appointments. He merely approved the proposal and sent the matter to the competent authority. At worst he could be accused of mistake of civil law. i.e. ignorance of rules. But a mistake of civil law negates mens rea."

27. We are also conscious of the fact that the learned trial Court dealt with the evidence led by the appellants in the mode and manner as if they have to establish their innocence irrespective of the evidence led by the prosecution. The prosecution since remained unable to produce convincing evidence to discharge initial onus, therefore, there is no legal compulsion to deal with the evidence led by appellants in their defence.

28. There is no cavil with the proposition and judicial consensus seems to be that "if on the facts proved no hypothesis consistent with the innocence of the accused can be suggested, the conviction must be upheld. If however, such facts can be reconciled with any reasonable hypothesis compatible with the innocence of the accused the case will have to be treated as one of no evidence and the conviction and the sentence will in that case has to be quashed. Rule of Islamic Jurisprudence has been laid down in the judgment rendered by the Hon'ble Supreme Court of Pakistan in *Ayub Masih's* case (PLD 2002 SC 1048), wherein the Hon'ble apex Court ruled that:-

"It is also firmly settled that if there is an element of doubt as to the guilt of the accused, the benefit of the doubt must be extended to him. The doubt, of course, must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, "It is better that ten guilty person be acquitted rather than one innocent person be convicted". In simple words it means that utmost care should be taken by the Court in convicting an accused. It was held in "The State v Mushtaq Ahmed (PLD 1973 SC 418) that this rule is antithesis of haphazard approach or reaching a fitful decision in a case. It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic Laws and is enforced rigorously in view of the saying of Holy Prophet (P.B.U.H) that the mistake of Qazi (Judge) in releasing a criminal, is better than his mistake in punishing an innocent".

29. The epitome of whole discussion gives rise to a situation that the appellants have been convicted without appreciating the evidence in its true perspective, rather the prosecution case is packed with various lacunas, discrepancies and irregularities, which resulted into a benefit of doubt to be extended in favour of the appellants not as a matter of grace but as a matter of right. Accordingly, while extending the benefit of doubt in favour of the appellants, we hereby allow these appeals, set-aside the conviction and sentences recorded by the learned trial Court against appellants by impugned judgment dated 14.11.2008 and acquit them of the charge. The appellants are on bail, their bail bonds stand cancelled and surety discharged.

JUDGE

JUDGE

NAK/PA