

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi.

Criminal Accountability Appeal No.14 of 2018.

Appellant: M. Bashir Bismil S/o. Ghulam Mehdi, presently confined in Central Prison, Karachi through Mr. Amer Raza Naqvi, Advocate.

Criminal Accountability Appeal No.15 of 2018.

Appellant: Tila Mohammad S/o. Zaid Mohammad Khan presently confined in Central Prison, Karachi through Mr. Amer Raza Naqvi, Advocate.

Criminal Accountability Appeal No.17 of 2018.

Appellant: Nazeer Channa S/o. Wahid Bux presently confined in Central Prison, Karachi through M/s. Shahab Sarki and Mairajuddin Advocates.

Criminal Accountability Appeal No.18 of 2018.

Appellant: Abdul Razzak S/o. Rehmatullah presently confined in Central Prison, Karachi through M/s. M. Rehman Ghous and Raghbir Junejo Advocates.

Criminal Accountability Appeal No.19 of 2018.

Appellant: Mureed Abbas S/o. Mian Riaz Hussain presently confined in Central Prison, Karachi through Mr. Obaid-ur-Rehman, Advocate.

Respondent/State (NAB): Mr. R.D. Kalhoro, Special Prosecutor NAB.

Date of hearing: 01.09.2020 and 02.09.2020.

Date of Judgment: 15.09.2020.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- The appellants M. Bashir Bismil S/o. Ghulam Mehdi, Tila Mohammad S/o. Zaid Mohammad Khan, Nazeer Channa S/o. Wahid Bux, Abdul Razzak S/o. Rehmatullah and Mureed Abbas S/o. Mian Riaz Hussain were convicted by Accountability Court No.1. Sindh Karachi. vide

Judgment dated 28.04.2018 in Reference No.17 of 2016 under section 10(a) of National Accountability Ordinance, 1999 (NAO) and sentenced for 10 years R.I. and fine of Rs.43,83,230/- each to the extent of their liabilities which is recoverable as arrears of land revenue as defined in section 33-E of the NAO and in default of fine they were ordered to serve R.I. for one year more. The accused persons were disqualified for a period of 10 years under section 15 of the NAO to be reckoned from the date of their release after serving their sentence for (a) seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body or any statutory or local authority or in service of Pakistan or of any Province and (b) shall not be allowed to apply for or be granted or allowed any financial facilities in the form of any loan or advances or other financial accommodation by any bank or financial institution owned or controlled by the Government for a period of 10 years from the date of their convictions. Hence the appellants have filed the above Criminal Accountability Appeals against their convictions. However, benefit of section 382-B Cr.P.C. was extended to the appellants.

2. The brief facts of the case as narrated in the reference are that on receipt of information regarding involvement of M/s. R.R. Enterprises in Sales Tax Refund fraud through fake invoices to the tune of Rs.24.68 Million during the period 2004-2007 an inquiry was authorized which after uncovering sufficient evidence was converted into an investigation on 15.05.2015. The investigation revealed that in the year 2003 the FBR had introduced a scheme through SRO No.575(1)2002, (SRO) 1125(1)/2011 which enabled exporters to claim refunds on the basis of input and output of purchases of sales. Another scheme allowed the local trader on zero rated basis to claim refunds without export. During the period from 2004 to 2007 accused Abdul Razzak, CEO of M/s. R.R. Enterprises claimed refunds through fake and flying invoices and forged documents amounting to Rs.24.68 Million. Accused Abdul Razzak defrauded the national exchequer through tampering and forging the proof of payment. He used fake invoices which he never got from purported suppliers to show exaggerated purchases and got refunded the above huge amount through fraud in connivance with the officials of the Sales Tax Department who were then posted in refund and other allied sections of Sales Tax FBR in contravention of Section 73 of the Sales Tax Act, 1990 and Rule 36 of Sales Tax Rules, 2006 and SRO 575(1) of 2002. In the instant case neither Post Refund Audit was conducted nor claim files were sent to Post Refund Audit (PRA) through enforcement/refund officers and officials in the respective period of each sanction in year 2004-2006. In 2007

the then Deputy Commissioner had forwarded a letter to PRA which was then knowingly missed/dumped by Tila Mohammad and Bashir Bismil as the file was not dispatched to PRA Division which led to an amount of Rs.24.68 Million being illegally refunded to R.R. Enterprises.

3. It is also alleged in the Reference that accused Tila Muhammad while posted and working as Auditor in FBR in connivance with co-accused Abdul Razzak, CEO M/s. R.R. Enterprises involved in this fraud by accepting, processing and maneuvering of fraudulent claim on the basis of fake and forged proof of payments and invoices. He deliberately omitted to refer the sanctioned file to audit section for Post Refund Audit (Post Audit Refund). Neither he himself checked the authenticity of documents through simple and random verification nor sent the files to PRA divisions. He willfully obstructed applying the law through misusing/failing to exercise his authority which benefitted Abdul Razzak.

4. It is further alleged in the Reference that accused Nazeer Ahmed Channa and Bashir Bismil while posted and working as Auditors in FBR willfully and deliberately failed to check the forgery and genuineness of refund sales tax documents provided by accused Abdul Razzak, CEO M/s. R.R. Enterprises and processed the files for onward sanctioning in disregard of the process of PRA.

5. It is also alleged in the Reference that accused Mureed Abbas while posted and working as Auditor in FBR authorized fake/concocted external audit report to show the purchase done by M/s. R.R. Enterprises as valid which was proved otherwise. Thus connivance and misuse of authority was proved against the accused in order to benefit accused Abdul Razzak. Thus in this way accused persons namely Nazeer Channa, M. Bashir Bismil, Mureed Abbas and Tila Mohammad being government officials misused and or failed to exercise their authority by committing an offence of criminal breach of trust and fraud in connivance with accused Abdul Razzak by accepting, processing, maneuvering and sanctioning refund claims of Abdul Razzak which were based on forged and fake documents i.e. proof of payment and invoice and deliberately avoiding to forward the refund files for PRA and thereby caused loss to the government exchequer to the tune of Rs.24.68 million and thereby committed the offence of corruption and corrupt practices as defined u/s.9(a) NAO and punishable u/s.10 NAO.

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6. When the Reference was referred to the trial court accused Abdul Razzak was an absconder and as such after compliance of requirement of Section 512 Cr.P.C. the said accused was declared proclaimed offender and accordingly copies of relevant documents were supplied to the accused persons in terms of Section 265-C Cr.P.C. and at the trial charge was framed and read over to the accused persons namely Tila Mohammad, Nazeer Channa, Bashir Bismil and Mureed Abbas to which they pleaded not guilty and claimed to be tried. Subsequently accused Abdul Razzak who was absconder put in his appearance and joined proceedings of the case and was supplied copies of documents in compliance of Section 265-C Cr.P.C. Thereafter on 04.08.2017 an amended charge was framed against all accused persons who all pleaded not guilty and claimed trial.

7. To prove its case the prosecution examined 08 prosecution witnesses and exhibited numerous documents. The trial court also called 2 CW's although they were the same witnesses who gave evidence about two different companies. The appellants all gave their statements under S.342 Cr.PC where by they denied the allegations against them. None of the appellants gave evidence under oath or called any DW in support of their defence case.

8. After hearing the parties and appraising the evidence before it the trial court vide the impugned judgment dated 28.04.2018 convicted and sentenced the appellants as mentioned above. Hence these appeals against their conviction have been filed by the appellants.

9. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 28.04.2018 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

10. Learned counsel for appellant Abdul Razzak who was the sole proprietor of RR Enterprises contended that he was innocent of any wrong doing, that he had not forged any document, that the suppliers/vendors he was dealing with all existed; that all his Sales Tax refund claims were genuine; that he had not colluded or connived with any official from the FBR in order to fraudulently obtain any sales tax refunds illegally by fraud and thus he was not a beneficiary of any one's misuse of authority and thus for any or all the above reasons he should be acquitted of the charge by being extended the benefit of the doubt. In

support of his contentions he placed reliance on **Amjad Naeem v The State** (2000 YLR 345).

11. Learned counsel for appellants Bashir Bismil and Tila Muhammad who were both processors of the sales tax refunds contended that they were completely innocent of any wrong doing, had not misused their authority to benefit appellant Abdul Razzak; that they had complied with all applicable rules and had simply fed the documents into the CREST system which did not throw up any anomalies; it was normal for processors to meet claimants; that at best it was a case of bona fide error of judgment on their part which amounted to an irregularity as opposed to an illegality and thus for any or all the above reasons they should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he placed reliance on **Khan Asfandyar Wali and others v Federation of Pakistan** (PLD 2001 SC 607), **Rauf Baksh Kadri v The State** (2003 MLD 777), **Muhammad Akram v The State** (2009 SCMR 230), **Khalid Mehmood and others v The State** (2011 SCMR 664), **The State v Anwar Saif Ullah Khan** (PLD 2016 SC 276) and **Waris Mean v The State and another** (PLD 1957 SC (Pak). 157).

12. Learned counsel for appellant Nazeer Channa who was also a processor of the sales tax refunds contended that his case was on an entirely different footing to that of processors appellants Bashir Bismil and Tila Muhammad since there was absolutely no evidence against him in connection with this case; the prosecution had not even proved that he was acting as a processor at the time when appellant Abdul Razzak's sales tax refund was dealt with; that the only evidence against him was a bald assertion by the PW 8 Zameer Abbasi who was the IO that through his processing of the sales tax refund of appellant Abdul Razzak he had caused loss to the state and thus for any or all the above reasons he should be acquitted of the charge by being extended the benefit of the doubt.

13. Learned counsel for appellant Mureed Abbas who was an auditor and had nothing to do with the FBR contended that his role only came into play once the sales tax refund had been processed and sanctioned and as such he had no role in the refund of the sales tax, that none of the elements of the charge had been made out against him; that the only evidence against him were two documents which he admittedly signed but these related to existing companies and that the trial court had erred in mixing his role up with the other official appellants; that the audit report was not on record; that he had not misused any

authority and thus for any or all the above reasons he should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he placed reliance on **Muhammad Siddiqui Farooq v The State** (2010 SCMR 198), **The State v Anwar Saif Ullah Khan** (PLD 2016 SC 276), **Abid Wali Khoso and others v National Accountability Bureau (NAB)** (2018 P Cr. L J 1607), **Abdul Rasheed alias Zahid and others v The State** (2019 MLD 654), **Arbab Khan v The State** (2010 SCMR 755), **Noor Muhammad Khatti and others v The State** (2005 P Cr. L J 1889), **M. Younus Habib v The State** (PLD 2006 SC 153) and **Muhammad Younis Lakhani v The State** (PLD 2006 Karachi 198).

14. On the other hand Mr. R.D. Kalhoro, Special prosecutor NAB has fully supported the impugned judgment. He contended that appellant Abdul Razzak had forged cheques for the purposes of illegal sales tax refund, in this respect he pointed to cheques which had initially been issued for cash and then had been doctored to show non-existent companies which were used for the illegal sales tax refund claim, that these cheques and the fake companies names they were in were deliberately not verified by appellant processors Bismil, Tila and Channa by misusing/failing to exercise their authority who acted in connivance with appellant Abdul Razzak which caused loss to the exchequer by successfully processing illegal and fraudulent sales tax refunds, that the appellant processors Bismil, Tila and Channa in order to ensure that their scam was not detected illegally by passed the post refund audit; that appellant Abdul Razzak submitted fake sales tax invoices in the name of fake companies which were all not verified and cleared by processors Bismil, Tila and Channa in connivance with the appellant Abdul Razzak by misusing/failing to exercise their authority which unduly benefited/favored appellant Abdul Razzak and caused a loss to the Exchequer; that appellant Mureed Abbas had deliberately by misusing his authority allowed these illegal sales tax refunds to pass through the post audit and as such the prosecution had proved its case against each appellant beyond a reasonable doubt and each appeal should be dismissed.

15. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellants, the impugned judgment with their able assistance and have considered the relevant law.

16. After our reassessment of the evidence we find that the prosecution has proved its case beyond a reasonable doubt against appellant Abdul Razzak the proprietor of RR Enterprises for the following reasons; 5

(a) It is an admitted fact that the appellant applied for and received the sales tax refund.

(b) It is quite apparent from the evidence on record that the appellant relied on forged sales tax invoices in order to make his claim. Significantly, PW 2 Muhammed Iqbal the proprietor of ACI Industries who allegedly gave sales tax invoices to the appellant deposed that such invoices were fake and even CW 1 Syed Umair Raza the senior auditor FBR produced documents which showed that ACI Industries had only given 9 invoices to the appellant worth a measly 48 lacs in total. Likewise despite call up notices being sent to the addresses of the other suppliers who allegedly gave sales tax invoices to the appellant none of the other suppliers could be found and in some cases the call up notice was returned as no one was at that address which leads to the only reasonable inference based on the particular facts and circumstances of the case that these suppliers did not exist and that the invoices were forged. This is more so since despite these entities being the appellants faithful business suppliers he did not call a single one of them as a DW in order to rebut the prosecution case. Likewise he did not give evidence on oath. PW 1 Syed Muammed Ali Abidi who is a bank manager also produced 135 cheques showing amounts debited from the appellants account. These cheques were tampered and forged and were not crossed cheques but rather cash cheques which do not tally with the cheques produced by PW 6 Syed Aley Jaffar which were the identical cheques except in the name of a false company which again shows the fraudulent actions of the appellant. Thus based on both the oral evidence as supported by the documentary evidence we have no doubt that the prosecution has proved its case against the appellant beyond a reasonable doubt and uphold his conviction for the offence charged especially as he has not been able to point out any legal infirmity in the impugned judgment.

17. With regard to sentencing however we find that, keeping in view the total amount of loss of 2.4 Core (around 50 lacs per appellant) and NAB's mandate to investigate mega corruption cases worth billions of Rupees, his sentence is too harsh also taking into account that the maximum sentence under the NAO is 14 years imprisonment and accordingly reduce the appellants sentence to 6 years RI along with the same fine as mentioned in the impugned judgment and that he will have to serve an extra years RI in the event that he fails to pay the fine. He shall have the benefit of S.382-B Cr.PC.

3

18. After our reassessment of the evidence we find that the prosecution has proved its case beyond a reasonable doubt against appellants Bashir Bismil and Tila Muhammad for the following reasons;

- (a) It is an admitted fact that both the appellants were processors who were working in the FBR Sales tax Refund department who according to the record processed appellant Abdul Razzak's sales Tax refund.
- (b) That both of the appellants under the sales tax rules were under an obligation to check all the invoices and ensure that the claim for Sales Tax refunds were admissible. Both the oral and documentary evidence in which their signatures appear in connection with the illegal sales tax refund shows that they completely failed to do so. It would have been excusable had they over looked one invoice but the fact that they over looked and failed to check the admissibility of so many invoices clearly shows that both the appellants failed to exercise their authority with the requisite mens rea in order to unduly benefit appellant Abdul Razzak especially when it is kept in mind that the appellant according to the evidence was regularly meeting appellant Tila and both the appellants deliberately by passed the required post refund audit to ensure that their misuse of authority/failure to exercise authority would not be uncovered. Thus, when their conduct is taken in a holistic manner it is quite clear that the appellants did not commit a mere irregularity but rather an illegality which caused a loss to the state and as such once again we find that the prosecution has proved its case beyond a reasonable doubt against both the appellants and uphold their convictions for the offence so charged especially as they have not been able to point out any legal infirmity in the impugned judgment.

19. With regard to sentencing however we find that, keeping in view the total amount of loss of 2.4 Core (around 50 lacs per appellant) and NAB's mandate to investigate mega corruption cases worth billions of Rupees their sentences to be too harsh also taking into account that the maximum sentence under the NAO is 14 years imprisonment and accordingly reduce both their sentences to 4 years RI each along with the same fine as mentioned in the impugned judgment and that either or both of them will have to serve an extra years RI in the event that both

of them or either one of them as the case may be fails to pay the fine. They shall both have the benefit of S.382-B Cr.PC.

20. After our reassessment of the evidence we find that the prosecution has NOT proved its case beyond a reasonable doubt against appellant Nazeer Channa who is acquitted of the charge based on the benefit of the doubt being extended to him who shall be released from custody unless he is wanted in any other custody case for the following reasons;

(a) It is an admitted fact that the appellant was a processer who was working in the FBR Sales tax Refund department however it is unclear as to whether he dealt with the sales Tax refund of appellant Abdul Razzak. This is because;

- (i) There is no definitive evidence that he processed or in any other way dealt with appellant Abdul Razzak's sales tax refund claim;
- (ii) He did not sign any document in respect of the sales tax refund
- (iii) PW 6 Syed Aley Jaffar who is one of the prosecutions star witnesses states as under during his cross examination;

"I do not know if accused Nazeer Ahmed Channa had been transferred in the year 2006. It is correct that as per analysis sheets available on record the accused Nazeer Ahmed Channa did not process the refund claim".

Thus, it is doubtful if the appellant was even working in the refund department when the refund was processed and he certainly did not play any role in its processing which is in consonance with his S.342 Cr.PC statement.

(b) The only other single piece of evidence against the appellant in the entire record of the trial is the bald unsubstantiated and uncorroborated allegation by PW 8 Zameer Abbasi who was the IO that the appellant caused a certain amount of loss.

21. After our reassessment of the evidence we find that the prosecution has NOT proved its case beyond a reasonable doubt against appellant Mureed Abbas who is acquitted of the charge based on the benefit of the doubt being extended to him who shall be released from custody unless he is wanted in any other custody case for the following reasons;

4

(a) He was not a processor and was not a part of the FBR and was in the Auditor Generals Office

(b) He played no role in processing or sanctioning the sales tax refund.

(c) The only evidence against him is that he admittedly signed two documents in connection with the sales tax refund which had **already** been sanctioned. That the prosecution has not proven that the companies concerned where he signed did not exist. The IO did not even serve them with a call up notice.

(d) He did not sign any audit report and PW 4 Muhammed Ayub Khan in cross examination specifically states that,

"It is correct that the audit was conducted in accordance with the law".

(e) That it appears that the learned trial court may have got his role mixed up with some of the other appellants by regarding him as a processor as is evident from the top of typed P 26 of the impugned Judgment which reads as under,

"It appears from the record produced by PW-06 including the sales tax refund claims of M/s. R.R. Enterprises during the year 2004 to 2007 the accused Tila Muhammad the then Senior auditor, accused Nazeer Ahmed Channa, Bashir Bismul and Mureed Abbas while auditors entertained, processed and were also instrumental in the sanctions and payment of sales tax refund claims to M/s. R.R. Enterprises which were otherwise inadmissible and processed through fake and flying invoices"

22. The appeals stand disposed of in the above terms along with all applications under Section 426 read with Section 561-A Cr P.C.