

IN THE HIGH COURT OF SINDH AT KARACHI

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

Criminal Accountability Appeal No.13 of 2017.

Appellant: Muhammad Sadiq Rajar S/o. Din Muhammad, presently confined in Central Prison, Karachi through Mr. Farooq H. Naek and Mr. Usman Shaikh, Advocates.

Respondent/State (NAB) Through Mr. R.D. Kalhoro, Special Prosecutor NAB assisted by the I.O. Waliullah.

Date of hearing: 10.09.2020.
Date of Judgment: 22.09.2020.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- The appellant Muhammad Sadiq Rajar S/o. Din Muhammad was convicted by Accountability Court No.IV, Sindh Karachi vide Judgment dated 03.08.2017 in National Accountability Bureau (NAB) Reference No.04-B of 2014 **Muhammed Sadiq Rajar and others**, whereby the appellant was convicted under section 9(a)(i)(ii)(iii)(iv)(vi)(ix)(x)(xi) and (xii) of National Accountability Ordinance, 1999 (NAO) and sentenced to suffer R.I. for ten (10) years and fine of Rs.10 million. In case of default in payment of fine he was ordered to suffer further R.I. for two (02) years. The appellant was also disqualified for a period of 10 years under section 15 of the NAO to be reckoned from the date of release after serving the sentence for 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 obtain any financial facility in the form of loan or advance from any financial institutions controlled by Government for the period of 10 years. Hence the appellant has filed the above Criminal Accountability Appeal against his conviction.

2. The very brief facts of the case as disclosed in the reference are that some senior officials of the Central Information Employee's Cooperative Housing Society (the Society) namely Muhammad Azam Brohi, Syed Muhammad Adnan, Abdul Qadir, Abdul Malik, and Rasheed Gul, Fahad Naseem Khan, Muhammad

Shoaib who were private persons in connivance and collusion with each other misused their authority by illegally cancelling plots of the Society and re allotting them and illegally auctioning the land which belonged to the Society to the persons who were otherwise not entitled to such land which caused a loss to the Society. In respect of some of the accused illegally awarding contracts to their favored contractors by misusing their authority in order to benefit those contractors which again caused a loss to the Society. That appellant Muhammad Sadiq Rajar who was the Registrar Co-operative Housing Societies deliberately misused his authority in connivance and collusion with the aforesaid co-accused by allowing the Society's land to be auctioned whilst ignoring a caution not to sell such land which had been placed on such land by the NAB under S.23 (a) NAO which caused a loss to the Society and as such the appellant and his co-accused had committed acts of corruption and corrupt practices under S.9 of the NAO which lead to the filing of the aforesaid Reference No. 04 B/2014 before accountability court No.IV in Karachi.

3. In order to prove its case, the prosecution examined 47 PWs and exhibited numerous documents. The appellant recorded his statement under Section 342 Cr.P.C., whereby he denied the allegations leveled against him and in particular stated that he did not know that the land which was auctioned was cautioned under S.23 (a) NAO and hence he had simply marked on the request for the auction by the Society "please attend" and marked it to one of his subordinates. He did not give evidence on oath and did not call any DWs in support of his defence case.

4. After hearing the parties and assessing the evidence available on record the learned accountability court convicted and sentenced the appellant as mentioned earlier in this judgment and hence the appellant has filed this appeal against conviction.

5. Learned counsel for the appellant Muhammad Sadiq Rajar has contended that the appellant was completely innocent of any wrong doing; that there was no evidence that he was in collusion or connivance with any member of the Society who had requested him to auction the land; that he was completely unaware of NAB's caution under S.23 (a) of the NAO over the land as he was not Registrar when NAB's caution letter was issued to the office of the Registrar; that the caution had not been brought to his attention; that he had not given his permission for the auction but had simply marked the concerned letter with the

words "please attend" and marked it to DDO Younis who was then responsible for conducting the auction; that even if he had known of the caution it was merely a procedural irregularity and not a criminal act for which he had no mens rea; that he by letter ordered any further proceedings taken pursuant to the auction to be immediately stopped and as such prevented a much greater loss to the Society/Government and that based on any or all of the above grounds he was entitled to be acquitted based on him being extended the benefit of the doubt. He also brought to our attention the fact that the appellant out of a 10 year sentence which in his view was particularly harsh and disproportionate to his role in the offence the appellant had already served out almost 7 years including remissions and the benefit of S.382 B Cr.PC. In support of his contentions he placed reliance on the cases of **The State and others v. M. Idress Ghauri and others** (2008 SCMR 1118), **The State v. Anwar Saifullah Khan** (PLD 2016 Supreme Court 276) and **Dr. Asghar Ali v. The State and others** (2016 P. Cr.LJ 193).

6. On the other hand special prosecutor NAB has fully supported the impugned judgment and had contended that the prosecution has proved its case beyond a reasonable doubt through its evidence and that the appeal be dismissed. In particular he has contended that the appellant was in full knowledge of NAB's caution which had even been brought to his attention shortly before the auction by PW 33 Muhammed Akram.

7. 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 including that cited at the bar.

8. After our reassessment of the evidence we find that the prosecution has **NOT** proved its case beyond a reasonable doubt against appellant Muhammad Sadiq Rajar 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) Admittedly the appellant had no particular connection with any senior office bearer/member of the Society and there is no evidence that he was aware of any wrong doing which the Society might have been involved in and there is no evidence that he connived or colluded with any of the Society's office bearers or co-accused in any way. His only interaction

with the Society was in his official capacity as Registrar Co-operative Housing Society.

(b) That he was not Registrar of the Co-operative Housing Society when NAB's letter of caution dated 20.01.2012 was sent to Mr. Muneer Baig and there is no direct evidence that he was aware of NAB's caution over the land before marking on the Society's request for auction, "please attend". Muneer Baig who appeared as PW 27 did not give evidence that he brought NAB's caution to the attention of the appellant and in cross examination states as under,

"I do not know if any letter was written by Younis Baloch, the then DOC to the Registrar accused Muhammad Sadiq Rajar disclosing factual position of the said commercial plots, but during my posting no such letter was written by Younis Baloch to accused Muhammad Sadiq Rajar".

This is **important** as Younis Baloch who was made a PW was the keeper of the record and was the person most likely to know of NAB's caution over the land. In his (PW 27 Muneer Baig's) evidence at best it might have been *presumed* that the appellant may have had some knowledge of the caution. It is well settled that presumptions cannot take the place of cogent evidence especially if there is no legal status given to such a presumption which there is not in this case.

The only evidence that the appellant might have had any knowledge of the caution before the auction is provided by PW 33 Muhammed Akram who sent a letter to the appellant to this effect although the value of this letter is damaged to a certain extent as no seizure memo was produced in respect of the same. **Significantly** this letter is marked to have been received in the appellant's office a day **after** the auction which would tie in with him later stopping any further action being taken in respect of the auction once he clarified the actual position from the record. Even otherwise, **significantly** PW 33 Muhammed Akram states as follows in his cross examination,

"It is a fact that no separate NOC was issued by accused Muhammad Sadiq Rajar and he has recorded words "please attend" on Society's letter dated 12.09.2013 whereby the Registrar was requested to depute his representative to attend the auction proceedings"

and

"It is correct to suggest that auction proceedings were stopped by accused Sadiq Rajar vide his letter dated 11.10.2013. Voluntarily says that a C.P. bearing No.4686 of 2013 was filed by accused Syed Muhammad Adnan against Registrar and others showing the apprehension of cancellation of auction of 40 commercial plots on various grounds".

and

"It is correct to suggest that accused Muhammad Sadiq Rajar had no criminal intent while issuing directions to attend".

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When read in a holistic manner we find that the evidence of PW 33 Muhammed Akram suggests that (a) the appellant gave no specific NOC for the auction to go ahead (b) once the appellant realized that the auction was not permissible he immediately prevented any further action being taken pursuant to the auction such as mutation of the plots which shows that he prevented any further unnecessary loss and (c) he had no criminal intent in allowing the auction which in terms of mens rea is an essential element of the offence as was held in the case of **M. Idress Ghauri** (supra) at P.1129 as under,

"There is no cavil to the proposition that an illegal order in a particular set of facts, may have the penal consequence but the question required to be adhered in the present case, was as to whether the act of grant of proprietary rights of the land without the power of Collector, by itself would constitute an offence of corruption and corrupt practices within the meanings of section 9(a)(vi) of the Ordinance without proof of essential ingredient of illegal gain and undue favour to constitute such an offence and the answer would certainly be in the negative. The concept of criminal administration of justice is based on the assumption that criminal act is injurious not just to an individual but society as a whole and violation of the criminal law which is built upon constitutional principles of the substantial as well as procedural law, has the consequence of punishment, therefore, the prosecution in the light of constitutional principle is under heavy duty to establish the violation of criminal law to award the punishment. The striding of law to bring an action within its compass is in conflict to the concept of fair treatment, 'therefore it is primary duty of the Court to ascertain whether the alleged offence was outcome of an act in violation of some law which can be termed as actus reus of the crime (guilty act) and if this essential element of crime is missing, the breach may not be subject to the sanction of criminal law, therefore, a person who is blamed to have committed an offence if is not accountable in criminal law for his action, he cannot be subject to the prosecution. The mens rea (guilty mind) is another essential component of crime without proof of which a person cannot be held guilty of an offence and similarly without the proof of concurrence to commit the crime, the offence is not complete. In addition to the above basic components of a crime, the harm caused in consequence to an act is also considered an essential element of a crime because the act if is harmless it may not constitute a crime. The above components of an offence of corruption and corrupt practices are not traceable in the series of transaction in the present case". (bold added)

(c) The fact that the appellant sent a letter within 20 days of the auction which prevented any further action being taken pursuant to the auction such as mutation of the plots shows that he prevented any further unnecessary loss and fits in with the fact that he did not have the necessary mens rea. This is because if he had the necessary mens rea and was in league with the other co-accused he would not have issued any such letter which in effect stopped

the scam in its tracks. If the appellant was in collusion and connivance with the other co-accused it also does not appeal to logic, common sense or reason that he would have sent such a letter. Rather he would have kept quiet and allowed the ill gotten gain to be made and possibly taken his share in the same.

(d) That there is no evidence that the appellant made any financial gain or received any favour on account of the auction taking place.

(e) The appellant's S.342 Cr PC statement is consistent with his defence case throughout trial which provides a believable alternative explanation to the offence for which he is charged.

(f) It is well settled law that the benefit of doubt must go to the accused by way of right as opposed to concession. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), wherein the Honourable Supreme Court has observed as follows:-

"It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

9. The appeal is allowed and disposed of in the above terms.