

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

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

Criminal Accountability Appeal No.03 of 2017.

Appellant: Shamshad Ali S/o. Muhammad Usman Ali,
 presently confined in Central Prison, Karachi
 through Mr. Saifullah, Advocate.

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

Date of hearing: 17.09.2020.

Date of Judgment: 29.09.2020.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- The appellant Shamshad Ali S/o. Muhammad Usman Ali was convicted by the Accountability Court No.II, Sindh Karachi vide Judgment dated 23.12.2016 in Reference No.10 of 2009, under section 10(a) of the National Accountability Ordinance, 1999 (NAO) and sentenced to suffer R.I. for ten (10) years and fine of Rs.1,01,21,960/-. In case of default in payment of fine he was ordered to suffer further R.I. for a period of one year. The appellant was also disqualified for a period of 10 years under section 15(a) 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 above Criminal Accountability Appeal for against his conviction.

2. The brief facts of the case are that the appellant/accused was posted and working as Accountant/Superintendent at Area Study Centre for Europe in Karachi University and during the year 2006 a complaint dated 11.10.2006 was moved by Professor Dr. Naveed Ahmed Tahir, Director, ASCE, University of Karachi to Director General NAB Sindh against the appellant and upon which an investigation was conducted by NAB authorities who found fraudulent misappropriation/embezzlement

from the funds of Area Study Centre for Europe (ASCE), University of Karachi involving an amount of millions of rupees from ASCE's accounts maintained at National Bank of Pakistan, Karachi University Branch through forgery of official's signature by accused Shamshad Ali the then Accountant/Superintendent in ASCE and thereby accused embezzled total amount of Rs.10,121,960/- by means of forgery and fraud from ASCE's main account No.077-6 and the provident fund A/C No.12518-9 both of which accounts were maintained at NBP, University of Karachi branch. It is further alleged that accused made different transfer entries from A/C No.077-6 from ASCE's account to A/c. No.11432-4 in his name and also made cash entries from the same account. The accused also made different entries from A/c. No.012518-9 in the name of provident/pension fund (ASCE) to the account in his name maintained at same branch and as such the National Accountability Bureau (NAB) filed Reference10/2009 against him on account of him having committed acts of corruption and corrupt practices under S.9 of the NAO.

3. The charge was framed against the appellant by the trial court to which he plead not guilty and claimed trial

4. In order to prove its case, the prosecution examined 10 PWs and exhibited numerous documents. The appellant recorded his statement under Section 342 Cr.P.C., whereby he denied the allegation leveled against him. He did not examine himself on oath or call any DW in support of his defence case.

5. After assessing the evidence before it the learned accountability court convicted and sentenced the appellant by the impugned judgment as earlier mentioned in this judgment. Hence the appellant has filed this appeal against his conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

7. After the reading out of the evidence and the impugned judgment learned counsel for the appellant candidly conceded that the prosecution

had proved the charge against the appellant beyond a reasonable doubt and the appellant on instructions did not want to argue the appeal on merits but instead only requested a reasonable reduction in sentence on the grounds that (a) he had served a substantial portion of his sentence (b) he was an old man of almost 70 years of age (c) that he suffered ill health and had already had an operation on his brain (d) that the appellant showed remorse for his actions by deciding not to contest the appeal and (e) the appellant had used his time productively in jail in activities which could contribute towards his reformation in that he had studied hard whilst in jail and had obtained numerous educational certificates.

8. Learned Special prosecutor NAB based on the mitigating circumstances put forward by the appellant however did not agree to a reduction in sentence however when confronted by the court that why based on the particular facts and circumstances of the case the appellant was not entitled to any reduction in his sentence of imprisonment he had no answer except to submit that the prosecution had proved the case against the appellant beyond a reasonable doubt and that he stood convicted and the sentence was in accordance with law.

9. Having gone through the evidence on record and the impugned judgment we are of the view that the prosecution has proved its case against the appellant beyond a reasonable doubt in respect of the offence for which he was charged based on both oral and documentary evidence which includes his confession and thus the only issue before us is one of sentencing.

10. We note that sentencing is at the discretion of the court and is not a mechanical exercise. In exercising its discretion the court should consider numerous factors such as the minimum and maximum sentence which can be imposed on conviction, the role of the accused, the gravity of the offence, in a NAB case the amount of loss caused to the State, whether the accused shows any kind of remorse, whether the accused is capable of reformation, the age of the appellant, the health of the appellant, his conduct in jail and how long he has already spent in jail etc. In this respect

reliance is placed on **Muhammed Juman V State** (2018 SCMR 318) which held as under at P322;

"Inflicting conviction and imposing sentence is not a mechanical exercise but it is onerous responsibility to inflict, fair, reasonable and adequate sentence, commensurate with gravity and or severity of crime, looking at the motive, attending and or mitigating circumstances that provoked or instigated commission of crime and it involves conscious application of mind. No mathematical formula, standard or yard stick could be prescribed or set out to inflict conviction and sentence, such factors vary from case to case and while undertaking such exercise Court must keep in light provisions contained in Chapters-III and IV of the P.P.C. Unfortunately, no sentencing guideline is laid down in Pakistan, though Courts have set out certain parameters in many cases as to what is mitigating and or aggravating circumstances that may warrant alteration and or varying in conviction and or sentence within the parameters provided under the charging or penal provision".

11. We find the mitigating factors made out by the appellant do justify a reduction in sentence keeping in view that NAB was unable to give any cogent reason as to why the 10 years sentence of imprisonment imposed on the appellant should be maintained. This is especially so keeping in view the various factors mentioned above which should be taken into account whilst exercising our discretion on sentencing and the mitigating factors put forward by the appellant. For example, in this case the maximum sentence was 14 years under the NAO yet the appellant was sentenced to 10 years imprisonment (for which he has already served out about 9 years as explained later in this judgment) despite the fact that the total loss to the State was only approx one crore rupees which pales into relative insignificance when it is considered that the primary mandate of the NAB under the NAO is to pursue mega corruption cases worth billions of rupees. Thus, whilst taking into consideration the arguments/mitigating factors justifying a reduction in sentence of the appellant we hereby by exercising our judicial discretion under S.423 Cr.PC maintain the appellant's conviction but modify the sentence of the appellant to the time which he has already undergone in custody (which amounts to almost 7 years despite him not being given the benefit of S.382 B Cr.PC which in our view he was entitled to which amounts to around a further one year and 9 months **plus** whatever remissions he was entitled

to during this approximate 1.9 years in jail which means in effect that the petitioner has spent at least 9 years in jail when remissions and S.382 B are included) which time undergone shall include the one year period for non payment of the fine especially as we consider his original 10 year sentence of imprisonment to be too harsh and disproportionate to the offence for which the appellant was convicted keeping in view the sentencing range under the NAO and the loss caused to the State and that he was denied the benefit of S.382 B Cr.PC. The appellant shall be released unless he is wanted in any other custody case however it is made clear that he will still be liable to pay the fine imposed on him under the impugned judgment which shall be recovered in the manner laid down in the NAO and be subject to the same disqualifications as imposed in the impugned judgment.

12. We are further fortified by our decision in reducing the appellant's sentence of imprisonment based on the particular facts and circumstances of this case by the recent supreme court case of **Tariq Saeed v State** (2020 SCMR 1177) which was also a NAB appeal against conviction where despite the appellant not showing any remorse and arguing his case on merits it was held as under at P.1181 Para 9 which reads in material part as under:

".....However, while relying on case titled "Muhammad Ashraf alias Chaudhry v. The State" (1994 SCMR667) and while taking into consideration that the petitioner is an old man with poor health condition, whereas he has already undergone substantial part of sentence recorded by both the courts, we deem it appropriate to meet the ends of justice reduce the sentence already inflicted upon the petitioner from seven years to five years while maintaining the sentence of fine of Rs.1,63,00,000/- and confiscation of farm-house belonging to petitioner in favor of the State. In the above said terms, this petition is converted into appeal and partly allowed."

13. The appeal, any constitution petitions and listed applications stand dismissed **except** as modified above.