**SUPREME COURT OF PAKISTAN**
(Appellate Jurisdiction)

**Bench-I:**
Mr. Justice Umar Ata Bandial, CJ
Mr. Justice Syed Mansoor Ali Shah
Mrs. Justice Ayesha A. Malik

**Civil Petition No.620 of 2021**
*(Against the judgment of High Court of Sindh, Karachi, dated 08.1.2021, passed in C.P No.D-4519/2019)*
**and**
**Civil Petition No.444 of 2022.**
*(Against the judgment of High Court of Sindh, Karachi, dated 08.1.2021, passed in C.P No.D-91/2022)*

Abbas Haider Naqvi & another (in CP-620/2021)
Yasser-ul-Haq Effendi & another (in CP-44/2022)

..... **Petitioner(s)**

**Versus**

Federation of Pakistan, etc (in both cases).

..... **Respondent(s)**

For the Petitioners: Mr. Makhdoom Ali Khan, Sr.ASC (in both cases)
assisted by Saad M Hashmi Adv & Yawar Mukhtar Adv & Anwar Cheem Adv

For NAB: Mr. Sattar Awan, Spl. Prosecutor NAB.

For the Federation: Nemo.

Date of hearing: 25.05.2022

**JUDGMENT**

**Syed Mansoor Ali Shah, J.** – This judgment decides both the above-captioned petitions as they arise out of the same NAB Reference No.16 of 2018.

2. Briefly stated, as per the NAB Reference the allegation against Abbas Haider Naqvi and Yasser ul Haq Effendi ("Petitioners"), who are the employees of Shell Pakistan Limited ("SPL"), is that they, in connivance with the other co-accused who are the CEO and Directors of Aerolube Pakistan Limited ("APL"), illegally sold the aviation fuel, also called Jet Propulsion ("JP-I"), as Super Kerosene Oil ("SKO") in the open market instead of supplying the same to aviation customers only, during the years 2013-2016. And thereby they caused a loss of Rs.2.37 billion to the public exchequer, as certain duties/taxes did not apply to the sale of JP-I but were levied on the sale of SKO. The NAB Reference states that by doing the said act, the Petitioners and their co-accused persons committed the

offence of corruption and corrupt practices as defined under Section 9(a)(x)(xi)&(xii), and punishable under Section 10 of the National Accountability Ordinance 1999 ("NAB Ordinance").

*C.P. No. 620 of 2021*

3. The Petitioners seek, through this petition, leave to appeal against the order dated 08.01.2021 passed by the High Court of Sindh, dismissing their constitutional petition filed under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution") against the order of the Accountability Court, dated 15.04.2019, whereby the Accountability Court had dismissed their application under Section 265-K of the Code of Criminal Procedure 1898 ("CrPC").

4. The Petitioners, in their application under Section 265-K CrPC, prayed for acquittal mainly on the grounds that no offence cognizable under the NAB Ordinance 1999 is made out against them, that the matter complained of does not spell out any offence, that the allegation levelled against them relates to an activity regulated under the Oil & Gas Regulatory Authority Ordinance, 2002 ("OGRA Ordinance") and thus falls within the exclusive domain of the Oil & Gas Regulatory Authority ("OGRA"), and that there is no probability of their conviction of any offence under the NAB Reference.

5. The Accountability Court dismissed their application, with the observations that the act of the Petitioners as alleged in the NAB Reference constitutes the offence as defined under Section 9 of the NAB Ordinance, that the recording of the prosecution evidence is underway and the evaluation of the evidence collected by the Investigating Officer at this stage may prejudice the case of either side, and that the object and purpose of the NAB Ordinance and the OGRA Ordinance are different, therefore, the contention that the OGRA Ordinance has an overriding effect does not have any substance.

6. The High Court dismissed the constitutional petition of the Petitioners and maintained the order of the Accountability Court, with the reasons that the contention of the Petitioners that no offence punishable under the NAB Ordinance is made out, can only be decided after deep appreciation of the prosecution evidence which is not permissible under the constitutional jurisdiction, that the trial of the Petitioners is near completion and expressing an opinion on merits of the case at this stage

would prejudice the case of the parties and defeat the ends of justice, and that the proceedings against the Petitioners under the NAB Ordinance and the imposition of fine-penalty on SPL[1], the employer-company of the Petitioners, under the OGRA Ordinance do not attract the protection against double jeopardy guaranteed by Article 13 of the Constitution and Section 403 of the CrPC. Hence, the present petition is for leave to appeal.

*C.P. No. 444 of 2022*

7. Through this petition, the Petitioners seek leave to appeal against the order dated 11.02.2022 passed by the High Court of Sindh, dismissing their constitutional petition filed under Article 199 of the Constitution against the order of the Accountability Court, dated 27.11.2021, whereby the Accountability Court had dismissed their application for transfer of the case to the Court of Special Judge (Customs and Taxation).

8. The Petitioners, in their application, prayed for transfer of their case from the Accountability Court to the Court of Special Judge (Customs and Taxation) on the ground that the allegation made in the NAB Reference relates to the alleged evasion of petroleum levy and sale tax payable on the sale of SKO, which falls within the domain of the Court of Special Judge (Customs and Taxation). The Petitioners relied, in this regard, on the amendments made in the NAB Ordinance by the NAB (Second and Third Amendments) Ordinances 2021, under which substituted Section 4(2)(a) of the NAB Ordinance provides that the provisions of the NAB Ordinance shall not be applicable to all the matters pertaining to federal, provincial or local taxation, other levies or imposts, including refunds, or loss of exchequer pertaining to taxation, and substituted Section 4(3) of the NAB Ordinance provides that all pending inquiries, investigations, trials or proceedings under the NAB Ordinance relating to such matters shall stand transferred to the concerned authorities, departments and Courts under the respective laws.

9. The Accountability Court dismissed the said application, with the observation that the allegation against the Petitioners of illegal sale of the JP-I in the open market, does not fall within the ambit of substituted Section 4(2)(a) and Section 4(3) of the NAB Ordinance. The High Court

[1] The OGRA has imposed fine-penalty of Rs.10 million on SPL vide order dated 11.01.2017, under Section 6(2)(p) of the OGRA Ordinance read with Rule 69 of 2016 Rules, for breach of provisions of Section 30 of the OGRA Ordinance by not supplying the requisite information, and has also dismissed the SPL's review petition vide order dated 12.10.2017.

maintained the order of the Accountability Court and dismissed the constitutional petition of the Petitioners, with the reason that the Petitioners by their alleged act of illegally selling the JP-I in the open market committed the breach of trust which is an offence under Section 9(a)(x)&(xi) of the NAB Ordinance, and that the case is not of tax evasion, in essence. Hence, this petition is for leave to appeal.

10. We have heard the arguments of the learned counsel for the parties and perused the record of the case with their able assistance.

11. First of all, we would like to state that there can be no cavil to the rule of practice and propriety, referred to by the High Court, that when the trial is near completion, the fate of the case should not ordinarily be decided under Section 265-K of the CrPC.[2] There may however be such exceptional circumstances which may justify departure from the said rule, as there is hardly any rule of practice which does not admit exception(s). Even otherwise, Section 265-K of the CrPC provides that the trial court can make an order of acquittal at any stage of the case, and such stage may be an initial stage of the case on taking cognizance before recording of the prosecution evidence,[3] or it may be a later stage of the case after recording of some evidence of the prosecution.[4] No absolute bar, in derogation of the law, can therefore be put on the statutory power of the trial court to entertain an application under Section 265-K, CrPC and decide upon its merits at a later stage of the trial if the exceptional circumstances of the case call for so doing to prevent the abuse of the process of court or to secure the ends of justice. The High Court has, however, failed to appreciate that the said rule has no application to a ground pleaded by an accused for his acquittal under Section 265-K of the CrPC, which does not require appraisal of the prosecution evidence recorded during trial, such as, the ground pleaded by the Petitioners in the present case.

12. Ordinarily, an accused, who invokes Section 265-K[5] CrPC for his acquittal, pleads that there is no probability of his being convicted of any offence in the case on any of the following four grounds: (i) that even if the facts alleged by the prosecution are taken to be true on their face value, they do not make out/constitute the commission of any offence by

[2] Yaqub Ali v. State 1981 PCrLJ 542; Subjally v. Hamid 1999 MLD 1645.
[3] State v. Ashiq Bhutto 1993 SCMR 523; Badar-Ud-Din v. Ahmad Raza PLD 1993 SC 399.
[4] Muhammad Sharif v. State PLD 1999 SC 1063; State v. Asif Ali Zardari 1994 SCMR 798.
[5] Section 249-A, CrPC contains similar provision for magisterial trial.

the accused;[6] (ii) that there is no evidence or incriminating material on record of the case in support of the commission of the alleged offence by the accused;[7] (iii) that the evidence or incriminating material collected during investigation in support of the commission of the alleged offence and proposed to be produced during trial is insufficient and, even if recorded, will not sustain conviction of the accused, of any offence in the case;[8] and (iv) that the prosecution evidence so far recorded does not make out a case for conviction of the accused, of any offence in the case and the remaining prosecution evidence, even if recorded, will not improve the prosecution case against the accused in any manner.[9] It is this fourth ground that attracts the application of the rule of practice and priority referred to by the High Court and, that too, when the trial is near completion, that is, when almost the whole of the prosecution evidence has been recorded. The wisdom behind the rule is that the appraisal of almost the whole prosecution evidence, when the trial is near completion, for deciding the application under Section 265-K CrPC amounts to pre-judging the case before the final judgment which not only reduces the sanctity and strength of the final judgment, but may also prejudice the case of the other accused, if any, undergoing trial. Any such exercise does not, therefore, serve the ends of justice. This rule thus has no relevancy or application to the first three grounds, which do not involve the appraisal of the prosecution evidence recorded during trial.

13. In the present case, the Petitioners have pleaded ground (i) for maintaining their application under Section 265-K of the CrPC. They have argued that the matter complained of does not make out any cognizable offence under the NAB Ordinance 1999, even if the alleged facts are taken to be correct on their face value. The trial court, i.e., the Accountability Court, and the High Court have rejected this ground with the findings that the Petitioners' alleged act of illegally selling JP-I in the open market constitutes the commission of a criminal breach of trust which is an offence under Section 9(x)&(xi) of the NAB Ordinance. The Petitioners have impugned before us these findings, contending that the same are not legally correct.

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[6] Muhammad Ashraf v. State 1990 PCrLJ 347; Muhammad Taqi v. State 1991 PCrLJ 963; Yasin Khanv. State 1995 PCrLJ 142.

[7] Abdul Sattar v. State 1992 PCrLJ 2054; Muhammad Sharif v. Muhammad Hussain 1993 PCrLJ 2053.

[8] Ghafooran v. Muhammad Bashir 1977 SCMR 292; Ghulam Habib v. State 1980 PCrLJ 754; Sheroo Khan v. Kaloo Khan 1992 PCrLJ 110.

[9] Muhammad Sharif v. State PLD 1999 SC 1063; State v. Asif Ali Zardari 1994 SCMR 798; Din Muhammad v. Muhammad Sharif 1979 PCrLJ 59

14. We, therefore, proceed to examine the legality of the said findings of the Accountability Court and the High Court. For this purpose, we reproduce here the provisions of Section 9(a)(x)&(xi) of the NAB Ordinance:

> 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-
>
> (x) if he commits the offence of criminal breach of trust as defined in section 405 of the Pakistan Penal Code, 1860 (Act XLV of 1860) with regard to any property including money or valuable security entrusted to him by members of the public at large;
>
> (xi) if he, in his capacity as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust as provided in section 409 of the Pakistan Penal Code, 1860 (Act XLV of 1860) in respect of property entrusted to him or over which he has dominion;
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> *(Emphasis added)*

The above provisions of the NAB Ordinance refer to Sections 405 and 409 of the Pakistan Penal Code 1860 ("PPC"); therefore, the provisions of these Sections of the PPC are also cited here for ease of reference:

> **405. Criminal breach of trust:** Whoever, being in any manner entrusted with property or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".
>
> **409. Criminal breach of trust by public servant, or by banker, merchant or agent:** Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
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> *(Emphasis added)*

The bare reading of Section 9(a)(x) of the NAB Ordinance shows that it applies only to the commission of the offence of criminal breach of trust with regard to a property entrusted to the accused by members of the public at large, while Section 9(a)(xi) of the NAB Ordinance relates to the commission of the offence of criminal breach of trust in respect of a property which was entrusted to the accused in his capacity as a banker, merchant, factor, broker, attorney or agent.

15. In the present matter, it is not the case of the prosecution (NAB) that JP-I, allegedly sold by the Petitioners in the open market illegally, was entrusted to them or their employer-company, SPL, by members of the public at large or entrusted to SPL by the Oil Refinery

Companies in the capacity as a banker, merchant, factor, broker, attorney or agent. There was no "entrustment" of property (i.e., JP-I) in the present case at all that could have made the case against the Petitioners fall within the scope of the provisions of Section 405, PPC and consequently constituted an offence under Section 9(a)(x)&(xi) of the NAB Ordinance.

16. Although the "entrustment" of property within the meaning of Section 405, PPC does not envisage the creation of a formal trust with all the technicalities of the law of trust, it does contemplate that to constitute entrustment the accused must have held the property in a fiduciary capacity. The word "trust" has been used in Section 405 in the ordinary sense of that word, and covers not only the relationship of trustee and beneficiary but also that of bailer and bailee, master and servant, pledger and pledgee, guardian and ward, and all other relations that postulate the existence of a fiduciary relationship between the complainant and the accused.[10] The entrustment of property implies that the ownership of the entrusted property vests in a person other than the one who is entrusted with it. If the property belongs to and is owned by the accused in his own right, it cannot be said that he was entrusted with that property and that by using or disposing of that property he committed the offence of criminal breach of trust. "Entrustment" is an essential ingredient of the offence of criminal breach of trust as defined in Section 405, PPC; therefore, where there is no entrustment of property, there can be no criminal breach of trust.

17. In the present case, SPL, the employer-company of the Petitioners, purchased JP-I from the Oil Refinery Companies, in its own right. The Oil Refinery Companies had not entrusted SPL with JP-I in its capacity of their banker, merchant, factor, broker, attorney or agent. Having purchased JP-I form the Oil Refinery Companies, SPL had become the owner thereof and there was no entrustment. Thus the act of selling JP-I owned by their employer-company, SPL, in the open market by the Petitioners, even if accepted to be true, does not constitute the offence either under Section 405 or under 409 of the PPC. When the primary offence of criminal breach of trust under section 405 PPC is not made out, the charge for the offences under Section 9(a)(x)&(xi) of the NAB Ordinance cannot sustain.[11]

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[10] State v. Jage Ram AIR 1951 Punj 103 (DB).
[11] Hashmat Ullah v. State 2019 SCMR 1730; Rafiq Haji v. Chairman, NAB 2015 SCMR 1575; Shahid Imran v. State 2011 SCMR 1614.

18. The prosecution (NAB) has, however, in disregard of the scope and extent of Sections 405 and 409 of the PPC, based its case against the Petitioners on the minutes of a Product Review Meeting, dated 04.08.2010, wherein the Director (L&M) of the Ministry of Petroleum & Natural Resources, Government of Pakistan, which reiterated the "directives/priority of JP-I supplies" and instructed the Oil Marketing Companies (which include SPL) to follow that "directives/ priority" and to make the supply of JP-I to Defence, local carriers (PIA, Shaheen, etc) and scheduled carriers. The Accountability Court and the High Court have also relied on the same. The prosecution (NAB) has referred to Rule 43C of the Pakistan Petroleum (Refining, Blending and Marketing) Rules 1971 ("1971 Rule"). This Rule provides that the Authority may, if it is of the opinion that public interest so requires, by order in writing, direct any refinery, marketing company or its agent or dealer, or a blending plant (or reclamation plant) to supply such quantity of any petroleum product to such person as may be specified in the order. As per Rule 2(b) of the 1971 Rules, the "Authority" referred to in Rule 43C means the Director General of Oil, and not the Director (L&M). As the Director (L&M) is mentioned to have reiterated the "directives/priority of JP-I supplies", in the minutes of a Product Review Meeting, dated 04.08.2010, and not to have issued the said "directives/priority" by himself, any such "directives/priority" issued by the Director General (Oil), is neither available on the record of the case nor has it been otherwise produced before us. Irrespective of the said "directives/priority", if any, it will not make the case against the Petitioners to fall within the definition of the offence of criminal breach of trust under Sections 405 and 409 of the PPC, or of the offence of corruption and corrupt practices under Section 9(a)(x)&(xi) of the NAB Ordinance. Any such directives have no bearing on the transfer of ownership of the sold JP-I from the seller (Oil Refinery Companies) to the purchaser (SPL) and does not make the contract of sale, a contract of trust. A violation of such directive, if any, may entail some other legal consequences, but cannot constitute an offence of criminal breach of trust under Section 405 of the PPC.

19. In a welfare State, the legislature enacts laws in public interest for the regulation of some trades or businesses by statutory bodies or Government functionaries.[12] Such regulation may involve obtaining of licenses and permits to conduct a certain trade or business; impose

[12] Article 18 of the Constitution permits such regulation.

reasonable terms and conditions as to how that trade or business is to be conducted; and control the production, distribution and consumption of any commodity during the conduct of that trade or business. The control on the production, distribution and consumption of some commodity, however, does not affect any change in the legal relationship between the contracting parties, nor does it alter the legal character, substance and consequence of the commercial transactions.[13] Such regulation does not change the private nature of the trade or business.

20. No offence under Section 9(a)(x)&(xi) of the NAB Ordinance is thus made out of the Petitioners' alleged act of illegally selling JP-I in the open market, even if the same is taken to be true on its face value. The findings of the Accountability Court and the High Court, having been made without examining the essential ingredients of the offence under Sections 405 and 409 of the PPC and of the offence under Section 9(a)(x)&(xi) of the NAB Ordinance, are found legally incorrect.

21. Since no offence under Section 9(a)(x)&(xi) or any other part of that Section of the NAB Ordinance is made out of the facts alleged in the NAB Reference against the Petitioners, there is no probability of their conviction for any offence in the NAB Reference. The Accountability Court had legally erred in dismissing the application of the Petitioners under Section 265-K of the CrPC and the High Court wrongly declined to correct that legal error in the exercise of its constitutional jurisdiction under Article 199 of the Constitution. We, therefore, convert Civil Petition No.620 of 2021 into appeal and allow the same. The impugned order of the High Court is set aside and the constitutional petition of the Petitioners is allowed: while setting aside the order of the Accountability Court and accepting the application of the Petitioners under Section 265-K, they are acquitted of the charge in NAB Reference No.16 of 2018.

22. The Petitioners have prayed also for quashment of the NAB Reference in their constitutional petition before the High Court, in addition to challenging the order of the Accountability Court passed on their application under Section 265-K of the CrPC. We have found that no offence cognizable by the NAB and triable by the Accountability Court under the NAB Ordinance is involved in the present case. In this background, Civil Petition No.620/2021 is converted into appeal and

[13] Ghasiram v. State AIR 1967 Cal 568 (FB).

allowed. Resultantly, the proceedings pending before the Accountability Court in NAB Reference No.16 of 2018, are hereby quashed being without jurisdiction.

23. Alleged violation of "directives/priority", if any, may entail its own consequences and having quashed the proceedings of NAB Reference No.16 of 2018, the Civil Petition No.444 of 2022 has become infructuous and is therefore disposed of accordingly.

Islamabad,
May 25, 2022.
Approved for reporting.

Certified to be True Copy

Court Associate
Supreme Court of Pakistan
Islamabad