

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
(JUDICIAL DEPARTMENT)

Criminal Appeal No.114/2019
Ch. Muhammad Aslam & another
versus
Chairman NAB & another

Appellants by: Syed Hamid Ali Bukhari, Advocate.
Respondents by: Barrister Rizwan Ahmed, Special Prosecutor, NAB.
Date of Decision: 18.02.2020.

MOHSIN AKHTAR KAYANI, J: Through the instant criminal appeal, the appellants have called in question order of the learned Accountability Court-I, Islamabad, dated 27.03.2019, whereby the appellants have been conditionally discharged of the charges.

2. Brief facts referred in the instant appeal are that the appellants being public office holders were booked in Reference No.13/2007 with the allegations of misuse of authority and committing offence of corruption and corrupt practices as defined in Clauses III, IV, XI, XII of Section 9(a) of the NAO, 1999. After recording of prosecution evidence and statement of accused persons under Section 342 Cr.P.C., the learned trial Court acquitted the appellants with the direction to appear before the Court along with other co-accused persons for decision. The appellants feeling aggrieved thereof moved an application under Section 265-K Cr.P.C. with the prayer that the condition imposed in the judgment of acquittal is illegal and contrary to law, however the learned trial Court vide order dated 27.03.2019 modified the condition that the appellants shall be summoned if required after recording of evidence of accused person. Hence, the instant criminal appeal.

3. Learned counsel for appellants contends that since the appellants have been acquitted of the charges for lack of evidence, they cannot be re-summoned for re-trial and as such, judgment of acquittal passed in favour of the appellants

has not been challenged by the respondents, therefore, the said judgment has attained finality and imposing of condition by the learned trial Court is illegal; that the appellants have faced a protracted trial for about ten (10) years and when the prosecution has ultimately failed to produced any incriminating evidence against the appellants, the learned trial Court acquitted the appellants honorably, therefore, summoning the appellants for re-trial is untenable in the eyes of law being a futile exercise and abuse of process of the Court, therefore, the impugned order 27.03.2019 may be rectified by expunging the condition imposed against the appellants.

4. Conversely, learned Special Prosecutor NAB while opposing the instant criminal appeal and supporting the impugned order contends that learned trial Court has rightly appreciated the facts and circumstances of the case and passed the impugned order, which is free any from illegality, and as such, the condition has been imposed on the appellants with view to achieve the ends of justice, therefore, the impugned order may be upheld.

5. Arguments heard, record perused.

6. Perusal of record reveals that the appellants are mainly aggrieved with the order dated 27.03.2019, passed by the learned Accountability Court-I, Islamabad, whereby the appellants namely Ch. Muhammad Aslam and Muhammad Anwar Ali Gopang have been acquitted from Reference No.11/2017 (Old Reference No.13/2007), filed by the Chairman, National Accountability Bureau in terms of Section 18(g) read with Section 24-B of the NAO, 1999 to the extent of condition imposed in the order.

7. In order to understand the proposition, it is necessary to reproduce the operative part of the order, which is as under:

"There is no likelihood of conviction on the accused on allegations of receiving illegal compensation and allotment of plot. Therefore, the application in hand is hereby accepted as such that the accused who were holders of public office at that time namely Muhammad Aslam, Ali

Anwar Gopang, Muzammil Hussain, Manzoor Hussain Shah, and private accused namely Shah Tamas are hereby acquitted of the charges leveled against them.

A separate file of trial be prepared for accused Naseer Ahmad. The accused holders of public office namely Ch. Muhammad Aslam, Ali Anwar Gopang, Muzammil Hussain, and Manzoor Hussain Shah shall be summoned if required, after recording of evidence against the accused Naser Ahmad. Relevant documents be detached from this file and be placed on separate file prepared of accused Naseer Ahmad."

8. Perusal of record reveals that the learned Trial Court has acquitted the appellants from the charges of Section 9(a)(iii)(iv)(vi)(xii) of the NAO, 1999 in terms of Section 265-k Cr.P.C. after holding a complete trial against 65 accused persons, out of which 07 were CDA officials and rest of them were private persons. The prosecution has produced 12 witnesses to prove their case, whereas the Accountability Court-I vide order dated 17.01.2011 has framed the charge against the appellants in the following manner.

"1. That you accused No-1 Ch. Muhammad Aslam while posted as Deputy Commissioner in CDA, Islamabad during year 1988-89 with the connivance of your other co-accused malafidely and illegally in order to give benefit to non-entitled persons accepted and decided review petitions of fake affectees and allowed compensation to non-entitled persons of village Dhrek Mori, Islamabad in respect of built-up-properties (BUP).

2.

3.

4. That you accused No-4 Muhammad Anwar Ali Gopang while posted as Asstt. Director (Technical) in CDA, Islamabad fraudulently and illegally prepared/signed measurement proforma of non-existent built-up-properties (BUPs) of village Dhrek Mori, Islamabad in order to facilitate the fake affectees on the basis of which your co-accused Deputy Commissioner declared the fake affectees as genuine. Furthermore, you with malafide intention prepared measurement proforma in respect of fake affectees whose review order were passed with forged signatures of the Deputy Commissioner."

9. The prosecution has produced different official witnesses including PW-5 Muhammad Ajaib/Tehsildar, PW-6 Manzoor Ahmad/Patwari, PW-8 Tariq Javed, Sub-Engineer Land Directorate, PW-9 Syed Muhammad Ali Shah/Retired Joint Secretary and PW-12 Hazrat Ali, Deputy Director FIA/I.O., to substantiate

the charge against the appellants. However, after recording of the prosecution evidence the appellants had also recorded their statement under Section 342 Cr.P.C. and had taken the categorical stance that the higher officials of CDA had involved the appellants in this case despite the fact that all orders of award have been confirmed in appeal and review based on different judgments of the superior Courts and when judicial orders had been passed and upheld by the CDA, a legal cover comes into play and as such, the compensation to the affectees was given on the order passed by Deputy Commissioner, CDA, which was judicial in nature and further upheld by the appellate authority, which has attained finality.

10. While considering the above background, the learned Accountability Court has passed a detailed judgment on 13.03.2017 with the following findings:

"In view of above circumstances, the evidence produced by the prosecution has not established mens re and actus rea as alleged in respect of accused present in the Court. Most of the accused/affectees are resident of village Dhrek Mori and some are living in adjacent villages as per their ID cards. Review orders were also challenged before Commissioner CDA through appeals which were found time barred. CDA had not further challenged the order of Commissioner before other forum IO has not recorded statement of lumberdar of the village of other residents of the village Dhrek Mori to establish that accused present in the Court were not resident of village Dhrek Mori. Name of one accused facing trial as also found in list of SES. Meaning, thereby that investigation is not conducted with full care and caution. Pick and choose is also done in the case. PWs have not fully supported the case of prosecution as it is clear from a resume of prosecution evidence recorded above.

Thus, accused present in the Court are entitled to benefit of doubt as prosecution has failed to establish the case beyond any reasonable doubt. They are acquitted of the charges leveled against them severally and jointly and to the extent of their case interse.

Case of four accused Shah Tamas, Gul Shirin, Sufi Muzaffar and Mumtaz Khan will be decided separately as discussed above. The accused holders of public office shall also appear in the Court along with the said four accused for decision and their role will be considered with reference to those accused too.

11. At the time of passing of the above referred judgment, four accused persons namely Shah Tamas, Gul Shirin, Sufi Muzaffar Khan and Mumtaz Khan

were not in attendance, who were required to be tried separately, however rest of the accused persons including the appellants had been acquitted of the charge, and as such, the said Gul Shirin, Sufi Muzaffar Khan and Mumtaz Khan died during the proceedings and accordingly their cases have been abated vide order dated 29.03.2017 and 17.03.2017, therefore, the only accused left for trial is Shah Tamas, whose trial had separately been conducted along with appellants, whereby they have been acquitted in terms of Section 265-K Cr.P.C. as having no probability of conviction, but the learned Trial Court while passing the impugned order imposed a condition upon the present appellants being public officials that they be summoned if required for the other accused person namely Naseer Ahmad. Such condition has to be considered in the light of power of the learned Trial Court in terms of Chapter XXVI "Of the judgment" in terms of Sections 366, 367 and 369 of the Cr.P.C., whereby the judgment shall contain:

- (a) points for determination;
- (b) the decision thereon;
- (c) reasons for the decision;
- (d) date and signature of the presiding officer;
- (e) it shall specify the offence in Section of Pakistan Penal Code or any other law under which the accused is convicted; and,
- (f) if it is the judgment of acquittal, then it shall state the offence in which the accused is acquitted.

12. The above referred requirements place a heavy onus upon the learned Trial Court with clarity to discuss the evidence and on the basis of such evidence brought on record the accused shall be convicted or acquitted in clarity and no condition could be imposed, except the sentence, or clear acquittal orders, whereas in this case, the learned Trial Court has imposed a condition not covered under the above mentioned provisions of law as the learned Trial Court is fully convinced that there is no evidence of offence under Section 9(a)(iii), (iv), (vi) &

(xii) of the NAO, 1999 is available/produced against the appellants, therefore, imposition of condition is not within the domain and power of the learned Trial Court to entangle the appellants in future trial despite the fact that every accused person of the reference has already been acquitted, except one.

13. We have confronted the Special Prosecutor NAB qua the situation emerged pursuant to passing of the impugned order, whereby he candidly conceded that no condition could be imposed.

14. In view of above reasons, the imposition of condition upon the appellants in the impugned order is contrary to law as they had already been acquitted of the charge by the learned Trial Court, therefore, further restriction is illegal. Accordingly, the captioned criminal appeal is ALLOWED in above terms and the conditionality imposed by the learned Trial Court in the impugned order dated 27.03.2019 is hereby SET ASIDE.

(LUBNA SALEEM PERVEZ)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Khalid Z.