

JUDGMENT SHEET

IN THE LAHORE HIGH COURT,
RAWALPINDI BENCH, RAWALPINDI.
JUDICIAL DEPARTMENT

Criminal Appeal No. 1809-E of 2010
(Muhammad Sadiq Raja Versus The State)

Date of Hearing	28.06.2021
Appellant by	Sh. Zamir Hussain Advocate
Respondent/State by	Mr. Husnain Khursheed Special Prosecutor for NAB

SOHAIL NASIR, J. This criminal appeal under Section 32 of the National Accountability, Ordinance, 1999 (*Ordinance*) is directed against judgment dated 29.06.2010 passed by learned Judge Accountability Court No. III, Rawalpindi on the basis of which Muhammad Sadiq Raja (*appellant*) was convicted and sentenced as under: -

***Under Section 9(a)(v) read with Section 10 of the Ordinance** to undergo five years RI and fine of Rs. 22559276/- (two crores, twenty five lacs, fifty nine thousand and seventy six). In default of payment of fine he was ordered to further undergo one year. It was directed that the fine shall be recoverable under Section 33 of the Ordinance. His House No. 53, G-11/2, Islamabad was also forfeited in favour of State.*

***Under Section 31-A of the Ordinance** to undergo three years RI*

It was also directed that sentences of appellant shall run concurrently.

2. Facts of the case are that on 13.11.2003 National Accountability Bureau (*NAB*) through its Chairman filed a reference under Section 18 of the *Ordinance* against Muhammad Sadiq Raja (*appellant*). It was maintained that appellant joined the Government Service in 1974 as Assistant (*BS-05*) and in 1986 he was selected as Section Officer; he had been serving in different ministries; in 1994 he was appointed as Deputy Director, Finance in National Institute of Health (*NIH*), Islamabad on deputation basis where he served till April, 1997; on receipt of information that appellant accumulated assets disproportionate to his known sources of

income, the investigation was authorized; it revealed on the basis of investigation that: -

- i) Appellant purchased plot No. 176 measuring 500 square yards situated at F-11/4, Islamabad from Khan Afsar Khan (*Pw-13*). He made the payment from joint account of him and his wife No. 3921-2, ABL G-10 Markaz Islamabad. The plot was transferred in the name of Sultan Mehmood. Later on appellant sold the said property to Mst. Rahat Ghafoor for a consideration of Rs. 3.25 million in March, 2001. Its sale proceeds were deposited in the joint account No. 5950-5, ABL G-10 Markaz Islamabad that was a joint account of appellant and his wife.
- ii) Appellant purchased plot No. 960, Sector G-10/1 Islamabad in October, 1997 from Muhammad Nazir for a consideration of 48200/- US\$ (Rs. 2123210/-). It was transferred in the name of Mst. Anar Begum, the mother in law of appellant. 32,000 US\$ were paid through cheque from the account of Sultan Mehmood the brother in law of appellant and 16200 US\$ were paid in cash. Thereafter, appellant constructed a house on the said plot by spending Rs.1.788 million.
- iii) Mst. Fozia Tariq (*Pw-1*) was the allottee of plot No. 53, Sector G-11/2, Islamabad. In 1998 appellant purchased said plot for a consideration of Rs. 26,00,000/- in the name of his wife Ghulam Kalsoom where he constructed a house by spending Rs. 2695024/-.

3. During investigating following bank accounts in the name of appellant, his wife Ghulam Kalsoom, his brother in law Sultan Mehmood and Maqsood Awan (*Dw-2*) were also traced: -

S. No	Bank/Brach	A/C No.	Period	Currency	Name of A/C holder
1	NBP,NIH, Islamabad	4188-8	September 1994 to August 2000	Pak. Rupees (salary) 228700	Accused
2	NBP, D-Block, Pak Secretariat, Islamabad	231-6	February 1987 to July 2002	Pak. Rupees (salary)	Accused
3	HBL, Super Market, Islamabad	11458-3	June, 1996 to December, 2000	Pak. Rupees 1350000/-	accused

4	HLB, Super Market, Islamabad	95209-9	June, 1996 to April, 2001	US\$ 21,600/-	Accused and his wife
5	HLB, Super Market, Islamabad	95292-0	March, 1997 to April, 2001	US\$ 15,842/-	Sultan Mehmood & Maqsood Awan
6	City Bank, Islamabad	5-520708-108	August 1996 to August 1998	US\$ 2,68,100/-	Sultan Mehmood & Ghulam Kalsoom
7	City Bank, Islamabad	6-000068-614	August 1998 to August 2001	Pak. Rupees 12,66,278/-	Sultan Mehmood & Ghulam Kalsoom
8	City Bank, Karachi	5-434686-107	August 1996 to January 1998	US\$ 10,000/-	M. Sadiq & Ghulam Kalsoom
9	ABL, G-10, Islamabad	3921-2	January 1996 to September, 2001	Pak. Rupees 62,92, 618/-	M. Sadiq & Ghulam Kalsoom
10	ABL, G-10, Islamabad	100-5950-5	March, 2001 to August 2001	Pak. Rupees 8,00,000/-	Sultan Mehmood & Ghulam Kalsoom

4. It was further asserted in complaint that all the bank accounts except shown at Sr. No. 1 and 2 were opened in the year 1996 or 1997 while appellant was posted in NIH as Deputy Director Finance; in the said accounts net credit entries of Rs. 9.937 million and US\$ 3,15,542/- respectively were made; if the conversation rate of US\$ was taken to an average of Rs. 40/- per dollar, amount of US\$ 3,15,542/- in Pakistan Rupees comes to 12,621,680/-. Hence, total currency was Rs.2,25,59,276/-; appellant received an amount of US\$ 10,000/- in his account No. 5-434686-107 City Bank, Karachi from contractor/supplier of NIH without consideration; that the appellant did not declare his assets and he also did not obtain permission from competent authority before sale and purchase of the properties; the inherited property of appellant was only 2 Kanals and

1 Marla; Sultan Mehmood brother in law of appellant was an illiterate and poor man having a small baby cycle shop at Chakwal who was unable to give any satisfactory explanation of his pecuniary resources in his bank accounts whereas Maqsood Awan other brother in law of appellant was in Saudi Arabia for the last ten years; from August 1994 to February 2001 appellant accumulated assets worth Rs. 2,25,59,276/- in his own name or in the names of his wife and brothers in law disproportionate to his legitimate and known sources of income which he could not reasonably account for.

5. Ultimate version of NAB was that as appellant had committed the offence of corruption and corrupt practices as defined in clause (v) of Section 9 (A) of the **Ordinance** so he was liable to be punished under Section 9 of the **Ordinance** and scheduled thereto.

6. It is important to add here that appellant during inquiry/investigation was declared as a Proclaimed Offender and vide a judgment dated 04.03.2004 passed by learned trial Court he was convicted under Section 31-A of the **Ordinance** and sentenced to undergo three years. He filed Criminal Appeal (8-E of 2006) in the Islamabad High Court, Islamabad which was allowed vide a judgment dated 04.06.2009 and case was remanded to learned Trial Court.

7. On 06.08.2009 a charge under Section 10 read with 31-A of the **Ordinance** was framed against appellant, who pleaded not guilty and demanded his trial.

8. In support of its case prosecution had produced following witnesses: -

Pw-1 Fozia Tariq, who was the owner of Plot No. 53 claimed that she had transferred the plot in the name of Mst. Ghulam Kalsoom, wife of appellant for a consideration of Rs. 26,00,000/-.

Pw-2 Tariq Aziz the husband of Fozia Tariq (Pw-1) supported her version.

Pw-3 Mushtaq Hussain Bhatti was a property dealer who sold out the plot No. 960, G-10, Islamabad to appellant for a consideration of US\$ 48200/-.

Pw-4 Sh. Ghulam Rasool an official of CDA produced documents pertaining to plots.

Pw-5 Ahmad Ali an official from ABL produced the documents with regard to accounts of appellant and his wife Ghulam Kalsoom.

Pw-6 Safdar Abbas Nagvi an official of HBL also produced documents of bank accounts and transactions.

Pw-7 Tariq Zafar Iqbal an official of NBP produced the documents about the account of appellant.

Pw-8 Shahid Iqbal Ch an official of ABL also produced record of bank accounts of appellant and his wife.

Pw-9 Athar Saeed Executive Director NIH produced the service record of appellant as well as declaration of his assets.

Pw-10 Ch. Muhammad Akram Khan Manager of NBP too produced the documents about the bank accounts of appellant.

Pw-11 Syed Ijaz Hussain Shah a property dealer made settlement for transfer of plot No. 176, F-11/4 Islamabad in the favour of appellant for a consideration of Rs. 35,00,000/-

Pw-12 Muhammad Younas Patwari produced record of inherited property of appellant.

Pw-13 Khan Afsar Khan sold his plot No. 176 Sector F-11/4 to appellant for Rs. 3500000/-.

Pw-14 Aamir Abbas Patwari produced the record of inherited property of appellant.

Pw-15 Zahid Ullah Income Tax Officer stated that there was no record of appellant with regard to tax payment.

Pw-16 Fozia Janjua an official of City Bank produced documents about the bank accounts of appellant and his wife.

Pw-17 Abdul Majeed Inspector is a witness to execution of non-bailable warrant of arrest of appellant.

Pw-18 Muhammad Ali Patwari produced revenue record.

Pw-19 Abdul Hameed Arif made assessment of the value of House No. 960 Street 26 Sector G-10/1 Islamabad.

Pw-20 Abdul Majeed son of Ch. Muhammad Moosa Section Officer of Interior Ministry stated about the Ex-Pakistan Leave granted to appellant, his non return from abroad and his dismissal from service due to his absence.

Pw-21 Dr. Muhammad Muntaz Ali Raza
Section Officer of the Establishment Division produced declaration of assets of appellant.

Pw-22 Noreen Imran *Manager City Bank, Rawalpindi provided information about the account of appellant.*

Pw-23 Mirza Muhammad Ashraf *the Deputy Director FIA is the investigating officer.*

9. After prosecution's evidence was closed, appellant was called for his examination under Sections 342 Cr.P.C where entire incriminating evidence was put to him. His ultimate version was that the assets were not beyond his means; whatever the property was in his name that was from his own income, and the amount which he received from his two brothers in law settled abroad. Appellant did not opt to appear in terms of Section 340(2) Cr.P.C however he produced his brother in law Muhammad Ayyub (**Dw-1**) and Muhammad Maqsood (**Dw-2**). He also came in witness box as **Dw-3**.

10. Muhammad Ayyub (**Dw-1**) brother in law of appellant maintained that he used to send money to appellant from abroad through different people; he also sent the money to appellant through banks; purpose of transferring the money to appellant was that they had joint family business of property.

11. Muhammad Maqsood (**Dw-2**) also maintained that he had been working in Saudi Arabia from 1995 to 2008 and he used to send money to appellant for joint family business of property.

12. Appellant as **Dw-3** also claimed that in 1994 he was posted as Deputy Director Finance in NIH; he was having no financial power in his job description where he remained till 1997; he was doing part time joint family business of sale purchase and construction along with his brothers in law; in 1997 he proceeded on long leave till 23.02.2001; his brothers in law were working in Saudi Arabia who used to send him money through different channels which was used in the business and profit had to be distributed proportionately.

13. Learned counsel for appellant contended that the accounts shown at serial No. 1, 2 and 3 are in the name of appellant whereas account shown

at serial No. 4 and 9 were joint with his wife and for remaining accounts appellant had no concern; only credit entries have been shown and there is no balance sheet of any of the accounts produced by prosecution; accounts were spread over couple of years having small negligible balance in the end which was seized by the NAB; certain amounts have been counted more than once which shows poor performance of the NAB; the assessment of plot No. 53 was made on prevailing market average for the year 2002 and not the one when it was purchased; prosecution in all circumstances had to prove the factum of misuse of authority or act of corruption in order to constitute the offence for which it was completely failed; mere possession of pecuniary resources of properties by itself does not constitute an offence; the decision of the case had to be on the basis of evidence and not on surmises and conjectures; there is no evidence with the prosecution to establish the element of misuse of authority or any other corrupt practices whereby the appellant accumulated the money of his own benefit or built up the property through malpractices; appellant was abroad and in his absence his wife provided all documents without fail; the investigating officer conducted dishonest investigation, who did not make an attempt to know all legitimate sources of income of appellant; appellant joined the service in 1974 as a clerk and on the basis of his hard work, he was promoted to BS-19 and during the service he also went to UK, Singapore and Morocco where he lived a simple life and saved considerable amount; brother in laws of appellant were admittedly abroad since long and sending the money by them to their sister and appellant was not an abnormality. He finally maintained that as prosecution could not prove the allegations against appellant, therefore, the conviction recorded by learned Trial Court cannot sustain.

14. On the other hand, learned Special Prosecutor for NAB argued that in a case where there are allegations against a public servant of his living beyond his means, the prosecution has to only prove on record his those assets and immediately thereafter the onus is shifted to accused to prove contrary and to account for satisfactorily; bank accounts produced by prosecution are showing abnormal transactions and he was the only

appellant who could furnish explanation in this regard but he was completely failed; wife and mother in law of appellant were possessed with no independent source of income therefore, appellant was under heavy duty to show that he had no concern with those properties and that his wife and mother in law were in a position to purchase said properties; appellant also remained absconder when he proceeded abroad and did not return therefore, his conduct is quite relevant and can be validly taken into consideration in favour of prosecution. He finally contended that on the basis of well reasoned judgment appellant has been rightly convicted by the learned Trial Court.

15. HEARD

16. The learned Law Officer while referring Section 14(C) of the *Ordinance* repeatedly contended that as presumption is against appellant therefore, he has to account for in all circumstances about the assets those which he had acquired. We do not find so, because on this proposition the principles are absolute. In 'Pir Mazhar ul Haq and others vs. The State through Chief Ehtsab Commissioner Islamabad PLD 2005 SC 63' it was held as under: -

“In criminal cases the general rule is that the accused must always be presumed to be innocent and the onus of proving everything essential to the establishment of the offence is on the prosecution. All that may be necessary for the accused is to offer some explanations of the prosecution evidence and if this appears to be reasonable even though not beyond doubt and to be consistent with the innocence of the accused, he should be given the benefit of it. The proof of case against accused must depend for its support not upon the absence or want to any explanation on the part of accused but upon the positive and affirmative evidence of the guilt that is led by the prosecution to substantiate accusation. There is no cavil with the proposition and judicial consensus seems to be that “if on the facts proved no hypothesis consistent with the innocence of the accused can be suggested, the conviction must be upheld. If however, such facts can be reconcile with any reasonable hypothesis compatible with the innocence of the accused the case will have to be treated as one of no evidence and the conviction and the sentence will in that case have to be quashed”

17. In '**Khan Asfandiyar Wali vs. Federation of Pakistan PLD 2001 SC 607**' it was observed by honorable Supreme Court of Pakistan: -

“Be that as it may, the prosecution has to establish the preliminary facts whereafter the onus shifted and the defence is called upon to disprove the presumption. This is also the consistent stand taken by Mr. Abid Hassan Minto as well as the learned Attorney General who adopted his arguments. This interpretation appears to be reasonable in the context of the background of the NAB Ordinance and the rational of promulgating the same notwithstanding the phraseology used therein. We are also of the view that the above provisions do not constitute a bill of attainder, which factually means that by legislative action an accused is held guilty and punishable. For safer dispensation of justice and in the interest of good governance, efficiency in the administrative and organizational setup, we deem it necessary to issue the following directions for effective operation of Section 14 (D).

- (1) The prosecution shall first make out a reasonable case against the accused charged under Section 9(A) (VI and VII) of the NAB*
- (2) In case the prosecution succeeds in making out a reasonable case to the satisfaction of the Accountability Court, the prosecution would be deemed to have discharged the prima face burden of proof then the burden of proof shall shift to the accused to rebut the presumption of guilt”*

18. Appellant has been convicted under Section 9(a)(v) read with Section 10 and 31-A of the **Ordinance**. Taking into consideration his conviction under Section 31-A of the *Ordinance*, which relates to absconding to avoid the service of warrants, we have observed that the only witness produced in this context by prosecution, is Abdul Majeed Inspector (**Pw-17**) to whom non bailable warrants of arrest were entrusted and he made the report accordingly. There is a difference between non-appearance by avoiding the process of law and absconding. As absconding, under the *Ordinance*, attracts the penal consequences therefore prosecution must prove that the warrant was issued; a serious effort was made for execution of warrant; statement of process server was recorded by the Court; the Court thereafter was satisfied and it issued the

proclamations in terms of Section 87 Cr.P.C and finally that the proclamations so issued were duly executed and in this context statement of process server was also recoded and then the Court being satisfied had declared the accused as a Proclaimed Offender. Prosecution in this case did not produce the officer to whom any proclamation was entrusted. In these circumstances, we are compelled to hold that the absconding of appellant in this case has not been proved by the prosecution and at the most before us, we can say, it was a long disappearance on the part of appellant. But said disappearance was not unlawful as it has been established from prosecution's evidence that appellant was abroad pursuant to approval of Ex-Pakistan leave for three years by the competent Authority.

19. Reverting our discussion to the conviction of appellant under Section 9(a)(v) read with Section 10 of the *Ordinance*, we have observed that only house No. 53, G-11/2 Islamabad has been forfeited besides imprisonment and fine. In the complaint case of prosecution was somewhat different. It was alleged that he purchased plot No. 176, F-11/4, Islamabad in the name of his brother in law Sultan Mehmood for a consideration of Rs. 3.25 million; he also purchased plot No. 960 in Sector G-10/1 Islamabad in the name of his brother in law Sultan Mehmood for a consideration of US\$ 32000/-. So it means that to the extent of purchase of plot No. 176, F-11/4 and plot No. 960, G-10/1 Islamabad, prosecution story has been disbelieved by the learned Trial Court. Our observations get support from an important fact. After the case was decided by the learned Trial Court, a caution was imposed by the NAB on House No. 960 Street 26 Sector G-10/1, Islamabad. Mst. Anar Begum, mother in law of appellant, who was also alleged as 'Benamidar', filed a writ petition (1456 of 2011) in this Court challenging the action of imposition of caution by maintaining that appellant had nothing to do with that property. This Court while accepting the writ petition had observed as under: -

"The final judgment revealed that House No. 960, Street No. 26, Sector G-10/1, Islamabad, about which caution notice was issued, was not forfeited

in favour of the State. This shows that the allegations levelled in the reference that this house belongs to accused/convict and he has procured the same through illegal means of corrupt practice was not accepted. The learned ADPG, NAB, was asked on 16.10.2012 to report if NAB has filed any appeal against the said judgment. He has today categorically stated that the judgment dated 29.06.2010 was not assailed by NAB although the house in question was not confiscated to the State. After conclusion of trial, this house cannot be kept under caution. The judgment passed by learned Judge, Accountability Court No.III, has attained finality. In the said judgment this house was not forfeited so it cannot be kept under caution. The petitioner being its owner has right to deal with it as desired”

20. Therefore, we find no difficulty to hold that prosecution was unsuccessful to establish many of the allegations leveled against appellant in the reference. By not challenging the judgment of trial Court prosecution is facing a serious challenge that how the impugned judgment can be defended when most of the allegations have not been proved. The principles to prove a case which we have referred earlier make the position clear that prosecution must come before the Court in a fair and transparent manner with the evidence that meets the requirements of credibility. If the evidence is not credible, its reliability cannot be demanded by the prosecution from the Court.

21. Therefore, now prosecution’s case is to the extent of Plot/House No. 53, G-11/2 Islamabad that it was beyond the known sources of the means of appellant. At this juncture we will also like to observe that in view of the position discussed above now prosecution cannot ask to look into the bank accounts of brother in laws and mother in law of the appellant.

22. Statement of Dr. Muhammad Mumtaz Ali Raza (**Pw-21**), the Section Officer of assets of Establishment division is very important for us. He had brought the assets declaration of appellant and according to those declarations the appellant had declare his assets as under: -

- I. House and agricultural land in village Sakral Chakwal valuing six lacs jointly owned by his brother which was inherited property.*

- II. 800 CC Suzuki Car valuing one lac which he had purchased.
- III. Jewelry gold valuing Rs.20000/- that was inherited and purchased.
- IV. Household goods. valuing Rs.100000/- that was inherited and purchased.
- V. Plot No. 53, G-11/2 Islamabad purchased for Rs.9,00,000/-
- VI. Personal loan Rs.1500,000/-.

23. How prosecution can say that appellant had not shown plot No. 53, G-11/2, Islamabad in his assets declaration. Once this plot was declared in assets declaration, it means that it was purchased with the approval of competent Authority.

24. Athar Saeed Dil (**Pw-9**) had brought the record from NIH and in cross-examination he admitted that appellant had availed house loan and car loan from the department and he was returning said loans in installments on the basis of deduction from his salary.

25. Prosecution could not bring on record any evidence that in the job description of appellant he ever remained connected with any financial affairs so it cannot be claimed also that appellant made any corruption during his long service.

26. An investigating officer is the most important witness in a case. Prosecution had produced Mirza Muhammad Ashraf Deputy Director (**Pw-23**) but he had conducted the investigation when appellant was not in the field. The main investigating officer of the case was Niaz Ahmad Assistant Director FIA who was given up by the prosecution on the reason that he had died. In this regard there was only a report of process server, who was never examined to confirm this fact. Even the learned trial Court did not find it necessary to verify the death of Niaz Ahmad Assistant Director FIA. For the sake of arguments, if it is believed that Niaz Ahmad was no more in this world, the prosecution was under obligation to prove his investigation to the extent of documents which he prepared through secondary evidence. Even this request was not made. It is settled principle of law that in case of non-production of investigating officer who is a material witness, the conviction cannot sustain. **‘(Bashir Ahmad &**

another vs. The State & others 2019 S C M R 1417)

27. We have already observed that keeping in view special features of this case there is no need to discuss that if the brothers in law and mother in law of the appellant were ‘Benamidar’ as to their extent the other properties have not been forfeited. In this background the statements of Muhammad Ayyub (**Dw-1**) and Muhammad Maqsood (**Dw-2**) have earned a great value because appellants’ version throughout was that his two brothers in law were abroad from where they used to send the money to him. It is also on record that appellant remained for a period of three years in Canada so his version to have the savings cannot be thrown out from consideration. In view of the principles which we have discussed earlier about presumption, the appellant was under obligation to offer a reasonable explanation although not beyond doubt. The word ‘reasonable’ does not mean that appellant has to prove his innocence by producing the evidence of high quality or at the same yardstick which is for the prosecution. It simply means ‘*something that is logical and exhibits good sense*’.

28. Concluding what we have deliberated above, we hold that prosecution has badly failed to prove its case beyond shadow of doubt against appellant therefore this appeal is **allowed**. Impugned judgment dated 29.06.2010 passed by the learned Trial Court is **set aside**. Appellant is **acquitted** from the case. He is on bail. His surety is discharged from terms and conditions of bail bonds.

(Raja Shahid Mehmood Abbasi)
Judge

(Sohail Nasir)
Judge

APPROVED FOR REPORTING

JUDGE