JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(*Judicial Department*)

Eh. Cr.A No. 48/2011 and 50/2011

i) Ajmal Khan Vs. State
ii) Taj Ali Khan Vs. State and another

Date of hearing: **19.12.2017**

Appellant(s): (Ajmal Khan) by
Barrister Waqar Ali, Advocate
(Taj Ali Khan) by
Barrister Syed Mudassar Ameer, Advocate

Respondent(s): (State /NAB) by
Syed Azim Dad, Senior Prosecutor for NAB

JUDGMENT

ISHTIAQ IBRAHIM, J.- Through this single judgment we propose to decide this appeal bearing **No. 48/2011** as well as the connected appeal bearing **No. 50/2011** as both these appeals are arising out of one and the same judgment dated 16.09.2011 rendered by learned Accountability Court-IV, Peshawar.

2. Brief facts of the case are that an inquiry was initiated by NAB authorities against Haroon Rashid, Junior Clerk in Health Department who is son of appellant Ajmal Khan. During the course of inquiry it came to light that appellant Ajmal Khan, Accounts Clerk in Health Department, had been

maintaining different accounts in the names of his minor sons namely Asif Saleem, Haroon Rashid and Nasar Jamal as guardian in National Bank and Habib Bank Lakki Marwat since 1990 to 1997 wherein many suspicious transactions had been made. The matter was further probed by NAB authorities and the evidence collected during the course of investigation revealed that the appellant alongwith co-accused Taj Ali Khan, Junior Clerk in Health Department, misappropriated an amount of Rs.1,99,32,803/- and Rs.59,00,000/- respectively during the period from 1995 to 2000. Final report of the investigation was prepared on the strength of which Director General, National Accountability Bureau, Khyber Pakhtunkhwa sent Reference No.06/2006 to learned Accountability Court-IV, Peshawar.

3. Initially, appellant Taj Ali Khan remained absconder and was proceeded against under Section 512, Cr.P.C by the learned trial Court. Appellant Ajmal Khan was formally indicted for the offences to which he

pleaded not guilty and opted to face the trial. Prosecution examined 45 PWs in support of its case whereafter statement of appellant Ajmal Khan under Section 342, Cr.P.C was recorded wherein he denied the allegations of prosecution, however, he did not opt to be examined on oath. He produced five witnesses in his defence whose statements were recorded as DW-1 to DW-5.

4. Appellant Taj Ali was arrested during the course of recording the defence witnesses of appellant Ajmal Khan. Supplementary reference was submitted against him before the trial Court who charge sheeted him for the offences but he denied the charge and claimed the trial. Prosecution produced 12 witnesses against him and closed its evidence. During examination of appellant Taj Ali, he pleaded innocence and asserted that the allegations of prosecution are false. He neither recorded his statement on oath in terms of Section 340(2), Cr.P.C nor wished to produce evidence in his defence.

5. After hearing the arguments, the learned trial Court vide judgment dated 16.09.2011 convicted and sentenced the appellants as under:-

1) Appellant Ajmal Khan

He was convicted under Section 10 of the NAO-1999 and sentenced to three years R.I with fine of Rs.200,00,000/-

2) Appellant Taj Ali Khan

(i) He was convicted under Section 10 of the NAO-1999 and sentenced to one year R.I and a fine of Rs.60,00,000/-

(ii) He was further convicted under Section 31-A of the NAO-1999 and sentenced to six months R.I. It was ordered that both the sentences shall run concurrently.

Being aggrieved, appellant Ajmal Khan has challenged his conviction and sentence through this appeal whereas appellant Taj Ali Khan has filed the connected appeal bearing No. 50/2011.

6. Arguments heard and record perused.

7. The record reveals that initially the trial commenced against appellant Ajmal Khan and prosecution examined 45 PWs whereafter he was examined under Section 342, Cr.P.C. During the course of recording

defence evidence of appellant Ajmal Khan, the other appellant Taj Ali Khan was arrested against whom supplementary reference was submitted before the learned trial Court. During his trial, prosecution examined 12 PWs and after his examination under Section 342, Cr.P.C, both the appellants were convicted and sentenced through the same impugned judgment. Record shows that the learned trial Court placed reliance on the evidence already recorded in absence of appellant Taj Ali Khan which is against the law. In this regard Section 353, Cr.P.C is relevant which is reproduced for convinience.

> **353. Evidence to be taken in presence of accused.** Except as otherwise expressly provided, all evidence taken under Chapters XX, XXI, XXII and XXIIA shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.

The record reveals that the point was raised before the trial Court as to whether the prosecution is bound to produce the entire PWs or the witnesses nominated in the Supplementary Reference filed against appellant Taj Ali. The learned trial Court vide

order dated 25.04.2011 held that the safe and convenient way will be that of allowing the prosecution to conclude its evidence in the supplementary Reference against the accused Taj Ali Khan and thereafter the the remaining proceedings be clubbed with that of appellant Ajmal Khan. As such, only the statements of 12 PWs were recorded in the supplementary Reference and the evidence already recorded in absence of appellant Taj Ali Khan was considered without recording the statements of those witnesses in his presence who had already been examined during the trial of appellant Ajmal Khan. In impugned conviction on the basis of such evidence is not legal. Even if an accused or his counsel gives consent to rely upon the previous evidence recorded in his absence even then consent of a party or his counsel does not confer any jurisdiction upon the Court nor anything illegal can be legalized with the consent so given by parties. Even otherwise when co-accused is arrested subsequently then they are to be charged/indicted jointly and thereafter

trial is to be carried out because both of them are accused in one and the same case/reference.

8. Admittedly, the learned trial Court has neither given an opportunity to appellant Taj Ali Khan of cross examining the witnesses who were examined in his absence except the I.O nor framed a fresh charge against the appellant Ajmal Khan on commencement of the trial against appellant Taj Ali. The safe and proper course for the learned trial Court was either to pronounce judgment against appellant Ajmal Khan on conclusion of the trial against him or to have charged both the appellants afresh for de novo trial but the learned trial Court did not adopt either of the mentioned two alternatives, as such, an illegality was committed. Reliance in this regard is placed on the judgment in the case titled *"Bahadur Sher and another Vs. The State" (1992 PCr.LJ 378)* wherein it is held that:-

> **8. In the instant case, as stated earlier, Shahab Gul appellant was charged by Mr. Abdul Wahid Seth on 3-4-1988**

when his co-accused Bahadur Sher was absconding. He examined 8 prosecution witnesses when the prosecution case was closed on 1-8-1988. In the meantime, in consequence of retirement of Mr. Abdul Wahid Seth, Mr. Jawaid Nawaz Gandapur took cognizance and he charged Bahadur Sher appellant alone on 1-10-1958 and re examined 9 witnesses and the prosecution case was closed. It is queer to note that when the trial of Bahadur Sher appellant commenced his co-accused Shahab Gul was not charged afresh. Since the trial of Shahab Gul appellant had concluded, then either after examining him under section 342, Cr.P.C., and recording defence evidence, if any, the learned trial Judge should have pronounced the judgment against him. In the alternative, the learned trial Judge should have charged both the appellants afresh and trial de novo conducted against them and pronounced the judgment. The learned trial Judge did not adopt either of the two alternatives and in consequence, an illegality of vital importance had crept in whereby the appellants have been prejudiced in their defence".

9. In the backdrop of the above discussion, remand of the case to the learned trial Court has become imperative. Therefore, this appeal No.48/2011 and the connected appeal No. 50/2011 are allowed, conviction and sentence of both the appellants are set aside and the case is remanded to the learned trial Court with directions to frame fresh charge against the appellants and thereafter proceed with the case in accordance with law

by examining the prosecution witnesses. Appellants are directed to submit bail bonds to the tune of Rs.2,00,000/- (two lac) each with two sureties each in the like amount to the satisfaction of the learned trial Court when they are summoned by the learned trial Court. Needless to mention that the trial Court shall conclude the trial as early as possible.

Announced
19.12.2017

JUDGE

JUDGE