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Judgment Sheet

IN THE LAHORE HIGH COURT (MULTAN BENCH) MULTAN

JUDICIAL DEPARTMENT

Criminal Appeal No.470 of 2016
(Shahid Hussain Shahid v. The State)

JUDGMENT

Date of hearing: 13.04.2017

Appellant by: Mr. Nishat Ahmed Siddiqui, Advocate.
State By: M/S Muhammad Akram Rao Special Prosecutor NAB and Muhammad Rasheed Qamar, DPGA.

Ch. Abdul Aziz, J. Shahid Hussain Shahid, (appellant) was tried by Judge Accountability Court, Multan in Accountability Reference No.29 of 2015 titled 'The State v. Shahid Hussain Shahid'. The learned trial court vide judgment dated 28.05.2016 convicted the appellant under section 9 (a) (ix) & 9 (a) (x) of the National Accountability Ordinance, 1999 (hereinafter referred to as the **NAO, 1999**) and sentenced him under section 10 (a) of the Ordinance ibid to undergo rigorous imprisonment for three years with the fine of Rs.10 Million and in case of non-payment of fine he was ordered to further undergo imprisonment for two years. Benefit of section 382-B Cr.P.C. was also extended in his favour. Feeling aggrieved thereby, the appellant field the instant appeal.

2. The proceedings, which led to the filing of the reference in the Accountability Court originated from information imparted by Muhammad Yaqoob (PW.19) through application (Exh.PW-19/C) dated 27.02.2014. It was alleged by Muhammad Yaqoob that he is in the business of Photostat and fax and Shahid Hussain Shahid (appellant) along with his co-accused Fida Hussain was on visiting terms with him. They used to visit his shop for the purposes of Photostat and Fax and

told him that they were in the whole-sale business of mobile accessories and were having office at Khawar Centre Multan Cantt; that he visited the said office where their father Khadim Hussain was also present who posed himself as Managing Director of the business; that all of them persuaded him to invest with them and in lieu of that he was offered handsome profit; that in this backdrop, he invested with them an amount of Rs.2,00,000/; that in the next month they paid him Rs.5,000/- as profit and also asked him to bring more investors; that shared this idea with his friends who ultimately also proceeded to invest their respective amounts with them; that for about 9/10 months, they received profit at the ratio of Rs.2,500/- per Rs.1,00,000/- for each month; that after about 98/10 months, Shahid Hussain Shahid and Fida Hussain disappeared from the scene on which, he established contact with them through phone and found that they were in Karachi; that subsequent to that when he tried to establish contact with them he found that their mobiles were switched off; that at this juncture, he and other investors went to their office and met their father who came forward with the promise to return the amount in the next month, however, after few days their office was found locked; that subsequent to that all of them approached the father of Shahid Hussain who came forward with the plea that they have suffered a loss in the business and advised them to be patient and promised to return the principal amount in the near future; that in this way, the accused persons have defrauded all of them and deprived them of an amount of Rs.5/6 Crores. The applicant/complainant also mentioned the names of thirteen aggrieved persons with their respective telephone numbers.

3. On receiving the complaint (Exh.PW.19/C), Saeed Ahmad Sheikh Deputy Director (PW.20) started the investigation and issued call up notices to Shahid Hussain Shahid (appellant) and his co-accused Fida Hussain. Shahid Hussain (appellant) initially opted not to join the investigation

proceedings, however, the allegations against Fida Hussain were found to be false. However, Shahid Hussain Shahid (appellant) in this case was arrested on 13.10.2015 and was subjected to thorough investigation, on the conclusion of which, a reference was filed against him in the Accountability Court.

4. The prosecution, in order to prove its case against the appellant produced as many as twenty witnesses which include *Muhammad Ihsan (PW.4)*, *Marjan Hamid (PW.5)*, *Syed Muhammad Sajjad Akbar (PW.6)*, *Muhammad Kamran Khan (PW.8)*, *Mouzam Kamran Babar (PW.10)*, *Muhammad Ishfaq (PW.11)*, *Azhar Iqbal (PW.12)*, *Munir Hussain (PW.15)*, *Ghulam Gillani (PW.16)* and *Muhammad Yaqoob (PW.19)* who deposed as to how the appellant defrauded them and *Saeed Ahmed Sheikh IO (PW.20)*, who investigated the matter. In addition, four witnesses namely *Hasnain Waris (PW.1)*, *Azhar Hayat (PW.2)*, *Farrukh Nadeem (PW.3)* and *Ahmad Usman (PW.7)* produced the record of the bank accounts of the appellant.

5. On the closure of the prosecution evidence, the appellant was examined under section 342 Cr.P.C. In response to the question "why this case against you and why the PWs have deposed against you", the appellant replied as under:-

> *"I was employee of Muhammad Hasan Ahmed Qureshi. I and my relatives had invested with him. Khalid Barvi was his partner who was running Photo Stat shop in Nawan Shahir Multan. Khalid Barvi invited and enticed his friends to invest with Muhammad Hassan Ahmed Qureshi. The cheque Books of my bank accounts were with Muhammad Hassan Ahmad Qureshi as security of my employment. I did not sign any cheque or issued any cheque in favour of any investors including the above detailed persons. I had filed a suit for recovery of Rs.1,48,50,000/- which was decreed in my favour. The execution is pending. P.W Azhar Iqbal was my witness in that suit. I also lodged two FIRs against Muhammad Hassan Ahmed Qureshi. He and Khalid Barvi had left the country. The aggrieved persons, especially above referred persons in the list targeted me, involved me in this case falsely and joined the investigation against me with mala fide because Muhammad Hassan Ahmed Qureshi and Khalid Barvi had left the country."*

The appellant neither opted to appear as a witness in his own defence under section 340(2) of Cr. P.C. nor produced any witness in his defence. However, he produced certain documents in his defence which include copies of two FIRs i.e. Exh.D.1 & Exh.D.2 and the copy of a decree sheet (Exh.D.3).

6. After the completion of trial, the learned trial court proceeded to convict and sentence the appellant as stated above, hence, the instant appeal.

7. It is contended by learned counsel for the appellant that that the instant case originated from the complaint, moved by Muhammad Yaqoob (PW.19), who while appearing as a witness altogether disowned its contents; that Muhammad Yaqoob was declared hostile nor was re-examined by the prosecution; that the learned trial court attached no importance to the fact that Azhar Iqbal (PW.12), previously appeared as a witness in a civil suit instituted by the appellant and deposed that the actual fraud was committed by Hassan Qureshi etc; that despite the fact that the statement of Azhar Iqbal recorded in the instant case was in conflict with his statement recorded in the civil suit, the learned trial court proceeded to ignore it; that the prosecution, in order to prove the guilt of the appellant tendered in evidence the photo copies of the cheques, which despite being inadmissible were relied upon by the trial court; that despite there being a specific denial by the appellant regarding his signatures on the cheques, no report of any handwriting expert was brought on record; that even according to the statements of the PWs, the amounts were paid in the business premises of Khalid, who was given a clean chit by the NAB Authorities and that the learned trial court never gave any consideration to the defence of the appellant, which was comprising upon strong documentary evidence.

8. On the other hand, learned law officers appearing on behalf of NAB Authorities vehemently controverted the arguments advanced on behalf of the appellant and contended

that the appellant has deprived as many as ten persons from their hard earned money by alluring them to invest in his business; that the guilt of the appellant is established on the basis of the statements of the aggrieved persons as well as from the documentary evidence produced during trial and that since the appellant has defrauded the public at large and have deprived them from their hard earned money.

9. Heard. Record perused.

10. The instant case is arising out of the complaint dated 27.02.2014 (Exh.PW.19/C) moved by Muhammad Yaqoob (PW.19). Muhammad Yaqoob while appearing as a witness disowned the contents of complaint and resultantly was declared hostile. However, the important feature of his statement pertains to his claim of being present in Madina Al-Munawara on 27.02.2014, when the complaint was moved. In support of this claim, he also tendered the copy of the relevant pages of his passport (Exh.PW.19/D/1). The perusal of his passport fortifies his claim of being away from the country when the complaint was statedly moved before the NAB Authorities. Such aspect of the matter is suggestive of the fact that the instant case is not free from the menace of fabrication of false evidence. Due to this reason, we are constrained to adopt a more cautious approach while appraising the prosecution evidence.

11. It divulges from the record that the case, as set up by the prosecution, is to the effect that the appellant, lured the general public by offering them exorbitant profit and thereby received certain amount from them for the purposes of investment and subsequently misappropriated the same. A wade through the prosecution case reveals that it is comprising upon the statements of twenty witnesses, which include eleven witnesses, who allegedly were defrauded by the appellant. Out of these elven witnesses, Zeeshan Hamid (PW.9), appeared in support of an amount of Rs.1,50,000/- invested by his brother Marjan

Hamid. According to the record, Marjan Hamid never joined the proceedings, either at investigation stage or during trial.

12. The perusal of the statements of above-mentioned eleven witnesses (victims) reveals that they initially received some profit, however, subsequently, the appellant disappeared from the scene and the cheques issued by him for the return of the amount were dishonoured. The detail of the witnesses and the amount invested by them is summarized as under:-

Sr.No.	**Name**	**Amount**
1.	Muhammad Ihsan (PW.4)	Rs.2,00,000/-
2.	Marjan Hamid (PW.5)	Rs.1,50,000/-
3.	Syed Muhammad Sajjad Akbar (PW.6)	Rs.5,30,000/-
4.	Muhammad Kamran Khan (PW.8)	Rs.1,00,000/-
5.	Mouzam Kamran Babar (PW.10)	Rs.32,00,000/-
6.	Muhammad Ishfaq (PW.11)	Rs.2,00,000/-
7.	Azhar Iqbal (PW.12)	Rs.34,00,000/-
8.	Ghulam Gillani (PW.16)	Rs.4,00,000/-
9.	Munir Hussain (PW.15)	Rs.1,00,000/-
10.	Muhammad Yaqoob (PW.19)	Rs.2,00,000/-

A wade through the statements of the above-mentioned witnesses shows that all of them handed over their respective amounts to the appellant, without any receipt or agreement. However, all of them are found to be unanimous in saying that the amount was invested with the appellant. It is important to mention here that no material is brought on record to determine the nature and the status of the investment. The perusal of the entire evidence reveals that the prosecution has failed to place on record even an iota of evidence regarding the timeframe of the investment and the return of the principal amount. Similarly, we have failed to come across any material regarding the consequences of the loss in the business as no terms and conditions, oral or written, were brought on record. Conversely, it came on record that the appellant gave the cheques to the witnesses as guarantee and that too without mentioning any

date. Most of the witnesses admitted in unequivocal terms that the dates of the encashment of the respective cheques were written by themselves.

13. According to record, out of total amount of Rs.8,480,000/- Azhar Iqbal (PW.12) paid an amount of Rs.3.400 Million. While appearing as a witness, he claimed that he invested this amount with the appellant, however, during cross-examination, he himself contradicted his earlier stance. According to the record, the appellant filed a civil suit against Hassan Qureshi, wherein Azhar Iqbal (PW.12) appeared as PW.2. While appearing as such, he deposed that said Hassan Qureshi defrauded the appellant for an amount of Rs.1,48,50,000/-. It would be appropriate to reproduce the relevant extract from his statement which is as under:-

> "It is correct that accused filed a civil suit against Hassan Qureshi. I was examined as PW.2 in that suit. I stated therein that Hassan Qureshi committed fraud with accused of amount Rs.1,48,50,000/- and cheques issued by him were dishonoured."

The above-mentioned extract is providing due support to the defence of the appellant, which he took while being examined under section 342 Cr.P.C. Similarly, Azhar Iqbal (PW.12) never produced the original cheques, either at investigation stage or during trial. Saeed Ahmad Sheikh Deputy Director (PW.20), who investigated the matter also admitted this fact, during his cross-examination. Likewise, Azhar Iqbal (PW.12) was found to be guilty of making dishonest improvements in his statement before the court. He stated before the court that he paid the amount to the appellant in installments, however, according to his statement under section 161 Cr.P.C. (PW.12/D-1), the amount was paid by him in lump sum. By making such an improvement, he compromised over his integrity and gave rise to doubts about the authenticity of his claim.

Muhammad Yaqoob (PW.19), who being the complainant was the star witness of the prosecution case, stated

in unequivocal terms that he made the investment on the asking of Khalid. Not only this, he further stated that the cheque was given to him by Khalid, who has proceeded to London. The perusal of the statements of some of the witnesses is suggestive of the fact that Khalid was somehow instrumental in the transactions.

14. The perusal of the record reveals that almost all the witnesses (victims), in support of their claims placed reliance solely on the respective cheques, statedly issued by the appellant. Except these cheques, neither any documentary evidence was brought on record nor any witness was produced in support of each claim. The appellant, during the course of trial, came forward with a specific denial of the execution of these cheques and challenged his signatures as well. It is settled principle of law that primarily the prosecution is bound to prove its case beyond any shadow of doubt. Keeping in view the denial of the appellant regarding the execution of these cheques, the prosecution was legally obliged to subject these cheques to the opinion of the Handwriting expert. However, we have failed to understand as to why it was not done.

15. We have also observed that even during the course of investigation, the appellant came forward with the stance that the actual business was of Muhammad Hassan Ahmed Qureshi. He further stated that he was an employee of Muhammad Hassan Ahmed Qureshi, who was the actual owner of the business. Surprisingly, the NAB Authorities made no effort even to interrogate Muhammad Hassan Ahmed Qureshi. Even, the Investigating Officer made no endeavour to find out the ownership of the shop where the business was being carried out. In this regard, we deem it appropriate to make reference to certain extracts of the statement of the Investigating Officer (PW.20) which are as under:-

> "The version of the accused was that actual business was of Muhammad Hasan Ahmed Qureshi. I did not ask Muhammad Hasan Ahmed Qureshi to join the inquiry or investigation

> …….
> …….
> The place of business of accused was at Khawar Centre Abdali Road, Multan. I visited that place. I do not know number of that shop. I did not visit proprietor of Khawar Centre. I did not inquire about the ownership of tenancy of that shop. I did not inquire from the surroundings whether the accused or Muhammad Hasan Ahmed Qureshi was running the shop of mobile accessories."

From the above extracts, it is evident that the NAB Authorities made no serious effort to find out the truth. Keeping in view the specific stance of the appellant (mentioned above), it was the legal obligation of the Investigating Officer to investigate the same. He could easily arrive at the truth or otherwise of the stance of the appellant regarding the ownership of the business. This could be done either by taking into possession the lease agreement of the shop or by interrogating other shopkeepers running business in the area. It needs no mention that the sole purpose of the investigation is to find out the truth. The efforts of the investigation must not be aimed at collecting the material which goes against the accused. The true spirit of the investigation is to collect the evidence, even if it favours the accused. While holding so, we are guided by the definition of investigation as envisaged in Criminal Procedure Code, 1898 and purpose of investigation as it stands defined in the Police Rules, 1934. The expression "investigation" is defined in section 4 (l) of the Criminal Procedure Code, 1898 as under:-

> "Investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police-officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf."

We also deem it appropriate to make reference to the provisions of Chapter XXV, Rule (2) (3) of the Police Rules, 1934 which is worded in the following manner:-

> "It is the duty of an investigating officer to find out the truth of the matter under investigation. His object shall be to discover the actual facts of the case and to arrest the real offender or offenders. He shall not commit himself prematurely to any view of the facts for or against any person."

16. The record of the instant case is suggestive of the fact that the matter was not properly investigated by the NAB Authorities. We have failed to come across any reason as to why the version of the appellant was not properly probed by the Investigating Officer. Based on the statement of the Investigating Officer (PW.20) we have arrived at an irresistible conclusion that by not investigating the matter properly, a great prejudice has been caused to the appellant. The stance of the appellant remained un-rebutted as no evidence contrary to the stance of the appellant was brought on record. It is salutary principle of law that the prosecution is duty bound to prove its case whereas the accused is only required to create a doubt about his involvement in the commission of offence. The same principle is made applicable under NAO, 1999 except the cases mentioned in section 14 of NAO, 1999. Admittedly, a transaction, which is culpable under section 9 (a) (ix & x) of NAO, 1999 does not fall within the purview of section 14 of NAO, 1999. Even in respect of offences mentioned in section 14 of the NAO, 1999, the prosecution has to make out a prima facie case, on the basis of legally admissible material.

17. In the above backdrop, on the conclusion of trial, the appellant was found guilty of having committed an offence under section 9 (a) (ix & x) of NAO, 1999 and was convicted under section 10 (a) of the NAO, 1999. Before proceeding further, it would be appropriate to have a look as to how sections 9 (a) (ix & x) of NAO, 1999 are worded by the legislatures:-

> "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:-
> (i) …….
> …….
> (ix) If he commits the offence of cheating as defined in section 415 of the Pakistan Penal Code, 1860 (Act XLV of 1860), and thereby dishonestly induces members of the public at large to deliver any property including money or valuable security to any person; or
> (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".

From the perusal of the foregoing provisions, it evinces that 9 (a) (ix) pertains to cheating, whereas 9(a) (x) relates to criminal breach of trust, if committed in relation to members of public at large. In this backdrop, the primary question which is required to be attended by this Court pertains to the fact that as to how the expression "public-at-large" is defined. Certain expressions, which are used in NAO, 1999 are defined in section 5 of the NAO, 1999. Admittedly, the expression "public-at-large" finds no mention in section 5 of NAO, 1999. It is a salutary principle of law that if an expression is not defined in any law, then its dictionary meanings can be followed and adopted. In this regard, we are enlightened by the principles of interpretation, laid down by the Hon'ble Supreme Court of Pakistan in the case of *Chairman Pakistan Railway Government of Pakistan v. Shah Jehan Shah* **(PLD 2016 Supreme Court 534)** wherein the Hon'ble Apex Court held as under:-

> "when a word has not been defined in the statute, its ordinary dictionary meaning was to be looked at"

18. We have gone through different dictionaries and have come across that the expression "public-at-large" is not defined in its literal sense and instead the two words i.e. "public" and "at large" are defined separately. In the Black's Law Dictionary, 9th Edition, the definition of the word "public" includes the following:-

> "relating or belonging to an entire community, state or nation"

Similarly, "at large" stands defined in the Black's Law Dictionary, 9th Edition as:-

> "Free; unrestrained; not under control. Not limited to any particular place, person, matter or question".

It can be gathered from the above-definitions that the from the expression "public-at-large", the legislatures have intended to focus the public at macro level. The expression does not aim at the offences committed at micro level. In this backdrop, in order to attract the mischief of section 9 (a) (ix & x) of NAO, 1999, the prosecution is obliged to bring on record that the accused was found guilty of defrauding the public at large scale. While observing so, we have also kept in mind the purpose of enactment of NAO, 1999. Even at the time of its promulgation, the law to cater with such like cases was already in field through the provisions of Pakistan Penal Code, relating to offence of cheating and criminal breach of trust. Needless to mention here that the NAO, 1999, being a special law, its provisions are to be applied in special circumstances only. In the instant case, as discussed above, the prosecution, in an endeavour to make out the offences, with which the appellant was charged, produced ten witnesses only. We cannot subscribe that such a small faction of the society can fulfill the definition of the expression "public-at-large". This is also a settled principle of law that the provisions of law are to be construed in its ordinary meaning. A Division Bench of the Sindh High Court while embarking upon the same issue, observed in the case of *Naseem Abdul Sattar and 6 others v. Federation of Pakistan and 4 others* **(PLD 2013 Sindh 357)** that:-

> "Perusal of section 415, P.P.C. in conjunction with section 9 (a) (ix) of Ordinance 1999 reflects that National Accountability Bureau under Ordinance 1999 has no jurisdiction to the cognizance of an offence of cheating under section 415, P.P.C. unless the accused has dishonestly induced members of the public at large to deliver any property including money or valuable security to any person and not in an individual case."

The Hon'ble Supreme Court of Pakistan in the case of *Rafiq Haji Usman v. Chairman, NAB and another* **(2015 SCMR 1575)** while embarking upon the expression "member of public-at-large" observed as under:-

> "We are of the view that 13 persons would hardly constitute **public** in its literal and ordinary sense;

> furthermore meaning of the word large i.e. "considerable or relatively great size, extent or capacity having wide range and scope" does not bring 22 or 13 persons as the case may be within its concept and fold. Thus, from this angle as well the said section seemingly perhaps can be held not attracted to the instant case".

From the above, it can safely be construed that the instant case from its peculiar facts and circumstances was wrongly brought within the ambit of section 9 of NAO, 1999. The numerical strength of eleven victims is sufficient to bring the instant case out of the purview of NAO, 1999. In our humble view, the matter of recovery of a liability, either arising out of broken promise or from the dishonoured cheques should have been placed before the civil court through a recovery suit. Similarly, the victims could approach the local police through a criminal case under section 489-F PPC.

19. There is another aspect of the matter which we deem appropriate to discuss. Such aspect of the matter pertains to the co-existence of cheating and criminal breach of trust. The two offences, from their very genesis comprise upon altogether different ingredients and are applicable in circumstances which are at variance with each other. In the offence of cheating, the possession of the property is shifted through deception, whereas in the cases of criminal breach of trust, the property is handed over to the accused with the consent of the victim, thereby creating a trust and with a specific direction in which such trust is to be discharged. In this regard, it would be appropriate to have a look of section 405 of PPC wherein the criminal breach of trust is defined, which is as under:-

> "**Criminal breach of trust**. Whosoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonesty use 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 willfully suffers any other person so to do, commits "criminal breach of trust"."

An in-depth analysis of foregoing provision reveals that in order to attract its mischief, the prosecution must prove the following ingredients:-

(a) Entrustment or dominion over property;
(b) Misappropriation or conversion to personal use of the property; and
(c) The disposal of the property in violation of direction of law or in violation of any express or implied legal contract.

It evinces from above that the instant transaction, wherein certain amount was allegedly entrusted to the appellant, without bringing on record the terms of entrustment do not fall within the ambit of criminal breach of trust. In this respect, it is important to mention here that a distinguishing line must be drawn between investment of money and the entrustment. Similarly, the concept of criminal breach of trust stands on different footing from a mere breach of contract. In order to make operative the element of criminal breach of trust, the terms and conditions, the scope of investment, its timeframe and the date of return of principal amount, the status of profit and loss sharing etc. are to be brought on record. From such features, it can be assessed that the transaction in question, whether falls within the ambit of criminal breach of trust or it comes within the purview of contract. It needs no elaborate discussion that breach of contract is amenable to the jurisdiction of civil court whereas the grievance arising out criminal breach of trust can best be redressed through the process of criminal law.

20. The upshot of the above-discussion is that due to the failure of the prosecution to bring on record any documentary evidence in support of the respective claims of the victims and the term of entrustment, the non-production of any report from the Handwriting expert, the improper investigation and the misapplication of section 9 (a) (ix & x) of NAO, 1999 is giving rise to a reasonable doubt about the culpability of the appellant. In our humble view, the appellant is found entitled to acquittal on the basis of such doubts. The instant appeal is accordingly

allowed. The conviction and sentence of Shahid Hussain Shahid (appellant) is set-aside and he is acquitted of the charge. He shall be released forthwith if not required to be detained in any other criminal case.

(Abdul Sami Khan)
Judge

(Ch. Abdul Aziz)
Judge

Najum*

APPROVED FOR REPORTING

JUDGE