

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT
ISLAMABAD

CASE NO. : CRIMINAL APPEAL NO.122-2018

Maryam Nawaz Sharif (Maryam Safdar)

Vs.

The State

CASE NO. : CRIMINAL APPEAL NO.123-2018

Capt. (R) Muhammad Safdar

Vs.

The State

Appellants by : M/s Muhammad Amjad Pervaiz, Muhammad Aurangzeb and Muhammad Anwar Hussain, Advocates, Mr. Irfan Qadir, Advocate (CM No.358-2021).
Appellants in person.

Respondent by : Sardar Muzaffar Abbasi, Deputy Prosecutor General, NAB, Mr. Usman G. Rashid Cheema, Special Prosecutor, NAB and Muhammad Rafay Maqsood, Special Prosecutor, NAB, Barrister Rizwan Ahmed, Special Prosecutor, NAB, Mr. Imtiaz Rashid Siddiqui, Special Prosecutor, NAB, Mr. Muhammad Azhar Siddique, Special Prosecutor, NAB

Dates of hearing : 13.10.2021, 17.11.2021, 24.11.2021, 21.12.2021, 18.01.2022, 10.02.2022, 17.02.2022, 21.03.2022, 12.05.2022, 02.06.2022, 09.06.2022, 16.06.2022, 21.07.2022, 15.09.2022 & 20.09.2022

Date of decision : 29.09.2022

AAMER FAROOQ J. This consolidated judgment contains the reasons of our short orders dated 29.09.2022 in the captioned appeals, which arise out of common judgment dated 06.07.2018 by the Judge-Accountability Court-I, Islamabad.

This Court, vide separate short orders dated 29.09.2022, allowed the above mentioned Criminal Appeals in the following terms:-

“For the reasons to be recorded later, the instant appeal is allowed and the judgment dated 06.07.2018 is set aside to the extent of appellant, namely Maryam Nawaz (Maryam Safdar); consequently, the conviction awarded is set aside and the above named appellant is acquitted of the charges against her in Reference No.20-2017”

“For the reasons to be recorded later, the instant appeal is allowed and the judgment dated 06.07.2018 is set aside to the extent of appellant, namely Capt. (R) Muhammad Safdar; consequently, the conviction awarded is set aside and the above named appellant is acquitted of the charges against him in Reference No.20-2017”

PARTIES

2. Maryam Nawaz Sharif (hereinafter referred to as Appellant No.1) (appellant in Crl. App. No.122-2018) and Captain (R) Muhammad Safdar (hereinafter referred to as Appellant No. 2) (appellant in Crl. App. No.123-2018) were tried in Reference No.20-2017 (the Reference) for offences under sections 9(a)(iv)(v) and (xii) read with section 10 along with Sr. No.2 of the Schedule to the National Accountability Ordinance, 1999 (the Ordinance) and were accordingly convicted; in this behalf, Appellant No.1 was awarded seven years Rigorous Imprisonment with fine and Appellant No.2 was awarded a year's Rigorous Imprisonment with fine.

BACKGROUND OF THE CASE

3. Brief background, leading to filing of the Reference against appellants No.1 & 2 along with Mian Muhammad Nawaz Sharif and others, is that in or about April, 2016, the International Consortium of Investigating Journalists released information relating to leaked documents of a private law firm namely Mossack Fonseca based in Panama; allegedly, some of the leaked documents pertained to the then sitting Prime Minister of Pakistan Mian Muhammad Nawaz Sharif and his family. As per the documents, allegedly the details of offshore companies incorporated under the laws of British Virgin Island were disclosed and two of the said company M/s Nescoll Ltd. and Nielsen Enterprises Ltd. were part of the same. Apparently, said Companies owned Apartments No.16, 16-A, 17 & 17-A Avenfield House, Park Lane London, United Kingdom (hereinafter referred to as Avenfield Apartments). In this regard, Apartment No.16 was purchased in the name of Nielsen Enterprise Ltd. on 31.07.1995, Apartment No.16-A was transferred in the name of Nielsen Enterprise Ltd. on 31.07.1995; Apartment No.17 was transferred in the name of Nescoll Ltd. on 01.06.1993 and Apartment No.17-A was transferred in the name of Nescoll Ltd. on 27.07.1996; as per the documents of incorporation Nielsen Enterprises Ltd. was incorporated on 14.04.1994 and Nescoll Ltd. was incorporated on 27.01.1993. A petition under

Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the Constitution) was filed on behalf of Imran Ahmad Khan Niazi, Chairman of a Political Party namely Pakistan Tehreek-e-Insaf before the Hon'ble Supreme Court of Pakistan impleading therein Mian Muhammad Nawaz Sharif as well as appellants No.1 & 2 *inter alia* along with sons of Mian Muhammad Nawaz Sharif. The petition, *inter alia*, included the matter of Avenfield Apartments owned by the above-mentioned companies. The gist of the case of the petitioner, in the said petition under Article 184(3) of the Constitution with respect of Avenfield Apartments, was that the properties were purchased by Mian Muhammad Nawaz Sharif through ill-gotten money in the name of two Companies namely Nielsen Enterprises Ltd. and Nescoll Ltd. and that his children are also beneficiaries of the same. The matter was heard by a five Member Bench of Hon'ble Supreme Court of Pakistan and the judgment was handed down on 20.04.2017. In the wake of the said judgment, Joint Investigation Team (JIT) was established by the august Apex Court, which was to enquire into veracity of the assertions made in the petition under Article 184(3) of the Constitution and furnish its report. JIT submitted its report before Hon'ble Supreme Court of Pakistan on 10.07.2017 and same led to the decision of the matter on 28.07.2017 reported as *'Imran Ahmad Khan and others Niazi Vs. Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan and others'* (PLD 2017 SC 692). In the said decision, National Accountability Bureau (NAB) was ordered to file Reference against Mian Muhammad Nawaz Sharif, Maryam Nawaz Sharif, Hussain Nawaz Sharif, Hassan Nawaz Sharif and Cap. (R) Muhammad Safdar relating to Avenfield Apartments within six weeks of the judgment; NAB was directed to consider the material already collected during course of investigation conducted earlier by JIT. NAB was also directed to file supplementary Reference(s), if and when, any other asset, which is not reasonably accounted for, is discovered and Accountability Court was directed to proceed with and decide the aforesaid Reference within a period of six months from the date of filing of such References. The Accountability Court was further directed that in case, if it finds any deed, document or affidavit filed by or on behalf of any accused person or any other person(s) to be fake, false, forged or fabricated, to take appropriate action against the concerned persons in accordance with law. A review petition was

filed against the said judgment of the Hon'ble Supreme Court of Pakistan by Mian Muhammad Nawaz Sharif and others, which formed basis of judgment dated 15.09.2017 reported as 'Mian Muhammad Nawaz Sharif and others Vs. Imran Ahmed Khan Niazi and others' (PLD 2018 Supreme Court 1). It is pertinent to mention that review petition filed by appellants No.1&2 and others was though dismissed yet it was observed therein that Accountability Court, seized of the matter, shall not be prejudiced by any observation made in the judgments of Hon'ble Supreme Court of Pakistan. For the ease of convenience, the relevant portion of the judgment is reproduced below:

"14 The argument that this direction implies unambiguous approval of the material collected by the JIT whose probative worth is yet to be established is also misconceived as none of our observations projects any such impression. The trial court in any case would be at liberty to appraise evidence including the material collected by the JIT according to the principles of the law of evidence without being influenced by any of our observations. Even otherwise, all the observations made in the judgment, being tentative, would not bind nor would restrain the trial court from drawing its own conclusions from the evidence recorded before it in accordance with the principles and provisions of the law of evidence".

On 01.08.2017, necessary delegations were made in terms of section 34-A of the Ordinance to the Director General, NAB for conducting inquiries/investigations. On 03.08.2017, D.G. NAB, in exercise of the authority, authorized the investigation and in the wake thereof, call-up notices were issued to appellants No.1&2. Call-up notices were duly responded by appellants No.1 & 2 through counsel on 22.08.2017; the Investigating Officer on 06.09.2017, prepared and signed interim investigation report recommending filing of Reference under section 9(a) of the Ordinance. On 07.09.2017, interim Reference was filed by NAB against Mian Muhammad Nawaz Sharif, appellants No.1 & 2 along with Hussain Nawaz and Hassan Nawaz (Reference No.20 of 2017). The said Reference was filed on the basis that under the facts and circumstances, the accused persons, including appellants No.1 & 2, committed offences under sections 9(a)(iv)(v) & (xii) as well as offence at Sr. No.2 of the Schedule to the Ordinance which are punishable under section 10 of the Ordinance read with Schedule attached thereto. Subsequently, Supplementary Reference was filed against the same persons noted hereinabove with some more details on 18.01.2018 for contravening the same provisions of law; on 09.10.2017, copies of requisite documents in terms of section 265-C of Code of Criminal Procedure (Cr.P.C.) were supplied to the accused persons; on 19.10.2017, an application was filed

by appellants No.1 & 2 under section 17 of the Ordinance along with section 265-C Cr.P.C. that copies of documents contained in Volume-10 of JIT report have not been provided; said application was dismissed on 19.10.2017 on the same date; charge was framed against appellants No.1 & 2 under section 9(a)(iv)(v) & (xii) read with Sr. No.2 & 3-a of the Schedule to the Ordinance. On 07.11.2017, an application was filed under section 30 of the Ordinance read with section 227 Cr.P.C. for amendment in charge by way of deletion of offence under Sr. No.3-a of Schedule to the Ordinance; referred application was allowed on 08.11.2017 and the offence under Sr. No.3-a of Schedule to the Ordinance was deleted.

CHARGE

On 08.11.2017, charge was amended. For ease of convenience, final charge framed against appellants No.1 & 2, is reproduced below:-

“I (Muhammad Bashir, Judge, Accountability Court-I, Islamabad) hereby charge you above- named accused No. 1 to 3, as under that:

You accused Mian Muhammad Nawaz Sharif were holder of public office. You and your family/dependants are owner in possession of Avenfield/Mayfair Properties namely Apartment No. 16,16A, 17 & 17A Park Lane London and those flats were in possession of you and your family since 1993. Source of investment for purchase of said properties through offshore companies M/s Nielsen Enterprises Ltd and M/s Nescoll Ltd which owned the said Avenfield Apartment is not justified and bearer shares of said companies were crystallized into the said property.

You accused Mian Muhammad Nawaz Sharif, Maryam Nawaz and absconding accused Hussain Nawaz, and Hassan Nawaz failed to justify legals/bonafide sources /means for purchase of said property.

You accused Maryam Nawaz was beneficial owner of above mentioned companies which owned Avenfield Properties. A false, fabricated trust deed dated 02-02-2006 in Calibri Font was filed whereas no such Font was available for such purposes of that deed in that year. That deed was signed by you accused Maryam Nawaz as well as you co-accused Capt Retd. Muhammad Safdar, signature of you accused Capt (Ret) Muhammad Safdar was as a witness. By filing such declaration, you both allegedly tried to mislead the investigation agency.

You Maryam Nawaz Sharif accused consciously concealed the actual facts regarding history of ownership of the said assets and the companies and there is failure on part of you all accused including absconding accused to account for sources/means/availability of fund and its lawful transfer abroad. Absconding accused had also no source of income at relevant time. Thereby you accused Min Muhammad Nawaz Sharif, Maryam Nawaz Sharif and Capt. (Retd.) Muhammad Safdar committed offences as defined under section 9 (a)(iv)(v)&(xii) as per details given above and offences cited at serial No. 02 of the schedule and punishable under section 10 of NAO 1999 read with schedule attached thereto.

And I hereby direct that you be tried by this Court on the said charge”

EVIDENCE LED BY THE PROSECUTION

The prosecution led evidence and the statements of six prosecution witnesses were recorded when again call-up notices were issued to appellant No.1 as well as appellant No.2 by the Investigating Officer under section 19 of the Ordinance; the reply was filed accordingly. On 12.01.2018, supplementary investigation report was prepared which recommended filing of Reference which was the basis of filing of supplementary reference noted hereinabove on 18.01.2018. Originally, in the calendar of witnesses, there were sixteen prosecution witnesses however subsequently an application was moved under section 540-Cr.P.C. by the prosecution for summoning of Zahir Shah, D.G. NAB, Rawalpindi to produce documents in respect of Mutual Legal Assistance from United Kingdom; said application was allowed on 20.04.2018 and Mr. Zahir Shah appeared as PW-17 on 08.05.2018. Evidence of the prosecution was closed and on 30.05.2018, statements of appellants No.1 & 2 under section 342 Cr.P.C. were recorded. On 03.07.2018, arguments were addressed and an application was filed on 05.07.2018 on behalf of *inter alia* appellants No.1 & 2 for postponement of announcement of judgment in order to attend indisposed mother of appellant No.1 namely Kalsoom Nawaz Sharif; said application was dismissed and ultimately on 06.07.2018, learned trial court passed the judgment.

VERDICT

Appellant No.1 was convicted for production of bogus trust deeds and being instrumental in concealment of properties of her father Mian Muhammad Nawaz Sharif, hence as an aider/abettor and attempting to act in conspiracy with her father, she was convicted for offences under sections 9(a)(v)(xii) of the Ordinance read with Entry at Sr. No.2 of the Schedule to the Ordinance and was convicted and sentenced to Rigorous Imprisonment for seven years with fine of two million pounds along with Simple Imprisonment for one year for offence under Serial No.2 *ibid*; appellant No.2 was convicted for offence of being the witness of trust deed and was awarded one year Rigorous Imprisonment as punishment; Avenfield Apartments were ordered to be forfeited to the Federal Government under section 10(a) of the Ordinance.

ANCILLARY FACTS

It is pertinent to observe that two of the accused persons namely Hussain Nawaz and Hassan Nawaz never appeared before learned trial court

and were declared 'proclaimed offenders'; their non-bailable perpetual warrants of arrest were issued.

It is also pertinent to observe that Mian Muhammad Nawaz Sharif initially filed appeal (Crl. App. No.121-2018) and also moved a number of petitions under Article 199 of the Constitution, one of them being W.P. No.3716-2019, which was disposed of vide judgment dated 29.10.2019 and eight weeks bail was granted to him by way of suspension of sentence; thereafter, he proceeded abroad during currency of bail period and never returned to Pakistan; consequently, he was declared a 'proclaimed offender' and his perpetual warrants of arrest were issued and the said appeal was dismissed vide judgment dated 23.06.2021 on the basis thereof with the observation that as and when he surrenders before the Court or is captured by the authorities, he may move an appropriate application for resurrection of the appeal.

SUBMISSIONS ON BEHALF OF APPELLANTS

Layout of the case of appellants

4. Mr. Amjad Pervaiz, Advocate Supreme Court (ASC) appearing for appellants No. 1 and 2 *inter alia* contended that no case, against the appellants, is made out in the facts and circumstances; he submitted that judgment of learned trial court is based on conjectures and surmises and is not supported by any evidence available on record. He submitted that there is no proof or evidence of ownership of the principal accused in respect of Avenfield Apartments, hence question of abetment or assistance does not arise. He contended that appellant No.1 could not have been convicted under section 9(a)(v) of the Ordinance, as she is not a 'public office holder'; in this behalf, it was submitted that allegation of acquisition of Avenfield Apartments, through corrupt and illegitimate means, was discarded by learned trial court and only charge, which remains, against Mian Muhammad Nawaz Sharif, was with respect to section 9(a)(v) of the Ordinance; learned counsel added that in order to discharge the onus regarding 'assets beyond means', parameters laid down by the Hon'ble Supreme Court of Pakistan in case reported as 'Ghani-ur-Rehman Vs. National Accountability Bureau and others' (PLD 2011 Supreme Court 1144), were not complied with. It was submitted that decision in Ghani-ur-Rehman's case was based on case reported as 'Khalid Aziz Vs. The State' (2011 SCMR 136), wherein the Hon'ble

Supreme Court cited with approval the decision by the Sindh High Court in case reported as 'Hakim Ali Zardari Vs. The State' (2007 MLD 910). Learned counsel further contended that there is not an iota of evidence that Avenfield Apartments have anything to do with Mian Muhammad Nawaz Sharif; the prosecution exhibited documents after documents, which do not establish any nexus of erstwhile Prime Minister of Pakistan with Avenfield Apartments. Mr. Amjad Pervaiz, ASC further contended that price, at which, Avenfield Apartments were purchased over a period of time, was neither established in evidence nor the known sources of income at the relevant time of Mian Muhammad Nawaz Sharif; in this behalf, he added that in light of judgments of superior courts, the known sources of income must be taken to be the sources known to the prosecution through investigation of the case; he continued that correlation of the known sources of income, with the price of the properties in question, would have established whether that the assets had been purchased beyond means by the accused persons. Moreover, ownership or title of the properties in question namely Avenfield Apartments also needed to be established however there is nothing on record with respect to the same; the fact that appellant No.1 neither held Avenfield Apartments as a 'dependent' or 'benamidar' was also not established and it cannot be taken axiomatically that since she is the daughter of Mian Muhammad Nawaz Sharif, hence is dependent, especially when, it was submitted during course of proceedings before Hon'ble Supreme Court of Pakistan that Mian Muhammad Sharif, the father of Mian Muhammad Nawaz Sharif, was running family business, which subsequently, devolved upon his grandsons and the then Prime Minister of Pakistan had nothing to do with the business affairs. It was also argued that Mian Muhammad Nawaz Sharif is not an appellant before the Court and his appeal stands dismissed for being absent from the Court, however, the case viz-a-viz Mian Muhammad Nawaz Sharif, is to be looked into at a glance, as conviction of appellant No.1 is based on being an abettor and aider of him. He added that under section 14(c) of the Ordinance, the burden to prove the means in acquisition of any property, which is alleged to be beyond means, is on the person against whom the allegation is made only after initial burden is discharged by the prosecution, however, since appellant No.1 is implicated only to the extent of aider and abettor; that plain reading of section 14(c) ibid

clearly shows that burden does not shift to her extent at all as the charge against appellant No. 1 was to the extent of section 9(a)(v) of the Ordinance; perhaps, the burden would have shifted, if the allegation was on Mian Muhammad Nawaz Sharif and the prosecution had proved the elements required for shifting of burden under section 14(c) *ibid* in terms of Ghani-ur-Rehman's *supra*.

Submission regarding forged and fabricated documents

Mr. Amjad Pervaiz, ASC contended that appellant No.1 could not have been convicted for allegedly submitting forged or fabricated documents, as learned trial court has deleted this charge at Sr. No.3(a) of the Schedule to the Ordinance. It was submitted that trust deed dated 02.02.2006 could only have been held to be a forged or fabricated document, if detailed inquiry is held through a summary trial under section 30 of the Ordinance, which can only be done, if instant appeal is dismissed. Learned counsel further added that evidence of Robert William Redlay (PW-14), as an expert, is inconsequential, as there is no evidence to the effect that said witness was an 'expert' which was needed to be established under Article 59 of Qanoon-e-Shahadat Order, 1984; he added that there is nothing on record to show that PW-14 had any special skills with respect to identification of Calibri Font which the prosecution alleged that same was not commercially available in the year 2006.

Submission regarding letters from Mossack Fonseca

Mr. Amjad Pervaiz, ASC also argued that it is the case of the prosecution that by virtue of letters from the law firm Mossack Fonseca that appellant No.1 is a 'beneficial owner' of Avenfield Apartments, which finding has been recorded by learned trial court on the basis of assumption. He argued that nothing exists on record that appellant No.1 was either dependent upon Mian Muhammad Nawaz Sharif or that she had any interest in the referred properties. It was submitted that letters from the law firm stating that appellant No.1 is a 'beneficial owner' means nothing inasmuch as said document was not admissible in evidence, as the maker of the document neither entered in the witness box to confirm contents thereof nor in the letters, it is submitted that on what basis, said assertions have been made; that the record, on the basis of which, letters were issued, also was not put forth before learned trial court, learned counsel argued. Learned counsel

further argued that appellant No.2 has been punished for evidencing the document, original whereof, was never produced before learned trial court and the executants never denied execution thereof. He submitted that it is trite law that for a document to be exhibited, the original document/primary evidence needs to be produced before the court and where such is not possible, copies thereof, through secondary evidence, is permissible in evidence provided certain conditions are met with; in the instant case, learned counsel contended that no permission was sought from the court to produce secondary evidence and the objection raised regarding admissibility of the document also was not dealt with in the final judgment. He added that appellant No.2 is a witness only to the extent of execution of document and does not the contents thereof. Even otherwise, it was submitted that the trust deeds, in question, are private documents, which did not require registration though had been attested by Solicitor in England, who never was called as a witness. It was submitted that the assertion that the documents were prepared later in time than 2006, has no impact on the case of the prosecution inasmuch as charge under Sr. No.3(a) of the Schedule to the Ordinance had been deleted, hence finding is contrary to the charge, which is not permissible.

Submission regarding non-availing of benefits of amendments in the Ordinance and shifting of burden

Mr. Amjad Pervaiz, ASC further argued that no benefit is being claimed in view of amendments made in the National Accountability Ordinance, 1999 and the case is being argued on the basis of law as it existed when appellants No.1 & 2 were charged and convicted. He submitted that under the scheme of law then existed, the burden under section 14(c) of the Ordinance does not shift upon the appellants as the allegation is levelled or charge is framed and the prosecution is not dispensed from discharging the basic burden of proof. He emphasized that initial burden regarding contents of offence needs to be discharged by the prosecution and only then presumption under section 14(c) *ibid* would be applicable in case the defence fails to justify the resources. By way of reiteration and recapitulation, learned counsel emphatically argued that since there does not exist any nexus of Avenfield Apartments with Mian Muhammad Nawaz Sharif, hence appellant No.1

could not have been held to be an aider/abettor and convicted of the offence under section 9(a)(v) read with section 9(a)(xii) of the Ordinance.

Submission on the responsibility of appellant No. 2

Learned counsel for the appellants submitted that appellants have also been convicted for the offence under Sr. No.2 of the Schedule to the Ordinance without there being any evidence to the effect. It was contended that call-up notices, as and when issued by NAB, were duly responded through the counsel and never ever the appellants hesitated from appearance before the Investigating Officer. It was submitted that even before JIT, appellants used to appear regularly and such was the position even before NAB. It was argued that prosecution was required to prove due service of summons upon the appellants which they failed to do so and never ever there has been delay in adjudication of Reference or investigation of the matter due to absence or non-appearance of the appellants.

SUBMISSIONS ON BEHALF OF NAB

Layout of the case of the Prosecution and specific response to the arguments of the appellants.

5. Sardar Muzafar Ahmed Khan Abbasi, Deputy Prosecutor General, NAB, along with Mr. Usman G. Rashid Cheema, Special Prosecutor, NAB (Mr. Usman G. Rashid Advocate Supreme Court did not appear before the court on the last date of hearing apparently on account of indisposition and the case was argued by co-counsel Sardar Muzaffar Ahmed Khan Abbasi), *inter alia*, argued that the judgment impugned clearly establishes the guilt of the appellants in the facts and circumstances, It was submitted that prosecution was able to prove beyond reasonable doubt that Avenfield Apartments have been acquired by M/s Nescoll Ltd. and Nielsen Enterprises Ltd., the beneficial owner of which, was Mian Muhammad Nawaz Sharif and subsequently appellant No.1 and asset was beyond his means. Learned counsel took the Court through various exhibits to establish that M/s Nescoll Ltd. and Nielsen Enterprises Ltd. are companies registered under the laws of British Virgin Island and Avenfield Apartments are under their ownership. Learned counsel further took the Court through the testimony of Mr. Wajid Ali Zia (PW-16) narrating the facts and circumstance in which the properties, in question, were acquired. They argued that it is commonly known that Sharif family is in possession of Avenfield Apartments and has, in

various instances, through media and at the Floor of the House, has admitted the ownership of the same, it was contended that in light of the said position, the burden of proof shifted on Mian Muhammad Nawaz Sharif and appellant No.1 to establish the resources, from which, the Avenfield Apartments were purchased. It was also submitted that certain facts and circumstances had been duly settled by the Hon'ble Supreme Court through its judgment in C.P. No.29/2016 in case *Imran Khan Niazi versus Mian Muhammad Nawaz Sharif*. In this behalf, attention of the Court was drawn on decisions dated 20.04.2017, 28.07.2017 & 15.09.2017 in Review Petition. Learned counsel submitted that letters received through Mutually Legal Assistance from M/s Mossack Fonseca, which according to learned counsels, clearly established that appellant No.1 is the beneficial owner of the Avenfield Apartments and she has, in that capacity, helped Mian Muhammad Nawaz Sharif to conceal the true ownership inasmuch as in 1993, she could not have acquired the property herself and consequently attained the beneficial ownership to keep the identity of true ownership concealed.

OPINION OF THE COURT

Ancillary

6. Erudite arguments on behalf of learned counsel for the parties have been heard with utmost care and evidence, placed on record, examined with their skillful assistance.

Observations as to delay in adjudication of appeals

7. Before embarking upon considering rival arguments on behalf of learned counsels for the parties, it is expressed with dismay that it has taken almost four years to decide instant appeals; in this behalf, it is observed that under section 32 (b) of the Ordinance, a High Court is required to decide an appeal filed against the final judgment of an Accountability Court within 30-days, however, though the instant provision is regarded as directory and not mandatory yet it is still expected that timeline provided would be achieved if not in letter at least in spirit. It is observed that after admission of appeals, much time was spent in the petitions filed for suspension of sentence and there-after, absence of co-accused Mian Muhammad Nawaz Sharif initially, after that, Mr. Amjad Pervaiz, ASC holding brief on behalf of appellants, got indisposed and was replaced by Mr. Irfan Qadir, ASC, who moved Miscellaneous Application (CM No.358-2021). The matter also lingered due

to restrictions in the period of COVID-19 Pandemic and there-after for almost a year, National Accountability Bureau, replaced a number of counsels as Special Prosecutors to argue the matter. There is time honoured saying in the justice system that '*justice delayed is justice denied*', hence it is expected in future in such like matters the parties will facilitate the courts in the expeditious dispensation of justice, which is a fundamental right of every citizen of Pakistan.

Relevant law

8. It is also expedient that before examining the contesting contentions of learned counsels for the parties and evaluating the evidence available on record, the relevant law, on the touchstone of which the case of the prosecution has been constructed, be examined along with interpretation rendered by the courts to the said provisions.

9. As noted above, charge against the appellants, under section 9(a)(iv)(v)&(xii) and Sr. No.2 of the Schedule to the Ordinance, was framed. Amongst the accused persons Mian Muhammad Nawaz Sharif, was the only one who was the holder of Public Office at the relevant time and the other co-accused, are his children and son-in-law (Capt. (R) Muhammad Safdar). Since Mian Muhammad Nawaz Sharif was acquitted in respect of charge under section 9(a)(iv) of the Ordinance and NAB did not choose to file an appeal against the said acquittal, the referred charge and the verdict, as such, has become immaterial, hence, said provision of law, is also not being reproduced. The relevant provisions of law, for the purposes of adjudication of instant matter, are as follows:

“9 (a)(v) if he or any of his dependents or benamidars owns, possesses, or has acquired right or title in any assets or holds irrevocable power of attorney in respect of any assets or pecuniary resources disproportionate to his known sources of income, which he cannot reasonably account for or maintains a standard of living beyond that which is commensurate with his sources of income; or

(xii) if he aids, assists, abets, attempts or acts in conspiracy with a person or a holder of public office accused of an offence as provided in clause (i) to (xi).

10. Punishment for Corruption and Corrupt Practices.--(a) [A holder of public office, or any other person who commits the offence of corruption and corrupt practices shall be punishable with [rigorous] imprisonment for a term which may extend to 14 years [and with fine] and such of the assets and [pecuniary resources] of such [holder of public office or person, as are] found to be disproportionate to the known sources of his income or which [are] acquired by money obtained through corruption and corrupt practices whether in his name or in the name of any of his

dependents, or benamidar shall be [**] forfeited to the appropriate Government [, or the concerned bank or financial institution as the case may be.]

(b) The offences specified in the Schedule to this Ordinance shall be punishable in the manner specified therein.

(c) The Federal Government may, by notification in the official Gazette, amend the Schedule so as to add any entry thereto or modify or omit any entry therein.

(d) Notwithstanding anything to the contrary contained in any other law for the time being in force and accused, convicted by the Courts of any offence under this Ordinance, shall not be entitled to any remission in his sentence.]

14. Presumption against accused accepting illegal gratification

(c) In any trial of an offence punishable under [“clause (v) of sub-section (a) of section 9 of”] this Ordinance, the fact that the accused person or any other person on his behalf, is in possession, for which the accused person cannot satisfactorily account, of [assets] or pecuniary resources disproportionate to his known source of income, or that such person has, at or about the time of the commission of the offence with which he is charged, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, the Court shall presume, unless the contrary is proved, that the accused person is guilty of the offence of corruption and corrupt practices and his conviction [therefore] shall not be invalid by reason only that it is based solely on such a presumption.

The Schedule **[See Section 10 (b)]**

<i>Sr. No.</i>	<i>Offences</i>	<i>Punishments</i>
2.	Refuses to answer questions, or to provide information to any member the NAB or any other agency when required to do so.	Rigorous imprisonment for a term which may extend to five years.

Prosecution’s Evidence

10. The prosecution in order to prove its case, led as many as 18-witness and a plethora of documents as exhibits. The star witnesses, appearing on behalf of prosecution were Robert William Redlay (PW-14), Akhtar Riaz Raja (PW-15), Wajid Ali Zia, Additional Director General Immigration, FIA (PW-16), Zahir Shah, Director General (Operations), NAB (PW-17) and Muhammad Imran, Deputy Director/Investigating Officer, NAB (PW-18). Out of these witnesses, the case of the prosecution revolves around testimonies of Wajid Ali Zia (PW-16) and Robert William Redlay (PW-14).

11. In so far as the documentary evidence is concerned, the key documents on behalf of the prosecution, are attested copies of register of title of Avenfield Apartments (Exh.PW-16/43-44), photocopies of letters from Financial Investigation Agency and letters of the Panama based firm

(Exh.PW-16/48-50), photocopy of CMA No.394-2017 in Cons. Pet. No.29-2016 (Exh.PW-16/51) as well as copies of incorporation certificates (Exh.PW-16/37-38).

Case of Prosecution against appellants in a nutshell

12. It is pertinent to mention that though Mian Muhammad Nawaz Sharif is not an appellant before us but reference shall be made to him time and again as case of appellant No. 1 is inextricable from the one of Mian Muhammad Nawaz Sharif because the charge against appellant No.1 is that she assisted, aided and abetted Mian Muhammad Nawaz Sharif. (underlining is by us to provide emphasis). In a nutshell, case of the prosecution, against appellant No.1 as is borne out from the Reference and the charge, is that Mian Muhammad Nawaz Sharif, while holding public office, got incorporated two companies namely M/s Nescoll Ltd. and Nielsen Enterprises Ltd., which purchased Avenfield Apartments over a period 1993-1996 and the beneficial ownership of the properties vests with his dependent namely appellant No.1 (Maryam Nawaz), who aided, assisted and abetted Mian Muhammad Nawaz Sharif in the commission of offence under section 9(a)(v) of the Ordinance. It is interesting to note that in none of the documents produced by the prosecution, Mian Muhammad Nawaz Sharif has anything to do with the incorporation of the two companies in question and/or having beneficial ownership of the Avenfield Apartments. In response to the query of the Court, learned Special Prosecutor NAB negated the version put forward by Sharif Family in proceedings under Article 184(3) of the Constitution before the Hon'ble Supreme Court of Pakistan (Cons. Pet. No.29 of 2016); in this behalf, CMA No.394-2017 was filed by the appellants in which resources, through which, Avenfield Apartments were purchased over a period of time, were explained (Exh.PW-16/51). It has been stated in the referred application that appellant No.1 in the year 2005 learnt from her brother Hussain Nawaz that Al-Thani Family intended to transfer to him the shares of the two companies which owned Avenfield Apartments in lieu of settlement of the investments made by late Mian Muhammad Sharif (father of Mian Muhammad Nawaz Sharif) and that he wanted to authorize appellant No.1 through trust deed to act on his behalf with respect to the said properties, as trustee. It was in the wake of the settlement that Al-Thani Family effected the transaction and Minerva Directors were appointed and subsequently

Trust Deeds were executed on 02.02.2006 by appellant No.1 and on 04.02.2006 by Hussain Nawaz. As per assertions in the application, the title deeds are with Hussain Nawaz and five months later, the transfer of bearer shares to him were cancelled and fresh ordinary shares, in each company, were issued in the name of Minerva Companies, which was attached in CMA No.7531-2016. Appellant No.1, in the said application, categorically denied anything to do with the companies or ownership of the Avenfield Apartments. In CMA No.7531-2017 filed in Cons. Pet. No.29-2017 (Ex.PW-16/4), appellant No.1 explained the background in which the money was generated for purchase of the properties after giving an elaborate background of victimization by the then military regime; Mian Muhammad Sharif moved to UAE and set up Gulf Steel Mills in 1974 and the business was conducted through Tariq Shafi his nephew as well as another partner namely Muhammad Hussain. The shares in the Gulf Steel Mills were sold in 1978 by late Mian Muhammad Sharif to Abdallah Kayed Ahli to settle the Company's outstanding liabilities with the domestic bank in Dubai hence 75% shares were sold and the name of the Company was changed to Ahli Steel Mills Company in the sum of 28,500,000 UAE Dirham. Subsequently in 1980, the exclusive ownership of the company, was with Ahli Family by way of transfer of its shares in the sum of AED 12 million, which amount was entrusted to Ahli Family of Doha to invest in real estate business. The acquisition of Avenfield Apartments by the two companies was done in the period as mentioned above and the bearer shares were kept by Al-Thani Family; after exile in 2000, Mian Muhammad Sharif advised Al-Thani Family that investment of AED 12 million plus return of it, would be for the benefit of Hussain Nawaz, which transaction culminated in 2006 and appellant No.1 was made, for a specific purpose and time period, the trustee for Hussain Nawaz due to peculiar domestic circumstances. This stance was taken by the Sharif Family in Cons. Pet. No.29-2017, which as per the prosecution version, is not correct and that all along the beneficial ownership was in effect of Mian Muhammad Nawaz Sharif through his dependent Maryam Nawaz.

Observation regarding non-availability of evidence and the case law regarding burden of proof in cases of section 9(a)(v) of the Ordinance

13. As noted above, with reverence, it is expressed that not a single document exists, which supports stance of the prosecution. It was argued

with great emphasis on behalf of NAB that onus was on appellant No.1 as well as Mian Muhammad Nawaz Sharif to establish resources through which Avenfield Apartments have been purchased. When confronted that whether the prosecution has discharged the onus required on its part as mentioned in *Ghani-ur-Rehman versus National Accountability Bureau* (PLD 2011 SC 1144), NAB could not explain the position. In order to delve further in the examination of the record and consider the arguments of the learned counsels of the parties it is appropriate that the relevant case law on the subject of principles for proving the case under section 9(a)(v) of the Ordinance and shifting of the burden is discussed. The seminal judgment on the issue is of the Honourable Sindh High Court in case *Hakim Ali Zardari versus State* (2007 MLD 910) which has been cited with approval by the august apex court in the subsequent decisions. The leading judgment, interpreting section 9(a)(v) of the Ordinance and the elements thereof, as noted above, is *Ghani-ur-Rehman* supra. It basically affirms the earlier judgment reported as *'Hakim Ali Zardari Vs. The State'* (2007 MLD 910). The august Apex Court, cited with approval, the paragraphs from the judgment of Hon'ble Sindh High Court in case *Hakim Ali Zardari* supra, which held as under:

"In order to prove the case, the prosecution is required to prove the ingredients of the offence, which are (1) it must establish that the accused was holder of a public office (2) the nature and extent of the pecuniary resources of property which were found in his possession, (3) it must be proved as to what were his known sources of income i.e. known to the prosecution after thorough investigation and (4) it must prove, quite objectively, that such resources or property found in possession of the accused were disproportionate to his known sources of income. Once these four ingredients are established, the offence as defined under section 9(a)(v) is complete, unless the accused is able to account for such resources or property. Thus, mere possession of any pecuniary resources or property is by itself not an offence, but it is failure to satisfactorily account for such possession of pecuniary resources or property that makes the possession objectionable and constitute offence. If he cannot explain, presumption under section 14(c) of the Ordinance that accused is guilty of corruption and corrupt practices is required to be drawn. Reference is invited to a case Biswa Bhushan Naik v. State (AIR 1954 SC 350) in which identical provision in Prevention of Corruption Act, 1947 were interpreted."

After citing and approving the said dictum, the Hon'ble Supreme Court of Pakistan went on to propagate the principles as under:

"6. The law now stands settled that in order to prove commission of an offence under section 9(a)(v) of the National Accountability Ordinance, 1999 it has to be proved by the prosecution as to what were the known sources of income of the accused person at the relevant time and that the resources or property of the accused person were disproportionate to his known sources of income and it is after such proof has been led and the necessary details have been provided by the prosecution that the onus shifts to the accused person to account for such resources or property because mere possession of

any pecuniary resource or property is by itself not an offence but it is failure to satisfactorily account for such possession 'of pecuniary resource or property that makes the possession objectionable and constitutes the relevant offence. In the case in hand the appellant's sources of income had never been brought on the record by the prosecution and had never been quantified by it at any stage of this case and, therefore, it was not possible for the learned trial court to conclude or to hold that the appellant or his dependants or so-called benamidars owned, or possessed assets or pecuniary resources disproportionate to the appellant's income. It is 'unfortunate that the investigating officer of this case as well as those responsible for prosecution of this case before the learned trial court had, probably on account of their sheer incompetence, utterly failed to do the needful in this regard and it is regrettable that even the learned trial court as well as the learned appellate court had completely failed to advert to this critical aspect of the present case'.

14. Similar proposition was faced by Hon'ble Supreme Court of Pakistan in case reported as '*Khalid Aziz Vs. The State*' (2011 SCMR 136), wherein, it was reiterated that prosecution has to establish necessary ingredients of section 9(a)(v) [as observed and laid down in case *Hakim Ali Zardari* supra] and then burden would shift upon the accused to explain his position as required under section 14(c) of the Ordinance. The prosecution in order to discharge the initial burden had to prove the above facts as noted in the foregoing principles. At the cost of repetition, the said principles are again reproduced below for the sake of brevity:

- a) The accused was holder of public office.
- b) The nature and extent of the pecuniary resources of property which were found in his possession.
- c) The known sources of income i.e. known to the prosecution after thorough investigation.
- d) The resources or property found in possession of the accused (in the instant case his children namely appellant No. 1 and Hussain Nawaz Sharif) were disproportionate to his known sources of income.

Explanation of the principles propounded in various cases and applying the same in light of the evidence available

It is only after the above four ingredients are proved the offence under section 9(a)(v) of the Ordinance is complete unless the accused can prove otherwise as required under section 14(c) *ibid*. It was contended on behalf of NAB that the key witness Wajid Ali Zia (PW-16) has explained the entire transaction being the Chairman of JIT and learned Special Prosecutor NAB took the Court through examination-in-chief of PW-16, the reading of which shows that only that has been stated, which already forms part of version of Sharif Family in CMA No.7531-2017 and CMA No.394-2017. In the cross-examination, PW-16 in response to the first question of learned counsel

appearing on behalf of Mian Muhammad Nawaz Sharif, candidly conceded that there is no document of title which he has collected to show that the Avenfield Apartments are the ownership of Mian Muhammad Nawaz Sharif and/or there is no document available showing that the referred properties had ever remained in the ownership of Mian Muhammad Nawaz Sharif. (*Emphasis added*)

15. Robert William Redley (PW-14), another key witness appeared for the prosecution who stated that in the year 2006 Calibri font was not available commercially and could not have been used in the Trust Deeds submitted by the Sharif family before the Supreme Court. As per the assertion of the appellants, he lacked qualification as an 'expert' and his opinion was of no significance. It was argued that even-otherwise, opinion of an expert cannot form basis of establishing criminal liability *per se* without any other cogent reason. It was argued that in the cross-examination, PW-14 has conceded that Calibri Font was available, even prior to 2006 though not for commercial use.

16. The Investigating Officer (PW-18) in the Reference also was not able to throw light as to the establishment of key ingredients for the offence under section 9(a)(v) of the Ordinance and rather reiterated the information/material available on record primarily collected by JIT during course of proceedings before the Hon'ble Supreme Court of Pakistan or otherwise placed on record during proceedings under Article 184(3) of the Constitution by the appellants in their applications. He opined that on the basis of the material collected, offences with which the appellants No. 1 and 2 have been charged are attracted and the accused persons ought to be convicted of the same.

The yardstick for evaluating expert opinion

17. Under Article 59 of Qanoon-e-Shahadat Order, 1984, it is to be established first that an expert, claiming expertise in a particular field, has that expertise. Article 59 *ibid* is as follows:

QANUN-E-SHAHADAT. 1984.
OPINION OF THIRD PERSONS WHEN RELEVANT

59. Opinions of experts: *When the Court has to form an opinion upon a point of foreign law, or of science/or art, or as to identity Of hand-writing or finger impressions; the opinions upon that point of persons specially*

skilled in such foreign law science or art, or in questions as to identity of hand-writing or finger impressions-are relevant facts.

Such persons are called experts.

Illustrations

(a) *The question is, whether the death of A was caused by poison. The opinion of experts as to the symptoms produced by the poisoned which A is supposed to have died, are relevant.*

(b) *The question is, whether A, at the time of doing a certain act, was by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.*

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do either wrong or contrary to law are relevant.

(c) *The question is whether a certain document was written by A, Another document is produced which is proved or admitted to have been written by A.*

The opinions of experts on the question whether the two documents were written by the same person or by different persons are relevant.

The interpretation rendered to Article 59 *ibid* is that in order to rely upon opinion of an expert, it needs to be established that a person, tendering the evidence, is an ‘expert’ on the subject, with respect to which, he is opining. An objection was taken by learned counsel for the appellants that nothing exists on record to substantiate the credentials of Robert William Redlay (PW-14) to qualify for him as an ‘expert’ on the subject of availability of fonts or computer software. The contention by learned counsel for the appellants finds support in various judgments. Reference is made to *Land Acquisition Collector, Sargodha versus Muhammad Sultan* (PLD 2014 Supreme Court 696). In the said judgment the honourable Supreme Court opined as follows:

“The provisions of Qanun-e-Shahdat Order 1984 including Art. 59 thereof makes it clear that the opinion of a witness is only relevant and carries some probative value if he is an expert in the fields specified in the said Article. Furthermore, even for the purpose of giving an opinion, the witness has firstly to establish the expertise vested in him either on account of academic qualification or experience or otherwise. Without such foundation, an opinion cannot by itself, be taken as having evidentiary value for proving a fact in issue”

On the touch stone of the above judgment of the Supreme Court the examination-in-chief of PW-14 shows that nothing was adduced by the prosecution in the examination-in-chief to establish PW-14 as an 'expert' in the field of software/fonts. In the referred facts, whether PW-14 could qualify as an 'expert', opining on non-availability of Calibri Font at the relevant time, is highly questionable. The prosecution primarily led the evidence of PW-14 to establish that at the relevant time i.e. in the year 2006, Calibri Font was not available for commercial use, hence trust deeds, sought to be relied upon by the appellants, are not genuine and perhaps prepared subsequently. In addition to the fact that there is no evidence to establish credentials/qualification of PW-14 as an 'expert', even-otherwise, in the cross-examination, PW-14 admits limited availability of Calibri Font at the relevant time and that he personally also downloaded the version and used the same; he also admitted that the default font of all Microsoft Programs is Calibri. He categorically stated that Windows VISTA was commercially lodged on 31.01.2007, but it was also stated that there was a pre-release of window VISTA known as 'BETA-1'; he stated that window VISTA BETA-1 was available in April, 2005 and subsequent versions were available in October & November, 2005; he also admitted that if the operator had sufficient knowledge then he could download the pre-release Window VISTA BETA-1 version which had the Calibri Font embedded; he admitted in cross-examination that w.e.f. 2005, six types of clear fonts including Calibri Font, were introduced by Microsoft as new fonts. Learned counsel for the appellants sought to tarnish the credibility of the witness on the basis that he was engaged by the Quist Solicitors, which was a firm of lawyers, which had as one of the partners, related to Wajid Ali Zia, the Chairman of JIT. Notwithstanding the credentials of the PW 14 as an expert even if he is accepted as an expert on the subject, the opinion of an expert on an issue is always regarded as weak evidence. Reliance is placed on Mandoos Khan versus The State (2003 SCMR 884) wherein the Supreme Court opined that expert opinion will not outweigh the trustworthy, confidence inspiring and consistent evidence; Syed Umer Shah versus Bashir Ahmed (2004 SCMR 1859) august apex court held that opinion of handwriting expert, otherwise a weak piece of evidence, should not be allowed to prevail against strong circumstances and strong evidence giving inference altogether to the

contrary. In Mrs. Saadat Sultan versus Muhammad Zahur Khan (2006 SCMR 193) the Supreme Court held that the opinion of a Handwriting expert is a very weak type of evidence and is not that of a conclusive nature. It was added, while relying on case law from across the border that there is nothing in Evidence Act to require the evidence given by an expert in any particular case to be corroborated before it could be acted upon as sufficient proof of what the expert states. In view of the evidence of PW 14 and the law on the subject of expert opinion, there is nothing on record to establish the credentials of Robert Redley as an expert and even if he is acknowledged as such his evidence is weak and does not prove per se that the trust deeds were bogus or fake in any way in the absence of any other proof in support thereof.

Opinion of the court on the trust deeds

18. Much talked about Trust Deeds were exhibited in evidence as Ex.PW-16/43 & 44; in the referred documents, declaration of trust was entered into between appellant No.1 and Hussain Nawaz Sharif, (her brother) and by virtue of the same, appellant No.1 was to act as 'trustee' and hold share(s) of the companies namely M/s Nescoll Ltd. and Nielsen Enterprises Ltd. for the sole and absolute benefit of her brother Hussain Nawaz Sharif; the said declarations of trusts were purportedly executed on 02.02.2006, which have been witnessed by appellant No.2 on behalf of Maryam Safdar and one Waqar Ahmed for Hussain Nawaz Sharif and also signed by Jeremy Freeman, Solicitor Freeman Box & Bentinck Street, London WIU 2BJ; none of the parties deny execution of the Trust Deeds; they are private documents evidencing a private transaction between sister and brother and did not require registration under any law either of Pakistan or United Kingdom or for that matter any other country.

19. The sole basis, for disbelieving the declaration of Trusts, is the testimony of PW-14 that Calibri Font was not available at the relevant time. In the first place, opinion of an 'expert' cannot solely form basis for proving or disproving an instrument (even if a person was qualified as an 'expert') as observed above and independent and unequivocal proof is required for the said purpose. The basic facts, which were not taken into account by learned trial court, were that Trusts terminated, once bearer shares were deposited with the relevant authorities. In light of cross-examination by Mr. Wajid Ali

Zia (PW-16), which fact, he stated, based on the opinion of Gilead Cooper. Likewise, Mr. Wajid Ali Zia, in his cross-examination, confirmed that appellant No.1 never saw nor has anything to do with the bearer shares. Moreover, UK Solicitor Jeremy Freeman, on 05.10.2007, wrote a letter (Ex.PW-15/1) confirming that he witnessed the Deeds on 04.02.2006. The said letter formed part of application (CMA No.432-2017) filed by the appellants before Hon'ble Supreme Court of Pakistan (Ex.PW-16/45). Mr. Jeremy Freeman was neither called as a witness by the prosecution nor Waqar Ahmed who witnessed the signatures on 04.02.2006 on behalf of Hussain Nawaz Sharif nor was associated during investigation.

20. In view of referred facts and circumstances, as noted above, the sole basis for holding the Trust Deeds as bogus, fake and fabricated, is the statement/evidence of PW-14; such statement solely cannot form basis for discarding an instrument, as firstly, it does not firmly establish that he is an 'expert' on the field; secondly, mere opinion of the expert is not a conclusive evidence on the subject, but is just as an opinion and cannot lead to prove or disprove the fact and thirdly none of the parties, who are signatory to the transaction, has come forward to deny the signatures or contents of the instrument.

Opinion on applicability of section 9(a)(v)

21. As stated hereinabove, initially charge was framed against the appellants in light of Sr. No.2 & 3 (a) of the Schedule to the Ordinance on the basis of Trust Deeds, but subsequently, same was dropped. The charge could have only been framed and conviction recorded, if it was proved beyond reasonable doubt that the documents in question were bogus, however, in view of above facts and circumstances, it cannot be conclusively held that the Trust Deeds were bogus, for that even if they had been prepared subsequently (as is the contention of the prosecution); viz none of the parties disputed the document nor denied the signatures. It was the prosecution, which had to prove that the documents have been prepared to mislead the prosecution and conceal the true identity of the transaction and ownership of Avenfield Apartments.

22. The examination of interim Reference and supplementary Reference makes it abundantly clear that the allegations levelled are vague inasmuch as precise role of Mian Muhammad Nawaz Sharif and his aider and abettor

namely appellant No.1, has not been specified in categoric terms. Though it is not appropriate that allegations are reproduced yet since in the instant case, it goes to the root of the matter in determining the issue, it is only worthwhile to examine nature of allegations against the appellants. The interim Reference elucidates that in the wake of leak of PANAMA Papers by the firm Mossack Fonseca, it came to light that Avenfield Apartments are the ownership of Mian Muhammad Nawaz Sharif and/or his children and pursuant to the proceedings by the Hon'ble Supreme Court of Pakistan, JIT was constituted which enquired into the matter; again, narrating the background about the inquiry of JIT in paragraph-6, it was stated that in the facts and circumstances and the evidence collected, the accused has committed offence of 'corruption' and 'corrupt practices' as defined in section 9(a)(iv)(v)(xii) and offence at Sr. No.2 of the Schedule to the Ordinance which are punishable under section 10 of the Ordinance. In the supplementary Reference, more specific allegations were levelled, but again, without segregating the role of each accused person; in this behalf, all the accused persons were collectively addressed in the Reference and it was stated that accused admitted ownership of Avenfield Apartments which were acquired with funds generated from business transaction in Abu Dhabi and Saudi Arabia and owner is respondent No.3 (Hussain Nawaz Sharif);the contents were taken from the application filed before Hon'ble Supreme Court of Pakistan. The referred ambiguity lurks in the evidence, as well, tendered by the prosecution and the charge framed. In the charge framed, as noted by examination thereof, no role of any accused person is specified therein. It seems that prosecution sought to build its case against appellant No.1 primarily on the basis that she, at the relevant time, was a dependent of Mian Muhammad Nawaz Sharif and in that capacity holds/held the beneficial ownership of Avenfield Apartments in order to conceal true identity of owners and therefore has aided and abetted Mian Muhammad Nawaz Sharif. Naturally, no independent allegation against appellant No.1 could have been levelled against her under section 9(a)(v) of the Ordinance inasmuch Maryam Nawaz was never and still is not a 'public office holder' so, she could not have committed the crime of 'assets beyond means' per se; her father Mian Muhammad Nawaz Sharif has remained a 'Public Officer Holder' in various capacities and even when, PANAMA Papers were leaked, he was the Prime

Minister of the country. The principal accused, in all regards, is Mian Muhammad Nawaz Sharif as per allegations of the prosecution, therefore, evidence which was to be led by the prosecution, was to the effect that in reality, Mian Muhammad Nawaz Sharif is the owner (legal or beneficial) of the Avenfield Apartments to purchase the property in the name of Maryam Nawaz, as she was his dependent, to conceal the true identity.

23. The instant appeals are by appellants No.1 & 2. As noted above, Mian Muhammad Nawaz Sharif is not an appellant before this Court, as his appeal was dismissed for non-appearance as earlier mentioned, however, the case of appellants cannot be separated from the case of Mian Muhammad Nawaz Sharif and some of the observations need to be made, as liability of appellant No.1 directly hinges on the culpability of the principal accused. The prosecution had to prove that in fact Mian Muhammad Nawaz Sharif purchased Avenfield Apartments in the name of Maryam Nawaz through corrupt and illegal practices and she being his dependent, has aided and abetted him by concealing the true ownership. The prosecution, in order to discharge its burden, had to spell out four elements as propounded in Ghaniur-Rehman's case supra as well as 'Khalid Aziz's case supra. For the ease of convenience, referred principles are reiterated even though already mentioned and reproduced above. It was to be proved by the prosecution that Mian Muhammad Nawaz Sharif was a holder of public office; the nature and extent of pecuniary resources of properties, which were found in his possession/his dependents namely appellant No. 1 and Hussain Nawaz Sharif; it was to be proved that those were his known sources of income that is known to the prosecution after thorough investigation and that by objectively such resources of property found in possession were disproportionate to his known sources of income. Keeping in view the referred principles, learned trial court was to examine the evidence brought on record to see if the burden has been discharged by the prosecution. It is public knowledge that Mian Muhammad Nawaz Sharif has held various positions over a period of time as Provincial Minister, Chief Minister and then Prime Minister of Pakistan. The prosecution had to prove that when the properties were acquired by Mian Muhammad Nawaz Sharif (in the name of his dependents through the above-named companies), he was the public office holder; there does not exist on record any evidence to the effect. A

nexus, that was required to be built, is that being a public office holder, he through corrupt and illegal means, acquired the properties, though the prosecution has tried to assert that M/s Nescoll Ltd. and Nielsen Enterprises Ltd. purchased the properties within the period 1993-1996 when Mian Muhammad Nawaz Sharif was public office holder; the prosecution had to place on record the notifications or some other proof of his appointment or holding of public office during the said period. There is nothing on record to the effect. The prosecution then had to lead evidence regarding known sources of income of Mian Muhammad Nawaz Sharif; again, it is observed that nothing exists on record by means of income tax returns or bank accounts or other sources from the investigation of the prosecution that, at the relevant time, those were the known sources of Mian Muhammad Nawaz Sharif. No cogent evidence exists on record as to the known resources/income of Mian Muhammad Nawaz Sharif; like-wise there is nothing on record as to the worth of Avenfield Apartments at the relevant time or even the price paid for the purchase of the said properties. If the prosecution's version is to be believed that the properties were purchased/acquired between 1993-1996, the known sources of Mian Muhammad Nawaz Sharif were needed to be established at the relevant time as well as the worth of Avenfield Apartments or in other words the actual consideration price, which the purchaser paid to the seller. In cross-examination, Wajid Ali Zia (PW-16) on the basis of hearsay evidence does mention the price but that evidence is neither admissible nor can be relied upon in the facts and circumstances. It is pertinent to observe that Mian Muhammad Nawaz Sharif all along, before JIT as well as in his statement under section 342 Cr.P.C. before the learned trial court, has denied any link with the Avenfield Apartments and there does not exist any document or testimony for that matter, which linked Mian Muhammad Nawaz Sharif directly or indirectly with Avenfield Apartments. The only justification for the case, against Mian Muhammad Nawaz Sharif, is that Avenfield Apartments were purchased in the names of the companies and the beneficial owner of the same is appellant No.1 and she is his dependent. The prosecution had to lead independent evidence that appellant No.1, at the relevant time, when the properties were purchased, was dependent upon Mian Muhammad Nawaz Sharif. In our culture, it is somewhat obvious that

children are dependent upon their parents but the matter in hand entails criminal allegations and penal consequences by way of punishment and something like this could not have been taken for granted by way of cultural norms and accepted that appellant No.1 is dependent upon her father. The prosecution was required to lead evidence to the effect beyond reasonable doubt that appellant No.1 was financially dependent upon Mian Muhammad Nawaz Sharif in order to qualify for the concept as provided in section 9(a)(v) *ibid*. The word 'dependent' or 'dependent child' is defined in Black's Law Dictionary 9th Edition as a needy child, who has been deprived from parental support or care because of the parent's or other responsible person's death. The general concept of 'legal dependent' is provided as 'a person who is depending according to the law; a person derives principal support from another and usually may invoke laws to enforce that support'. It is reiterated that no evidence exists that at the relevant time, appellant No.1 was dependent upon Mian Muhammad Nawaz Sharif financially.

24. Even-otherwise, prosecution had to prove the nexus of Sharif Family either Mian Muhammad Nawaz Sharif or appellant No.1 or her two brothers arrayed as accused with M/s Nescoll Ltd. and Nielsen Enterprises Ltd. It is an admitted position and not denied by any party that Avenfield Apartments were purchased in the name of referred companies. In this behalf, official copy of registered title of Avenfield Apartments was exhibited; copy of title documents of 17-Avenfield is exhibited as Exh. PW-16/39, property No.17-A is exhibited as Exh.PW-16/40, copy of 16-Avenfield properties is exhibited as Exh.PW-16/41 and copy of property No.16-A is exhibited as Exh.PW-16/42. All the title documents show the referred companies as owners of the properties. However, nothing on record exists to establish that when the properties were purchased, the beneficial ownership of the said companies vested with Sharif Family.

25. In the application filed by the appellants as well as Hussain Nawaz, before the Honourable Supreme Court of Pakistan, stance was taken that the beneficial ownership of the companies was transferred to Sharif Family in the year 2006 by way of arrangement with Al-Thani Family of Qatar and before that properties were in possession on rent. In this behalf, background was submitted that father of Mian Muhammad Nawaz Sharif (Mian Muhammad Sharif) was running the family business and had stakes in the Gulf Steel Mills

UAE through Tariq Shafi; there existed debts on the company due to business loans obtained from Bank of Credit and Commerce International and by way of settlements, the payments were made by family of Qatar to unload some of the equity in the business. It was asserted that a family arrangement was arrived at, by virtue of which, beneficial ownership of the Avenfield Apartments, was transferred. Mr. Wajid Ali Zia (PW-16), appearing as prosecution witness, reiterated the said fact, which was narrated by Sharif Family before Hon'ble Supreme Court of Pakistan. The prosecution, it seems that in the Reference as well as before us, in categorical terms, denied referred version of appellant No.1. It was categorically stated that Sharif Family has nexus with Avenfield Apartments since 1993-96, when same were purchased by the companies referred above. It was specifically enquired from learned Special Prosecutor NAB to establish such nexus, however, he was unable to do so, as no document exists to the effect. Apart from the stance taken by Sharif Family in the application, two sets of documents are available on record viz declaration of trusts and letters received through Financial Investigation Agency British Virgin Island from Mossack Fonseca stating that the beneficial owner of the companies is appellant No.1 (Ex.PW-16/48-50). The contents of the Trust Deeds, their effect and implications have already been discussed in preceding paragraph hence need not be discussed again. It is pertinent to observe here that the original trust deeds were not placed before the learned trial court and only the photocopies of the same. Though they were exhibited in evidence under objection by appellants but the said objection, it seems, has been overruled by not applying the correct law. It is trite law that contents of a document can only be proved either through primary evidence or secondary evidence; where the original document is placed on record the same is primary evidence, however in certain exceptional circumstance copies are admissible in evidence which are secondary evidence, but prior to leading secondary evidence the permission of the court is required. Reference is made to Articles 72-76 of Qanun-e-Shahdat Order 1984. In Abdul Rehman versus Haji Muhammad Yousaf (2007 SCMR 61) the Honorable Supreme Court held that where only copy of power of attorney was placed on record the same is not conclusive proof of its execution. Similar finding was handed down by Sindh High Court in Azmat Trading Company versus NDLC-IFIC Bank

Limited (2013 CLC 1800); in Azhar Abbas versus Haji Tahir Abbas (2021 CLC 1351) Lahore High Court held that admitting photocopy of a document in evidence and reading the same in evidence without observing legal requirements of Article 76 of Qanun-e-Shahdat Order 1984 would be illegal.

26. In so far as letters from Mossack Fonseca dated 22.06.2012 are concerned, they could have been received in evidence as per section 21(g) of the Ordinance, however, in order to prove veracity of the said documents, or contents thereof, maker of the same had to enter the witness box as per Qanoon-e-Shahadat Order, 1984. Reference is made to Mst. Fatima versus Najeeb Ullah (2020 CLC 780), wherein the Honorable Lahore High Court held that where neither authors of the documents nor the witnesses nor such documents were produced in original, then such documents without formal proof cannot be relied upon; similar decisions on the issue are Abdul Aziz versus Zaibun Nisa (PLD 2022 SC 504), Muhammad Younas versus Ghazanfar Abbas (2017 YLR 2229), Muhammad Rafiq Chaudary versus Fahmeeda Begum (2019 YLR 125) and Mst. Nishat alias Shato versus Muslim Khan (PLD 2011 Peshawar 23). In a recent judgement the Honorable Division Bench of Sindh High Court in Muhammad Younas Arain versus State (PLD 2022 Sindh 222) reiterated the principles regarding the difference between admissibility or tendering of a document in evidence and proof thereof. The court held as follows:

“i) A document being tendered in evidence would not imply that it has been accepted by the court as an admissible piece of evidence and its probative value has been overlooked into and determined.

ii) To produce original document (primary evidence) or its certified copy etc. (secondary evidence) is basically the mode of proving the document itself, its existence, and not the contents it contains.

iii) Determination of evidentiary or probative value of the contents of a document is the next stage which is undertaken only after existence or execution of a document has been established either through primary or secondary evidence, as the case may be.

iv) First stage is to prove existence of a document itself, once it is past positively, second stage to prove the contents of the document seeks to convey comes into play.

v) *Tendering a document in evidence is wholly distinct a rule, it concerns with the mode of proving the document itself, its existence, its probative value is a different matter, and involves assessment to be made by the trial court of a fact it seeks to establish.*

(vi) *When a Photostat document is taken on record subject to its admissibility and later no steps are taken to prove the contents of the document by leading primary or secondary evidence, the document would not be taken into consideration for determining its evidentiary value. Merely by tendering a document in evidence, it gets no evidentiary value unless its contents are proved in terms of Article 79 of Qanun-e-Shahadat.*

(vii) *When a piece of evidence/document sought to be tendered is admittedly inadmissible, irrespective of mode of proof of such document, its production in evidence will be denied.*

(viii) *But to hold or to view that a given piece of evidence is inadmissible (its contents cannot be accepted or admitted to have probative value even if it is taken on record) will involve presence of predetermination of such fact.*

(ix) *When the defense objects to tendering i.e. mode of proof of a document in evidence, it will be the duty of the court to decide it immediately and not defer it.*

(x) *However, when the objection is not on existence or execution of the document itself but on its contents, its evidentiary value, the fact it seeks to convey, and there is a chance that primary or secondary evidence may be led to prove its contents, its production in evidence will not be denied.*

(xi) *Presumption of genuineness is attached to a public document, attested or certified copy thereof is relevant and admissible in evidence, unless contrary is proved rebutting such presumption completely.*

(xii) *There is no requirement of law to examine author or attesting witness to prove existence of a public document. Therefore, there is no obligation upon the prosecution to examine any such person in proof of an official document.*

(xiii) *The document in the investigation is collected/obtained under a seizure memo. Section 94, Cr.P.C. is relevant in this respect and, among others, empowers the I.O. to seize or collect a document required for investigation purpose.*

(xiv) *Whereas, under Article 91 of Qanun-e-Shahadat Order, the document, purporting to be a record or memorandum of the evidence, can be produced in the court by a witness and it will have a presumption of genuineness attached to it.*

(xv) *The rule to appreciate a document in a criminal case as an admissible piece of evidence cannot be identified with the regime applied to appreciate a document for the said purpose in a civil case in respect of a private document.*

(xvi) *While the claim of a party in civil proceedings is decided on preponderance of probability. All that is necessary in a civil case is to show that proof adduced in support of a fact is such that it will make a prudent mind act upon it.*

(xvii) *In a criminal case, the prosecution has to prove guilt of an accused beyond a reasonable doubt. His conviction is recorded by the court only when it is satisfied that possibility of his innocence, on the basis of evidence adduced against him, is completely ruled out”.*

In the instant case, no representative of M/s Mossack Fonseca and company appeared as a witness. Even otherwise, the contents of letters do not divulge that on what basis, appellant No.1 is being stated to be the beneficial owner of the companies; it is not clear from the letters that on what basis, certificate or the letter is being issued and in what capacity the law firm is saying so. The letters are dated 2012 and were used in evidence in 2017-2018, hence the position prior to 2012 and at the time of hearing of criminal case, also was not clear, therefore, letters from law firm Mossack Fonseca and company though elucidate that appellant No.1 is beneficial owner of the companies, but again, does not help prosecution, as its stance has been that the Avenfield Apartments were in possession and ownership of Sharif Family right from the time when they were purchased by the above said companies. It was specifically enquired from the learned Prosecutor NAB that at what precise time, the role of appellant No.1 in this case, is material and the reply was since 2006 when declaration of trusts was made. In response, learned counsel for the appellants contended that Trust Deeds were just a time bound arrangement due to domestic complexities of Hussain Nawaz Sharif and once the shares were surrendered, the Trust disappeared and appellant No.1 had no role again in the properties. As noted, it is well known principle of Qanoon-e-Shahadat Order, 1984 that mere tendering a document in evidence does not prove its contents and drawer or maker of the same has to enter into witness box to prove contents thereof. In the instant case, no representative of law firm, as noted above, entered the witness box, even the basis on which statement was issued i.e. other connecting documents, were also not tendered in evidence, hence two letters cannot form basis for establishing that appellant No.1 is the beneficial owner of the two companies in question and on the said basis Exh.PW-16/48-50 does not further the case of prosecution.

Effect of public knowledge in criminal cases

27. It was further argued by learned Special Prosecutor NAB that it is in public knowledge that Hussain Nawaz Sharif/Sharif family is in possession of Avenfield Apartments hence the Court can take notice of the same and the said fact shifts the burden on the appellants under section 14(c) of the Ordinance. It is settled principle of criminal law that prosecution has to prove its case beyond reasonable doubt and establish the guilt, however, shifting of the onus to prove, on appellants No. 1 and 2, cannot be solely on the basis of public knowledge. The fact that there is public knowledge of the factum of possession of Avenfield Apartments with the Sharif Family does not absolve the prosecution from proving said fact or the nexus of ownership or possession in accordance with established principles of Qanoon-e-Shahadat Order, 1984 or the law of evidence. Reference is made to Liaqat Ali versus The State (2018 YLR 550), in which the Division Bench of Honorable Lahore High Court while making reference to Articles 111 and 112 of the Qanun-e-Shahdat Order 1984 held that court can only take judicial notice of the circumstances and factors mentioned in Articles 111 and 112 and the referred provisions of law are exception to the general rules that all relevant facts must be proved either through oral or documentary evidence. It was added that, the purpose of enacting above mentioned provisions apparently is that court may take judicial notice of a fact which incontestably is within public knowledge and is admitted by other party. The factum of possession of Sharif family of Avenfield Apartments is not something of which the judicial notice could be taken by the court and the prosecution had to prove it by leading evidence to the effect.

Effect of admission by the accused

28. It was argued on behalf of NAB that at various forums, Mian Muhammad Nawaz Sharif, Hussain Nawaz, Hassan Nawaz and Maryam Nawaz have admitted ownership of Avenfield Apartments; in this regard, the record consisted of newspaper clipping/videos/audios, was tendered in evidence. It is an established principle that even if an accused admits to a charge, the prosecution is not absolved from proving the same. Reliance is placed on cases reported as Talib Hussain versus The State (2017 YLR 436), Muhammad Akhter versus The State (2022 P.Cr. LJ 591), Yasir Hussain versus The State (2015 MLD 1531) and Azhar Iqbal versus The State (2013

SCMR 383), wherein the Honorable Supreme Court held that where the prosecution failed to prove its case the accused ought to be acquitted even where he has admitted guilt.

Shifting of burden under section 14(c) of the Ordinance

29. Learned counsel appearing for NAB also argued that under section 14(c) of the Ordinance the burden was on Mian Muhammad Nawaz Sharif and Appellant No. 1 to justify the means for acquisition of the Avenfield apartments. The referred contention of the learned counsel is not correct as in numerous judgments the Honourable Supreme Court as well as High Courts of the country have held that the prosecution needs to discharge initial burden by proving the elements of section 9(a)(v) (mentioned repeatedly hereinabove) and only then the burden would shift under section 14(c) *ibid*. Some of the cases on the issue are as follows;

- a) *State versus Khalid Aziz* (2011 SCMR 137) the Honorable Supreme Court held that the prosecution has to establish four ingredients of section 9(a)(v) (already mentioned herein above) and then the burden would shift upon the accused to explain his position as required under section 14(c) of the Ordinance.
- b) *Syed Qasim Shah versus The State* (2009 SCMR790), it was held that section 14 of the Ordinance cannot be used to undermine the well-established rule of law that burden to prove guilt of the accused initially is on the prosecution and it never shifts to the accused unless discharged through cogent and reliable evidence.
- c) *National Accountability Authority versus Naseem ur Rehman* (2018 PCr. LJ 1682), NAB is not invested with unbridled general jurisdiction to inquire into and investigate against each and every person, accumulated properties on any pretext that such properties were outcome of corruption and corrupt practices and shift burden in terms of section 14 of the NAB Ordinance to such person, who has no nexus with the matters enumerated in the preamble of the Ordinance or with the provisions contained in section 9 of the NAB Ordinance.
- d) *State versus Nisar Hussain Shah* (2022 P Cr. LJ 713), it was held that even where the accused acknowledge the ownership and acquisition of the assets the prosecution had to prove that the same

were acquired through ill gotten money as they were acquired through resources beyond his means and only then the burden is to shift.

- e) *Ikram Shah versus The State* (2002 YLR 1400), it was held that in section 14(c) the legislature in its own wisdom has used words unless the contrary is proved which means the contrary can only be proved by accused if earlier something has been proved against him, that is the burden shall shift to the accused to prove to the contrary if some case has been made out against him by the prosecution when the law raises the presumption against the accused and calls upon him to prove to the contrary.
- f) *Muhammad Hayat versus The State* (PLD 2002 Peshawar 118), the legislature in its own wisdom has used words unless the contrary is proved which means the contrary can only be proved by accused if earlier something has been proved against him, that is the burden shall shift to the accused to prove to the contrary if some case has been made out against him by the prosecution when the law raises the presumption against the accused and calls upon him to prove to the contrary.
- g) *Muhammad Akram Nadeem versus NAB* (2007 P Cr. LJ 1972), it was held that presumption under section 14 (c) of National Accountability Ordinance, 1999 is that court is required to presume if prosecution proves that accused is guilty of offences of corruption and corrupt practices on the condition that prosecution proves the ingredients of clause 9(a)(v) of National Accountability Ordinance, 1999.
- (h) *Farrukh Javed Ghumman versus The State* (PLD 2004 Lahore 155), it was observed that the evidentiary requirement to prove the afore-referred charge was couched in section 14(c) of the said Ordinance. It was observed in the said judgment that the, provision of section 14(c) of the National Accountability Ordinance, 1999, though not unknown in special laws, is a deviation from the age-old principle of the law of evidence that an accused is presumed to be innocent unless proved otherwise by the prosecution. Here a presumption of guilt has been raised against the accused. It was

added that the presumption raised, one has to bear in mind, is a qualified one i.e. the trial Court would be justified in raising this presumption only when the prosecution succeeds in proving the basic ingredients of the charge. The initial burden continues to be on the prosecution. It was observed by the Lahore High Court that to substantiate the charge, the prosecution has to prove the following facts:

- (i) The accused or any of his dependents or benamidars owns or possesses or has a right or title in assets or holds irrevocable power of attorney in respect of assets;*
- (ii) What are the "known sources of income" of the accused?*
- (iii) That the assets and properties acquired are disproportionate to the "known sources of income" of the accused".*

The expression "known sources of income" means the sources of income known to the prosecution after thorough investigation of the case. Obviously the prosecution is not expected to know every detail of the income of the accused. But to bring a charge against someone under the law under consideration, the prosecution has to give details of the "known sources of income", compare it objectively with the assets etc., and only in case of the latter being disproportionate, can it file the reference. If the accused is holder of a public office, his salary, his allowances and other privileges like transport etc. are part of his known sources of real income. If, he happens to be a land owner as well, the agricultural income has to be included in his income. It is the duty of the Investigating Officer to thoroughly inquire into the known sources of income" of the accused and the latter has to be given full opportunity in this regard. Assessment of agricultural income may not be an easy task for the Investigating Officer for more than one reason. Firstly, in our rural culture book keeping is rarely done, secondly, there is no compulsion to do so as it is not a taxable income, thirdly, even if someone does it, he is not expected to maintain the record for a decade and, fourthly, when the accused is holder of a public office, it is not an offence and he is not obliged to maintain the account to meet any future eventuality.

In view of the above case law the presumption contained in section 14(c) only became applicable if the ingredients of the offence under section 9(a)(v) were

proved; where the prosecution failed to discharge initial burden of proof (beyond reasonable doubt) the presumption would not arise. In the instant case as noted above the prosecution failed to discharge the initial burden under section 9(a)(v) *ibid* hence the onus never shifted to appellants No. 1 and 2.

Charge of not assisting NAB in investigation

30. Another charge which forms basis of indictment upon appellants No.1 & 2 and conviction is non-cooperation by them during course of investigation by NAB authorities. In this behalf, it is again observed that there is nothing on record, which establishes that call-up notices were issued and were not responded to by the appellants. Learned counsel for the appellants took the Court through call-up notices and the response through counsel by the appellants. Again, it is never the case that the appellants were called during course of investigation and they did not attend the investigation or made statements. In the said facts and circumstances, it is not clear as to on what basis, conviction has been made for an offence at Sr. No.2 of the Schedule to the Ordinance.

Standard of NAB's investigation

31. The role of NAB in investigating the matter is also below par rather is disappointing. In this behalf, as noted above, the matter was referred to NAB by Honorable Supreme Court of Pakistan with the observation that it may rely on the material already collected by the JIT but that did not preclude NAB from investigating the matter independently. Under the law it was incumbent on NAB to investigate the issue and collect evidence and in fact the august apex court had granted six-week time to NAB to do the needful only thereafter file reference. The testimony of Mr. Wajid Zia (PW16) as well as the DG NAB and the Investigating Officer (PW 17 & 18), clearly shows that no effort was made to investigate the issue independently and the statements made by the referred witnesses is a result of documents collected by JIT and the opinion thereupon without independently proving the same. It is well accepted and known by now that in the criminal cases the opinion of the investigating officer has no probative value and he submits only about the evidence collected and his opinion thereupon. Reference is made to *Hayat Ullah Khan versus Muhammad Khan and others* (2011 SCMR 1354). The classic example of the standard of investigation conducted by NAB is the only

document referred to in the impugned judgment to connect the accused persons with the Avenfield Apartments is Ex. PW 18/3, it is a chart analyzing the assets and liabilities of Mian Muhammad Nawaz Sharif. The said document was tendered in evidence by Mr. Imran Masood PW 18; the objection was raised on behalf of defence regarding the admissibility of the said document as the witness was not the maker of it and Mr. Wajid Zia (PW 16) did not in his statement owned the document that the same has been prepared by JIT and even otherwise the document even if prepared by JIT or the Investigating Officer on the basis of other record has no evidentiary value. The Investigating Office before filing of interim and supplementary References, it seems, did not investigate the matter and the sole basis for doing the same was on the documents collected by JIT. Moreover, the role of independent prosecution is a sine qua non for effective criminal justice system, which can dispassionately advise the investigating agency about the merits and demerits of the investigation and the strength or otherwise weakness of the case. It is surprising that despite have an army of prosecution team, in the instant case no independent evaluation of the case was made. In Asif Sehgal versus National Accountability Bureau (PLD 2003 Lahore 686), the Division Bench of Honorable Lahore High Court alluded on the caliber of investigation by the NAB by observing as follows:

“In cases pertaining to economic crimes, it is essential for NAB to engage fair-minded economic experts so that experts or Chartered Accountants form independent and fair views with respect to liabilities in such cases.”

NAB as a National Institution will be respected by the people of Pakistan more when justice is assured to all and not otherwise or merely because of its clout. An institution has great mandate which is highlighted in the preamble of its law and that ideal is to be saved from destruction and has be taken care of faithfully in the national interest

In case of Asfandiyar Wali (aforementioned), the Supreme Court of Pakistan had directed the Government to ensure proper investigation and also form an in house accountability system. But it appears that a lot has still to be done on the curative side.

Poor investigation will lead to poor results in an adversarial system and even good laws will become bad laws when badly implemented. Patriotic organizations have to set ideals before themselves which have to be followed with discipline and steadfastness. This is only possible if there is also accountability within the system so that the system weeds out the undesirables, otherwise the Anti-Corruption Act of 1947 was a better drafted law but of its poor implementation it failed to come up to our expectations”.

We deem appropriate at this stage to write in the judgment that questions regarding the key documents in the case and linking the same to Mian Muhammad Nawas Sharif as well as appellant No. 1 were asked initially in November, 2021 and on multiple dates were repeated and as a result thereof

even the counsels representing NAB were changed, but even till the last date of hearing the learned counsel representing NAB was unable to assist us on the issue. (Emphasis Added by us)

Recapitulation

32. By way of recapitulation, it is stated that allegation of corrupt and illegal practices (section 9(a)(iv) of the Ordinance) against Mian Muhammad Nawaz Sharif was turned down by the learned trial court and no appeal was filed there-against; the sole charge against Mian Muhammad Nawaz Sharif was of 'assets beyond mean'. In this behalf the assets of the companies as Avenfield Apartments were attributed to him, which according to the prosecution, were in the name of his dependent child i.e. appellant No.1. There is no direct or indirect proof that appellant No.1 was the dependent of Mian Muhammad Nawaz Sharif at the relevant time and the prosecution failed to establish the elements/ ingredients of section 9(a)(v) referred to in preceding paragraphs which are required for transfer of burden of proof to the accused under section 14(c) of the Ordinance.

33. The charge against appellant No.1 is of aiding and abetting by way of concealing true identity of the owners of the Avenfield Apartments. It is noted that under section 14(c), where prosecution establishes assets beyond means of the principal accused or his benamidar or dependent of the accused, the onus shifts on the accused to negate the allegations. Appellant No.1 was never the principal accused under section 9(a)(v) *ibid* and only charge under section 9(a)(xii) *ibid* of aiding and abetting was against her and under the scheme of section 14(c) of the Ordinance, burden never shifted on her to establish ownership rather, all along, it remained on the prosecution. In the case of appellant No.1, though elaborate evidence has been led to establish guilt of appellants No. 1 and 2 but the same does not prove cogently charge against them, as the documents were regarding a private transaction between a sister and brother, which did not require registration and the Solicitor, practicing in United Kingdom, affirmed the execution who was never called to give evidence. The prosecution could not prove the element of aiding and abetting the principal offender, on part of appellant No. 1 for the reasons already noted above. In brief prosecution has failed to prove beyond reasonable doubt that Appellant No. 1 was beneficial owner of Avenfield

Apartments or that had anything to do with Neilson Enterprises Limited and Nescoll Limited.

34. Appellant No.2 has solely been convicted for evidencing a forged and bogus document, however, there is no evidence that any party has denied the execution. It is trite law that a witness to the document only gives evidence to the extent of witnessing said document and not contents thereof. There is nothing on record to establish that documents are bogus apart from allegation that Calibri Font was not available in 2006, on which date, they were executed, however, even that evidence is not creditworthiness; firstly, as the expert could not be regard as an 'expert' and secondly as per his own statement in cross-examination, Calibri Font was available albeit in few hands. Much emphasis was laid on behalf of NAB that certain facts have already been proven in the proceedings before the Hon'ble Supreme Court of Pakistan and needed not be proved, the referred argument is misconceived inasmuch as the proceedings before the Hon'ble Supreme Court of Pakistan were under Article 184(3) of the Constitution and in the said proceedings, the matter was referred to NAB for initiation of criminal cases; if no proof was required then no referral to NAB was necessitated. The prosecution had to discharge its burden independently in respect of findings of the august Apex Court and this intention is clearly borne out from the observations of the august Apex Court in the above-mentioned review petition reported as 'Mian Muhammad Nawaz Sharif and others Vs. Imran Ahmed Khan Niazi and others' (PLD 2018 SC 01).

Non availing of the benefit of the amendments in the Ordinance

35. Learned Special Prosecutor NAB also sought to argue that benefit of the amendments made in the Ordinance is not available to the appellants; in response, learned counsel for the appellants refuted the said argument by stating that his clients are not seeking benefits of amendments made in the Ordinance. It is pertinent to mention that during pendency of instant appeals, amendments were made in the Ordinance, by virtue of which, amendments in section 9(a)(v) *ibid* were also made; the said amendments are inconsequential in the cases of the appellants inasmuch as the whole case has been argued on the basis of law that was available at the time of filing of Reference and recording of convictions against the appellants.

Errors in the judgment of the Trial Court

36. Adverting now to the judgment of the learned trial court impugned before us it is noted that the same is based on wrong application of the law. In this behalf the reading of the impugned judgment shows that the learned trial court has copiously reproduced the arguments by the defence and even cited the case law, however, while handing down the conclusion has erred in application of the correct law. The learned trial court has held the letters from Panama based law firm to be the proof of the fact that appellant No. 1 is the beneficial owner of the Avenfield Apartments. Under section 21(g), which starts with the non-obstante clause and excludes Qanun-e-Shahdat Order 1984 and the other law on the subject, material received from foreign government shall be taken as evidence in the legal proceedings; the referred reasoning prevailed with the learned trial court to reach conclusion that on the basis of the referred letters Mian Muhammad Nawaz Sharif and appellant No. 1 are the owners of Avenfield Apartments. It is noted that the conclusion drawn is not correct; first, the special status with the exclusion of normal laws of evidence is only attached to material received from the foreign government, secondly, in the instant case the letters are not from the foreign government but the Panama based law firm thus did not have that special status. The covering letter from the Financial Investigating Agency in British Virgin Island has not vouched for the veracity of the letters from the law firm rather acted just as courier. If the beneficial ownership was confirmed, in the Avenfield Apartments, by the Financial Investigation Agency independently from the record, the position would have been different and section 21(g) *ibid* would have applied in letter and spirit. Moreover, as already noted the letters from the law firm does not state the basis and the resource for making the statement that appellant No. 2 is the beneficial owner and in absence thereof, reliance to be placed on them for convicting someone is unjustifiable. Even otherwise if the letters are accepted as correct in letter and spirit, they do not further the case of the prosecution as the element of appellant No. 1 being dependent on her father was not proved nor the fact that Mian Muhammad Nawaz Sharif actually forked out the money to buy the properties in question. The reasons for the letters from Panama law firm not being conclusive evidence regarding the factum of ownership of appellant No. 1 in Avenfield Apartments are already discussed in preceding paragraphs. In so far

as trust deeds are concerned again learned trial court erred in placing reliance on the same for the reasons already discussed. In a nutshell the trust deeds are private documents duly witnessed and the execution of the same is not denied by anyone. Though the existence and the execution of the trust deeds is not denied but the prosecution was required to tender the original document and in case of failure thereof the procedure and law provided in Articles 73 to 78 of Qanun-e-Shahdat Order 1984 was to be followed which was not done in the instant case. The reasons spelt out by the learned trial court for dispensation of notice, as required under the law are not justifiable. In this behalf under Article 77 *ibid*, notice is required to be served, in order to lead secondary evidence, with respect to a document in possession of another person; the exceptions enumerated in the proviso to the Article *ibid* are not attracted.

37. In view of foregoing, the prosecution has not been able to prove its case against appellants No.1 & 2 and the conviction recorded against appellants No.1 & 2 is without justification or basis.

CONCLUSION

38. For the above reasons, instant appeals are allowed and the judgment dated 06.07.2018, to the extent of appellants, is set aside and they are acquitted of the charges. All pending applications are accordingly disposed of. Since the appellants No. 1 and 2 were on bail as their conviction and sentence had been suspended, the sureties stand discharged and the office is directed to do the needful in this regard.

(MOHSIN AKHTAR KAYANI)
JUDGE

(AAMER FAROOQ)
JUDGE