Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

(1) Criminal Appeal No. 423/2019
Najam ud Din Vs. The State.

(2) Criminal Appeal No. 07/2020
Ghulam Rasool Ayubi Vs. The State.

APPELLANTS BY:	Rai Muhammad Nawaz Kharal and Mr. Ali Nawaz Kharal, Advocates in Criminal Appeal No. 423/2019. Mr. Imran Shafique, Advocate in Criminal Appeal No. 07/2020.
STATE BY:	M/s Nasir Mehmood Mughal and M. Afzal Qureshi, Special Prosecutors, NAB.
DATE OF HEARING:	16-11-2021.

BABAR SATTAR, J.- Through this judgment we will decide ***Criminal Appeal No. 423/2019*** and Criminal ***Appeal No. 07/2020*** arising out of the judgment passed by the learned Accountability Court dated 20.12.2019, whereby the appellants were found guilty of the offence of corruption and corrupt practices as defined under section 9(a)(ix)(x) & (xii) of the National Accountability Ordinance, 1999 **("Ordinance")** punishable under section 10 of the Ordinance and were sentenced to undergo rigorous imprisonment for a term of 14 years along with a fine of Rs.33,920,000/-. It was further held that if the fine were not paid by the appellants, it would be recoverable as arrears of land revenue. The learned Accountability Court also held that the appellants were disqualified to hold public office for a period of 10 years and further they were

disqualified to seek any financial facilities from any financial institution, owned or controlled by the Government, for a period of 10 years pursuant to section 15 of the Ordinance. The appellants were granted the benefit of section 382-B of Cr.P.C, while all the movable and immovable properties of the appellants already frozen by the National Accountability Bureau **("NAB")** were ordered to be forfeited.

2. The brief facts are that the appellants were accused of collecting 32 million rupees from public-at-large on the fraudulent basis that they were running a legal modaraba business even though none of the appellants had registered any modaraba company in accordance with law. Initially the appellants paid profits on the amounts collected from various individuals in order to build public trust regarding the profitability of the business. But they were essentially running a Ponzi scheme whereby the profits returned to prior investors were in fact investments made by subsequent investors. Eventually the appellants embezzled the amounts received from public-at-large and defaulted in paying profits as well as the originally invested amounts to the various investors/complainants. The scheme of the fraudulent business was that the appellant, Najam Ud Din, represented himself as the owner of a modaraba business who while associated with a madrassah and having religious background gained the trust of the people and enticed them to invest in his modaraba business. He received sums from various investors/complainants and handed over the amounts received to the other appellant Ghulam Rasool Ayubi. Najam ud Din had entered into modarabat namas with the investors from whom

investments were solicited by him and for an initial period he paid profits to various investors as well. Najam ud Din handed over the sums received from investors to Ghulam Rasool Ayubi, who entered into agreements with Najam ud Din and also issued Najam ud Din undated cheques in lieu of the investment received. Once Ghulam Rasool Ayubi defaulted in paying profits to Najam ud Din, Najam ud Din defaulted in paying profits to the investors/complainants from whom he had received investments. NAB received various complaints from public-at-large and initiated an inquiry which was subsequently transformed into an investigation. NAB filed Reference No. 12/2014 under section 18(g) of the Ordinance against Ghulam Rasool Ayubi and two other co-accused for having committed the offence as defined under section 9(a)(ix)(x) & (xii) of the Ordinance. During the pendency of the trial in such reference, Ghulam Rasool Ayubi recorded his confessional statement before the learned Accountability Court on 17.01.2019 and acknowledged running a fraudulent modaraba business and having collected Rs.3.70 billion from investors/complainants and further acknowledged having received investments in such illegal modaraba business through agents, including, *inter alia*, from Najam ud Din. In the said reference Najam ud Din was not an accused. On the basis of confessional statement, the learned Accountability Court found Ghulam Rasool Ayubi guilty for the offence of corruption and corrupt practices as defined under section 9(a)(ix)(x) & (xii) and sentenced him to serve out a term of 10 years and further imposed a fine in the amount of Rs. 3.70 billion as his admitted liability under sections 10 and 11 of the Ordinance. The

conviction is in field and Ghulam Rasool Ayubi is serving his sentence.

3. After completion of the investigation in the present case, NAB filed Reference No. 15/2018 under section 18(g) of the Ordinance in which Najam ud Din and Ghulam Rasool Ayubi were both named as accused and were charged for offence under section 9(a)(ix)(x) & (xii) on 24.09.2018. Both the accused pleaded not guilty to the charge and demanded trial which commenced thereafter. After testimony of 10 prosecution witnesses recorded by the learned Accountability Court, appellant Najam ud Din requested the learned Accountability Court on 14.03.2019 to be allowed to make a confessional statement, whereby he confessed to running an illegal modaraba business in the name of Najam ud Din (Mezban) and Najam ud Din and Sons Construction Company. He acknowledged that the said company was not registered with the SECP and that he had no license to engage in modaraba business but he lured the general public to invest in such illegal business and received almost Rs.32 million from public at large. That he handed over the said money to Ghulam Rasool Ayubi, who entered into agreements with Najam ud Din and also issued seven cross cheques. He also confessed to investing Rs.1.9 million from his own funds in the business being run by Ghulam Rasool Ayubi.

4. The learned Accountability Court has produced an extensive summary of the evidence adduced by the prosecution witnesses, which need not be re-summarized for our present purposes. In his statement under section 342 of Criminal

Procedure Code, 1898 **("Cr.P.C")**, Najam ud Din claimed to be an agent of Ghulam Rasool Ayubi and admitted that he collected funds from public-at-large and handed over the same to Ghulam Rasool Ayubi. Ghulam Rasool Ayubi in his statement under section 342 of Cr.P.C denied the charge against him and claimed that in view of the evidence adduced, the charge framed against him was not made out as he had no nexus with any of the investors/complainants. He claimed that he was running a modaraba business under the name of Mezban Stores and that Mezban Trading Corporation Limited was registered with the SECP in which co-accused Najam ud Din was not shareholder, director or partner. And that he (Ghulam Rasool Ayubi) had already made a confessional statement in relation to the illegal modaraba business that was run by him in the name of Mezban Stores, pursuant to which he had already been tried and found guilty for an offence under section 9(a)(ix)(x) & (xii) of the Ordinance and awarded a sentence of 10 years along with a fine of Rs.3.7 billion. He claimed that none of the prosecution witnesses or investors/complainants who had handed over their investments to Najam ud Din claimed to have engaged in any manner with Ghulam Rasool Ayubi and given that he had already been tried, convicted and awarded a sentence for committing offences under section 9(a)(ix)(x) & (xii), he could not be tried for the same offence once again in the instant reference.

5. After considering the arguments of the learned counsel for the appellants, the appellant, Najam ud Din, was convicted on the basis of his confession dated 14.03.2019 and the appellant, Ghulam Rasool Ayubi was also convicted in view of

the fact that he had recorded his confessional statement in Reference No. 12/2014. And his plea that his trial in the present reference amounted to double jeopardy was dismissed on the basis that he had confessed to committing the offence while running an illegal business in the name of Mezban Stores, while the illegal modaraba business being carried out by Najam ud Din was not in the name of Mezban Stores and that the agreements between Ghulam Rasool Ayubi and Najam ud Din in lieu of which seven guarantee cheques were handed over by Ghulam Rasool Ayubi to Najam ud Din did not mention Mezban Stores. Due to such distinction created by the learned Accountability Court, Ghulam Rasool Ayubi's plea that the charge against him amounted to double jeopardy was disregarded and he was found guilty and sentenced to a term of 14 years rigorous imprisonment together with fine of Rs.33,920,000/- along with Najam ud Din.

6. Learned counsel for the appellant, Najam ud Din, submitted that Ghulam Rasool Ayubi had been charged with an offence of defrauding public-at-large in the amount of Rs.3.70 billion in Reference No. 12/2014, in which he had been awarded a sentence of 10 years. But Najam ud Din, who was convicted on the basis of his own confessional statement and had admittedly received sums from public-at-large in the amount of Rs.32 million only, was awarded a sentence of 14 years, which fell foul of the doctrine of proportionality in awarding sentence. He contended that the learned Accountability Court did not appreciate the mitigating circumstances, including, *inter alia*, that the conviction of Najam ud Din was based on his own

confession and that he had invested sums received from public-at-large along with his own investment in the illegal modaraba business being run by Ghulam Rasool Ayubi and was essentially acting as an agent to Ghulam Rasool Ayubi, who had been awarded a sentence of 10 years in Reference No. 12/2014 and consequently Najam ud Din was entitled to receive a lesser sentence given his role and the quantum of funds that he was liable for embezzling.

7. Learned counsel for the appellant, Ghulam Rasool Ayubi, submitted that the appellant's trial for the offence of corruption and embezzling funds received from public-at-large in the name of illegal modaraba business under section 9(a)(ix)(x) & (xii) of the Ordinance was barred under Article 13 of the Constitution as well as section 403 of Cr.P.C read with section 26 of the General Clauses Act, 1877. He contended that given that Ghulam Rasool Ayubi had already been tried for the same offence and convicted and such conviction was in force and he serving out the sentence awarded to him, and could consequently not be charged and tried for the same offence once again. He contended that the learned Accountability Court failed to appreciate that nothing turned on the fact that Najam ud Din was collecting money in the name of another enterprise that he claimed to run and that Ghulam Rasool Ayubi had acknowledged his guilt in relation to the illegal business being carried out in the name of Mezban Stores. His contention was that test for double jeopardy was satisfied in the present case and that the learned trial court tried and punished the appellant for the same offence for which he had already been convicted. Learned counsel for the

appellant further contended that the evidence clearly established that none of the prosecution witnesses testified engaging directly with Ghulam Rasool Ayubi and there was nothing on record to establish that Ghulam Rasool Ayubi was aiding and abetting Najam ud Din in relation to an offence that he was liable for or that such act constituted an offence independent from the offence for which Ghulam Rasool Ayubi was tried and convicted.

8. The learned Special Prosecutor, NAB supported the impugned judgment and stated that the judgment suffered from no infirmity.

9. The conviction of appellant, Ghulam Rasool Ayubi, in Reference No. 12/2014 was based on a confessional statement made by him during trial. Likewise, the conviction of the appellant, Najam ud Din, in the present reference has also been passed on the basis of his confessional statement made before the learned Accountability Court. The question of guilt of the appellants is therefore admitted and is not in question before this Court in the present appeals.

10. The only ground raised by Najam ud Din in his appeal is that the sentence awarded to him is harsh and is liable to be reduced. And the question raised by Ghulam Rasool Ayubi is that he could not be tried in the present reference given that he had already been tried for the same offence in Reference No. 12/2014, in which he admitted his guilt and was convicted and sentenced to serve out a term of 10 years.

11. Let us reproduce the relevant provisions of law that grant protection against double punishment within our jurisdiction. Article 13 of the Constitution states the following:

> ***13. Protection against double punishment and self incrimination****. No person-*
>
> *(a) shall be prosecuted or punished for the same offence more than once; or*
>
> *(b) shall, when accused of an offence, be compelled to be a witness against himself.*

Section 403 of Cr.P.C states that:

> ***403. Person once convicted or acquitted not to be tried for same offence.-****(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.*
>
> *(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, subsection (1).*
>
> *(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.*
>
> *(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same*

> *acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.*
>
> *(5) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897 (X of 1897), or section 188 of this Code.*

Section 26 of the General Clauses Act states that:

> ***26. Provisions as to offences punishable under two or more enactments-*** *Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.*

12. There is nothing in the evidence adduced by the prosecution which establishes that the appellant, Ghulam Rasool Ayubi, was directly engaged in interfacing with any of the investors/complainants in the reference from which these appeals emanate or that he directly solicited funds from such persons. Alia Munawar, I.O (PW-6) acknowledged during cross-examination that Najam ud Din was not acting as an agent of Ghulam Rasool Ayubi and was rather engaged in modaraba business with Ghulam Rasool Ayubi as a partner and investor. Abid Yaseen (PW-7) in his statement testified that he had been advised by Najam ud Din to invest in his business and that Najam ud Din was engaged in modaraba business with Ghulam Rasool Ayubi, but that he never met with Ghulam Rasool Ayubi himself. Tariq Mehmood (PW-8) also acknowledged in his testimony that he had not seen Ghulam Rasool Ayubi and it was only Najam ud Din who told Tariq Mehmood (PW-8) about Ghulam Rasool Ayubi. Abdul Samad Mughal (PW-10) stated that

Najam ud Din told him that Najam ud Din was engaged in business with Ghulam Rasool Ayubi and also handed over cheque to the said prosecution witness, which was a guarantee cheque in the amount of Rs.2.5 million (Exh.PW-10/2) and was signed by Ghulam Rasool Ayubi, but acknowledged that he never entered into any agreement with Ghulam Rasool Ayubi, that the agreement between Najam ud Din and Ghulam Rasool Ayubi did not include the name of Abdul Samad Mughal (PW-10), that Ghulam Rasool Ayubi never directly handed over any cheque to Abdul Samad Mughal (PW-10), and that the said cheque was also not issued by Ghulam Rasool Ayubi in front of Abdul Samad Mughal (PW-10).

13. A perusal of evidence adduced by the prosecution suggests that Ghulam Rasool Ayubi was running illegal modaraba business in the name of Mezban Stores for which he was tried and convicted by the learned Accountability Court in Reference No. 12/2014. In his confessional statement, on the basis of which he was convicted, Ghulam Rasool Ayubi admitted that he had received funds from various individuals, including Najam ud Din. Najam ud Din, on the other hand, was running his own modarba business in which he was collecting investments from public-at-large by fraudulently representing himself as the operator of his own modaraba business. The amounts that Najam ud Din collected in relation to his modarba business were then invested by Najam ud Din in the illegal modaraba business of Ghulam Rasool Ayubi. There is nothing on record to establish that Ghulam Rasool Ayubi directly enticed or collected funds from any of the investors/complainants who handed over their

funds to Najam ud Din. It is also on record as stated by Alia Munawar, I.O (PW-6) that Najam ud Din was charged for an offence collecting funds between years 2011 and 2013 and there is nothing on record to establish that Ghulam Rasool collected funds from the investors/complainants in Reference No.15/2018 during any period after the year 2014 i.e. for a period beyond which he had already made a confession for having committed an offence under section 9(a)(ix)(x) & (xii)of the Ordinance in Reference No.12/2014, for which he was found guilty and awarded 10 years rigorous imprisonment. We find that the distinguishing feature identified by the learned trial court (i.e. that Najam ud Din was running an illegal modaraba business in a name different to that of Mezban Stores, in relation to which Ghulam Rasool Ayubi had made a confession and was found guilty.) as a basis to reject Ghulam Rasool Ayubi's plea that he was being tried a second time and awarded double punishment for an offence for which he had already tried and convicted and was serving his sentence, is not convincing.

14. Ghulam Rasool Ayubi was admittedly tried in Reference No. 12/2014 for the same offence in which he has been tried in Reference No. 15/2018. The money was collected by Ghulam Rasool Ayubi from public-at-large which amounted to Rs.3.70 billion and according to his own confessional statement it included the amount received from Najam ud Din. The period in which he received the said funds was not different from the period for which he has been charged for a separate offence in Reference No. 15/2018, as Alia Munawar (PW-6) has acknowledged that Najam ud Din received funds between 2011

and 2013, which were then invested in the business run by Ghulam Rasool Ayubi. What emerges from the above is that Ghulam Rasool Ayubi was running an illegal modaraba business for which he was tried and convicted and such conviction is in field. Najam ud Din, while being investor in the illegal business of Ghulam Rasool Ayubi, was also running an illegal modaraba business of his own during the same period for which Ghulam Rasool Ayubi had been tried and convicted in Reference No.12/2014. Najam ud Din after collecting funds for his illegal modaraba business invested the same in the business of Ghulam Rasool Ayubi, for which Najam ud Din was charged in the Reference No. 15/2018 and found guilty on the basis of his own confessional statement. It therefore emerges that Ghulam Rasool Ayubi has been charged in the present reference for an offence which is not different from or independent of the offence for which he had been tried and convicted in Reference No. 12/2014. We are therefore convinced that trial of the appellant, Ghulam Rasool Ayubi, in Reference No. 15/2018 was barred under section 403 of Cr.P.C and Article 13 of the Constitution, which clearly bar the State from prosecuting or punishing a citizen for the same offence more than once. The appellant, Ghulam Rasool Ayubi, has already been convicted under section 9(a)(ix)(x) & (xii) of the Ordinance in Reference No. 12/2014 and has been sentenced to serve out a term of ten years and has also been held liable to pay fine of Rs.3.7 billion, and could not have been retried and convicted for the same offence. Reliance in this regard is placed on ***Muhammad Nadeem Anwar Vs. Securities and Exchange Commission of***

Pakistan through Director NBFCs Dept., Islamabad (***2014 SCMR 1376), Hassan and others Vs. The State and others(PLD 2013 SC 793)*** and ***Abdul Malik Vs. The State and others (PLD 2006 SC 365)***. The learned Accountability Court did not appreciate this aspect of the matter, therefore, the conviction and sentence awarded to Ghulam Rasool Ayubi in Reference No. 15/2018 suffer from legal infirmity. The trial and conviction of Ghulam Rasool Ayubi is in breach of his Article 13 rights guaranteed by the Constitution.

15. In view of the above, **Criminal Appeal No. 07/2020** filed by the appellant, Ghulam Rasool Ayubi, is **allowed** and conviction and sentence awarded to him in Reference No. 15/2018 is hereby set aside. He will continue to serve his term for the offence for which he has already been convicted and sentenced in Reference No. 12/2014, and will be released once he serves out such sentence or is was no longer required in any other case.

16. We have reviewed the contention raised on behalf of the appellant, Najam ud Din, with regard to sentence awarded to him. Ghulam Rasool Ayubi admittedly was the mastermind of the fraud committed against public-at-large for which he was convicted and sentenced to 10 years of rigorous imprisonment in Reference No. 12/2014. In view of the principle of proportionality the sentence awarded to a person found guilty of an offence ought to be proportional to his role. Given that the role of the appellant, Najam ud Din, was not more abominable than that of Ghulam Rasool Ayubi who defrauded public-at-large

in the amount of Rs.3.7 billion, he ought not be meted out punishment that is more severe than that awarded to Ghulam Rasool Ayubi. Ghulam Rasool Ayubi had already been sentenced to a term of 10 years for the same offence for which Najam ud Din was subsequently awarded a sentence of 14 years. We feel that the sentence awarded to Najam ud Din is therefore disproportionate to the conduct for which he has been found culpable. In this regard we are fortified by the law laid down in ***Zahid Imran Vs. The State (PLD 2006 SC 109)*** and ***The State through the Deputy Director (Law), Anti-Narcotics Force Vs. Mujahid Naseem Lodhi (PLD 2017 SC 671).*** The mitigating factors that were applied by the learned Accountability Court while sentencing Ghulam Rasool Ayubi, including, *inter alia*, that the accused had confessed his crime, is equally attracted in the case of Najam ud Din, whose conviction is also based on his confessional statement. We therefore feel that sentence awarded to Najam ud Din is liable to be reduced. **Criminal Appeal No. 423/2019** is **partially allowed** only to the extent that the sentence awarded to the appellant, Najam ud Din, is reduced to a term of 10 years, while the conviction of Najam ud Din and all other components of the punishment awarded to him are hereby upheld.

(MOHSIN AKHTAR KAYANI)
JUDGE

(BABAR SATTAR)
JUDGE

Announced in the open Court on _____.

JUDGE

JUDGE

Saeed*