Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal Appeal No. 64 of 2014

The State
Vs
Tariq Ayub Khan Khakwani

STATE BY: M/s Nasir Mehmood Mughal and Muhammad Afzal Qureshi, Special Prosecutors, National Accountability Bureau.

RESPONDENT BY: M/s Shah Khawar and Barrister Qasim Nawaz Abbasi, Advocates.

DATE OF HEARING: 08-06-2021.

BABAR SATTAR, J.- Mr. Tariq Ayub Khan Khakwani, the respondent in the appeal in hand, was acquitted by the learned Accountability Court by judgment dated 21.05.2014 in Reference No. 01/12-IBD filed by the National Accountability Bureau **("NAB")** under section 18(g) read with section 24(b) of the National Accountability Ordinance, 1999 **("Ordinance")** on 20.11.2012. The acquittal has been challenged through this Criminal Appeal.

2. The allegation against the respondent were three-fold: (i) that while serving in the National Assembly Secretariat, he had been illegally allotted Plot No. 145, Sector I-8/2, Islamabad, which was a consequence of misuse of authority by the then Secretary, Ministry of Housing and

Works; (ii) that he had made significant transactions in his account No. 1501-1 maintained by him at Allied Bank Limited Parliament House Branch for deposit of salary, which included credit transactions in the amount of Rs.1,87,94,090/- even though his sources of income did not justify such transactions; and (iii) he paid Rs.9,14,402/- to Islamabad Club and an amount of Rs.320,000/- to Serena Hotel in lieu of wedding functions of two of his sons and maintained a standard of life beyond his means. Investigation against the respondent was initiated on the basis of a complaint received anonymously through the Intelligence Bureau and an inquiry was authorized on 24.10.2005, after conducting which, Mr. Irfan Azeem Burney, Inspector/PW-15. After completion of investigation Chairman NAB recommended closure of the investigation under section 9(c) of the Ordinance, which was not granted approval by the learned Accountability Court by order dated 16.07.2008. NAB then authorized Mr. Asim Raza/PW-24 to investigate the matter on 11.05.2010. Director General NAB, in exercise of powers delegated by Chairman NAB, once again recommended closure of investigation for lack of sufficient evidence. However such recommendation was not given effect and NAB filed a reference against the respondent of having in possession assets disproportionate to his income rendering him liable to punishment under section 9(a)(iv) and 9(a)(v) of the Ordinance.

3. The charge was framed and after recording and appraisal of evidence, the learned Accountability Court ruled

that the prosecution had failed to discharge the initial burden of proof and build a reasonable case against Mr. Khakwani, who was acquitted from the charges leveled against him.

4. The prosecution's case against Mr. Khakwani in relation to illegal allotment of plot was that he was not an employee of the Federal Government at the time when he was allotted the plot by the Federal Government Employees Housing Foundation and misrepresented his employment status to the Ministry of Housing and Works. In response to which, Mr. Parvaiz Akhtar, Section Officer, Ministry of Housing and Works/PW-15 had placed a note stating that the respondent was not on the strength of Ministry of Housing and Works in 1990 was required to furnish requisite departmental certificate indicating the name of his employer to determine whether or not he was a regular government employee. And that notwithstanding such note Mr. Khakwani was allotted a plot and he was consequently the beneficiary of abuse of authority by the Secretary, Ministry of Housing and Works. The sum total of the evidence against the respondent in relation to the charge of illegal allotment of plot was the statement of PW-15, Mr. Parvaiz Akhtar, that he placed a note in the file stating that the respondent was not on the strength of Ministry of Housing and Works in 1990 even though his allotment application and service documents were signed by P.S to the Minister for Housing and Works. The plot was allotted to the respondent on 17.04.1990 by the Federal Government Employees Housing Foundation from the discretionary quota of the Minister for Housing and Works. Mr.

Khakwani subsequently sold the plot for Rs.6.3 million. Mr. Khakwani was the beneficiary and not the authority vested with the power to allot the same. The plot was allotted to him by the then Secretary, Housing and Works, Brigadier (R) Ain-ud-Din, who was the competent authority for such purpose. NAB did not press charges against Mr. Ain-ud-Din. There was no evidence produced that Mr. Khakwani filed forged documents to seek allotment of the said plot. In his statement made under section 342 of Cr.P.C, Mr. Khakwani stated that he was a regular employee of PTDC in BS-17 in 1989-1990 and had been transferred to the position of PRO to the Minister for Housing and Works on deputation basis, which deputation order could only be made in relation to regular employees of the Federal Government. Consequently, the plot in question was allotted in accordance with rules, regulations and policy prevalent at the relevant time. The prosecution has not produced evidence to establish that Mr. Khakwani was not an employee of PTDC or that he was not serving on deputation with Minister for Housing and Works in 1990. The learned Accountability Court concluded that the NAB was neither successful in establishing that Mr. Khakwani committed any fraud to have the plot allotted to him nor did the Ministry of Housing and Works initiate any action to have the allotment cancelled and consequently given that the competent authority that had allotted the plot (i.e. Secretary, Ministry of Housing and Works) was not alive any more, NAB had failed to prove the charge that the allotment of plot amounted to misuse of authority by the then Secretary,

Ministry of Housing and Works of which Mr. Khakwani was the beneficiary.

5. The second allegation related to credit and debit transactions in the account of Mr. Khakwani that NAB alleged were beyond his known sources of income. The prosecution's case was that the credit and debit entries in the bank account that was characterized as a salary account reflected possession of assets disproportionate to Mr. Khakwani's sources of income. In this regard the NAB relied on the testimony of PW-20, Abrar Abbas, introduced as financial expert who prepared a financial evaluation report to assist the investigation against Mr. Khakwani. The said report was essentially a chart reflecting credit and debit entries in the account of the respondent. In his cross-examination, Mr. Abrar Abbas, the financial expert, acknowledged that he was unaware of the sources from which the money was transferred to the account of the accused/respondent. PW-24, Mr. Asim Raza, Deputy Director Investigation, testified that the transactions identified as suspicious within the salary account of the respondent were analyzed and it was the prosecution's case that an amount of Rs.2,68,60,312/- was disproportionate to the known sources of income of the respondent. During cross-examination, he acknowledged that he did not himself compare transactions affected in the bank account of the accused/respondent with accounts of family members of the respondent. He also acknowledged that he had not calculated the total income generated by a petrol pump that was owned by the wife of the accused/respondent.

The learned Accountability Court observed in view of the evidence that there was no accounting of paper trail provided in relation to the account of the respondent. It observed that a Rs.4 million had been transferred in Mr. Khakwani's account on behest of his father, after he passed away, which amount was distributed amongst legal heirs of Mr. Khakwani's father and an amount of Rs. 1.6 million was then credited into the account of Mr. Khakwani as his share of inheritance from the amount saved by his father in the form of defence saving certificates. The learned Accountability Court further observed that there was no evidence regarding who deposited the money and the purpose of such deposit and that there was no nexus between the deposit of funds and the misuse of authority on behalf of the respondent. It further noted that there was also no accounting of amounts that were withdrawn from the account of Mr. Khakwani and what became the money that was withdrawn as the prosecution had produced no evidence on the record to establish that the respondent had acquired moveable or immovable property through ill-gotten means. In view of the trail of evidence in this regard, the learned Accountability Court came to the conclusion that the prosecution had failed to discharge the initial burden of proof that bank transactions over a period of 14 years reflected that Mr. Khakwani possessed assets beyond his means.

6. The third major allegation related to payments made to Islamabad Club and Serena Hotel, which according to the prosecution established that the respondent maintained a

standard of life beyond his legitimate means. The learned Accountability Court observed that the prosecution had produced no evidence that payments made to Islamabad Club had in fact been made by Mr. Khakwani himself and not made by someone else. It also noted that DW-2, Mr. Khalid Haoorn, had testified that he had been utilizing membership benefits afforded by Islamabad Club to Mr. Khakwani and made payments to the club in lieu of utilization of such benefits. DW-2 also testified that he along with another friend had borne the expresses of Walima reception hosted at Serena Hotel in the amount of Rs.300,000/-. In the absence of evidence that Mr. Khakwani had directly made payments to Islamabad Club or Serena Hotel, the learned Accountability Court concluded that the prosecution had failed to discharge the initial burden of proof to establish that the respondent maintained a life style beyond his means.

7. In defence, the respondent produced Mr. Iqbal Ahmed Hussain as DW-3, who was the Manager of petrol pump owned by the spouse of the respondent and testified that he deposited various amount in the bank account of the respondent. The respondent in his statement under section 342 of Cr.P.C had asserted that the amounts deposited in his account in relation to inheritance from savings of his father at the time of death of his father including Rs.1.6 million which constituted his share for such inheritance, Rs. 3.2 million procured from House Building Finance Corporation as House Building Advance facility and Rs.6.3 million gifted by him to his spouse after the sale of his house, the amounts deposited

in his account that were proceeds of sale of petroleum products at the petrol pump owned by his spouse and Rs.3.3 million deposited in his account by his brother-in-law after sale of a plot owned by said brother-in-law in Sector I-8/4 Islamabad, were all sources that had not been taken into account while building a case against him on the basis of an anonymous complaint motivated by mala fides.

8. The learned Special Prosecutor, NAB, on the question of allotment of illegal plot taking a fair stance stated that in ***National Accountability Bureau through Chairman Vs. Aamir Lodhi and another (PLD 2008 SC 697)*** it was held that if the principal accused was not proceeded against, the abettor could not be convicted. In relation to bank transactions, he submitted that the record established that there were transactions in the amount of Rs.1,70,00,000/- that had been transacted in the salary account of the respondent from 1994 through 2006 and such transactions could not be justified in view of his salary or his income as declared in his tax statement. And that in relation to allegation with regard to payments made to Serena Hotel, while Mr. Khakwani claimed in response to question No. 5 of his statement under section 342 of Cr.P.C that his family friend Farrukh Ismail had borne the expenses of the wedding ceremony, DW-2 claimed that he along with other friend Chaudhry Fakhar had borne such expenses contradicting Mr. Khakwani's account. The learned Special Prosecutor, NAB further contended that there was ample evidence to establish the charge against Mr. Khakwani and the learned

Accountability Court had erred by misreading evidence. The learned Special Prosecutor contended that in view of Section 14 of NAO, the onus was on Mr. Khakwani to justify the transactions in his account and the payments made to Islamabad Club and Serena Hotel.

9. The learned counsel for the respondent supported the judgment rendered by the learned Accountability Court.

10. On the question of illegal allotment of the plot there is nothing on the record to establish that the plot was allotted illegally. The prosecution has failed to establish that the respondent was not an employee of the Federal Government or an attached department in 1990 and was consequently not entitled to the allotment of said plot or that he had committed any fraud or misrepresentation in convincing the competent authority that he was entitled to the said plot. The prosecution has failed to establish that the allotment itself constitutes abuse of authority for purposes of section 9(a)(iv) of the Ordinance. And even in the event that a case could have been made out for illegal allotment of plot, such allegation would be against the then Secretary, Ministry of Housing and Works, in his capacity as the competent authority that allotted the plot. And given that no such case was made out as Mr. Ain-ud-Din had already passed away, no case can be made out against Mr. Khakwani in relation to the allotment of plot as a beneficiary or an abettor in view of the law down by the august Supreme Court in ***Aamir Lodhi***. In relation to the charge of unexplained transactions within the

salary account of the respondent, great emphasis was placed by the prosecution on the fact that the account in question was maintained for the single purpose of crediting the salary of the respondent. This seems to be based on a misconception that an account earmarked for deposit of salary of a government servant is not to be used or cannot be used for other transactions. The financial analysis undertaken to build the charge of unexplained transactions is essentially a tabulation of debit and credit entries spread over a number of years and cannot be described as an analysis of any sort. NAB has not created any trail of transactions that it claimed to be of suspicious nature as it has neither identified whether the deposits were cash or whether the credit entries were consequence of funds transferred from other accounts. It has made no effort to identify the sources of funds in relation to credit entries or the beneficiaries or recipients of any debit transactions. It has not investigated whether credit and debit entries were transactions from or to accounts of family members of the respondent. It has not investigated or accounted for the various sources of funds identified by the respondent, including funds received from House Building Finance Corporation, funds in lieu of savings of his father that were distributed amongst legal heirs after his father's demise, funds claimed by the respondent to be the part of the sale proceeds of house sold by the respondent and gifted to his spouse, and funds that form part of sale proceeds from Mr. Khakwani's brother-in-law deposited in his account. Further there is no accounting of the total revenue transactions

conducted in relation to the petrol pump owned by the spouse of the respondent, the income generated by such petrol pump and the proportion of the income/revenue from the petrol pump that made its way into the account of the respondent. In view of lack of evidence in this regard, NAB has failed to account for the sources of funds available to the respondents. NAB has also not established through record as to what became of the funds that were debited from the account of Mr. Khakwani and whether he acquired any moveable or immovable assets that were disproportionate to his own sources of income. In relation to payments made to the Islamabad Club and Serena Hotel there is nothing on record to establish that the respondent made such payments himself. NAB appears to have conducted no investigation to even determine whether such payments were made through cheques or through cash. In relation to Islamabad Club, it has gathered no evidence to see if the facilities afforded by the Club to Mr. Khakwani were utilized by any of his friend as claimed by DW-2. In a nutshell in view of the evidence produced by NAB it has failed to discharge the onus to build a reasonable case against Mr. Khakwani for purpose of section 9(a)(iv) and 9(a)(v) of the Ordinance.

11. It has been held by the august Supreme Court in ***Muhammad Hashim Babar Vs. The State and another (2010 SCMR 1697)*** that in order to build a case against an accused for purposes of section 9(a)(iv) of the Ordinance, the prosecution must prove the following:

> *(i) It must establish that the accused was holder of a public office.*
>
> *(ii) The nature and extent of the pecuniary resources of property which were found in his possession.*
>
> *(iii) It must be proved as to what, were his known sources of income.*
>
> *(iv) It must prove, quite objectively, that such resources or property found in possession of the accused were disproportionate to his known sources of income.*

It was further held in ***Muhammad Hashim Babar*** that, *"mere possession of any pecuniary resources of property is by itself not an offence but failure to satisfactorily account for such possession of pecuniary resources or property makes the possession objectionable and constitutes offence."*

12 The ratio of ***Muhammad Hashim Babar*** was reiterated in ***Ghani-ur-Rehman Vs. National Accountability Bureau and others (2011 PLD SC 1144)***, wherein it was held that once the said ingredients have been proved by the prosecution, the ouns shift on the accused to account for such resources and property, and it is in the event of failure of the accused to account for such resources or property that such ownership constitutes an offence. It was further held in ***Ghani-ur-Rehman*** that if no nexus is established by the prosecution between misuse of authority and amassing of wealth or accumulation of wealth, it cannot be held that the charge under section 9 of the Ordinance stands established.

13. The effect of section 14 of the Ordinance was first considered by the august Supreme Court in ***Khan Asfandyar***

Wali Vs. Federation of Pakistan ***(PLD 2001 SC 607***) wherein the following was held:

> *"Be that as it may, the prosecution has to establish the preliminary facts whereafter the onus shifts and the defence is called upon to disprove the presumption. This interpretation appears to be reasonable in the context of the background of the Ordinance and the rationale of promulgation the same notwithstanding the phraseology used therein. The above provisions do not constitute a bill of attainder, which actually means that by legislative action an accused is held guilty and punishable. For safer dispensation of justice and in the interest of good governance, efficiency in the administrative and organizational set up, it is necessary to issue the following directions for effective operation of section 14(d):*
>
> *(1) The prosecution shall first make out a reasonable case against the accused charged under section 9(a)(vi) and (vii) of the National Accountability Bureau Ordinance, 1999.*
>
> *(2) In case the prosecution succeeds in making out a reasonable case to the satisfaction of the Accountability Court, the prosecution would be deemed to have discharged the prima facie burden of proof and then the burden of proof shall shift to the accused to rebut the presumption of guilt.*

14. In ***Mansoor ul Haq Vs. Government of Pakistan*** ***(PLD 2008 SC 166)*** it was held that:

> *"The National Accountability Bureau Ordinance, 1999, no doubt is a special law and prosecution having the advantage of the provision of section 14(a) of the Ordinance may not under heavy burden to discharge the onus of proving the charge as the Court may on discharge of initial burden of proving prima facie case by the prosecution raise a presumption of guilt but in the light of concept of criminal administration of justice, the*

> *prosecution is not absolved of its duty to prove the charge beyond reasonable doubt under NAB Ordinance as the burden of proof is only shifted on the person facing charge if the prosecution succeeds in making out a reasonable case by discharging the initial burden of proving the charge. The provision of section 14(d) of the said Ordinance envisages that burden of proof is only shifted to the accused to rebut the allegations if the prosecution succeeds in establishing the preliminary facts to raise the presumption of guilt."*

15. Reiterating the law settled by the august Supreme Court in the aforementioned judgment, it was held in ***Syed Qasim Shah Vs. The State (2009 SCMR 790)*** that the prosecution is never absolved of his obligation to prove the charge beyond reasonable doubt and that the burden shifts to the accused under the Ordinacne only after the prosecution has succeeded in establishing the presumption of guilt by making out a reasonable case.

16. The scheme of the Ordinance in view of section 14 regarding the shifting of the burden of proof was enumerated by the august Supreme Court in ***Pir Mazharul Haq and others Vs. The State through Chief Ehtesab Commissioner, Islamabad (PLD 2005 SC 63)***, wherein it held the following:

> *"31. It would be a misconception of law that every accused who faced trial in the Accountability Court or against whom a reference has been sent the "presumption as envisaged in section 14 of the NAB Ordinance, 1999" would start running against him. Where the prosecution has failed to discharge the onus of "proof" by adducing cogent, concrete and forthright evidence the*

presumption of guilt would not arise against him and thus the question of conviction would have not arisen."

17. It was held by the august Supreme Court in ***Khalid Aziz Vs. The State (2011 SCMR 136)*** that, for purposes of the Ordinance the non-disclosure in income tax statement is not sufficient basis to establish a charge against an accused as the Income Tax Department can always take action under the relevant law in case of non-disclosure of income and on such basis any adverse inference cannot be drawn to prove the ingredients of an offence under the National Accountability Ordinance.

18. In view of the law settled by the august Supreme Court, NAB had an obligation to prove the ingredients of offence under section 9(a)(iv) and 9(a)(v), including, *inter alia*, the known sources of income of the respondent in order to establish that the resources and assets found in possession of the respondent were disproportionate to his known sources of income. In view of the evidence produced before the learned Accountability Court, NAB has been unable to provide a basic account of sources of funds that were available to Mr. Khakwani, including the sources of income of his spouse and recipients of the funds debited from the account of the respondent. Without providing a complete account of the sources of such funds it can obviously not be proven that such funds are either illegitimate or disproportionate to the legitimate sources of income of the respondent. As NAB has failed to prove the ingredients of the offence that the respondent was charged with, the question of transfer of onus

upon the respondent to account for such resources did not arrive as was rightly concluded by the learned Accountability Court. The learned Accountability was also correct in concluding that NAB has failed to prove any nexus between misuse of authority for purposes of section 9 of the Ordinance and accumulation of any assets on part of the respondent, in view of which the NAB's case would fall foul of law as settled by the august Supreme Court in ***Ghani-ur-Rehman***.

19. For the above reasons, the instant appeal is **dismissed** for being without merit.

(MOHSIN AKHTAR KAYANI)
JUDGE

(BABAR SATTAR)
JUDGE

Announced in the open Court on 24.06.2021.

JUDGE

JUDGE

Saeed*