

**IN THE SUPREME APPELLATE COURT GILGIT-BALTISTAN
GILGIT**

BEFORE:-

***Mr. Justice Sardar Muhammad Shamim Khan, Chief Judge.
(In Chamber)***

Cri.PLA No.19/2018

The State

Petitioner

Versus

Thekidar Nazir Ahmed

Respondent

Present:-

Mr. Muhammad Qadir, Prosecutor-General for State

Date of hearing: 02.09.2024

JUDGMENT

Sardar Muhammad Shamim Khan, Chief Judge:- Through instant Criminal Petition filed under Article 75 of the Gilgit-Baltistan Order, 2018, the petitioner/State seeks Leave to Appeal against the impugned judgments dated 04.11.2017 & 11.06.2018 passed by the learned trial court as well as learned Chief Court, G.B, respectively, whereby, respondent/accused namely Thekidar Nazir Ahmed was acquitted in case FIR No. 57 of 2009 dated 11.12.2009 offences under sections 406 & 409 PPC registered at Police Station Astore.

2. Precisely, the prosecution story as narrated by Murad Khan, Complainant / Incharge Civil Supply Astore, in FIR is that a contract for transportation of government's wheat from Bulk Depot Astore to Shankargarh Depot Astore was executed between the complainant and Thekdar Nazir Ahmed (Respondent). The said Contractor (Nazir Ahmed/respondent) picked up 4840-sacks of wheat from civil supply Astore Depot, out of which, he unloaded 4078-sacks of wheat in Shankargarh Depot Astore whereas the remaining 762 sacks of wheat were missing. The respondent (Thekdar Nazir Ahmed) neither transported the said 762 sacks of wheat to Civil Supply Depot at Shankargarh nor deposited the amount/price of said missing 762 sacks of wheat in the account of the government's treasury. On the basis of written complaint submitted by the

complainant, formal FIR (Exh.PW.7/A was registered against the respondent/accused at Police Station Astore.

3. After completion of investigation, police submitted report under section 173 Cr.P.C. against the respondent/accused before the learned trial Court. Prosecution in order to prove its case, examined as many as 10-witnesses. After conclusion of trial, the learned trial court vide judgment dated 04.11.2017 acquitted the respondent from the instant case. Against the aforesaid acquittal of the respondent/accused the State preferred Criminal Appeal No.02 of 2018 before learned Chief Court G.B which was dismissed by said Court vide judgment dated 11.06.2018.Hence, the instant CrI. petition.

4. Learned Prosecutor-General contended that the respondent was nominated in the FIR; that there was specific allegation against the respondent/accused that he dishonestly misappropriated 762 sacks of wheat belonging to Government, therefore, the offence under section 406, PPC is attracted against the respondent as the wheat in question was entrusted to the respondent for transportation of the same from Bulk Depot Astore to Shankargarh Depot Astore and the same was under his dominion; that the learned trial court failed to appreciate that the wheat in question was owned by the complainant/Government and the respondent has misappropriated the same deliberately in order to cause wrongful loss to the complainant/Government; that prosecution witnesses in their respective statements fully implicated the respondent/accused in the commission of instant occurrence; that prosecution by producing trust worthy and confidence inspiring evidence proved its case against the respondent beyond reasonable doubt but learned trial court without any lawful justification acquitted the respondent on the basis of flimsy ground which has resulted into miscarriage of justice; Thus, it is submitted that by accepting instant CrI.PLA, notice be issued to respondent and thereafter he be convicted and sentenced in accordance with law.

5. Arguments heard. Record perused.

6. According to prosecution case, the respondent namely Nazir Ahmed entered into a contract with the complainant for transportation of wheat from Bulk Depot Astore to Civil Supply Depot Shankargarh Astore. The said contractor/respondent picked-up 4840-bags of Wheat from the Bulk Depot Astore

but he only dropped 4078-Bags of Wheat at Civil Supply Depot Shankargarh whereas the remaining 762-Bags of Wheat were missing. It has been alleged in the FIR that the respondent also did not deposit the price of aforesaid missing bags of wheat in the account of Government's treasury, rather he misappropriated 762-Bags of Wheat.

7. It has been noticed that FIR was registered against the respondent under sections 406 & 409, PPC. Admittedly, the respondent/accused is not a public servant, rather, he is a private contractor, therefore, the offence under section 409, PPC would not be attracted against him. During trial, the learned trial court also did not frame charge under section 409, PPC against the respondent/accused rather charge was framed under section 406, PPC against him(respondent). According to FIR (Exh.PW-7/A) the complainant came to know about the alleged misappropriation of wheat bags on 23.11.2009 but the matter was reported to the police on 11.12.2009 with an extraordinary delay of about 18-days. No explanation has been furnished by the complainant/Incharge Civil Supply Depot Astore that why he kept mum for such a considerable period and did not report the matter either to police or high-ups of the Food Department immediately. It has further been noticed that agreement Deed was executed between the respondent and Director Civil Supplies & transport Northern Areas and according to said agreement, the respondent/contractor was required to transport the Bags of Wheat to concerned Depot within the period commencing from 16.07.2009 to 30.06.2010. According to terms and conditions of the said agreement, it was incumbent upon the respondent to deposit the security amount of Rs. 30,000/- in favour of Director Civil Supplies & Transport Northern Areas. In para No.7 of the said agreement, it was clarified that in case of violation of the agreement and misappropriation of supplies by the contractor/respondent, the Director Civil Supplies shall have the right to terminate the Agreement by giving notice in writing to the contractor/respondent and to recover the Damages from the respondent. In such circumstances, it is clear that the dispute between the parties was that of civil nature because violation of contract does not constitute any criminal liability. It has not been alleged in the FIR that the complainant had entrusted the wheat to the respondent within the meaning of section 406, PPC. Mere breach of promise, agreement or contract does not ipso facto attract the definition of criminal breach of trust contained in section 405, PPC and such a

breach is not synonymous with criminal breach of trust without there being a clear element of entrustment therein. In this regard I seek guidance from the judgment of Hon'ble Supreme Court of Pakistan reported as "*Rafiq Haji Usman vs Chairman, NAB and another*" (2015 SCMR 1575) wherein it has been held as under:-

*"an essential element for making out and establishing a case of criminal breach of trust is the entrustment of property or money or with any dominion over property, which is dishonestly misappropriated or dishonestly used or disposed in violation of any direction prescribed by law or the mode in which such trust was to be discharged or in the context any contract etc, however the promise to sell the property for which consideration/money is paid or an agreement to sell is entered upon and the money has been paid pursuant to such an agreement, it shall not be the same as entrustment of property within the concept of noted provision. In case of entrustment, the money/property received is to be retained for return to the giver at a later time as opposed to a promise or contract where investment is made or money is paid for the purposes of fulfillment of a specific agreed upon purpose/contract. In such a case where money/property for any other purpose would not attract the penal consequences of section 405 ibid. for the purpose of above view, we draw support from the judgment of this Court reported as *Shahid Imran vs the State and another* (2011 SCMR 1614), wherein it has been held" the law clearly recognizes a distinction between payment/investment of money and entrustment of money or property as in the former case the amount of money paid or invested is to be utilized for some purpose whereas in the latter case that sum of money or property is to be retained and preserved for its return to the giver and same is never meant to be utilized for any other purpose...a mere breach of a promise, agreement or contract does not ipso facto attract the definition of criminal breach of trust contained in section 405, PPC and such a breach is nor synonymous with criminal breach of trust without there being a clear case of entrustment."*

Keeping in view the facts and circumstances of the case, I am of the considered view that offence under section 406, PPC is not made out against the respondent in the instant case as neither any property was entrusted to him (respondent) by the complainant as per spirit of section 406, PPC nor he misappropriated the same, rather it is violation of agreement by either of the parties, therefore, the dispute between the parties was that of civil nature.

8. It has further been noticed that at the time of recording the statement of the respondent/accused under section 342 Cr.P.C no incriminating piece of evidence had been put to him (respondent). It is settled law that if any piece of evidence or a circumstance is not put to an accused person at the time of recording his statement

under section 342 Cr.P.C, then the said evidence cannot be considered against him for the purpose of recording his conviction. In this regard reliance is placed on the case reported as Haji Nawaz vs The State (2020 SCMR 687). During the course of arguments, learned Prosecutor-General has frankly conceded that at the time of recording the statement of the respondent/accused under section 342 Cr.P.C no incriminating piece of evidence was put to him(respondent) for seeking his explanation, therefore, prosecution evidence cannot be used against the appellant. Keeping in view the facts and circumstances of the case, I am of the considered view that the learned trial court after appreciation of the evidence/material available on record has rightly acquitted the respondent/accused from the instant case.

9. Prosecution evidence has been disbelieved by the learned Chief Court on the basis of common sense, plausibility and reasonableness. Learned Prosecutor-General has failed to point out a single error, infirmity or illegality in the impugned judgment as to the acquittal of respondent. Learned trial court as well as learned Chief Court have given convincing and plausible reasons while acquitting the respondent which cannot be considered contrary to settled principles of law made from time to time by the Apex Court as well as this Court.

10. A judgment of acquittal cannot be upset sparingly as the accused would enjoy double presumption of innocence, one relating to the pre-judgment stage, that every accused is innocent till proved otherwise and the other one through a judicial verdict. Learned Law Officer though repeatedly used the adjectives, illegality, infirmity or improbability as to the impugned judgment, but without any element of self-assurance and articulation. The well-settled principle of law is that a judgment of acquittal can only be interfered with if it looks wholly perverse, capricious, arbitrary, artificial, speculative or based on misreading or non-appraisal of the evidence on record, which incidentally is not the situation herein.

11. For what has been discussed above, I am not inclined to grant leave to appeal, which is declined and consequently this petition stands dismissed.

- Sd -
Justice Sardar Muhammad Shamim Khan
Chief Judge