

**IN THE HIGH COURT OF SINDH AT KARACHI**

**Cr. Acq. Appeal No. 158 of 2018.**

**PRESENT:-**

**Mr. Justice Abdul Mobeen Lakho.**

Mohammad Usman Shar son of  
Khadim Hussain Shar. .... Appellant

Versus

The State (through DAG) & others ..... Respondents

Applicant Through Mr. Kausar Ali Shar, Advocate.

Respondent Through Ms. Amna Ansari, DAG.

Date of hearing 23.10.2019.

Date of Order 02.11.2019.

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**J U D G E M E N T**

**Abdul Mobeen Lakho, J:-** Through instant Acquittal Appeal, appellant has assailed order dated 26.02.2018 passed by learned Judicial Magistrate No. XI Malir Karachi, in Case No. 106 of 2017, arising out of FIR No.177 of 2017 registered at Police Station Bin Qasim, acquitting the respondents/Accused under Section 249-A Cr.P.C.

2. Precisely, the facts of the case are that on 19.10.2017 complainant Mohamad Usman son of Khadim Hussain lodged an FIR at P.S. Bin Qasim, Karachi, stating therein that he sold his car bearing No.ACD-108, Maker Indus, Corolla to one Asif Memon in sum of Rs.6,50,000/- (Six Lac Fifty Thousand only) out of which four lacs were paid to him and a cheque for the sum of Rs.2,80,000/- (two lac eighty thousand only) was issued towards balance amount, but on present, but the same was bounced. The complainant approached Asif Memon, who kept him on false hopes on one pretext or the other. During such period one Ashfaque Memon called on complainant cell No.0300-3113970 and extended threats for life as well registration of false cases in order to terminate his job. Hence, this FIR.

3. After completing investigation challan was submitted against the accused persons under section 512 Cr.P.C. After obtaining pre-arrest bail accused joined the trial.

4. A formal charge was framed against the accused under section 489(f) PPC and 25-D of the Telegraph Act, 1885 on 16.02.2018, to which they pleaded not guilty and claimed to be tried.

5. Right after framing of charge an application under Section 249-A, Cr.P.C was filed on 20.02.2018 by the respondents/accused notice on the application was issued to learned ADPP only.

6. Learned counsel for appellant/complainant contends that the impugned order is bad in law and facts inasmuch as the learned trial Court allowed the application under Section 249-A, Cr.P.C without notice to the complainant; though the diaries show that the counsel for the complainant is present on 09.02.2018 and 16.02.2018; that no steps were taken to call the witnesses; that sufficient material is available on record to justify the case of the appellant/complainant; the learned trial Court has arrived at a wrong conclusion that there is no probability of the respondents/accused being convicted; that the learned trial Court while acquitting the respondents/accused has not applied its judicial mind and based its findings on surmises and conjectures; that law favour decision on merits rather on technicalities. Lastly, prayed that the impugned order may be set-aside and the matter may be remanded back to the learned trial Court for decision on merits after recording the evidence in the matter. In support of his arguments, the learned counsel relied upon the cases of law reported in *MISS SHAGUFTA PARVEEN KHAN versus FATEH JUNG AND 2 ORS (2012 Y.LR. 2907 Sindh)* and *MOHAMMAD NAWAZ VERSUS THE STATE AND OTHERS (2011 MLD299 LAHORE)*.

7. On the other hand, the learned counsel for the respondents/accused contends that there are material contradictions in the statement of complainant as alleged in the FIR and the statements of witnesses under Section 161, Cr.P.C., that admittedly

the cheque in question is not in the name of appellant/complainant; that no documentary evidence has been brought on record to substantiate the case of the prosecution; that the charge is groundless and the learned trial Court has rightly acquitted the respondents/accused of the charge. Lastly submitted that the impugned order is just and proper and based on overwhelming findings, hence calls for no interference. In support of his arguments, the learned counsel relied upon the cases of law reported in *CH ABID MEHMOOD versus MIRZA ZAFAR JAVED AND OTHERS (2019 P.Cr.L. 1241) Lahore (Rawalpindi bench)*].

8. The learned APG has not supported the impugned order. He, however, adopted the same arguments as advance by the learned counsel for the appellant/complainant.

9. Heard; perused the available record.

10. Apparently the diaries of the Learned Trial Court show that the counsel for the complainant is present on 09.02.2018 and 16.02.2018, on 16.02.2019, charge was framed and the matter was put off to 26.02.2019. This application u/s 249-A Cr.P.C was filed on 20<sup>th</sup> February, 2019 and notice was issued only to ADPP for 26<sup>th</sup> February, 2019. It would be conducive to refer relevant diaries sheet of learned trial Court, which reads as under:-

...

**“09-02-2018.**

*Case called. Accused Asif and Ashfaq are present on bail. ADPP for the State, Advocate for complainant and D/C are present. Copies under section 241-A Cr.P.C. supplied to accused persons at Ex-02. Case put off to 16.02.2018, for charge. Issue summons to all PWs through IO, with direction to produce all PWs, on next date of hearing, without fail.*

*Sd/-*

*Sign. of Judge*

**16-02-2018.**

*Criminal Case called. Accused Asif and Ashfaq are present on bail. ADPP for the State, Advocate for complainant and D/C are present. Charge framed against accused persons at Ex-02. Plea of accused persons recorded at Ex-02/A and Ex-02. in which accused persons pleaded not guilty and claimed to be tried. Case put off to 26.02.2018,*

*for evidence. Present accused persons are directed to attend. Issue summons to all PWs through IO, with direction to produce all PWs, on next date of hearing, without fail.*

*Sd/-  
Sign. of Judge*

**Office Diary.**  
**20-02-2018.**

*Advocate for accused persons filed application under section 249-A Cr.P.C. order passed on it. Notice to ADPP for the State. ADPP for the State received the copy of same. Matter is already fixed on 26.02.2018, for evidence as well as hearing on application under section 249-A Cr.P.C.*

*Sd/-  
Judicial Magistrate-XI,  
Malir, Karachi.*

**26-02-2018.**

*Criminal Case called. Accused Asif and Ashfaq are present on bail. ADPP for the State and D/C are present. Arguments heard on application under section 249-A Cr.P.C. Order announced in open Court. Application allowed. Order passed on separate order sheet which is kept on record. Accused Asif son of Soomar and Ashfaq son of Muhammad Soomar Memon are present on bail, their bail bonds stand cancelled and sureties discharged.*

*Sd/-  
Sign. of Judge”*

...

The diaries show that the complainant is present and is regularly pursuing that matters, there was no harm in giving an opportunity to the complainant to make his submission in Court on the application filed by the accused U/S 249-A Cr.P.C. The learned trial Court decided the application in haste. The trial Court had taken cognizance of the offence and framed charge under section 489-F PPC and 25-D of the Telegraph Act. Therefore, pre-mature acquittal 249-A without providing opportunity of hearing to the complainant who is present on each date would be against the principle of natural justice where one cannot be condemned unheard. I, therefore, am of **the opinion that the complainant be given a fair opportunity of hearing which was not provided him.**

11. The impugned order of acquittal is hereby set-aside; case is remanded back to the trial Court to the extent of hearing the application u/s 249-A Cr.P.C afresh after notice to both parties and by

affording opportunity to the parties of hearing and decide the application on merit.

12. This Criminal Acquittal Appeal is disposed of in the foregoing terms.

JUDGE

Jamil Ahmed/P.A.