

IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE

Mr. Justice Nazar Akbar
Mr. Justice Zulfiqar Ahmad Khan

(1) Criminal Appeal No.228 of 2018

Sheeraz Ali	----	Appellant
s/o Fayyaz Ali Memom v.		
The State	----	Respondent

(2) Criminal Appeal No.230 of 2018

Shabir Ali Memon	----	Appellant
s/o Ali Muhammad Memon v.		
The State	----	Respondent

Date of hearing: 04.12.2020

Mr. Qasim Ali, advocate for the appellant in Cr. Appeal No. 228 of 2018
Mr. Raja Jawwwad Ali Sahaar, advocate for the appellant in Cr. Appeal No. 30 of 2018
Mr. Muhammad Iqbal Awan
DPG

J U D G M E N T

Zulfiqar Ahmed Khan, J:- Being aggrieved and dissatisfied with the Judgment passed by the Special Court (Offences in Banks) Sindh at Karachi dated 07.04.2018 in Case No. 36/2013 arising out of FIR No.19/2013 FIA CBC Karachi u/s 409, 420, 468, 471, 34 and 109 PPC Messrs. Sheeraz Ali s/o Fayyaz Ali Memon and Shabir Ali Memon s/o Ali Muhammad Memon both having been convicted under Section 420 PPC and sentenced to suffer 5 years R.I. and fine of Rs.63,87,500 (and in case of non-payment of fine to suffer further S.I. for 1 year) and to suffer 2 years R.I. and fine of Rs.2,40,353 (and in case of non-payment of fine to suffer further S.I. for 6 months) respectively, have preferred these appeals which are decided with this single judgment.

2) The concise facts of the FIR dated 09.09.2013 lodged on the basis of the complaint of Faisal Javed, Regional Head Fraud Risk Management Compliance Legal & investigation Group NIB Bank Limited are that accused Muhammad Moosa Memon, Counter Service Officer NIB Bank Nawabshah Branch executed various un-authorized fund transfers in the various accounts of the customers without vouchers and subsequently the proceeds were transferred in the accounts of his real brother Shabir Ali Memon and co-accused Sheeraz Ali Memon (the present appellants). It was narrated that such practice was carried out by the accused Muhammad Moosa from the targeted accounts, debits from cash in transit account and by cash misappropriation. The names of customers given below are whose amounts were debited unauthorizedly without vouchers and monies were credited to the account of the present appellants.

Name of Customer	Account Number	Disputed amount
Harish Kumar	7068905	4,25,655/=
Abdul Hafeez	7001398	1,861,882/=
Imran Ali Rajput	6968217	654,415/=
Mr. Farooque Hussain	7081049	7,598,000/=
Abid Hussain	7851561	1,999,000/=
Total claimed amount		Rs.12,538,952/-

3) After receipt of challan, NBWs for the arrest of the absconding accused Muhammad Moosa were issued which returned unexecuted, whereupon statement of process server ASI Abid Raza of FIA was recorded wherein he stated that the accused after committing fraud had migrated abroad, as such he could not be arrested or served. In view of the statement of process-server, the said accused was declared as absconder.

4) Charge was framed against the present appellants to which they pleaded not guilty and claimed trial, whereupon prosecution examined PW-1 Faisal Javed who produced complaint as Exh.4/A, seizure memo of the documents as Exh.4/B, the documents serial wise mentioned in seizure memo from Exh.4/B-1 to 4/B-12, seizure memo of the documents as Exh.4/C, the deposit slips, voucher, cheques etc. mentioned serial wise in seizure memo from Exh.4/C-1 to 4/C-796, PW-2 Shabir Ahmed as Exh.5, PW-3 Arshad Ali Qureshi vide Exh.6, PW-4 Nisar Ahmed vide Exh.7, PW-5 Zulfiquar Ali vide Exh.8 who produced photocopy of the cheque, photocopy of CNIC, as well as photocopy of

undertaking as Exh.8/A and Exh.8/B, PW-6 Imran Ali Rajput as Exh.9, PW-7 Haresh Kumar as Exh.10 and PW-8 Nafees Ahmed S.I FIA/I.O of the case vide Exh.12, who produced copy of the FIR as Exh.12/A. The prosecution given up PW Riaz vide statement Exh.11. Thereafter the prosecution closed its evidence side vide statement Exh.13.

5) The statements of both the accused were recorded u/s 342(1) Cr.P.C wherein they denied the commission of the offence and claimed to be innocent.

6) PW-1 Faisal Javed deposed that in the year 2012 he was posted as regional head of fraud risk management unit of NIB Bank where several complaints were received from the account holders of Nawabshah Branch about misappropriation of funds from their accounts. On receipt of such complaints, an internal investigation was conducted through sub-ordinates which revealed that absconding accused Moosa Memon CSO of the Branch had transferred funds in the account of his relatives (the present appellants) and after transfer of funds, these persons withdrew the said amounts. He also used to credit the amount from the centralized account of the bank into the accounts of the appellants. On such report PW-1 sent the complaint to the FIA which he produced as Exh.4/A. He produced record before the FIA officials on 19.11.2013 which was seized under seizure memo Exh.4/B. He also produced documents from Exh.4/B-1 to 4/B-12. The fraud was detected from the year 2009 onwards. He also handed over the relevant vouchers, cheques, deposit slips etc., from the year 2009 till the enquiry was conducted by them to the I.O. and such seizure memo of the documents was prepared. He produced the said seizure memo as Exh.4/C. He also produced the deposit slips, voucher, cheques etc. mentioned serial wise in seizure memo from Exh.4/C-1 to 4/C-796.

7) PW-2 Shabir Ahmed deposed that he was posted as Branch Manager in NIB Bank Katchery Road Branch Nawabshah where the absconding accused Moosa Memon was posted as CSO. Accused Shabeer Ali Memon is his real brother and co-accused Sheeraz Ali Memon is his cousin and both were maintaining their accounts in their Branch. Complainants Abid Hussain, Haresh Kumar, Imran, Farooq, Abdul Hafeez and Abid appeared before him and made complaints that the amounts from their accounts were debited in the sum of Rs.12,513,952/-. The enquiry was conducted internally and during the course of

such enquiry, it was revealed that some of the money from the account of aforementioned complainants were credited in the account of appellant Sheeraz Ali Memon and some of the money was credited in the account of appellant Shabir Ali Memon. The Absconding accused Muhammad Moosa also debited money from GL account of the Bank and credited in the account of both of these accused too.

8) PW-3 Arshad Ali Qureshi deposed that he joined NIB Bank Nawabshah Branch in the year 2008 as CSS and in the year 2010 he was promoted as Associate Relationship Officer and remained posted in NIB Bank till the year 2012. The absconding accused Moosa Memon was also posted as Cash Service Officer in the same Branch. In the year 2012 fraud was detected in their Branch and an internal enquiry was conducted in which it was revealed that the absconding accused Moosa Memon used his ID for making transactions in the system and committed fraud of more than Rs.2 crores as per findings of the internal enquiry. The said evidence of Arshad Ali Qureshi went un-rebutted.

9) PW-4 Nisar Ahmed deposed that in the year 2012 he was posted as customer service Officer in NIB Bank Nawabshah, and the absconding accused Muhammad Moosa was posted as CSO in their Branch. In the year 2012 an enquiry was transferred in their branch from head office whereby it was revealed that the absconding accused Moosa Memon made certain fraudulent entries in the records by using his ID of which he was completely unaware. During the course of internal enquiry Moosa's brother (appellants No.2) deposited an amount of Rs.2 million in the Bank. He does not remember the exact figure of misappropriated amount. His evidence also went un-rebutted as he has not been cross examined.

10) PW-5 Zulfiquar Ali deposed that in the year 2012 he was posted as manager operation in NIB Bank Nawabshah Branch. Two CSOs were posted in their Branch namely the absconding accused Moosa Memon and Nisar Ahmed. Their customer Haresh Kumar had sent a complaint to the head office against CSO Moosa Memon for fraudulent withdrawal of money from his account. On this complaint an enquiry committee was formed which conducted enquiry, examined the record as well as recorded the statements of the employees. From their enquiry it was revealed that the said Moosa Memon had committed

misappropriation and embezzlement of an amount of Rs.12,538,952/= and after committing such misappropriation, he absconded abroad. It further surfaced that absconding accused Moosa Memon used the account of the bank from which an amount of Rs.10 million were misappropriated by him fraudulently. During the course of internal enquiry, the brother of accused Moosa Memon namely accused Shabir Ali Memon handed over a cheque in the sum of Rs.2,268,440/= drawn on UBL but subsequently he came to know that an amount of Rs.2 million were deposited by him against the said cheque. The photocopy of the cheque and undertaking was produced by him as Exh.8/A and 8/B.

11) PW-6 Imran Ali Rajput deposed that he was maintaining his account in NIB Bank Nawabshah Branch. While making an enquiry about his balance, he came to know that there was shortage of Rs.654,000/= in his account. He was informed that a bank employee with the name of Moosa Memon had misappropriated the said amount.

12) Haresh Kumar was examined as PW-7 who deposed that he was maintaining his account in NIB Bank Nawabshah Branch and in the year 2013 when he received the statement of account, after going through the same he detected some wrong entries. He met with the Branch Manager and informed the manager regarding shortage of funds in his account to the tune of Rs.425,655/=. He was advised to approach the head office of NIB Bank to whom he informed about those fraudulent entries. After examining his account, Bank admitted fraudulent transactions in his account and obtained an application from him and assured him of holding enquiry and remittance of his misappropriated amount, but despite of his efforts, funds were not remitted in his account (till recording of his evidence). His evidence also remained un-rebutted.

13) Nafees Ahmed S.I. FIA/I.O. of the case was examined as Exh.8 who deposed that on 09.09.2013 he was posted as S.I FIA CBC Karachi. He received a copy of the FIR for investigation which he produced as Exh.12/A which was lodged on the complaint produced as Exh.4/A. During investigation, he seized the record from the concerned bank branch on various dates through different seizure memos. He also recorded the statements of witnesses' u/s 161 Cr.P.C According to the complaint the accused Moosa Memon miscredited the funds in

the account of his brother and nephew (the present appellants) and withdrew the same through their accounts.

14) With regards to the role of appellant Sheeraz Ali (brother of Muhammad Moosa), the modus operandi adopted by Moosa Memon was furnished by PW-1 Faisal Javed who stated that he used to transfer the funds in the accounts of his relatives and afterwards withdrew the same. The cash deposit tendered by other customers for credit into their respective accounts was also not deposited in their accounts, rather those sums were credited in the account of the appellants. He also used to credit amounts from the centralized account of the Bank into the accounts of his relatives. The evidence furnished by PW-1 Faisal Javed was elaborated and supported by PW-2 Shabir Ahmed (the Branch Manager) who stated that six complainants namely Abid Hussain, Haresh Kumar, Imran, Farooq, Abdul Hafeez and Abid appeared before him and made complaints that the amounts from their accounts have been wrongly debited totaling to Rs.12,513,952/=. During the enquiry, it was revealed that some funds from these accounts were credited in the account of the appellants. The absconding accused Moosa Memon also debited monies from GL account of the Bank and credited those in the accounts of both the accused persons.

15) Accused Sheeraz Ali Memon in his statement u/s 342(1) Cr.P.C claimed that he obtained running finance from NIB Bank, his account was debited to the extent of finance granted by the bank. His account till registration of the FIR was debit account and since April 2012 no Bank statement was issued to him to show that any excess payment was withdrawn by him. He claimed to be innocent alleging that he had no access to the bank documents. He produced photocopy of his bank statement in his support.

16) From the oral and documentary evidence produced before the trial court, the learned trial court reached to the conclusion that through flying entries and through the fraudulent mode (as evidenced by various PWs) an amount totaling to Rs.6,387,500/ was credited in the account of accused Sheeraz Ali Memon which was later on withdrawn, hence it was proved against accused Sheeraz Ali Memon beyond any reasonable doubt that he was in league with absconding accused as facilitator and abettor who made fraudulent entries through the account of this accused. With regards the co-accused Shabeer Ali Memon,

according to the charge an amount of Rs.2,240,353/= was credited into his account through fraudulent means adopting the same modus operandi as detailed above. It also surfaced that accused Shabeer Ali issued cheque of Rs.2,268,440/= in favour of the bank against the amount which landed in his account. He also not deny the issuance of letter Exh.8/B in which he himself mentions that *"...amount of Rs.2,268,440/= was transferred in my account without my knowledge but I am the owner of this account I will pay that amount through cheque No.464871 on 27.8.2012.."* through this letter he himself admitted credit transactions in his account against which he initially handed over cheque of Rs.2,268,440/ to the Bank but later on the said cheque was not encashed but the accused deposited an amount of Rs.2 millions to the bank. These pieces of evidence have sufficiently proved that fraudulent transactions were made to the tune of Rs.2,268,440/= in his account. The said accused Shabeer Ali Memon in his statement u/s 342(1) Cr.P.C claimed that the cheque Exh.8/A was obtained by the complainant bank forcibly on the account of being brother of the absconding accused Moosa Memon which is evident from Exh.8/A. He admitted writing of letter dated 27.6.2012 to the branch manager. He claimed his innocence and adopted the stance that not a single rupee has been debited or used by him in any manner, but he has been booked on the account of being brother of the absconding accused Moosa Memon and that real culprits have not deliberately been joined as the accused. He further stated that he had no access to any ID, flying entries, parking of amount or any transaction within the Bank.

17) On the basis of the fore disclosed evidence, the trial court having observed that the criminal intention of both the accused was evident from the fact that they kept withdrawing the amounts from their accounts which were in excess of their genuine deposits but they never bothered to intimate the Bank officials regarding availability of excess credit in their accounts, reached to the conclusion that the appellants committed the offence of cheating and were accordingly sentenced as detailed in the opening paragraphs.

18) Learned counsel for the appellant mainly contended that while FIR was registered in the year 2013, the crime has been shown to have been initiated as of 2009 and no recourse was taken by the Bank in this span of 5 years. It was pointed out that appellant Shabeer Ali Memon has already deposited a sum of

Rs.2 Million with the bank in satisfaction of his liability shown by the Bank in the sum of Rs.2,268,440/= and he has only been penalized as he is brother of the absconding accused Moosa Memon. With regards Sheeraz Ali Memon it was argued that as per the Bank's own record only a sum of Rs.6,381,500/= was credited in his account however no evidence of withdrawal of these sums by him was brought on the record. It was also argued that element of *mens rea* was lacking in the case. It was finally argued that trial court's judgment is based on presumptions, assumptions and conjecture hence not sustainable in the eyes of the law. To the contrary learned DPG strongly supported the judgement and stated that monies were credited into the accounts of the appellant and it was in appellants' knowledge that these additional funds did not belong to them and they rather than reporting to the Bank about these unwarranted remittances, encashed these sums for their own gains or to pass them on the absconding accused. Request was made for the dismissal of these appeals.

19) Heard the learned counsel, the learned DPG and reviewed the material on record. While the trial court's judgment has fully attended to the factual aspects of the case and have established the money trail into the account of the appellants, the legal questions that perturbed our minds are that (a) was there a lack of *mens rea* in the case at hand, (b) and what is the effect of delay in filing the instant FIR as PW-1 Faisal Javed admitted that the instant fraud started in the year 2009.

20) With regards *mens rea* in such diverted bank deposit matters where the monies landed in the accounts of the accused persons, whether an offence under section 420 PPC is made out or not is the strict question before us. With regards ingredients of section 420, courts have dilated at various occasions as to essential ingredients of Section 420 to be (i) cheating; (ii) dishonest inducement to deliver property or to make, alter or destroy any valuable security or anything which is sealed or signed or is capable of being converted into a valuable security, and (iii) *mens rea* of the accused at the time of making the inducement. Section 415 defines cheating as "Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not

do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person or any other person in body, mind, reputation or property, is said to "cheat". Modus operandi adopted by Moosa Memon (the main accused) as furnished by PW-1 Faisal Javed was that the former *used to transfer the funds in the accounts of his relatives (ie the present appellants) and afterwards withdrew the same*. Prosecution has not brought any evidence to show that the present appellants had any contact with the victims, as seen from the definition of "cheating" to cheat, one must induce the person to be cheated. In this case the customers have been cheated and none of the witnesses has alleged any occasion that the present appellants tried to induce them. While the second ingredients of Section 420 doesn't exist in the present case, however if we look at the third ingredient of the said section it puts a further layer over the first ingredient and requires presence of *mens rea* while inducing the victim. PW-6 Imran Ali Rajput while deposing has stated that he was maintaining his account in NIB Bank Nawabshah Branch. While making an enquiry about his balance, he came to know that there was shortage of Rs.654,000/= in his account. He was informed that a bank employee with the name of Moosa Memon (the main accused) had misappropriated the said amount. As well as Haresh Kumar PW-7 also deposed that whilst he was maintaining his account in NIB Bank Nawabshah Branch and in the year 2013 he received the statement of account, after going through the same he detected some wrong entries. He met with the Branch Manager and informed the manager regarding shortage of funds in his account to the tune of Rs.425,655/=. He was advised to approach the head office of NIB Bank to whom he informed about those fraudulent entries. After examining his account, Bank admitted fraudulent transactions in his account and obtained an application from him and assured him of holding enquiry and remittance of his misappropriated amount, but despite of his efforts, funds were not remitted in his account (till recording of his evidence). These two witnesses have not named any of the appellants either. In the case of State v. M. Idrees Ghauri reported as 2008 SCMR 1118 the Hon'ble Supreme Court has held that in case ingredients of an offence are found missing in a case, no penal consequences would ensue.

21. At this juncture it would not be out of place to consider the aspect of fiduciary duty of Bank in such cases. Bank employees hold a position of trust

where honesty and integrity are inbuilt requirements of functioning, as they deal with public money being engaged in financial transactions they act in a fiduciary capacity, the highest degree of integrity and trustworthiness is a must and unexceptionable. It is quite unfortunate that alleged fraudulent transactions continued over five years and the Bank could not detect those and only the customers had to come forward to report loss of their deposits within four corners of the Bank. Under Deposit Protection Corporation Act, 2016 it is responsibility of a Bank to guarantee full repayment of specified amounts (at the moment set as Rs.250,000) under section 7(1) of the said Act through the said Corporation to the account of each customer in such cases. It is also questionable that when PW-3 Arshad Ali Qureshi had deposed that the absconding accused Moosa Memon used his ID for making the alleged payment in the accounts of the appellants why he was not charged as the prosecution did not bring any evidence to verify his innocence. If one's ID is used in a computer system, liability of all acts done under the said ID prima facie falls on the holder of the ID holder, unless he proves otherwise.

22. With regards delay in lodging the FIR on 9.9.2013 for the alleged offences having taken place in the year 2009 no plausible explanation has come forward justifying this colossal lapse. This fact alone hits roots of the case. Afterthought and onus-shifting cannot be ruled out. Inspirations in this regard can be taken from the case of Abdul Ghafoor Gondal v. The State reported as 2020 SCMR 861.

23. Resultantly we do not see that the appellants could have been rightly convicted under section 420 PPC hence the trial court wrongly convicted them under the said section. Resultantly these appeals are allowed, the appellants are acquitted of charge. They are already on bail. Their bail bonds be released and security be discharged.

Judge

Judge