

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

CR. APPEAL NO.67/2015
CR. APPEAL NO.71/2015

Date

Order with signature of Judge

12.04.2019

Mr. Javed Ahmed Kazi and Syed Abid Hussain, advocates for appellant in Cr. Appeal Nos.67 and 71 of 2015 respectively.

Mr. Waseem Akhtar, Assistant Attorney General.

Appellant No.1 Rafiq and Appellant No.2 Mst. Zahana (Appeal No.71/2015) are present.

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ORDER

Appellants have assailed judgment dated 28.02.2015 arising out of FIR No.292/2012, u/s 3(2)(a)(b), 13 and 14 of the Foreigner Act 1946 read with sections 419, 420, 468, 471 and 109 PPC, PS F.I.A. Passport Cell.

2. Briefly, facts of prosecution case are that complainant reported that appellants alongwith others were proceeding to Dhaka on strength of emergency passports/travel permits (EPs/TPs) as per routine practice, during immigration process it transpired that EPs/TPs are fake; further before obtaining boarding cards from airline as per procedure, these EPs/TPs are signed by immigration officials after confirming their genuineness however in present case all EPs/TPs contained fake/forged signatures of immigration officials, hence appellants were offloaded and sent for legal action; during enquiry appellants failed to give plausible account of their entry into Pakistan and also failed to account for issuance of Bangladeshi travel permits/emergency passports and disclosed that they got issued the

same through different persons/agents and also failed to disclose their complete particulars.

3. Heard learned counsel for the parties and perused the record.

4. At the very outset, learned counsel for appellants contends that appellants are by birth Pakistan national and have recorded such statement under section 342 CrPC by submitting copy of CNIC. Learned counsel for appellant shows the original documents issued by CNICs of appellants. Learned counsel for appellant further contends that charge framed by learned trial court is not in accordance with law as nowhere appellants claimed themselves to be Bangladeshi national or that they had entered into Pakistan without traveling documents, as per documentary record appellants are by birth Pakistani national; that documents recovered from appellants' possession were not sent for verification to the concerned Bangladeshi authorities; prosecution did not place on record any such document to establish its case against appellants; that on the basis of similar allegations and charge, remaining accused were acquitted of the charge, has placed on record a copy of order dated 09.08.2017 in criminal appeal No.58/2015 arising out of same FIR whereby in the case of similar allegations, co-accused Shah Jahan was acquitted.

5. Learned Assistant Attorney General could not controvert the contentions made by counsel for appellants and admits that there is nothing on record that documents recovered from the possession of appellants were sent for verification except statement of investigation officer but that investigation officer did not place on record any documentary material to substantiate his allegations.

6. Heard and perused the available record *carefully*.

7. At the outset, it can safely be said that no one can be punished on basis of an allegation or a charge but it is always the **proof** of guilt which the prosecution has to establish beyond reasonable doubt. In short, on basis of an allegation / charge one can well be tried but can't be convicted. This has been the reason that at conclusion of **trial** the trial Court is under legal obligation to place every single **incriminating evidence**, came against the accused, into notice and knowledge of the **accused** in shape of questionnaire as required by Section 342 Cr.P.C. It must always be kept in view that the section 342 Cr.P.C requires an explanation of *any circumstances appearing in the evidence against him(accused)*' hence making it quite clear that at such stage the **evidence** is to be seen / examined and not the allegation / charge. The failure on part of the trial court in such **duty** would result in exclusion of such **evidence** from consideration. Reference may well be made to the case of Qaddan & Ors v. State 2017 SCMR 148 wherein principle was again reaffirmed as:-

'3. ... The law is settled that a piece of evidence not put to an accused at the time of recording of his statement under section 342, Cr.P.C. cannot be considered against him.

8. The allegation / charge against the appellants / accused was that of traveling on **fake** document as well that of having *illegally* entered into and residing in Pakistan therefore, it was always obligatory upon the prosecution to have proved *both* charges by **evidence**.

9. The *first* part of the charge relates to **fake** documents (traveling documents) which allegation, I have no hesitation in saying, cannot be proved unless the authority, claimed to have issued the same, denies issuance thereof. The perusal of the evidence of the Inspector Azeemuddin (PW-4) shows that he claimed to have got verified from **Deputy High Commission, Government of Bangladesh** and also produced **'photocopies thereof'** as Exh.6/C and 6/D. Without prejudice to the *legally* established principle of law for proving a **'document and contents** thereof" as well admission of the said PW that:

"It is correct to suggest that the letter Ex.6/C is not on printed letter head Ministry of Foreigner Affairs".

I do not find any referral to such documents (*verification process*) in 342 Cr.P.C statement of the accused persons. For ease, the same (342 Cr.P.C statement) is reproduced hereunder:-

"Q.no.1. You have heard prosecution evidence and it has come on record that on 22.11.2012, at about 0700 hours, complainant Inspector Zia Hassan Rizvi, In-charge Shift-C, FIA Immigration (Dep), JIAP, Karachi had detained you along with Rafiq when you were proceeding to Dacca from Karachi on the strength of Emergency Passport / Travel Permit and **on inquiry you disclosed to be Bangladeshi National and had entered in to Pakistan without any traveling documents and remained in Pakistan illegally in contravention of provisions of Foreigners Act, 1946.** What you have to say"

Ans....

Q.no.2. Why the PWs have deposed against you?

Ans..

Q.no.3 Do you want to examine yourself on oath?

Ans.

Q.no.4 Do you want to lead any evidence in your defence?

Ans.

Q.no.5 Is the travel permit dated..... fake document.

Ans...

Q.no.6 Do you have to say anything else?

Ans..."

10. I am quite surprised rather shocked that how a '**document**' can be believed to have been proved as "**fake**" when the only person, competent to deny legality thereof, is not examined *least* says so in *writing*. Be that as it may, since, *undeniably* such claimed verification of traveling documents was never included in the 342 Cr.P.C. statement hence it was never advisable for a **Criminal Court** to record conviction for offences, relating to **fake** documentation or use thereof as **genuine**. Thus, conviction on such charge / allegation *legally* cannot sustain.

11. Now, I would revert to second part of the charge which relates to so called admission of the appellants / accused before Inspector Azeemuddin (PW-4) at relevant time that they (accused persons) illegally entered into and stayed into Pakistan though being **Bangladeshi**. I would not like to make much comments on legality of such '**admission**', alleged to have been made before police official, but find it suffice to refer the relevant portion of judgment of *Hayatullah v. State* 2018 SCMR 2092 wherein the act of court, considering such *inadmissible* document, was commented as:-

"At rel-P/2096

A heavy responsibility lies upon the court as well as the prosecution and defence counsel to be alert so that inadmissible evidence should not come on the record. If any party tender such evidence during the trial the other party should immediately raise objection to the admissibility of such evidence and the court should decide the same then and there before proceeding further and prevent it from coming on record if it is found to be inadmissible in

evidence. It is the duty of the trial judge to check such evidence without waiting for any such objection from either side because the judge is required to be vigilant and to play an active role while recording the evidence of witness.

It is the duty of the court to make distinction between admissible and inadmissible evidence and only admissible evidence would be allowed to come on record. If any inadmissible evidence is brought on the record then it will expose the ability and knowledge of law of the prosecutor and defence counsel. If the trial judge allows to bring the inadmissible evidence on record then it must reflect adversely regarding the knowledge of law and ability of said judge. We have observed that in certain cases the case files were found filled with inadmissible evidence which is ultimately to be discarded. It is the duty of the court to stop the witness at the moment he utters inadmissible evidence and should not allow to bring on record such inadmissible evidence.

Such *like* admissions may help the investigating officers in discovering the **truth** as well helping in the **investigation** but same cannot be a '**foundation**' to hold the conviction. Here, a referral to a portion of the cross-examination of the PW Azeemuddin, being relevant, is made hereunder:-

“It is correct to suggest that names of even those off-loaders children are appearing in the FIR who were aged about 6/7 months. I cannot say if these minor children were born in Karachi. I had not inquired from accused persons where they gave birth these minors, either in Karachi, Pakistan or else where. I had not visited the addresses of the accused persons personally. I had not recorded statement of any private persons from the locality of addresses of the accused”.

Thus, it is quite obvious that not only the said official but the learned trial Court judge *too* took such so called **admission** as sufficient for declaring one as '**foreigner**'. Here, a referral to relevant portion of the *impugned* judgment, being relevant, is made hereunder:-

“.. The accused during recording of his statement under section 342 Cr.P.C has disclosed he has got CNIC. The perusal of CNIC shows that the accused has got CNIC with conclusion of NADRA staff on _____ (except for one accused, date of issuance is prior to FIR) which is illegally and said CNIC was expired on But she has not renewed the same. Since long she / he is residing illegally in Pakistan. He has no documents to prove he is Pakistan National. Further he himself

admitted that Travel Permit has provided an agent, who has received money from him, it means he has knowledge it is a fake document and not genuine...”

12. In view of what has been discussed, I am of the clear view that impugned conviction, recorded by trial court, is not in accordance with settled principles for appreciation of evidence as no reasonable and admissible material was ever there to convict the accused persons, therefore, the learned trial court wrongly held that prosecution proved its case beyond any reasonable doubt.

13. Accordingly, impugned judgment being perverse, fanciful, capricious and not maintainable in law, is hereby set side. Appeals are allowed; appellants are acquitted of the charge. Appellants are present on bail, their bail bonds are canceled and sureties are discharged.

Office to place copy of this order in connected appeal.

J U D G E