

## IN THE HIGH COURT OF SINDH AT KARACHI

### Criminal Appeal No. 295 of 2012

<b>Khurram Arif</b>	.....	<b>Appellant</b>
	<b>versus</b>	
<b>The State</b>	.....	<b>Respondent</b>

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### Criminal Appeal No. 296 of 2012

<b>Syed Raees Alam</b>	.....	<b>Appellant</b>
	<b>versus</b>	
<b>The State</b>	.....	<b>Respondent</b>

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### Criminal Appeal No. 298 of 2012

<b>Azam Ali Leghari &amp; another</b>	.....	<b>Appellants</b>
	<b>versus</b>	
<b>The State</b>	.....	<b>Respondent</b>

M/s. Khawaja Naveed Ahmed, Farhan Zia Abrar and Ms. Shazia Manzoor, Advocates a/w appellants in CrI. Appeal Nos.295 & 298 of 2012.

None appeared on behalf of Ms. Qamar Bano or Ashraf Ali Khan.

Mr. Siraj Ali Chandio, Addl. Prosecutor General, Sindh.

### JUDGMENT

**Omar Sial, J.:** A 600 square yard plot bearing number C-6 situated in Block 10-A, Gulshan-e-Iqbal, Karachi was allotted to one Abdul Aziz on 11.01.1977. It was subsequently transferred in the name of Ms. Qamar Bano on 06.06.1984. Somewhere in the period ranging from 1995 to 1996, a group of estate brokers comprising of (i) Syed Raees Alam (ii) Aurangzeb (iii) Ejaz Ahmed (iv) Iftikhar Hussain Butt and (v) Athar Ali allegedly prepared a power of attorney allegedly executed by Ms. Qamar Bano in favour of Syed Raees Alam. The plot of land, on the basis of the power of attorney, was then sold and transferred, by the group of estate agents mentioned above, to Mehmood Ali Mekhri and Ahmed Ali Mekhri. It was subsequently alleged by Ms. Qamar Bano on 09.01.1997 that she had never executed a power of attorney and it was also revealed that the said power of attorney was not signed by Qamar Bano, nor was her address correct on it, nor was the stamp of the Jeddah Consulate affixed on it a genuine one. F.I.R. No. 15 of 2009 was registered on 26.05.2009 under sections 420, 468, 471 and 34 P.P.C. read with section 5(2) of the Prevention of Corruption Act, 1947 at

the Anti-Corruption Establishment police station. In addition to the 5 estate agents mentioned above, 4 officials of the Karachi Development Authority, namely, (i) Azam Ahmed Leghari (ii) Zahid Ameen (iii) Khurram Arif and Abdul Mubeen, were also included in the array of accused.

2. On 18.10.2010, a charge was framed against 6 accused namely (i) Syed Raees Alam, (ii) Aurangzeb, (iii) Aijaz Ahmed, (iv) Azam Ali Leghari, (v) Khurram Arif and (vi) Zahid Ameen. All 6 pleaded not guilty and claimed trial.

3. The first prosecution witness **(PW-1) was Ashraf Ali Khan**. He was the person who claimed that he was acting as an attorney on behalf of Qamar Bano in the litigation. The second prosecution witness **(PW-2) was Anwar Latif**. He was an employee of the KDA during the period 1982 and 2007 and testified how the allotment and various transfers of the plot in question took place. The third prosecution witness **(PW-3) was Ali Khan Bhayo**. He was an Assistant Director at the Anti-Corruption Establishment. He was the officer who registered the case and was also the complainant. The fourth prosecution witness **(PW-4) was Abdul Latif**. He was an Assistant Director at the Anti-Corruption Establishment. It appears that he was first asked to investigate the case but as permission for prosecution could not be obtained he had transferred the case for investigation to Abdul Rahim Shoro. The fifth prosecution witness **(PW-5) was S.I. Jaseem Akhtar**. He was also an investigation officer of the case. The sixth prosecution witness **(PW-6) was Haq Nawaz**. He was the Inspector who filed the section 173 Cr.P.C. report in the court. The seventh prosecution witness **(PW-7) was Inspector Abdul Rahim Shoro**. He was the second investigation officer of the case. The eighth prosecution witness **(PW-8) was Inspector Ali Akbar Habibani**. He was the third investigating officer of the case.

4. In their respective statements under section 342 Cr.P.C. all the accused pleaded innocence and said that none of the witnesses had testified against them. In addition Khurram Arif said that all he had done was take the file after completion of all formalities from one desk to another. Zahid Ameen said all that he did was record the statements of the buyer and the seller of the property. Azam Ali Leghari said that he was not even aware that Qamar Bano had complained about the transfer. Syed Raees Alam stated that he was a victim of the whole episode and that he had a number of documents to show that he had carried out his due diligence. Aurangzeb also considered himself innocent and

submitted a few documents in support of his plea. None of the accused recorded their statements on oath.

5. At the end of the trial, the learned Anti-Corruption Court (Provincial) Karachi on 23.10.2012 announced its verdict. Aurangzaib and Aijaz Ahmed were acquitted. Syed Raees Alam, Syed Khurram Arif, Zahid Amin and Azam Leghari were sentenced to one year in prison and a fine of Rs. 50,000 or 3 further months in prison in default for offences under section 420, 468, 471 and 34 P.P.C. read with section 5(2) of the Prevention of Corruption Act, 1947. It is this judgment of the learned trial court that has been called in question in these proceedings. Zahid Amin died during the course of these proceedings.

6. I have heard the learned counsel for the appellants and the leaned Additional Prosecutor General. Notices were also sent to Ms. Qamar Bano and her purported attorney Ashraf Ali Khan but none effected an appearance. My observations and findings are as follows.

7. Quite surprisingly, Ms. Qamar Bano remained absent throughout the proceedings. Her statement was not recorded by the investigating officer let alone she be examined as a witness. Ashraf Ali Khan acted on her behalf in these proceedings on the basis of, what appears to be a dubious, power of attorney. The copy of the power of attorney produced by him to justify that he was authorized to act on her behalf, was never proved to have been executed by Ms. Qamar Bano. Ashraf Ali Khan when asked to reveal the whereabouts of Qamar Bano simply stated that she had gone away somewhere for medical proceedings. In a separate statement Ashraf Ali Khan recorded at trial, he simply stated that he had received the summons for Qamar Bano to appear as witness but that Qamar Bano had gone away to the USA for medical treatment. No evidence from any hospital in the USA was produced by him.

8. The plot was transferred to Ms. Qamar Bano on 06.06.1984. Ashraf Ali Khan on behalf of Qamar Bano claimed that the first time she became aware that a transfer was taking place in the name of Mehmood Ali Mekhri and Ahmed Ali Mekhri was on 19.07.1996. On 01.01.1997 a lawyer by the name of Suleman Kassim sent a document to the Ministry of Foreign Affairs to determine the genuineness of the same. The Ministry concluded it was not genuine. A cursory look at the letter of the Foreign Office reflects that there is no specific mention of

a power of attorney in that letter and that it merely refers to a “document”. What was Suleman Kasim’s nexus with the whole issue was neither explained at trial nor was it revealed as to the copy of which document was sent for verification. Further, it is reflected from the record that neither Suleman Kasim was called as a witness nor was Tariq Iqbal Soomro (the Foreign Office representative who wrote the letter) or as a matter of fact anybody from the Ministry came at trial to confirm whether the letter written by it was genuine. A letter written by the Foreign Ministry does not fall within the ambit of section 510 Cr.P.C. and thus it was imperative that the author of the letter be called as a witness to prove it. This having not been done, the letter was inadmissible in evidence. Qamar Bano’s passport was also not produced at trial to prove that she was not in Jeddah, as she claimed, when the power of attorney was executed nor was any travel record of hers produced to show the same. In effect, the prosecution’s claim that Ms. Qamar Bano was not in Jeddah at the relevant time went unproved. Qamar Bano’s signatures on the power of attorney were also never sent to a hand writing expert to verify whether the signatures appearing on it were hers or not. Neither was the statement of Ahsanullah Qureshi, the Foreign Office representative who was said to have verified the power of attorney in Jeddah ever questioned about his alleged role let alone he be examined as a witness.

9. PW-2 Anwar Latif (KDA) stated at trial that when Mehmood Ali Mekhri and Ahmed Ali Mekhri made an application for pre-lease transfer on 04.08.1996, an objection from Qamar Bano was received on 28.08.1996. He further narrated that the parties had then entered into litigation. He also testified that it was the responsibility of one Abdul Mubeen (the dealing clerk at KDA) to verify the genuineness of a document filed. Abdul Mubeen was responsible to verify the documents of all properties situated in Block No. 10-A. However, he also stated that at the time when this transaction took place there was no procedure in place to verify the genuineness of documents ostensibly stamped by any of Pakistan’s diplomatic missions abroad.

10. PW-10 Ali Akbar Habibani the investigating officer stated at trial that he had found no evidence of the involvement of Azam Leghari, Khurram Arif and Zahid Ameen in the incident and had recommended that they not be arrayed as

accused. He further confirmed that he had never seen Qamar Bano let alone record her statement.

11. To facilitate reference, the offences with which the appellants were charged, convicted and sentenced were as follows:

**420. Cheating and dishonestly inducing delivery of property.** *Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

**468. Forgery for purpose of cheating.** *Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

**471. Using as genuine a forged document.** *Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.*

**34. Acts done by several persons in furtherance of common intention.** *When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.*

12. In order to analyze the offences for which the appellants were convicted, it would be necessary to break it down into its constituent elements. The basic components of a crime are the conduct of the actor (*actus reus*) and his or her state of mind at the time (*mens rea*). Unless a crime is one of strict liability or there is a legal defence present, the prosecution must prove both components before the court can convict the accused.

13. All the three sections of the Pakistan Penal Code with which the appellants were charged do not fall within the ambit of strict liability offences, in that all three require the prosecution to prove the *mens rea* of the appellant along with the *actus reus*. The *mens rea* required for an offence under section 420 P.P.C. is the intent to cheat and dishonestly induce; for an offence under section 468

P.P.C. it is intention to cheat whereas for an offence under section 471 P.P.C. it is dishonest or fraudulent intent or knowledge that the document is forged. Reference in this regard may also be made to **2011 SCMR 1966**.

14. Consonant with the principle that a person is considered innocent until proven guilty, the prosecution must prove each and every element of the offence '*beyond reasonable doubt*'. In the backdrop of the foregoing, the question that arises is whether in the present case, the prosecution was able to prove the elements of the offences for which the appellants were charged beyond reasonable doubt or not.

15. Section 420 P.P.C. begins with the words "*Whoever cheats and thereby dishonestly induces.....*". Cheating is defined in section 415 P.P.C. as follows:

**415. Cheating.** *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".*

16. A cumulative reading of sections 420 and 415 P.P.C. shows that for an offence under section 420 P.P.C. to occur an accused must have cheated. For his act or omission to be "*cheating*", one of the ingredients to be satisfied is that the 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. In the present case, because of the observations made above i.e. Qamar Bano not examined, vagueness regarding what document was sent to the Ministry of Foreign Affairs for verification, absence of any person from the Foreign Office as a witness, the power of attorney purportedly given to Ashraf Ali Khan by Qamar Bano to represent her in the proceedings before the trial court not having been proved, whether Ashraf Ali Khan could initiate criminal proceedings on behalf of Qamar Bano, in the circumstances of the case, not being proved, the prosecution was unable to establish beyond reasonable doubt that the said power of attorney was indeed fake and forged. If cheating was not proved, the charge under section 468 P.P.C. also falls apart as the said section requires that the forgery should be done

with the intent that the document forged would be used for the purpose of cheating. Similarly, for the foregoing reasons it was also not established that the appellants had fraudulently or dishonestly used as genuine the power of attorney which the appellants knew or had reasons to believe to be a forged document. To the contrary, Syed Raees Alam maintained till the last minute that it was a genuine document and the parties have 2 civil suits pending adjudication in connection with the property and the documents, where once again Qamar Bano apparently is conspicuous by her absence, suggests that civil court is the appropriate forum to decide the issue whether the power of attorney executed in favour of Syed Raees Alam was genuine or not and further decide the ownership issues which have cropped up between the parties as a consequence. It is also pertinent to mention that in any case, it was the version of the prosecution witnesses themselves that the person from KDA i.e. Abdul Mubeen, who was said to be the person responsible for checking the veracity of a document submitted at the KDA remained an absconder. The benefit of doubt created should have gone to the accused in accordance with well established principles of law.

17. The learned trial court has also convicted the appellants under section 34 P.P.C. Section 34 of the P.P.C provides that when a criminal act is done by several persons, in furtherance of a common intention of all, each such person is liable for that act in the same manner as if it were done by him alone. It is well settled that common intention pre-supposes prior concert. It requires a pre-arranged plan because before a man can be held to be vicariously liable for the criminal act of another, the act must have been done in furtherance of a common intention of them all. The plan must not necessarily be an elaborate one and there is a possibility that it is formed on the spur of the moment. However, there must be a pre-meditation or pre-arrangement.

18. In **Muhammad Akbar vs The State (PLD 1991 SC 923)** it was held that: ".....it is evident that a joint action by a number of persons is not necessarily an action performed with a common object, but it may be performed on the spur of the moment as a reaction to some incident and such a case would fall within the ambit of section 34, P.P.C. However, it may be pointed out that section 34, P.P.C. contemplates an act in furtherance of common intention and not the common intention simpliciter and that there is a marked distinction between similar intention and common intention and between knowledge and common

intention. It may also be observed that mere presence of an accused at the place of incident with a co-accused who commits offence may not be sufficient to visit the former with the vicarious liability, but there should be some circumstance manifesting a common intention. Generally common intention inter alia precedes by some or all of the following elements, namely, common motive, pre-planned preparation and concert pursuant to such plan. However, common intention may develop even at the spur of moment or during the commission of offence as pointed out hereinabove. Conversely common intention may undergo change during the commission of offence.”.

19. In **Muhammad Yaqoob vs The State (PLD 2001 SC 378)** it was observed that “It was held a few decades earlier by this Court which still holds the fields that ‘it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all. The inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference or the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis”.

20. In **Shoukat Ali vs The State (PLD 2007 SC 93)** it was held that “After having gone through almost entire law qua the provisions as contained in section 34, in our considered view the following are the prerequisites of the section 34 before it could be made applicable:--

- (a) It must be proved that criminal act was done by various persons
- (b) The completion of criminal act must be in furtherance of common intention as they all intended to do so.
- (c) There must be a pre-arranged plan and criminal act should have been done in concert pursuant whereof.
- (d) Existence of strong circumstances (for which no yardstick can be fixed and each case will have to be discussed on its own merits) to show common intention.



(e) The real and substantial distinction in between 'common intention' and 'similar intention' be kept in view.

21. Applying the principles as enunciated and interpreted by the Hon'ble Supreme Court, it will have to be seen whether the appellants in the present case, had acted with a pre-arranged plan and thus a common intention. Apart from the fact that the prosecution was unable to prove its case against the appellants beyond reasonable doubt, even for a charge under section 34 to be successful, absolutely no evidence was led at trial to establish a pre-arranged plan or a prior meeting of the minds.

22. In view of the above observations, the appeals are allowed and the impugned judgment is set aside. The appellants are acquitted of the charge. They are on bail. Their bail bonds stand cancelled and sureties discharged. The sureties may be returned to their depositors upon identification.

JUDGE